

KEYWORD: Criminal Conduct

DIGEST: Applicant is 29 years old and has worked for a defense contractor since 2003. Applicant pled guilty and was convicted in 1998 for driving under the influence of alcohol and leaving the scene of an accident. Also in 1998, Applicant was convicted of a minor violation, visible air pollution. In 2003, Applicant was convicted of peace disturbance and trespassing following an incident where he and the mother of his child were arguing. Applicant failed to mitigate the security concerns surrounding his criminal conduct. Clearance is denied.

CASENO: 04-04543.h1

DATE: 03/15/2005

DATE: March 15, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04543

**DECISION OF ADMINISTRATIVE JUDGE**

**CAROL G. RICCIARDELLO**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

Robert Hamilton, Esq.

**SYNOPSIS**

Applicant is 29 years old and has worked for a defense contractor since 2003. Applicant pled guilty and was convicted in 1998 for driving under the influence of alcohol and leaving the scene of an accident. Also in 1998, Applicant was convicted of a minor violation, visible air pollution. In 2003, Applicant was convicted of peace disturbance and trespassing following an incident where he and the mother of his child were arguing. Applicant failed to mitigate the security concerns surrounding his criminal conduct. Clearance is denied.

**STATEMENT OF CASE**

On September 30, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance.<sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J, criminal conduct.

In a sworn statement, dated October 26, 2004, Applicant responded to the SOR allegations, and requested a hearing. In his SOR response, Applicant admitted some allegations contained in the SOR and denied others. Applicant also provided explanations in an effort to extenuate and mitigate the security concerns raised by the allegations.

The case was assigned to me on January 3, 2005. A notice of hearing was issued on February 1, 2005, scheduling the hearing for February 24, 2005. A prehearing conference call with both counsel was conducted on February 10, 2005, and discovery issues were resolved. The hearing was conducted as scheduled. The government submitted five exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record. The Applicant testified, on his own behalf, and submitted 34 exhibits that were marked as Applicant's Exhibits (AE) A-HH, and were admitted into the

record. The transcript was received on March 8, 2005.

## **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 29 years old and has worked for a defense contractor since 2003. Applicant has bachelor degrees in physics and electrical engineering. Applicant worked while attending college. Applicant received high grades in high school and college. Applicant has a daughter from a previous relationship. He shares joint custody with the mother of their daughter. Applicant is current on his debts and has had no negative reports regarding his work performance.

Applicant was arrested for driving under the influence of alcohol and a felony charge of leaving the scene of an accident in 1998. The later charge was reduced to a misdemeanor leaving the scene of the accident. Applicant was at a dance club and had been drinking. When he left the club there was a lot of traffic and he hit the car in front of him. Two to three occupants of the car he hit got out of their car and started to hit Applicant's vehicle. Applicant became frightened and backed up his vehicle. Upon doing so he hit another car and as he left the area he hit a third car. He failed to stop and exchange information with the occupants of the vehicles he hit. The police were waiting for Applicant when he arrived home. Applicant spent the night in jail and was bailed out the next day. Applicant was charged with driving under the influence of alcohol (DUI) and felony leaving the scene of an accident. Pursuant to a plea agreement, Applicant pled guilty to DUI and the felony leaving the scene of an accident charge was reduced to a misdemeanor charge for the same offense. Applicant was sentenced to six months in jail, suspended, provided he complete two years probation with conditions to include completion of alternative community service, 15 days in county jail (work release), attendance at alcohol awareness program, and payment of court costs. Applicant completed his probation requirements, but due to a court error his probation was suspended. The error was corrected and his probation was successfully completed.

Court documents reflect that Applicant signed a plea agreement whereby he pled guilty to the DUI offense and the misdemeanor offense of leaving the scene of an accident. These documents dated May 11, 1998, formalized the agreement and reflected Applicant's approval by his signature and that of his attorney's. (AE S-W) However, when questioned at the hearing, Applicant claimed he had no knowledge of pleading guilty to the charge of leaving the scene of the accident. His testimony was not credible. Applicant failed to list the charge of leaving the scene of the accident on his security clearance application (SF 86) dated September 16, 2003, and failed to mention it in his sworn statement regarding the incident dated February 23, 2004.

Applicant admitted he was charged on August 22, 1998, with contributing to the delinquency of a minor. Applicant was the passenger in a vehicle that was legally driven by a minor. Applicant had an open container of alcohol from which Applicant was drinking inside the vehicle. The driver was not drinking. Applicant's charges were reduced and he pled guilty to the amended charge of visible air pollution and paid a fine. Applicant claimed at the hearing that he did not list this offense on his SF 86 because the fine was less than \$150.00. AE CC reports the fine paid was for \$200.00.

Applicant was arrested on April 29, 2003, and charged with peace disturbance and trespassing. Applicant and the mother of their child did not have a formal custody agreement prior to April 2003. They had been arguing about visitation and child support for the child. Applicant wanted to visit the child and the mother advised that the child was in a safe place. Applicant then "tracked down" the mother at her boyfriend's house. (GE 3) Applicant then drove to the house "with the intention of taking my daughter home with me if she was there."(GE 3) Applicant was not drinking alcohol at the time, but was angry. The police received a complaint against Applicant for harassment. Applicant parked his car a couple of blocks away from the house where the mother's boyfriend lived and where he suspected his child was located. Applicant failed to provide any reasonable explanation for why he would park so far away if he was merely trying to retrieve his child. Applicant proceeded to walk by the residence and noticed there was a police officer present. The police later found Applicant in a park near the residence and arrested him. Applicant had fallen in a creek and injured himself. The police were unaware of the injury at the time of the arrest, but later had Applicant transported to a medical facility. Applicant was charged with trespassing in the backyard of the resident of the boyfriend and peace disturbance.

Applicant pled guilty to peace disturbance and trespassing. He was sentenced to two years probation, ordered to take an aggressive behavior course and pay court costs. Applicant's probation expires in August 2005.

Applicant and the mother of their child have formalized a custody and visitation agreement that calls for mediation in the event there is a dispute.

Applicant's testimony at the hearing was evasive, contradictory, and often non responsive when delving into his motives and actions regarding his offenses in 1998 and 2003.

Applicant provided statements from a family member, neighbor and supervisor. All attest that Applicant is trustworthy, responsible, and intelligent. In addition, they attest that he has a superb employment history and is reliable in his work performance and attendance.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, with its respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination 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 is something less than a preponderance of evidence.<sup>(4)</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>(5)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(6)</sup>

No one has a right to a security clearance<sup>(7)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(8)</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.<sup>(9)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.<sup>(10)</sup> It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

## **CONCLUSION**

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.

Based on all the evidence, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*), apply in this case. Applicant was convicted of DUI and fleeing the scene of an accident in 1998. Later that year he pled guilty to an amended charge of visible air pollution. In 2003, he was convicted of peace disturbance and trespassing.

I have considered all the Criminal Conduct Mitigating Conditions (CC MC) and especially CC MC E2.A10.1.3.1 (*The criminal behavior was not recent*), CC C E2A10.1.3.2 (*The crime was an isolated incident*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), and conclude they do not apply. Applicant's first offense occurred in January 1998. Shortly thereafter in August 1998, he had a minor criminal violation. However, in 2003 he was arrested for peace disturbance and trespass. Applicant's most recent offenses occurred less than two years ago, and Applicant remains on probation for this offense. Considering his probationary status, it is too recent to mitigate the concerns. Based on the seriousness of the criminal activity in 1998, and his behavior surrounding the criminal offenses in 2003, I conclude these offenses were not isolated. Applicant's actions surrounding his 2003 offense reflect questionable judgment and immaturity, despite being 27 years old at the time. Finally, I find Applicant's testimony at the hearing to be evasive, vague, contradictory and not credible.

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 life to make an affirmative determination that the person is eligible for a security clearance. Indeed the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and various other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I have considered all the evidence in this case and the credibility of the Applicant. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. Applicant has failed to mitigate the security concerns caused by his criminal conduct. Accordingly, Guideline J, pertaining to criminal conduct is decided against Applicant.

## **FORMAL FINDINGS**

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. 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.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, 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, ¶ E3.1.14.

4. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

5. ISCR Case No. 94-1075 (August 10, 1995) at pp.3-4; Directive, Enclosure 3, ¶ E3.1.15.

6. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15

7. *Egan*, 484 U.S. at 531.

8. Id.

9. Id.; Directive, Enclosure 2, ¶ E2.2.2.

10. Executive Order 10865 § 7.