

DATE: September 17, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-14539

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Catherine M. Engstrom, Esq., Department Counsel

FOR APPLICANT

Sterling Newcomb, Esq

SYNOPSIS

On November 9, 2001, Applicant entered a plea of no contest to the offense of evading arrest or detention, a Class B misdemeanor. Adjudication was deferred for one year and he was placed on community supervision (probation) for twelve months. The offense resulted from Applicant fleeing from a police officer who was attempting to stop him for a speeding violation. He successfully completed the period of his probation and the charges were dismissed on April 23, 2003. Applicant has led a law-abiding life, with the exception of a number of prior traffic offenses, and is otherwise considered to be a responsible individual of high moral character. Clearance is granted.

STATEMENT OF THE CASE

On October 29, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct based upon Applicant's 2001 deferred adjudication and 12 month probationary sentence for Evading Arrest with a Vehicle (a Class A misdemeanor)

Applicant submitted an answer to the SOR that was sworn to on November 22, 2002, and requested a clearance decision based on the written record without a hearing. Applicant denied he pled no contest to the offense as alleged in the SOR, but admitted he pled no contest to Evading Arrest (a Class B misdemeanor) and was placed on probation and fined.

Department Counsel prepared a File of Relevant Material (FORM) on March 26, 2003 that was mailed to Applicant on April 3, 2003. Applicant, through counsel, submitted a written response to the FORM that was received by DOHA on May 19, 2003. Applicant's response to the FORM contained five exhibits and four character reference letters. Department Counsel indicated she did not object to the admissibility of Applicant's response or the attachments thereto.

FINDINGS OF FACT

Applicant's partial admission to the sole allegation in the SOR is incorporated herein. In addition, after a thorough review of the pleadings, exhibits and character reference letters, I make the following findings of fact:

Applicant is 23-years-old, single, and a recent college graduate. He was employed by a defense contractor as a "coop student" while he attended college, and obtained full-time employment with the same contractor following his graduation. He is considered to be a responsible employee who has had routine access to classified information during his employment without incurring any security violations. He is viewed by his supervisors as a dedicated and hard-working employee who is a "team player." He has earned a reputation of being of high moral character outside work.

On September 2, 2001, at approximately 10:00 a.m., Applicant was driving his automobile at a speed of 95mph in a 65mph speed limit zone. Upon seeing a police car traveling in the opposite direction, Applicant exited the highway, executed several turns in an attempt to elude the pursuing police officer, and eventually parked his vehicle in a field in a further effort to hide from the officer. Applicant was arrested and charged with Evading Arrest (a Class B misdemeanor).

Applicant entered a plea of *no contest* to the charge of Evading Arrest on November 9, 2001. The proceedings were thereupon deferred without entering an adjudication of guilt and Applicant was placed on community supervision for a period of 12 months. Included as conditions of the community supervision were requirements that Applicant report to a community supervision office, pay a fine in the amount of \$850.00, pay court costs and fees, perform 80 hours of community service restitution, not commit any new offenses and report any new arrests to his supervision officer. Applicant successfully completed the community supervision, including all conditions imposed incident thereto, and an order dismissing the case was entered on April 25, 2003. The Community Supervision Officer assigned to Applicant's case opined that he had learned a valuable lesson from his experience on community supervision.

Although Applicant had been issued approximately 10 speeding tickets between the time he began driving at the age of 16 in 1996 and when he was arrested for the above offense, his driving privilege was never suspended or revoked. While he exited highways on two or three occasions when he thought police officers might be about to stop him for speeding violations, he never did so, with the exception of the above arrest, when he knew he was about to actually be stopped.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chiefs among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance⁽¹⁰⁾

determinations should err, if they must, on the side of denials." Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. ⁽¹¹⁾

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. The evidence establishes that he did commit the offense of Evading Arrest (a Class B misdemeanor), and was placed on community supervision for a period of 12 months. Additionally, Applicant had previously received numerous speeding citations, although his driving privileges were never suspended or revoked. The evading arrest charge originated from yet another speeding violation being committed by Applicant. Although Applicant exited highways on two or three prior occasions when he thought he might be stopped by police for speeding, there is no evidence that Applicant ever actually evaded arrest in a legal sense on a prior occasion. DC 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply in this case.

Applicant's numerous speeding violations and sole criminal arrest all occurred when he was between 16 and 21 years of age. The last reported offense of any type committed by Applicant was the arrest for evading arrest in 2001. Conditions of Applicant's community supervision sentence were that he "commit no offenses against the laws of this or any other State or the United States" and "report any new arrest to the supervision officer in writing within 48 hours." The judge who entered the *ORDER DISCHARGING DEFENDANT FROM PROBATION AND DISMISSING PROCEEDINGS* on April 23, 2003 made a specific finding that Applicant had successfully completed all of the terms and conditions of his probation, allowing for an affirmative conclusion that he has not committed any offenses subsequent to his September 2, 2001 arrest, until at least the date of the order.

Additionally, Applicant was a 21-year-old college student at the time of the arrest. He has now graduated from college and began a full-time career. The character reference letters attest to his work ethic, sense of responsibility, and outstanding moral character. Further, the community supervision officer charged with monitoring his conduct while on community supervision has opined that Applicant has learned the valuable lesson from his experience on supervision that the court surely intended. Considering Applicant's youthful age and student status at the time of the arrest on September 2, 2001, I find the intervening two years and the substantial change in his status sufficient to conclude that MC 1: *The criminal behavior was not recent* applies in this case. There also is sufficient evidence in the record to find that MC 6: *There is clear evidence of successful rehabilitation* applies.

After considering the evidence of record in this case, and weighing the disqualifying conditions against the mitigating conditions, I find that Applicant has mitigated the security concerns caused by his criminal conduct. He has overcome the case against him and satisfied his ultimate burden of persuasion. Guideline J is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: For the Applicant

Subparagraph a: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.