

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was convicted of reckless driving (reduced from driving while intoxicated) in 1999, and driving while intoxicated in 2003. He also received punishment under Article 15 of the Uniform Code of Military Justice in 1997. He failed to disclose the 1997 and 1999 incidents in a Questionnaire for National Security Positions he submitted in 2003, and the Article 15 punishment when interviewed by a special agent from the Defense Security Service in August 2003. Applicant has mitigated the criminal and personal conduct concerns that existed in this case. Clearance is granted.

CASENO: 04-02423.h1

DATE: 02/13/2006

DATE: February 13, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-02423

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

## **FOR APPLICANT**

Pro Se

### **SYNOPSIS**

Applicant was convicted of reckless driving (reduced from driving while intoxicated) in 1999, and driving while intoxicated in 2003. He also received punishment under Article 15 of the Uniform Code of Military Justice in 1997. He failed to disclose the 1997 and 1999 incidents in a Questionnaire for National Security Positions he submitted in 2003, and the Article 15 punishment when interviewed by a special agent from the Defense Security Service in August 2003. Applicant has mitigated the criminal and personal conduct concerns that existed in this case. Clearance is granted.

### **STATEMENT OF THE CASE**

On March 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. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct). Applicant submitted answers to the SOR that were received by DOHA on March 28, 2005, and April 11, 2005. He admitted SOR subparagraphs 1.a. through 1.c., denied all other 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 eight documentary exhibits that were marked as Government Exhibits (GE) 1-8, and admitted into the record without objection. Applicant testified, and submitted five documentary exhibits that were marked as Applicant Exhibits (AE) 1-5. AE 1, and AE 3 through AE 5 were admitted into the record without objection. Administrative notice was taken of the information contained in AE 2 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 a 32-year-old man who is employed as mechanical technician by a defense contractor. He graduated from high school in 1991, and earned an associate of science degree in aerospace science from a community college in May 1994. He served on active duty in the U.S. Air Force from February 1995 until February 1999, attained the rank of senior airman (paygrade E-4), was awarded a good conduct medal, and received an honorable discharge. He possessed a secret security clearance while in the USAF without incident. Applicant has been married since June 2000, and has a two-year-old child, and a nine-year-old stepchild.

Applicant was disciplined pursuant to Article 15, Uniform Code of Military Justice (UCMJ) in September 1997. He admitted his guilt to the offense of False or Unauthorized Pass Offense and was demoted one paygrade and ordered to serve 30 days correctional custody. The conduct for which he was sentenced was based upon his participation in the alteration of the military identification cards of several friends who were less than 21 years of age so they could frequent adult night spots with him. Although the alteration of the cards occurred in 1995, the discovery of the misconduct did not occur until 1997.

Applicant was charged with Driving Under the Influence (DUI) in September 1999, after registering a 0.103 BAC (the presumptive intoxication BAC level at that time in the state where the arrest occurred was 0.10). He pled guilty to a reduced charge of Reckless Driving and was required to attend an alcohol-related class. No other information about this offense is of record.

Applicant was again charged with DUI in January 2003. He pled guilty to the DUI and was sentenced to serve 15 days in jail (10 days suspended), ordered to pay \$781.00 fines and costs, and required to attend a MADD Impact Panel and 12 alcohol awareness training sessions. A Speeding charge for driving 65-mph in a 35-mph zone was dismissed as part of the plea agreement.

Applicant executed a Questionnaire for National Security Positions (SF 86) on March 12, 2003, and certified the statements contained therein were true, complete, and correct to the best of his belief and knowledge. Although he disclosed the 2003 DUI in the SF 86, he did not disclose the 1997 Article 15 or the 1999 DUI charge.

Applicant's explanation for not disclosing the Article 15 is that because of the manner in which it was handled he was not aware that he had been disciplined under the UCMJ. The question in issue (23 e) reads as follows: *In the last 7 years, have you been subjected to court martial or other disciplinary proceedings under the Uniform Code of Military Justice? (Include non-judicial, Captain's mast, etc.)* Applicant testified as follows:

Q. When did you become aware it was under Article 15?

A. To me the Article 15 was just a general punishment for pretty much what I

was told during the time I was in the Air Force was it was general punishment for your commander to take out on you for whatever actions it is. It doesn't necessarily have to be under the guidelines of this UCMJ, it could be insubordination or showing up late for work you can actually receive an Article 15.

Q. So you were aware that you received non-judicial punishment?

A. Yes.

Q. And you're aware that the UCMJ is the general criminal rules governing all of the military?

A. Yes.

Q. And why didn't you realize that this applied under the UCMJ?

A. Well, Article 15 is, like I said, is a non-judicial punishment. And all the other

UCMJ codes, all the other articles have to go through a court martial proceeding for the person to be convicted of it. And this is why I didn't relate the Article 15 back to the UCMJ.

I mean this is years after it happened when I was asked the question on the application. So, you know, Article 15 UCMJ just didn't click when I was filling out the information. (Tr. pp. 34-35)

Following the imposition of discipline for the incident, Applicant was allowed to complete his military service, was awarded a Good Conduct Medal, and was honorably discharged from the Air Force.

Applicant's explanation for not disclosing the 1999 DUI charge is that because it was reduced to Reckless Driving he did not think it needed to be listed. The various subsections of question 23 in the SF 86 ask about criminal charges and convictions relating to felonies, firearms, explosives, alcohol, etc., and concludes with a subsection asking about other arrests or convictions excluding traffic offenses for which a fine of less than \$150.00 was imposed. Applicant's confused testimony about the 1999 DUI arrest indicates he concluded he did not have to list the 1999 DUI charge

because it was not a felony, was a traffic offense, and apparently a fine of less than \$150.00 was imposed.

Applicant provided a written statement to a special agent from the Defense Security Service on August 28, 2003. While he discussed with the agent his two DUI charges, he did not disclose the Article 15 proceeding. Again his explanation for not disclosing that incident is that based upon the manner in which it was handled he was not aware he had been subjected to proceedings under the UCMJ.

### **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, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are 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 determinations should err, if they must, on the side of denials."<sup>(10)</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>(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 based upon the 1997 Article 15 proceeding and the two DUI charges. 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 participation in the falsification of the military identification cards belonging to several friends occurred in 1995, and was deemed minimal enough to only warrant discipline administered under Article 15, UCMJ. His BAC at the time of the 1999 DUI arrest was just barely over the proscribed limit of 0.10, and he was allowed to plead guilty to the reduced charge of Reckless Driving. His 2003 DUI happened more than three years ago, and there has been no subsequent criminal conduct on his part. Following the 2003 DUI, Applicant attended a victim impact panel and 12 alcohol counseling sessions. He credibly testified he seldom drinks alcohol anymore, and, when he does consume alcohol away from home his wife acts as a designated driver. Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; and MC 4: *. . . the factors leading to the violation are not likely to recur* apply. Guideline J is decided for Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

Applicant failed to list the Article 15 and 1999 DUI charge in the SF 86 he submitted in 2003. He failed to disclose the Article 15 in a 2003 statement he provided to an investigator from the Defense Security Service. Having considered Applicant's appearance, demeanor, and manner of testifying; the substance of his total testimony; his expressed and demonstrated confusion about what was being asked of him by the questions in issue in the SF 86; his misunderstanding of the relationship of Article 15 to the UCMJ, courts-martial, and the discipline that was imposed upon him, which is corroborated by the facts that he was allowed to complete his military service and was awarded a Good Conduct Medal following the Article 15; and, the full disclosure he made in the security clearance application and statement about the 2003 DUI, I am satisfied he was not attempting to deliberately provide false or misleading information. Accordingly, no disqualifying condition exists. Guideline E is decided for Applicant.

### **FORMAL FINDINGS**

SOR ¶ 1-Guideline J: For Applicant

Subparagraphs a-d: For Applicant

Subparagraphs a-c: For 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.