

DATE: April 8, 2004

In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-23915

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

**FOR APPLICANT**

Pro Se

**SYNOPSIS**

Applicant was convicted on three occasions between 1997 and 1999 of either not having a valid driver's license or driving while his license was suspended. Each of those offenses arose from an unpaid traffic fine that was levied in the state where Applicant previously resided. He was also charged with misdemeanor assault in 1996. That charge was dismissed after he paid a fine and attended an anger management course. Applicant credibly explained why he did not disclose these occurrences in the security clearance application he signed in December 1999. Applicant has mitigated all security clearance concerns. Clearance is granted.

**STATEMENT OF THE CASE**

On July 31, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find 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 security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct). Applicant submitted an answer to the SOR that was received by DOHA on September 15, 2003. He admitted one SOR allegation, denied three others, and did not address a fifth allegation. Applicant requested a hearing.

The case was assigned to another administrative judge on November 6, 2003, and reassigned to me on November 21, 2003, due to caseload considerations. A notice of hearing was issued on December 2, 2003, scheduling the hearing for December 18, 2003. I vacated that hearing date based on personal reasons. A new notice of hearing was issued on January 12, 2004, rescheduling the hearing for February 3, 2004. The hearing was conducted as rescheduled.

The government submitted seven documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-7 and admitted into the record without an objection. The Applicant testified at the hearing, called one character witness to testify on his behalf, and submitted twenty-seven documentary exhibits that were marked as Applicant Exhibits (AE) 1-27 and admitted into the record without an objection. The transcript was

received on February 12, 2004.

### FINDINGS OF FACT

Applicant's admission to the one SOR allegation is incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 38 years old and has been employed as a laborer by a government contractor since February 1996, first as a temporary and later as a permanent employee. He was laid-off from November 1997 to June 1998, while still employed as a temporary. He has been married since February 1986. He and his wife have two children, ages twenty and fourteen, who are both students. Applicant graduated from high school in 1984, and has completed some further studies at community colleges. The character witness, numerous letters of recommendation, and employment certificates submitted by Applicant attest to his reputation for being honest, trustworthy, dependable, and well-liked, both as an individual and as an employee.

Applicant was raised and lived in a different state from his present state of residence until 1996. He decided to relocate to the area in which he presently resides because of the prevalence of crime in the area where he formerly resided and out of concern for the well-being of his children. Applicant preceded his family and shared a residence with two other persons, one male and one female, when he first relocated to his present state of residence.

On September 9, 1996, Applicant got into an argument with his female roommate that became physical when she attempted to scratch and kick him. She contacted the police and Applicant was charged with Domestic Violence Assault 4<sup>th</sup>. A court summons was sent to Applicant on December 5, 1996, and returned as undelivered on December 13, 1996, because he had moved. A warrant for his arrest was issued on December 24, 1996, and was served upon him on January 11, 1997. Applicant agreed to a deferred prosecution on March 27, 1997, and was ordered to pay a fine in the amount of \$150.00 and to attend an anger management class. He paid the fine and completed the class, and the charge was dismissed on March 28, 1998.

Applicant apparently had an unpaid traffic ticket when he moved in 1996 that resulted in the suspension of his driver's license. As a result, he was charged with driving without a valid driver's license on April 18, 1997, and driving while license suspended (DWLS) on March 20, 1998 and April 15, 1999.<sup>(2)</sup> He was found guilty on each occasion and ordered to pay fines of \$457.00 (\$362.00 suspended) for the no valid driver's license offense, \$250.00 for the 1998 DWLS offense, and \$1,000.00 (\$700.00 suspended) for the 1999 DWLS offense. Additionally, he was sentenced to serve 90 days in jail for the 1999 DWLS offense (90 days suspended). Applicant paid each fine and the cases were closed. He also paid the outstanding fine of \$172.00 on the ticket from his former state of residence on August 23, 2002, resulting in the clearance of the warrant from that state and reinstatement of his driving privilege.

Applicant signed a security clearance application (SF 86) on December 17, 1999, in which he answered "No" to question 26: *In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25? (Leave out traffic fines of less than \$150.00 unless the violation was alcohol or drug related.)* . . . Based on the arrests and traffic offenses described above, that answer was false. Applicant actually prepared a handwritten SF 86, submitted that form at his workplace, and someone there typed the document that was admitted as GE 1, and presented it to Applicant to sign. Applicant requested to see the handwritten form he prepared when he was informed of the incorrect answer provided to question 26 to verify that he had not listed the arrests, but the handwritten form apparently was not retained.

Unable to verify he gave a wrong answer in the handwritten form, Applicant has acquiesced to the government's assertion that he answered question 26 incorrectly, and acknowledged that he signed the typewritten form. Applicant explains the incorrect answer as resulting from either his misunderstanding question 26 or thinking he was not required to list the arrests because of his understanding that the charges would not be on his record because of the type of disposition entered.

### POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief 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, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are 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.<sup>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof in a security clearance case is <sup>(5)</sup>

something less than a preponderance of evidence , although the government is required to present substantial evidence to meet its burden of proof.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</sup> 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.<sup>(8)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

No one has a right to a security clearance<sup>(10)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>(12)</sup>

### 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. He was charged with assault and three relatively serious traffic offenses between September 1996 and April 1999. Additionally, a warrant was issued for his arrest sometime earlier based upon his failure to pay a traffic fine in his former state of residence. Disqualifying Condition (DC) 2: *A single serious crime or multiple lesser offenses* applies in this case.

The last traffic offense Applicant committed occurred in December 1998. The only non-traffic offense he was charged with occurred in September 1996, and that charge was ultimately dismissed. Mitigating Condition (MC) 1: *The criminal behavior was not recent* applies. Further, having considered Applicant's appearance, demeanor, and manner of testifying at the hearing, along with the reputation evidence he submitted and the whole-person factors in evidence, I find MC 6: *There is clear evidence of successful rehabilitation* also applies.

After considering the evidence of record in this case, and weighing the disqualifying condition against the mitigating conditions, I find that Applicant has mitigated the security concern caused by his criminal conduct. Guideline J is decided for Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Once again, I have considered Applicant's appearance, demeanor, and manner of testifying at the hearing, along with the reputation evidence he submitted and the whole-person factors in evidence in determining whether there was a deliberate omission on his part in the SF 86 he signed. It is clear from the evidence that Applicant lacks experience in preparing forms such as the SF 86. Further, he is obviously a relatively unsophisticated individual who convincingly testified: "I think now looking at it - - when I thought I understood what I was doin', I didn't understand it. It was like I didn't have a clue." (Tr. pg. 70) I find Applicant did not deliberately falsify the SF 86 he submitted and no disqualifying condition applies under Guideline E. Guideline E is decided for Applicant.

### FORMAL FINDINGS

SOR ¶ 1-Guideline J: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

SOR ¶ 2-Guideline E: 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. Clearance is granted.

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. A hit and run charge filed in connection with the 1999 DWLS charge that arose from a property damage accident was dismissed.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.