

DATE: October 11, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-02267

DECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a history of criminal conduct concerns to include four convictions in 1997 -- one for obstructing highways and public passages in February, one for disorderly conduct in May, and two for disorderly conduct in November. In May 2001, he was convicted of simple assault, violation of the Uniform Firearms Act (a third degree felony), and two counts of recklessly endangering another person. In February 2002, he was convicted of simple assault, recklessly endangering another person and driving under the influence. Applicant has not mitigated this past conduct. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 24, 2003, DOHA issued a Statement of Reasons (SOR)⁽¹⁾ detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on January 22, 2004, and elected to have a hearing before an administrative judge.

DOHA received the case on February 27, 2004, and it was assigned to me the same day. On April 12, 2004, DOHA issued a notice of hearing scheduling a hearing for April 29, 2004. The hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

The government offered six documents, which were admitted without objection as Government Exhibits (GE) 1 through 6. I left the record open after the hearing to afford Applicant the opportunity to submit additional documents. The Applicant submitted five documents, which were admitted without objection as Applicant Exhibits (AE) A through E. DOHA received the transcript on May 11, 2004. DOHA imposed a moratorium on issuing decisions involving the Smith Amendment pending a change in the law. *See footnote 2.* DOHA recently lifted that moratorium, which accounts for the delay in issuing this and other decisions involving the Smith Amendment.

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 a 29-year-old unmarried man. He has two minor daughters, who reside with their mother. Applicant graduated from college in 1999 with a bachelor of arts degree, majoring in history and minoring in business. Applicant seeks to retain his secret security clearance, which he has held since 1997 in his capacity as deputy director of information technology for a company that conducts a significant portion of its business with the defense industry.

On February 9, 1997, Applicant was arrested by his college police department, and charged with obstructing highways and other public passages. On February 11, 1997, he pled guilty and sentenced to pay \$98.50, which included fines and costs, (SOR ¶ 1.f.).

On May 16, 1997, Applicant was arrested by his college police department, and charged with disorderly conduct. On May 23, 1997, he pled guilty and was sentenced to pay \$198.50, which included fines and costs, (SOR ¶ 1.e.).

On October 12, 1997, Applicant was arrested by his college police department, and charged with harassment. On November 18, 1997, he pled guilty and was sentenced to pay \$176.50, which included fines and costs, (SOR ¶ 1.d.).

On November 5, 1997, Applicant was arrested by his college police department, and charged with simple assault and harassment. On December 10, 1997, he pled guilty to the harassment charge and was sentenced to pay \$1,500.00, which included fines, costs, and restitution, (SOR ¶ 1.c.).

On July 10, 2000, Applicant was arraigned following an arrest, which stemmed from an altercation on July 8, 2000, on the following charges: 1. One count of aggravated assault, first degree felony; 2. One count of aggravated assault, second degree felony; 3. Three counts of simple assault, second degree misdemeanors; 4. One count of possession of an instrument of crime, first degree misdemeanor; 5. One count of possession of a weapon, first degree misdemeanor; 6. One count of conspire aggravated assault, first degree felony; 7. One count of attempted murder of the first degree, first degree misdemeanor; 8. One count of carrying a firearm without a license, third degree felony; and 9. Six counts of recklessly endangering another person, second degree misdemeanors. GE 2.

On May 15, 2001, Applicant pled guilty to: 1. One count of simple assault, second degree misdemeanor; 2. One count of violation of Uniform Firearms Act, third degree felony; and 3. Two counts of recklessly endangering another person, second degree misdemeanors. GE 3.

On December 18, 2001, Applicant was sentenced: 1. To undergo imprisonment for not less than three months nor more than 23 months in the local county correctional center; 2. Two years probation effective January 7, 2002; and 3. To pay fines and costs of prosecution totaling \$1,937.00. All fines and costs were payable within 18 months of sentencing date. (SOR ¶ 1.b.) GE 4. Applicant served time in the local county correctional center from January 7, 2002 to March 20, 2002, less than one year. He was placed in the work release program and was allowed to work full time during the day, but was required to spend evenings in the correctional center. GE 5. [\(2\)](#)

Applicant testified the July 8, 2000 incident started while playing basketball at a neighborhood block party, which he and a friend had been invited to by his girlfriend's parents. Applicant estimates he "had about six or seven beers throughout the course of the day." During the game obscenities were exchanged between Applicant and his friend and the neighborhood residents. Applicant's friend got into a fight with one of the neighborhood residents. Following this altercation, the mother of Applicant's girlfriend asked Applicant and his friend to leave, which they did. After leaving, Applicant's friend realized he was missing some personal items that were lost while fighting. Applicant and his friend decided to return to the block party to retrieve the missing items.

When they returned, they were greeted by a number of hostile neighborhood residents. The neighborhood residents began to throw rocks and bottles at Applicant's car. After the first bottle hit Applicant's car, he removed a 9 millimeter handgun from his glove compartment. Applicant stated, "I pulled this gun out not to shoot anyone but to scare this crowd because I sincerely believed that they were going to beat me to death if I was unable to get out of there. As I

grabbed the gun from my glove box, I stepped out of my car and I held the gun up above my head and I pointed it straight in the air to the sky. . . . The person closest to me did take a step back when I got out of my car; however, he (the person), stepped forward towards me and I hit him in the side of his face with the gun. As I did so, the gun discharged. When I hit this person, the safety must have been unlocked." GE 5.

After striking the individual with his handgun, he fell to the ground. The victim did get up and Applicant and his friend left the scene. They decided to dispose of the handgun and did so by throwing it out of the car window into the woods. They "then proceeded to Atlantic City to kind of blow off some steam." Tr. 36. Applicant emphasized that he "had no intention of shooting anyone or murdering anyone" GE 4. After Applicant and his friend left the scene, the police were called and the victim was transported to the hospital, treated and released. GE 2. The bullet from the discharged handgun was later found in a house across the street. GE 3.

On January 27, 2002, Applicant was arrested and charged with: 1. simple assault; 2. recklessly endangering another person; 3. driving under the influence of alcohol or drugs; and 4. aggravated assault while driving under the influence of alcohol or drugs. On February 8, 2002, Applicant pled guilty to: 1. simple assault; 2. recklessly endangering another person; 3. driving under the influence.

On the simple assault charge, Applicant was sentenced to not less than 11 ½ months nor more than 23 months to be served under house arrest with electronic monitoring. For the recklessly endangering another person, Applicant was sentenced to two years probation and assessed monthly supervision fees, with probation ending in March 2006. On the driving under the influence charge, Applicant was sentenced to 48 hours incarceration in the county jail. Additionally, Applicant was ordered to pay fines and costs of \$498.00 and ordered to attend Alcohol Highway and Safety School. (SOR ¶ 1.a.)

This arrest occurred after Applicant drank a pitcher of beer at a bar and decided to go to a nightclub. He was accompanied by his girlfriend and another male friend. While traveling on the interstate and adjusting his CD player, he rear-ended a vehicle in front of him. The collision with the car in front of him caused him to hit the middle barrier and a wall. His car spun completely around before coming to a complete stop. Applicant and his friend were not injured; however, his girlfriend injured her nose and was bleeding. The driver who was struck by the Applicant later claimed neck and back injuries. Applicant's BAC was .129%. GE 5.

Applicant submitted performance evaluations from his employer covering a five-year period reflecting solid work performance. AE A through E.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead they are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, administrative judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive. The government has the burden of proving any controverted fact(s) alleged in the SOR, and the facts must have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for

access to classified information to "United States citizens . . . whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Executive Order 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Where the facts proven by the government raise doubts about an applicant's judgment, reliability or trustworthiness, then the applicant has the ultimate burden of establishing his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

Security clearances are granted only when "it is clearly consistent with the national interest to do so." *See* Executive Orders 10865 § 2 and 12968 § 3.1(b). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2 "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." *See Egan*, 484 U.S. at 531.

Criminal Conduct - Guideline J

In the SOR, DOHA alleged that Applicant was convicted of simple assault, recklessly endangering another person, and driving under the influence in February 2002, that he was convicted of simple assault, violation of the Uniform Firearms Act, and two counts of recklessly endangering another person in May 2001, that he was convicted of harassment in November 1997, that he was again convicted of harassment in November 1997 a second time, that he was convicted of disorderly conduct in May 1997, and that he was convicted of obstructing highways and other public passages in February 1997, (¶¶ 1.a through 1.f.). SOR ¶ 1.g. is no longer applicable under the Smith Amendment. *See fn 2.*

The government established its case under Guideline J by Applicant's admissions and evidence presented. Were Applicant's involvement with the law enforcement community limited to his misdemeanor arrests while in college in 1997, one could perhaps overlook these transgressions as part of the process of growing up and lack of maturity. Unfortunately, Applicant's involvement with law enforcement did not end with these youthful indiscretions. In July 2000, Applicant's behavior hit a low when he engaged in conduct that could have had disastrous consequences. Fortunately, no one was fatally injured.

In short, Applicant showed an extreme lack of judgment when he drove back to a party that he had been asked to leave by his girlfriend's mother. He returned to a party with a handgun readily available in his automobile glove compartment to a situation he knew to be hostile. When he returned to the party and things escalated, he brandished his handgun and struck an individual in the face. The handgun discharged lodging a bullet in a house across the street. It is most fortunate for all concerned the person struck did not suffer serious bodily injury. Applicant's response to the situation after the shooting was to dispose of the handgun by throwing it into the woods, and drive to Atlantic City with his friend to "blow off some steam."

In January 2002, less than two years later, Applicant rear ended another vehicle and following this accident was convicted of driving under the influence with a .129% BAC. Again, it is fortunate no one was seriously injured.

Given the number and nature of Applicant's arrests and convictions covering a six-year period, I have grave doubts regarding Applicant's suitability to hold a security clearance. Additional time is needed to determine whether he has learned from his past behavior.

Applicable Criminal Conduct Disqualifying Conditions (CC DC) are: E2.A10.1.2.1. (*Allegations or admission of*

criminal conduct, regardless of whether the person was formally charged); and CC DC E2.A10.1.2.2. (*A single serious crime or multiple lesser offenses*). Applicable Criminal Conduct Mitigating Conditions (CC MC): None. I find against Applicant on this concern.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1.: Guideline J: AGAINST APPLICANT

Subparagraphs 1.a.-1.f.: Against Applicant

Subparagraphs 1.g.: Not Applicable

In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, as well as the whole-person concept and other appropriate factors and guidelines in the Directive.

DECISION

In light of all of 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.

Robert J. Tuider

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

2. In 2000, a federal statute, commonly referred to as the "Smith Amendment," was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who was convicted of an offense in a U.S. court and was sentenced to more than one year in jail. 10 U.S.C. § 986 (c)(1) (2001). "In a meritorious case," the Secretary of Defense could authorize an exception to the prohibition. The Secretary was not authorized to delegate that authority. 10 U.S.C. § 986(d) (2001). In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, directed that, in cases in which the decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not recommending further consideration of the case for a waiver of the prohibition. DOHA Operating Instruction No. 64 ¶ 3.e (Jul. 10, 2001). At the time the SOR in this case was issued, the Smith Amendment was applicable.

As amended in 2004, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited to those who are sentenced to more than one year in jail and were incarcerated as a result of that conviction for at least one year. 10 U.S.C. § 986(c)(1) (2004). In light of the 2004 amendment, this case no longer falls under the 2000 Smith Amendment.