

KEYWORD: Criminal Conduct

DIGEST: Applicant was charged with three criminal offenses between 1979 and 2000. The last two charges were dismissed. Applicant has successfully mitigated the security concern caused by his criminal conduct. Clearance is granted.

CASENO: 03-11927.h1

DATE: 02/21/2006

DATE: February 21, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-11927

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Candace Le'I, Esq., Department Counsel

## **FOR APPLICANT**

Joel P. Borowiec, Esq.

### **SYNOPSIS**

Applicant was charged with three criminal offenses between 1979 and 2000. The last two charges were dismissed. Applicant has successfully mitigated the security concern caused by his criminal conduct. Clearance is granted.

### **STATEMENT OF THE CASE**

On September 1, 2004, 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 (criminal conduct). Applicant submitted a sworn answer to the SOR that was received by DOHA on October 29, 2004, admitted all SOR allegations, and requested a hearing.

The case was assigned to me on August 1, 2005. A notice of hearing was issued on September 14, 2005, scheduling the hearing for November 1, 2005. At Applicant's request, the hearing was rescheduled to October 31, 2005, pursuant to an amended notice of hearing that was issued on October 12, 2005. The hearing was conducted as rescheduled. The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1- 7. GE 1 through GE 3, GE 5, and GE 6 were admitted into the record without objection. GE 4 and GE 7 were admitted into the record over Applicant's objection. Applicant testified, called three witnesses to testify on his behalf, and submitted seven documents that were marked as Applicant Exhibits (AE) 1-7. AE 1 through AE 6 were admitted into the record without objection. Department Counsel's objection to AE 7 was sustained. The transcript was received on November 9, 2005.

### **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 49 years old and has been employed by several different defense contractors since May 1995. He has been working for his present employer since October 1999, currently as a senior supervisor. Applicant served on active duty in the U.S. Army from July 1974 until he retired as a Sergeant First Class (paygrade E-7) in October 1994.

Applicant was first married in July 1977. That marriage ended in divorce in October 1984. Applicant has two sons from that marriage, ages 28 and 23, who he has not had contact with for many years. Applicant has been remarried since October 1984, and has a 23-year-old stepson from this marriage.

In April 1979, while Applicant was on active duty in the Army, one and one-half marijuana cigarettes were found in his auto after he became lost and was stopped for unknowingly attempting to enter a restricted area aboard a military base. He was charged with possession of marijuana, and the charge was disposed of at an Article 15, Uniform Code of Military Justice hearing with Applicant being reduced to in rank. Applicant possessed a top secret security clearance at the time of this offense, and it was suspended/revoked for approximately two to three years after imposition of the Article 15.

In September 1990, Applicant became involved in a verbal disagreement with the driver of another vehicle. That person, who happened to play center for a professional football team, exited his car, approached Applicant while he was still seated in his vehicle, and threatened him with physical violence. Applicant, realizing there was a great disparity in size between himself and the other individual, displayed a handgun and was subsequently charged with Recklessness with a Weapon. Applicant was undertaking law enforcement training at the time and was lawfully in possession of the weapon. The charges were dismissed after the other driver told the judge that the weapon was never unholstered or pointed at him.

In April 1991, Applicant became involved in an argument with his wife. His wife was taking prescribed medications for diagnosed medical conditions that caused her to act irrationally at times. During the argument, she produced a firearm, Applicant attempted to kick it away from her, and she was struck in the head and her head against a wall. She testified at the hearing that this incident was her fault and Applicant had not assaulted her. No charges were filed against Applicant, however, his command suggested he seek counseling or face the possibility of being administratively separated from the Army. Applicant attended one or two counseling sessions.

Applicant did get into a physical altercation with his wife in August 2000. This incident occurred after they argued and she attempted to leave the marital residence to go to her sister's nearby house. Applicant struck her in the leg with a stick knocking her to the ground. He thereafter pulled her by the hair and hit her with the stick while she was on the ground. Applicant was charged with domestic violence offenses that were dismissed because his wife did not want to testify against him. According to Applicant's wife this is the only time he was ever violent toward her and there have been no

incidents of domestic violence since August 2000.

Applicant's witnesses and letters of recommendation establish he was an excellent Soldier and is a valued employee. He is considered to be honest, trustworthy, reliable, and capable of being entrusted with access to classified information. Applicant has possessed a top secret security clearance since approximately 1974, and, except for the two or three years it was suspended/revoked following the 1979 Article 15, there have not been any allegations made that he has mishandled or otherwise risked the compromise of classified information and no other action has ever been taken to revoke his 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, 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<sup>(10)</sup>

determinations should err, if they must, on the side of denials." 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. Applicant unlawfully possessed marijuana in 1979, and committed a domestic violence offense in 2000. The evidence does not support finding he committed a criminal offense in connection with either the 1990 or 1991 incidents. Disqualifying Conditions (DC) 1: *Allegations or admission of criminal conduct, regardless of whether the person was formally charged*; and DC 2: *A single serious crime or multiple lesser offenses* apply.

Applicant's criminal offenses were separated by more than 20 years, and the last offense occurred more than five years ago. The offenses are totally dissimilar in nature and not indicative of a recurring pattern of misconduct. Applicant's wife testified there has not been a repeat of domestic violence and that they have learned to peacefully work out any marital disagreements that occur. Applicant's references establish he is a hardworking and reliable individual. Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 2: *The crime was an isolated incident*; MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* 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. Once again, it must be noted that no one has a right to a security clearance<sup>(12)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(13)</sup> After considering the evidence of record in this case, I find Applicant has mitigated the security concern caused by his criminal conduct. Guideline J 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

### **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. 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.
12. *Egan*, 484 U.S. at 528, 531.
13. *Id.* at 531.