

DATE: October 29, 2004

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In Re:  
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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18190

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Edward W. Loughran, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant was arrested on five occasions between July 1987 and April 2000. His last conviction, on August 24, 2000, resulted in a sentence of 365 days jail (335 days suspended) and 10 years probation. He successfully completed a domestic violence intervention program in 1998, and quit drinking alcohol about two years ago. Applicant has successfully mitigated the security concern caused by his criminal conduct. Clearance is granted.

**STATEMENT OF THE CASE**

On May 24, 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. <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 June 21, 2004, admitted all allegations contained in the SOR, and requested a hearing.

The case was assigned to me on August 26, 2004. A notice of hearing was issued on September 10, 2004, scheduling the hearing for September 27, 2004. The hearing was conducted as scheduled. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1 - 4, and admitted into the record without objection. Applicant called one witness, and testified on his own behalf. The record was held open to provide Applicant the opportunity to submit documentation in support of his case. He submitted one item after the hearing through Department Counsel that was marked as Applicant Exhibit (AE) 1, and admitted into the record without objection. The transcript was received on October 6, 2004.

**FINDINGS OF FACT**

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

Applicant is 42 years old, has never been married, but has resided with a woman in a spouse-like relationship since 1992. They have three children together, ages 11, 9, and 6. She also has a 13-year-old child and a shared-custody arrangement with that child's father. The family has resided together in the same residence since 1992. Applicant has been employed by a defense contractor aboard an Air Force Base as a relief station mechanic since August 2002. He was employed as a driller/derrick man by an oil drilling company from December 1989 to August 2002. (2)

Applicant was charged with Driving While Intoxicated (DWI) in November 1987, convicted, and sentenced to 30 days confinement (27 days suspended), and fined \$500.00. Although he didn't believe he was intoxicated at the time, he does admit his blood alcohol concentration was over the legal limit when he was arrested.

He was charged with Disorderly Conduct in September 1991 for his involvement in a bar fight. The charges were dismissed. He was involved in another bar fight in April 2002, and was charged with Assault. The charges were dismissed after he paid for damage he caused to a door and jacket.

Applicant got into an argument with his spouse-like partner in November 1997. During the argument, she threw a fire extinguisher at his feet and he grabbed her and choked her. When she attempted to call the police, he grabbed the telephone and threw it to the ground. He was convicted of Assault for his part in this incident, and sentenced to one-year probation, approximately seven days in jail, and ordered to attend a domestic violence intervention program. He attended the required 24 group sessions and successfully completed the program. The woman involved in the altercation testified she never observed any display of violence by Applicant either before or after this incident, although she did describe him as short tempered before he completed the program. She also testified he quit drinking alcohol about two years ago, and has now learned to control his anger by walking away and taking a time out.

Applicant's last arrest arose from a traffic incident in April 2000. Angered because he perceived another driver would not allow him to pass, Applicant exited his vehicle, exchanged words with the other driver, and then grabbed the other driver by the neck leaving marks on his neck. He was convicted of Assault in the Fourth Degree, and sentenced to 10 years non-reporting probation, 365 days in jail (335 days suspended), and fined \$5,000.00 (\$5,000.00 suspended). He served the jail sentence in increments around his work schedule.

Applicant testified he quit drinking about two years ago because he no longer found it fun to go out, and because he wanted his children to have a father who didn't drink alcohol. While he denies alcohol was involved in the 2000 arrest, he also indicated he believed alcohol may have been part of the anger problem he used to experience, and did not feel it needed to be a part of his life.

## **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. (3) The government has the burden of proving controverted facts. (4) The burden of proof in a security clearance case is something less than a preponderance of evidence (5), although the government is required to present substantial evidence to meet its burden of proof. (6) "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence." (7) 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. (8)

Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

No one has a right to a security clearance<sup>(10)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(11)</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>(12)</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 was convicted of three offenses between July 1987 and April 2000. He was also arrested on two other occasions, in 1991 and 1992, and admits having been involved in bar fights each time. 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 last offense occurred four and one-half years ago, and the one before that seven years ago. Both offenses obviously arose out Applicant's inability to control his temper. Applicant completed a domestic violence program in about 1998, and there have been no further incidents of domestic violence since. He also appears to have benefitted greatly from the relatively harsh sentence imposed following the 2000 traffic altercation. Not only have there been no further incidents of violence, but there is credible evidence Applicant has abstained from alcohol for approximately two years, and has learned to use effective tools to control his anger.

Applicant also receives credit under the "whole person" concept for his steady work, residential, and family history. Together with the more recent changes in his lifestyle, they are indicators of a mature, steady, responsible, and trustworthy individual. MC 1: *The criminal behavior was not recent*; 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>(13)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(14)</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

Subparagraph e: 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. The company he worked for changed ownership during this period of employment, but he continued on in the same job.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id.* at 531.
12. *Egan*, Executive Order 10865, and the Directive.
13. *Egan*, 484 U.S. at 528, 531.
14. *Id.* at 531.