

DATE: July 28, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04147

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a former active duty service member who has worked for a defense contractor as a communications systems installer for nine years. Applicant was either charged with or found guilty of minor criminal offenses on five occasions by military or civilian law enforcement. Most of the incidents involved alcohol. Applicant admitted to still consuming alcohol on occasion. Applicant has not mitigated security concerns based on his criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On August 31, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on September 9, 2004. The SOR alleges security concerns under Guideline J (Criminal Conduct) of the Directive.

Applicant answered the SOR in writing on September 14, 2004. He admitted four of the allegations under Guideline J with explanation, and denied two of the allegations with explanation. He requested a hearing before an administrative judge and the request was received by DOHA on September 16, 2004. Department Counsel was prepared to proceed with the case on May 16, 2005, and the case was assigned to me on May 23, 2005. A notice of hearing was issued on May 25, 2005, and the hearing convened on June 21, 2005. Seven government exhibits and the testimony of the Applicant were received during the hearing. The transcript was received on July 14, 2005.

FINDINGS OF FACT

Applicant is 37 years old and has been a communications installation specialist for nine years for a defense contractor. He is not now married but was previously married and has three children he supports. He served on active military duty

for seven years and received a security clearance which he still holds.⁽¹⁾

While on active military duty in Germany in 1991, Applicant used a credit calling card given to him by another military service member to make calls to his family in the United States. Applicant thought the card belonged to the service member who gave it to him, but it was in fact stolen. Applicant believed he could use the card and would reimburse the service member for the cost of his calls. The incident was investigated and determined there was sufficient probable cause to believe Applicant received services under false pretenses. However, his command took no action against Applicant.⁽²⁾

While in the barracks at a new duty station at Christmas time in 1995, Applicant was involved in an altercation with another service member. The service members had been drinking alcohol before the altercation took place. An officer tried to break up the fight, and Applicant accidentally hit the officer. Military police arrived and Applicant resisted them. Applicant received non-judicial punishment for the offenses of assault and battery, drunk and disorderly conduct, resisting apprehension, and disrespect to an officer. He was reduced in grade and forfeited pay for two months.⁽³⁾

Applicant admitted he was arrested and fined for urinating in public in 1996.⁽⁴⁾ In 1997, Applicant was involved in a physical altercation with his sister and niece. His sister and niece were arguing and Applicant got between them. He broke a bottle and his sister was cut and received three stitches. Applicant was charged with domestic assault and received a suspended jail sentence, fined, and to attend a domestic violence program which he completed.⁽⁵⁾

Applicant was involved in an altercation with his girlfriend in 2001 over the purchase of tires. The police were called and Applicant was charged with assault and battery. Applicant claims the girlfriend started the altercation and hit him first. Applicant pled guilty to the offense on the advice of his lawyer, and sentenced to a suspended jail term and probation for two years. Since he had already attended a domestic violence course, he did not have to attend another course.⁽⁶⁾

Applicant was charge with and found guilty in 2002 of driving under the influence with a blood alcohol level of .16, and improper lane change. He was sentenced to a suspended jail sentence, a fine, driver's license suspension for one year, and to attend an alcohol safety program. Applicant completed the program.⁽⁷⁾

Applicant has not had encounters with law enforcement since 2002. He drinks on week-ends but does not consider himself a heavy drinker.⁽⁸⁾

POLICIES

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."⁽⁹⁾ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.⁽¹⁰⁾

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽¹¹⁾ An administrative judge should consider: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the applicant's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other

pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation of recurrence.⁽¹²⁾

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.⁽¹³⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.⁽¹⁴⁾ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.⁽¹⁵⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹⁶⁾ "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability."⁽¹⁷⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽¹⁸⁾

Based upon a consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct: There is a security concern because a history or pattern of criminal conduct creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions section below.

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The government has established its case under Guideline J. Applicant's non-judicial punishment while on active military duty, his arrest and conviction for urinating in public, his arrests and convictions for domestic violence and assault, and his arrest and conviction for driving while under the influence brings the matter under Criminal Conduct Disqualifying Conditions E2.A10.1.2.1 (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*); and E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*). While the military report of criminal investigation concluded there was probable cause to believe Applicant received services under false pretenses by using the credit calling card, which may amount to an allegation of criminal conduct, I conclude the lack of action taken on this offense and Applicant's explanation that he did not know the card was stolen is sufficient to find this was not criminal conduct and there is no basis to the allegation. However, Applicant admitted or was found guilty of all other offenses. There are no serious crimes but there are multiple lesser offenses. I conclude the above disqualifying conditions have been established except for allegation 1.a.

The Criminal Conduct Mitigating Conditions that may pertain to Applicant are E2.A10.1.3.1 (*the criminal behavior was not recent*); E2.A10.1.3.2 (*the crime was an isolated incident*); and E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). There are five criminal offenses by Applicant in seven years, the latest being 2002. This pattern or history of criminal conduct is recent, and five incidents in seven years is not isolated. Additionally, Applicant has not presented any evidence of successful rehabilitation. Alcohol was involved in most of the criminal conduct. Applicant still drinks even though he claims he has modified his drinking. While he has not had an encounter with law enforcement in the last three years, he has not shown that he has modified his conduct so he will not be involved in criminal conduct in the future. As a predictive exercise, his past criminal conduct indicates he will continue to lack judgment and reliability. Applicant has not met his burden to mitigate the security concerns for criminal conduct.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

DECISION

In light of all of the circumstances in 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.

Thomas M. Crean

Administrative Judge

1. Tr. 23; Government exhibit 1 (Security clearance application, dated Mar. 10, 2000).
2. Tr. 12; Tr. 24-27; Government exhibit 2 (Criminal investigation report, dated, Oct. 17, 1993).
3. Tr. 13-14; Tr. 27-29; Government exhibit 3 (Commander's report of disciplinary action, dated, May 1, 1996); Government exhibit 4 (Applicant's statement, dated Apr. 12, 2001) at 1-3.
4. Tr. 29.
5. Tr. 16-17; Tr. 31.
6. Tr. 15-16; Tr. 29; Government exhibit 5 (Applicant's statement, dated May 2, 2003); Government exhibit 6 (Court order, dated Aug. 6, 2001).
7. TR. 31; Government exhibit 7 (Applicant's statement, dated, Dec. 17, 2002).
8. Tr. 31.
9. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
10. Directive ¶ E2.2.1.
11. *Id.*
12. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

13. *See* Exec. Or. 10865 § 7.

14. Directive ¶ E3.1.14.

15. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.

16. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

17. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

18. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.