

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was charged with and convicted of a variety of criminal offenses between 1972 and 2005. He abused controlled substances in 2000. He failed to file state and federal income tax returns, as required by law, on numerous occasions between 1993 and 2001. He failed to disclose many required details about his background in a security clearance application he submitted in November 2001, including his abuse of controlled substances while possessing a security clearance. Clearance is denied.

CASE NO: 03-24700.h1

DATE: 02/08/2006

DATE: February 8, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-24700

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was charged with and convicted of a variety of criminal offenses between 1972 and 2005. He abused controlled substances in 2000. He failed to file state and federal income tax returns, as required by law, on numerous occasions between 1993 and 2001. He failed to disclose many required details about his background in a security clearance application he submitted in November 2001, including his abuse of controlled substances while possessing a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On January 6, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 January 31, 2005, admitted all SOR allegations except those contained in SOR subparagraphs 1.f., 1.g., 1.h., 1.i., 1.r., and 2.a, and requested a hearing.

The case was assigned to me on August 26, 2005. A notice of hearing was issued on September 15, 2005, scheduling the hearing for October 18, 2005. The hearing was conducted as scheduled. The government submitted eight documentary exhibits that were marked as Government Exhibits (GE) 1-8. GE 1 through 6 were admitted into the record without objection and administrative notice was taken of the information contained in GE 7 and GE 8 without objection. Applicant testified, and submitted ten documentary exhibits that were marked as Applicant Exhibits (AE) 1-10, and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. One hundred and seventy-two pages of additional documents were timely received, marked as group exhibit AE 11, and admitted the record without objection. The transcript was received on October 28, 2005.

PROCEDURAL MATTERS

Following the presentation of all evidence, Department Counsel moved to amend the SOR to add subparagraph 1.s. to read as follows:

In approximately November 2004, you were charged with assault (domestic abuse) in (name of city and state omitted). You pled guilty and were sentenced in approximately March 2005 to 36 weeks counseling.

The motion was granted without objection. Applicant thereafter admitted the allegation and stated he did not need additional time to respond to the allegation.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 53 years old and has been employed as a technical specialist by a defense contractor since July 1997. He was previously employed by the same defense contractor as a senior field engineer from March 1997 until June 1997, and as a senior field engineer by a different defense contractor from December 1991 until March 1997. Applicant graduated from high school in 1971, and served on active duty as a member of the United States Navy from June 1975 until November 1981. He possessed a top secret security clearance from approximately 1980 until 1998, and has possessed a secret clearance since 1988. He was married in August 1985, separated from his wife in January 1997, and the marriage ended in divorce in May 1999. He has three children from the marriage.

Applicant was convicted of possession of cocaine in 1972, and placed on probation for two years. He claims to have purchased the cocaine for another person who refused to accept delivery of the substance. He admits using the cocaine after the delivery was refused. He claims this is the only time he has ever used cocaine.

Applicant was charged with car theft in 1974, and the charges were dismissed. He claims the incident was a misunderstanding over whether he had paid for repair work on his automobile. The repair shop had a warrant issued for his arrest based on its claim that he removed the auto from the repair shop's lot without paying for work performed on the car. Applicant claims he had paid cash for the work and the repair shop was mistaken. The judge dismissed the charges on the basis that the matter was not criminal but instead a civil law dispute.

Applicant was arrested in 1975 based on a warrant for the car theft charge that had apparently not been properly quashed. The vehicle he was driving at the time of this arrest was searched by the arresting officer and a small quantity of marijuana was found in the vehicle. Although Applicant denies the marijuana belonged to him, he pled guilty to the charge of possession of marijuana after spending 10 days in jail waiting for the theft warrant to be cleared. Upon pleading guilty, he was sentenced to the 10 days time served and released from custody.

Applicant was charged with illegal operation of a boarding house sometime in 1974/75 based upon his renting out rooms in a house he owned without having the appropriate license. He posted a bond, failed to appear in court on the scheduled trial date, and his bond was forfeited.

Applicant was charged with desertion from the Navy in 1978. He was tried at either a summary or special court-martial, most likely convicted of unauthorized absence, and sentenced to be reduced from paygrade E-4 to paygrade E-2 and confined for 30 days. His explanation for deserting is that he was being forced to work in an environmentally unsafe work area without proper protective gear. He surrendered on the advice of an attorney after being absent for 30 days and was allowed to complete his enlistment.

Applicant was charged with assault (domestic violence) in February 1998 after he became involved in a verbal argument with his estranged wife and forcibly removed her from his residence. She sustained bruises and/or scrapes on her arm and elbow and complained of pain to the rear of her head as a result of Applicant's having pushed her out the door of the residence thereby causing her to fall and strike her head. He was convicted of assault and sentenced to serve six months probation, and ordered to serve one day in jail, pay a fine in the amount of \$150.00, and attend anger management classes.

Applicant was arrested and charged with driving under the influence of liquor (DUI) in June 2001. He pled guilty to an amended charge of speeding and was fined \$80.80.

Applicant was again charged with assault (domestic abuse) in about November 2004, after he became involved in a physical altercation with his 17-year-old son. He and his son were working on a carpentry project at their house when Applicant became upset about the youth's incorrect work performance. The two scuffled, the son fled the house, and the police were called. Applicant pled guilty to the assault charge in about March 2005, and was ordered to attend 36 weeks of counseling. Applicant's son was referred to juvenile court.

Applicant failed to file federal income tax returns in 1993 and from 1996 through 2001. He failed to file income tax returns in his current state of residence from 1997 through 1999. His explanations for not filing the returns include that he was initially working outside the United States and had problems obtaining the forms to file, he was afraid that if he subsequently filed the government would discover he had not filed in 1993, he moved several times, his sister died, and because of the various stresses and disruptions in his life caused by the break up of his marriage, his attempt to raise three children on his own, and the fact that his records were stored away and not easily accessible he procrastinated and did not get around to filing the returns. The various records Applicant submitted, most notably the copy of the tax refund check (AE 10), and the bank statements contained in AE 11, suggest Applicant has now filed all past due returns.

Although the SOR alleges Applicant failed to file state income tax returns in a different state from that where he currently resides for the years 1993, 1994, 1996, and 1997, Applicant denies he was a resident of that state during those years. Included in AE 11 are permits indicating he entered a foreign country in December 1991, and was permitted to stay in that country until at least September 1995. Each of those permits lists Applicant's

place of residence in the U.S. as a state other than that alleged in the SOR.

Applicant submitted a security clearance application in November 2001 in which he failed to disclose, as required, that he had been charged with and convicted of possession of marijuana in 1975, charged with DUI in 2001, and charged with and convicted of assault in 1998. He also failed to disclose he had abused marijuana on two occasions in 2000, and had abused methamphetamine (as frequently as twice weekly) and marijuana between February 2000 and October 2000 after having been granted a secret security clearance.

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.⁽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 determinations should err, if they must, on the side of denials."⁽¹⁰⁾ 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 based upon Applicant's numerous arrests and convictions between 1972 and 2005, and his willful failure to file state and federal income tax returns for a number of years. Disqualifying Conditions (DC) 1: *Allegations of admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply. However, there is insufficient record evidence to establish Applicant willfully failed to file state income tax returns in the state alleged in SOR subparagraphs 1.g., 1.h., 1.i. and 1.k.

By his conduct, Applicant has displayed a continuing pattern of disregard for a wide variety of laws, ranging from those designed to prevent drug abuse and domestic violence, to those intended to provide for the orderly collection of taxes. His most recent criminal conduct occurred just over a year ago. Nothing in the record adequately mitigates his unwillingness or inability to conform his conduct to that required by law or demonstrates he can be trusted to properly safeguard classified information. I have considered all mitigating conditions under Guideline J and none apply.

Personal conduct under Guideline E 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.

Applicant omitted numerous details about his background in the security clearance application he submitted in November 2001, including facts about his criminal record, drug abuse, and drug abuse while possessing a security clearance. He provided several explanations for the omissions, none of which are credible. He also used controlled substances while possessing a security clearance, and failed to file income tax returns as required in his current state of residence. DC 2: *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*; DC 4: *Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*; and DC 5: *A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency* apply. I have considered all mitigating conditions under Guideline E and none apply.

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions. Applicant has failed to present sufficient evidence of

refutation, extenuation, and mitigation to overcome the case against him. Guideline J and Guideline E are decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a-f: Against Applicant

Subparagraphs g-i: For Applicant

Subparagraph j: Against Applicant

Subparagraph k: For Applicant

Subparagraphs l-s: Against Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraphs a-i: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

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.