

KEYWORD: Criminal Conduct

DIGEST: Applicant was charged with five criminal offenses between 1985 and 2001. He has failed to mitigate the security concern caused by his criminal conduct. Clearance is denied.

CASE NO: 03-25473.h1

DATE: 02/17/2006

DATE: February 17, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-25473

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

**FOR APPLICANT**

### **SYNOPSIS**

Applicant was charged with five criminal offenses between 1985 and 2001. He has failed to mitigate the security concern caused by his criminal conduct. Clearance is denied.

### **STATEMENT OF THE CASE**

On January 14, 2005, 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. [\(1\)](#) 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 that was received by DOHA on February 18, 2005, admitted all SOR allegations, and requested a hearing.

The case was assigned to me on September 6, 2005. A notice of hearing was issued on September 15, 2005, scheduling the hearing for November 3, 2005. The hearing was conducted as scheduled. The government submitted ten documentary exhibits that were marked as Government Exhibits (GE) 1- 10, and admitted into the record without objection. Applicant testified and submitted six documents that were marked as Applicant Exhibits (AE) 1-6, and admitted into the record without objection. The transcript was received on November 18, 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, has never been married, and has no dependents He has been employed by a succession of

defense contractors since 1991, with the exception of the period between sometime in 2000 and January 2002, when he was employed outside the defense industry. His present employment position is as a product test specialist. Applicant served on active duty in the U.S. Air Force from June 1983 until June 1987. He attained the rank of sergeant and was awarded an honorable discharge. He received an associates degree in electronics in June 1987, and is currently pursuing a bachelor of science degree.

Applicant has possessed a security clearance since approximately 1983. No complaints have ever been made alleging he mishandled or otherwise risked the compromise of classified information and no prior action has ever been taken to revoke his security clearance. He submitted several letters from employers and co-workers that attest to him having earned a reputation for being a dependable and reliable employee.

Applicant was charged with disorderly conduct in August 1985. After spending a night in jail, he pleaded no contest to the charge and was fined \$68.50. Applicant's explanation for this arrest is that he had stopped at a bar near the base where he was stationed to have a beer with a couple of casual friends from the Air Force. While he was in the restroom, a scuffle broke out between his companions and a group of local townspeople. He did not become involved in the scuffle, but instead was just standing nearby and watching. When the police arrived and began interviewing witnesses, Applicant inquired of an officer as to when they were going to get their side of the story. The officer told him to be quiet or he would be arrested. The officer then arrested Applicant when he asked the officer what he would be charged with.

Applicant was arrested in February 1989, and again charged with disorderly conduct. Applicant's version of this incident is that after playing rugby, he and a friend were going to go home and get cleaned up and then meet the rest of the team for dinner. The friend asked him to provide a ride home to two females whom Applicant did not know before that time. While they were driving home, another car began cutting them off and then stopped in front of them at a stoplight. Applicant stopped his vehicle several car lengths behind the other vehicle to avoid any confrontation with the occupants of that car. However, the driver of the other car exited his car and threw a beer bottle that struck the windshield of Applicant's vehicle. Applicant then became involved in an altercation with the other driver. It turns out, unbeknownst to Applicant, that the two women had arrived at the rugby game with the men in that other vehicle. Applicant was required to attend anger management classes and the charge was dismissed.

In October 1990, Applicant was charged with Assault in the 4<sup>th</sup> Degree. (2) Applicant met his brothers and father to play in a golf tournament. His brother had gotten a hole-in-one before he arrived, so his brothers and father had been celebrating. After he arrived, they all went to a country and western bar to continue the celebration, but his brother was refused service because he was intoxicated. They decided to leave the bar. The cover charge they had paid was being refunded, when Applicant's brother attempted to reenter the bar to retrieve a jacket he had forgotten. As his brother bolted through the door, bouncers pounced upon him and began to beat him. Applicant interceded in an effort to protect his brother, and was arrested along with two of his brothers. He pleaded guilty to the assault charge and received a 12-month deferred sentence and was ordered to pay a fine of \$100.00. The charge was dismissed upon payment of the fine.

Applicant was charged with driving under the influence (DUI) in June 2001. He claims to have only consumed a couple glasses of wine before being stopped by a police officer. Although Applicant denies he was intoxicated, the officer

indicated he had failed a field sobriety test and made him submit to a field breath alcohol test. He registered a 0.09 BAC on the test. The state's presumed intoxication level at the time was 0.08 BAC. Applicant testified he submitted two additional breath tests after being arrested and registered a 0.07 BAC and a 0.05 BAC. It is unclear from the record whether he was actually charged with DUI, but he pleaded guilty to Reckless Driving. He was sentenced to serve 365 days confinement (suspended) and ordered to pay a fine of \$5,000.00 (\$4,750.00 suspended). Applicant was also required to attend an alcohol information school and a victim impact panel.

Applicant was charged with Residential Burglary and Assault in the 4<sup>th</sup> Degree - Domestic Violence for an incident that occurred in December 2001. Applicant's version of this incident is that after attending a Christmas party he decided to stop by his ex-girlfriend's house at about 1:00 A.M. to pick up some of his belongings because he was going to be moving out of state soon. They had lived together for several years, but had separated months earlier. He claims to have been unsuccessful in previous attempts to contact her to arrange to retrieve the items.

Applicant testified he let himself into the house with a key he had retained from when they lived together. He entered her bedroom and was surprised to find a man in bed with her. He kicked the sideboard of the bed, she jumped out of bed yelling for him to not hurt the other man, and she and Applicant then went into the living room to talk. He heard the man calling the police and decided he should leave. He denies making physical contact with either individual. He was arrested on a warrant at his place of employment for the charges related to this incident in February 2002.

The victims' statements contained in the police reports and court records from the December 2001 incident disclose that after entering the bedroom, Applicant was swearing at the man, kicked the bed, pushed the female to the floor, and then kicked the man in the leg. The woman persuaded Applicant to accompany her into the living room to get him away from the man in the bed. In the living room, Applicant grabbed her head by placing his hands over both ears and applied a lot pressure while squeezing her head. Applicant then pushed her across the room, causing her to fall to the floor. Applicant threatened her with death, and then left the apartment before the police arrived.

Applicant offered to plead guilty to Assault in the 4<sup>th</sup> Degree and Trespass, but the prosecutor apparently refused to reduce the Residential Burglary charge. Following a jury trial, Applicant was convicted of Assault in the 4<sup>th</sup> Degree, a gross misdemeanor, and Trespass. He was sentenced to one-year probation, and ordered to pay a fine of \$1,000.00, attend anger management classes, and perform 240 hours of community service.

Applicant claims he had only consumed a small amount of beer from the first bottle that had been served to him before he was arrested in 1985. He testified he only consumed a couple of glasses of wine before being arrested for DUI. He denied consuming any alcohol before any of the other arrests.

## **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>(3)</sup> The government has the burden of proving controverted facts.<sup>(4)</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence<sup>(5)</sup>, although the government is required to present substantial evidence to meet its burden of proof.<sup>(6)</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>(7)</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>(8)</sup> 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 charged with five criminal offenses that occurred between 1985 and 2001. 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 testified to his version of each incident, and essentially claims to have never been in the wrong. To believe Applicant, it would be necessary to find: a) he was an innocent bystander, not involved in the 1985 bar fight, and arrested merely for asking an innocuous question of a police officer; b) he innocently left a rugby game with two women that he had no reason to think were involved with other men at the game, and was defending himself from a totally unprovoked attack in 1989; c) he was going to the aid of his brother who was being unjustly attacked by bouncers in 1990; d) he had only consumed a couple glasses of wine and was not intoxicated before recording a 0.09 BAC and being arrested for DUI in 2001; and e) he was innocently going by his ex-girlfriend's house at 1:00 A.M. to retrieve his personal belongings and remained cool, calm, and collected when he discovered her in bed with another man.

Before he testified, Applicant was informed his testimony was being received subject to the possible criminal penalties imposed by 18 U.S.C. § 1001. I thereafter observed Applicant's appearance and demeanor while testifying, and have carefully considered the substance of his testimony. I have also carefully considered the nature and disposition of each offense, and what incident reports are of record in this case. Having done so, I find Applicant's testimony about each and every offense incredible.

Not having been alleged in the SOR, Applicant's false testimony is not itself a separate basis for denying him a security clearance. However, it does demonstrate his continued willingness to violate criminal laws when he deems it in his interest. Accordingly, he is not entitled to application of Mitigating Conditions (MC) 4: *. . . the factors leading to the violation are not likely to recur*; or MC 6: *There is clear evidence of successful rehabilitation* to his case. Likewise, his recent criminal conduct by providing false testimony demonstrates there has not been a sufficient passage of time to demonstrate he is a law-abiding citizen and entitled to application of MC 1: *The criminal behavior was not recent*. The remaining mitigating conditions clearly have no applicability to the facts of this case.

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 failed to mitigate the security concern caused by his criminal conduct. Guideline J is decided against Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against Applicant

Subparagraph c: Against Applicant

Subparagraph d: Against Applicant

Subparagraph d: Against 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. Assault in the 4<sup>th</sup> Degree is a gross misdemeanor, punishable by imprisonment in a county jail for not more than one year, or by a fine not to exceed \$5,000.00. Rev. Code Wash. §9A.36.041; Rev. Code Wash. §9A.20.021
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.