

DATE: August 30, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03931

CISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Sabrina Redd, Esq., Department Counsel

FOR APPLICANT

Pros Se

SYNOPSIS

Applicant was convicted of alcohol-related driving offenses in 1994 and 1995, and felony theft in 1998. He has mitigated the security concern caused by his criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

On October 4, 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 November 28, 2005, admitted all SOR allegations, and requested a hearing.

The case was assigned to me on April 7, 2006. A notice of hearing was issued on April 7, 2006, scheduling the hearing for April 25, 2006. The hearing was conducted as scheduled. The government submitted 17 documentary exhibits that were marked as Government Exhibits (GE) 1- 17, and admitted into the record without objection. Applicant testified and submitted 23 documents that were marked as Applicant Exhibits (AE) 1-23, and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documents in support of his case. Twenty-three additional documents were timely received, marked as AE 24-46, and admitted into the record without objection. [\(2\)](#) The transcript was received on May 5, 2006.

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 37 years old, has been married since August 2002, and has an eight-month-old son. He has been employed

by a succession of defense contractors as an analyst since January 1999. Applicant graduated from college in 1992, and was awarded a bachelor of science degree in finance.

He enlisted in the U.S. Army in January 1993, served on active duty until November 1996, attained the rank of corporal (paygrade E-4), and was awarded an honorable discharge. He has never possessed a security clearance.

Applicant was charged with Driving While Ability Impaired (DWAI)⁽³⁾ on July 13, 1994. He pled guilty and was sentenced to 90 days jail (suspended), fined approximately \$342.00, ordered to complete an alcohol evaluation and a Level I alcohol program, and was required to perform 24 hours of community service. Applicant successfully completed all terms of the sentence.

Applicant was again charged with DWAI on April 16, 1995. He pled guilty to this offense and was sentenced to one year in jail (360 days suspended), one year probation, fined approximately \$560.00, ordered to complete a Level II alcohol program, and was required to perform 48 hours community service. Applicant voluntarily appeared in court in April 1997 and requested additional time to complete the terms of his probation. He was granted an extension of time and thereafter successfully completed all term of his sentence.

Applicant was employed by a state university from January 1997 until January 1998. While so employed, he engaged in a number of schemes to defraud and/or steal money from the university, including: ordering items for his personal use and charging them to a university account; arranging to have his girlfriend receive pay for work she did not perform; and stealing funds that were entrusted to him. The total amount stolen was approximately \$43,000.00.

Applicant's unlawful activity was discovered when a merchant informed the university about unusual purchases that were made by Applicant and charged to the university that the merchant believed were fraudulent charges. Applicant was questioned by university police officers, initially denied any wrongdoing, and refused to consent to a search of his apartment. But, within an hour of his denial, Applicant contacted the police, admitted the wrongdoing they were investigating, and permitted a search of his apartment and the seizure of the property he had misappropriated. Applicant also admitted the other misconduct he had committed.

Applicant was permitted to resign from the university in lieu of being fired in January 1998. He was charged with two counts of felony theft and one count of embezzlement of public property on February 18, 1998. He pled guilty to the two counts of felony theft on April 6, 1998, and the embezzlement charge was dismissed. Applicant was sentenced to serve four years in the community corrections department on one count of felony theft, and six years probation on the other count, the sentences to run consecutively. He was ordered to pay \$43,184.00 in restitution and approximately \$3,150.00 in fees and costs. Applicant entered the community corrections department (a work-release center) on July 2, 1998, abided by all rules of the center, and was released therefrom on November 10, 1998. That portion of his sentence was then amended to four years probation.

Applicant was never involved in any criminal activity prior to his July 1994 DWAI arrest. He has not engaged in any criminal activity since his February 1998 arrest. He attributes the misconduct he engaged in the mid-1990s to his poor coping with several disturbing incidents in his life, including: 1) discovering his mother had spent all the money he had earned and saved to pay for his college education; 2) his family almost being evicted from their home on multiple occasions because his mother failed to pay on their mortgage; 3) his fiancée engaging in several affairs and then breaking off their engagement while he was serving overseas with the Army; and 4) his parent's divorce.

Following his 1998 conviction, Applicant met with a counselor twice weekly for three months until the counselor moved from the area. (GE17) He then began seeing a psychiatric clinical specialist from the Department of Veterans Affairs. The clinical specialist's assessment was that Applicant's "history reveals a period of depressed mood, loneliness and inadequate coping skills immediately preceeding [sic] and during the commission of the crime. (GE 17) He was diagnosed as suffering from adjustment disorder with depressed mood, resolving. (GE 17)

On September 29, 1998, the clinical specialist sent a letter to Applicant's attorney for use in a request to have Applicant's probation transferred to the state where his immediate family resided. She wrote as follows:

... Our focus has been the development of greater insight as to why he chose to commit a felony crime and what

changes need to occur in values and judgment to prevent such recurrence in the future. A second goal is to make him aware of the signs of depression so that he will seek appropriate treatment should such symptoms occur again. (Applicant) has always been prompt and he is very involved in the sessions; his attitude is positive and cooperative.

It is my professional opinion that (Applicant) is making steady progress toward the goals stated. The very structured Community Corrections Program to which he has been sentenced has served to heighten his awareness of his crime and his responsibility to society, and has forced him to focus upon the issues at hand almost exclusively.

I would support a recommendation for transfer to structured probation in an area nearer to this man's home in (state omitted). I believe he would benefit positively from the support of family, the guidance and love of family and friends. . . (GE 17)

In November 1998, after successful completion of his sentence in the community corrections center, Applicant was granted permission by the court to have his probation transferred to the state where his family resided. He actively sought assistance from his siblings in dealing with the emotional problems that contributed to his unlawful conduct. He complied with all terms of probation, including paying the restitution and other court-ordered costs, and his probation was terminated on December 22, 2003.

Applicant submitted numerous certificates and letters of recommendation that attest to his successful work and personal history since being released from the community corrections center in November 1998. He has reestablished himself as a trustworthy and responsible member of society who is active in his church and community. He received a psychological examination in May 2006, in support of his application for a security clearance. The psychologist offered the following recommendation:

The history of this patient, his demonstrated responsibility over time, his ability to have insight into the error of his previous behavior, and to evidence significant remorse accompanied by positive behavioral changes indicate that (Applicant) has no evidence that he would be a security risk for his employer or the United States Government. He suffers from no major psychopathology and suffers from no character disorders. . . . (AE 24)

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.⁽⁴⁾ The government has the burden of proving controverted facts.⁽⁵⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁶⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁷⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁸⁾ 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.⁽⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁰⁾

No one has a right to a security clearance⁽¹¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹²⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹³⁾

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 two alcohol-related traffic offenses and a serious criminal offense between 1994 and 1998. Disqualifying Condition (DC) 2: *A single serious crime or multiple lesser offenses* applies.

Applicant's criminal conduct occurred during a relatively brief period of his life and, by all accounts, was due to his inability to properly cope with significant stressors that occurred about that time in his life. Following his conviction of two counts of felony theft in 1998, he sought counseling and complied with all terms of his probationary sentence. Since being released from the work-release program, he has maintained steady employment with a succession of government contractors, proven himself to be a trustworthy and reliable employee, and been an active and respected member of his church and community. A recent psychological examination provides a positive prognosis and additional support for concluding that Applicant is unlikely to engage in future criminal conduct. Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; 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. 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 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. Department Counsel sent me two e-mails indicating she had no objection to admission of Applicant's additional submissions. Copies of those e-mails have been marked as Appellate Exhibits (App. Ex.) I and II, and are included in the correspondence file portion of the record.
3. DWAI is a less serious offense than Driving Under the Influence (DUI) under the applicable state law, and only requires that the offender drove a vehicle after having consumed alcohol that "affects the person to the slightest degree

so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle." C.R.S. 42-4-1301 (1) (g) (2005)

4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
6. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
7. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
8. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
9. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
10. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
11. *Egan*, 484 U.S. at 528, 531.
12. *Id.* at 531.
13. *Egan*, Executive Order 10865, and the Directive.