

DATE: October 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12037

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Philip B. Peterson, Esq.

SYNOPSIS

Applicant pled guilty to Aggravated Fleeing and Eluding on April 8, 2003, for an offense committed on July 19, 2002, and was placed on two years probation. Although he has no prior criminal history, the false sworn statement he provided on April 17, 2003 and the false testimony he provided at the hearing on August 18, 2004 prohibit finding he has mitigated the security concern caused by his criminal conduct. Clearance is denied.

STATEMENT OF THE CASE

On March 8, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were 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 a security concern under Guideline J (criminal conduct). Applicant submitted a sworn answer to the SOR on April 28, 2004, admitted the sole allegation contained in the SOR, and requested a hearing.

The case was assigned to another administrative judge on June 28, 2004, and was reassigned to me on July 2, 2004, to be heard in connection with other cases I had scheduled in the same region. On July 26, 2004, a notice of hearing was issued scheduling the hearing for August 18, 2004. The hearing was conducted as scheduled. The government called Applicant and one other witness, and submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without objection. Applicant testified on his own behalf, and submitted a folder containing numerous documents that was marked as Applicant Exhibit (AE) 1, and admitted into the record without objection. The transcript was received on August 27, 2004.

PROCEDURAL MATTERS

Department Counsel submitted a *MOTION TO AMEND THE STATEMENT OF REASONS* on June 23, 2004 seeking to add two allegations under Guideline E alleging Applicant falsified a security clearance application (SF 86) he submitted

on February 21, 2001 by not disclosing his arrest on July 19, 2002 and conviction on April 8, 2003. Department Counsel subsequently submitted a document entitled *WITHDRAWAL OF MOTION TO AMEND THE STATEMENT OF REASONS* which was granted at the hearing without objection.

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 47 years old, and has been employed as a machinist by a defense contractor since July 1995. He previously was employed by another defense contractor as a tool maker from September 1982 to July 1995. He has held a secret security clearance since approximately 1981, and there have been no allegations or reports made alleging any mishandling or potential compromise of classified information on his part. There also has not been any administrative action taken to revoke, suspend, or downgrade his security clearance before the SOR herein was issued by DOHA.

Applicant stated in the SF 86 he submitted on February 21, 2001 that he has been married since September 13, 1998. He testified he is a single parent and that two of his children (according to the SF 86, he has three children ages 21, 18, and 16) live with him. The letters of recommendation, certificates of achievement, performance appraisals, and other documents he submitted attest to his work reputation for being an honest, responsible, and trustworthy individual who is possessed of high integrity. He is considered to be a skilled machinist and tool maker.

The incident leading to Applicant being found guilty of Aggravated Fleeing and Eluding on April 8, 2003 began with what should have been a routine traffic stop for speeding. Although Applicant admits he was speeding on July 19, 2002, his version of what occurred and that of the arresting officer differ greatly.

The officer's testimony and the various police reports in evidence (GE 3) provide the following version of the incident:

The police officer was operating a stationary radar gun outside his police vehicle at a speed checkpoint, assisted by a second police officer, on July 19, 2002 at about 4:00 PM. He clocked Applicant's vehicle being driven at about 70 MPH in a 55 MPH zone. The officer signaled with his hand for Applicant to pull over. However, instead of stopping, Applicant swerved around the officer, accelerated, and continued down the road at a high rate of speed.

The officer got into his marked police vehicle, activated the lights and siren, and began to pursue Applicant at a speed in excess of 120 MPH (according to the officer his vehicle has a governor preventing it from going over 120 MPH and Applicant was pulling away from him at an estimated speed of 130 MPH when he attained his maximum speed). Applicant passed two vehicles in traffic on a crested two lane bridge at a speed of about 100 MPH approximately three miles from the spot of the initial attempted stop, and the officer backed off the pursuit for safety reasons.

Having radioed other officers of the pursuit, the pursuing officer was informed a police officer from another jurisdiction was about one mile ahead and would attempt to stop Applicant at a roadblock he was establishing at that location. Applicant stopped at the roadblock and was taken into custody.

Applicant's testimony, and the statements he provided (GE 2 and GE 5) provide the following version of the incident:

Applicant was on his way home from work when he observed a police officer by the side of the road pointing towards the side of the road. He also observed a vehicle with the backup lights illuminated nearby and presumed the officer was letting him know there was a vehicle in the process of backing onto the road. Applicant continued on down the road followed by a truck. He never saw or heard a police vehicle pursuing him, was driving at approximately 70 MPH, never exceeded about 75 MPH, and never passed vehicles on the bridge, although he did pass a vehicle at the base of the bridge that was making a turn.

About one mile past the bridge, Applicant saw a police vehicle in the middle of the road, and a police officer outside the vehicle with his weapon drawn and the laser sight aimed at Applicant. Applicant stopped, and was roughly arrested by that officer and handcuffed. The original police officer who had been standing by the side of the road arrived at the location of the arrest about five minutes after he had been taken into custody.

Applicant pled guilty to Aggravated Fleeing and Eluding (a felony) on April 8, 2003. The officer testified the endangerment of other drivers as Applicant passed the cars on the bridge is what made this incident an aggravated felonious offense. Applicant was placed on two years probation, ordered to attend a four-hour driving class, and assessed a fine and costs totaling \$280.00. He complied with all conditions of probation and the probation was terminated in July 2004.

Applicant provided a sworn statement to a special agent from the Defense Security Service (DSS) on April 17, 2003 in which he related the above version of events with additional details. At the hearing, Applicant was properly admonished about the provisions of 18 U.S.C. § 1001, and was reminded of those provisions on two additional occasions. He was also specifically informed that section of law applied to any statements or testimony he provided during the hearing. He testified in accordance with his version of the incident as described above, again with additional details.

Applicant's statement to the DSS agent and his testimony are patently false. It is unbelievable that he saw the officer pointing to the side of the road and interpreted the gesture as a warning about a backing vehicle. It is totally incredible that he continued on down the road at no more than 75 MPH and not only did not see or hear a police vehicle pursuing him, but was not overtaken by the police car in short order. Most telling of the falsity of Applicant's version is his admission that an officer from another jurisdiction had established a roadblock and apprehended him at gunpoint several miles from the site where the incident began. The only explanation for that officer's actions is there was a high speed pursuit involving Applicant that was radioed ahead by the pursuing officer.

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.⁽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. Applicant was convicted of Aggravated Fleeing and Eluding, a felony carrying a maximum sentence of 15 years confinement. DC 2: *A single serious crime.* . applies in this case.

I have considered all mitigating conditions (MC) and find none apply. I have specifically considered 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*. Each of those mitigating conditions would have at least some applicability to this case if Applicant were honest, forthright, and truthful about what occurred on July 19, 2002. Instead he has chosen to provide a false sworn statement to a DSS special agent, and false testimony to an administrative judge. These repeated false assertions are themselves serious crimes under 18 U.S.C. § 1001, and deprive him of the benefit of any of these mitigating conditions.

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⁽¹²⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹³⁾

I have given full and the most serious consideration to the nature of the incident that led to Applicant's arrest and conviction, the letters of recommendation and employment records in evidence, and the possible motivation he may have had for providing a false statement and false testimony. After considering the evidence of record in this case, I find Applicant has failed to mitigate the security concern caused by his criminal conduct. Guideline J is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 2-Guideline J: Against the Applicant

Subparagraph a: 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. 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.

12. *Egan*, 484 U.S. at 528, 531.

13. *Id.* at 531.