

DATE: April 9, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-02796

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was convicted of 2<sup>nd</sup> Degree Arson on November 6, 1972 and sentenced to ten years in prison. He was seventeen years old when he committed the offense, and nineteen years old when he was paroled on June 18, 1974. He has now been married for twenty-six years, has been continuously gainfully employed since being paroled, and has no subsequent criminal history. Because of the statutory disqualification imposed by 10 U.S.C. § 986, he is unable to mitigate the security concern his criminal conduct has created. Clearance is denied. I recommend further consideration of this case for a waiver.

**STATEMENT OF THE CASE**

On October 9, 2003, 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. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed. Applicant submitted a sworn answer to the SOR that was received by DOHA on December 1, 2003, admitted he was convicted of 2<sup>nd</sup> Degree Arson, and requested a hearing.

This case was assigned to me on January 12, 2004. A notice of hearing was issued on January 13, 2004, scheduling the hearing for February 6, 2004. The hearing was conducted as scheduled. The government submitted two documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-2 and admitted into the record without an objection. The Applicant testified at the hearing, called his wife as a witness on his behalf, and submitted twelve documentary exhibits that were marked as Applicant's Exhibits (AE) 1-12 and admitted into the record without an objection. The transcript was received on February 18, 2004.

**FINDINGS OF FACT**

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

Applicant is a 49-year-old man who has been self-employed as an owner-operator of a tractor-trailer since approximately 1980. He is presently seeking to obtain a security clearance to enable him to haul sensitive material, apparently pursuant to defense department contracts, for a company to which he leases his equipment. He submitted letters of recommendation and certificates attesting to his being a skilled driver and an honest, hardworking, and trustworthy individual.

Sometime in 1972, Applicant broke into a house trailer with two other youths and stole several items, including a motorcycle, from therein. They returned the motorcycle to the premises, but then set fire to the trailer in an effort to conceal their crimes. The trailer was completely destroyed. Applicant was 17 years old at the time of these offenses, and considered a minor under the applicable state law. The juvenile court declined to exercise jurisdiction over his case, resulting him being prosecuted as an adult.

Applicant was charged with the offenses of 2<sup>nd</sup> Degree Burglary, 2<sup>nd</sup> Degree Arson, and Larceny. He entered a plea of guilty to the 2<sup>nd</sup> Degree Arson charge on November 6, 1972, and was sentenced to serve ten years in prison on January 31, 1973. He was paroled to a halfway house on June 18, 1974, released from the halfway house sometime in approximately 1975, and was released from parole and had his rights restored on May 10, 1977. Applicant was 19 years old at the time he was paroled.

Applicant admitted at the hearing that he had broken into another house when he was approximately 13 years old, although he was never arrested for that offense. He did not steal anything from that residence. He also admitted at the hearing that he had committed a shoplifting offense when he was approximately eight years old, although again he was never arrested for that offense. Applicant has no criminal history subsequent to his incarceration in 1972, with the exception of minor traffic offenses.

Applicant obtained his high school diploma while in prison. He met his wife while he was a halfway house resident when he attended Bible study classes that she and her family also attended. They have been married since October 1977, have no children, and own their own home. Applicant's wife is also a truck driver, and they operate the family trucking business together. She will act as the required second driver when Applicant hauls classified loads. Applicant held a variety of jobs from the time he was paroled until he began his own trucking business.

### **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, 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.<sup>(2)</sup> The government has the burden of proving controverted facts.<sup>(3)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(4)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(5)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(6)</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>(7)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(8)</sup>

No one has a right to a security clearance<sup>(9)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</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>(11)</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. The evidence establishes he was convicted of 2<sup>nd</sup> Degree Arson in 1972 and sentenced to imprisonment for a term of ten years. He actually served more than eighteen months prior to being paroled to a halfway house. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 3: *Conviction in a Federal or State court*,

including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year apply in this case.

Other than the arson conviction and two prior offenses committed when he was a tender age child, Applicant has led a law-abiding life. He has no criminal history subsequent to his release from prison in 1974. The character letters he submitted attest to his honesty, integrity and competency as a driver. I find that mitigating Conditions (MC) 1: *The criminal behavior was not recent*; and MC 6: *There is clear evidence of successful rehabilitation* apply in this case. However, because of the statutory disqualification imposed by 10 U.S.C. § 986, Applicant is unable to mitigate his criminal conduct. Guideline J is decided against Applicant.

I recommend further consideration of this case for a waiver of the disqualification mandated by 10 U.S.C. § 986.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the 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. I recommend further consideration of this case for waiver of the 10 U.S.C. § 986 disqualification. 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.