

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was convicted of several offenses between 1994 and 1999, and, until recently, had a warrant outstanding for his arrest because of his failure to complete community service hours ordered as part of the sentence for his 1999 conviction. The security clearance concern caused by his criminal conduct has been mitigated. He has also mitigated the security concern created by inaccurate information he provided during the course of a security clearance interview. Clearance is granted.

CASENO: 04-04925.h1

DATE: 07/14/2005

DATE: July 14, 2005

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-04925

**DECISION OF ADMINISTRATIVE JUDGE**

**HENRY LAZZARO**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Esq., Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant was convicted of several offenses between 1994 and 1999, and, until recently, had a warrant outstanding for his arrest because of his failure to complete community service hours ordered as part of the sentence for his 1999 conviction. The security clearance concern caused by his criminal conduct has been mitigated. He has also mitigated the security concern created by inaccurate information he provided during the course of a security clearance interview. Clearance is granted.

### **STATEMENT OF THE CASE**

On December 15, 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. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J (criminal conduct). Applicant submitted an answer to the SOR, dated February 23, 2005, admitted all SOR allegations except a portion of the allegation contained in SOR subparagraph 1.a., and requested a hearing.

The case was assigned to another administrative judge on March 24, 2005, and reassigned to me on May 20, 2005, due to caseload considerations. A notice of hearing was issued on May 27, 2005, scheduling the hearing for June 15, 2005. The hearing was conducted as scheduled. The government submitted seven documentary exhibits that were marked as Government Exhibits (GE) 1-7, and admitted into the record without objection. Applicant testified, and submitted 13 documentary exhibits that were marked as Applicant Exhibits (AE) 1-13, and admitted into the record without objection. The transcript was received on June 28, 2005.

### **PROCEDURAL MATTERS**

Prior to commencement of the presentation of evidence, Department Counsel moved to amend SOR subparagraph 1.a. to strike the following words and numbers: *Vandalism, (4) Possession of Marijuana 28.5 grams or less, (5)*. That motion was granted without objection.

Following the presentation of Applicant's case, Department Counsel made a motion to amend the SOR to add the following paragraph 2 under Guideline E:

You falsified your statement to a Defense Security Services agent when you said "I have never smoked marijuana since the arrest in early summer 1994" when in truth you knew and sought to conceal that you had used marijuana after that date.

The motion was granted with objection. A recess was then taken to give the Applicant time to consider whether he needed additional time to respond to the amended SOR. Following the recess, Applicant stated he did not need additional time to respond to the amended SOR.

### **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 29-year-old man employed as a commercial diver/tender by a defense contractor. He quit high school in 1994 during his senior year, and sometime thereafter earned a GED diploma. After dropping out of high school, Applicant headed to the mountains where he worked at a variety of odd jobs, including a number of bartender jobs, until he decided it was time settle down and make something of himself. He and his fiancée moved in 2000 to the area where they now reside.

Applicant began a course of study in commercial diving in November 2000, and obtained a certificate in November 2001. He was hired by his present employer as a part-time diver in March 2002, and was made a full-time employee in March 2005. Due to the serious nature of the profession, lengthy part-time employment is required by Applicant's employer to allow candidates for full-time employment to be scrutinized by their coworkers and diving supervisors. Applicant's diving supervisor has concluded that Applicant has proven himself to be a person of high integrity, responsibility, and ambition. He also found Applicant to be dependable, possessed of good judgment and a mature outlook, and an asset to their organization. Applicant's duties require him to travel to U.S. Navy bases throughout the United States, and, in the future, overseas, working underwater on Navy ships.

Applicant was arrested in March 1994, and charged with Possession of Marijuana for Sale. The arrest arose out of a traffic stop while he was a passenger in a car driven by a friend. Applicant was searched, and about one-half ounce of marijuana was discovered concealed in a belt he was wearing. Although half the marijuana belonged to the driver, Applicant claimed it all belonged to him in an effort to keep the friend from getting arrested. Applicant pled guilty to the felony offense, was placed on 36 months probation, and was ordered to attend Narcotics Anonymous meetings, and assessed a fine of \$4,300.00.

While on probation for the 1994 arrest, Applicant's residence was searched as part of his probation sentence, and a prescription cold medicine tablet that his mother, who worked in a physician's office, had given him was discovered. Because the tablet had not actually been prescribed for him, he was found to be in violation of probation and sentenced to 45 days in jail. Applicant has now completely paid the fine and completed the probation.

Applicant was arrested in August 1994, and charged with Driving Under the Influence (DUI). He believes he registered about 0.08 in a breath test that was administered. He was convicted of the charge, and placed on two years informal probation, and ordered to pay a \$300.00 fine, attend DUI school, and ten Alcohol Anonymous meetings.

Applicant was arrested in July 1996, and charged with Personate to Make Others Liable. The charge was based upon him being discovered by a police officer with his older brother's identification in his wallet. He was convicted and placed on 12 months probation.

Applicant's last arrest occurred in February 1999, and resulted in him being charged with Assault and Battery and Public Intoxication.<sup>(2)</sup> This arrest occurred after Applicant and a friend, who was wearing yet another friend's lift pass, attempted to cut ahead of other persons waiting in a ski lift line. The ski patrol was called by the lift operator, Applicant and his friend became physically confrontational, and the two were forcibly subdued by the ski patrol and police. Applicant was convicted of Assault and Battery,<sup>(3)</sup> and sentenced to 36 months probation, two days jail, fined \$125.00, and ordered to perform 100 hours of community service.

Applicant relocated to his present area of residence without completing the community service work causing a warrant to be issued for his arrest in October 2000. Applicant learned of the warrant upon being interviewed by a Special Agent from the Defense Security Service (DSS) in February 2004. He thereafter contacted the court that issued the warrant, had a public defender appointed to assist him, and managed to get the warrant recalled. He was ordered to complete 100 hours of community service by December 5, 2005, and to reimburse the public defender's office \$200.00 for the services provided to him. He has paid the reimbursement in full and completed 20 hours of community service. He is working fairly regular hours on Saturdays through a youth organization to complete the remaining hours.

Applicant claimed in his February 2004 DSS statement that he had "never smoked marijuana since the arrest in early summer 1994." Applicant testified he smoked marijuana once or twice after the 1994 arrest in response to Department Counsel's questions. He went on to assert that he did not intend to provide false information to the DSS agent and that he could not remember specific dates. The totality of his testimony indicates he quit smoking marijuana as a more or less routine matter following the 1994 arrest, but did smoke it on a couple of occasions in the several years following that arrest.

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

No one has a right to a security clearance<sup>(11)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(12)</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>(13)</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 four arrests that occurred between 1994 and 1999, and the arrest warrant that remained outstanding until fairly recently. Disqualifying Condition (DC) 2: *A single serious crime or multiple lesser offenses* applies.

The last arrest occurred more than six years ago, before Applicant began his course of study that led to the issuance of a diving certificate and his present employment. Although there was an arrest warrant outstanding until recently, Applicant was unaware of its existence, took prompt action to have it recalled, and will have completed the community service hours within the next several months to fully put that incident behind him. What is most important, he has clearly demonstrated by his work performance over the past three years and the observations of his dive supervisor that he has significantly matured and become a responsible young man. Finally, it is noteworthy that there has been no criminal conduct on his part since February 1999. Accordingly, 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* all 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 made an incorrect statement about when he last used marijuana during his DSS interview. However, the totality of the information available indicates he substantially quit using marijuana following his 1994 arrest, and thereafter used it on only a couple of isolated incidents, the last being sometime in the mid to late-1990s. Considering Applicant's appearance, demeanor, manner of testifying, the substance of his testimony, the full and frank disclosures he made in the security clearance application he submitted in June 2003, and throughout his DSS statement and the hearing, 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

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Subparagraph e: For Applicant

SOR ¶ 2-Guideline E: 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. The SOR allegation, as amended, alleged Applicant was also charged with Defrauding a Ski Area. The criminal complaint (GE 4) discloses the individual who was with Applicant at the time of the incident leading to their arrest is the only one of the two who were charged with that offense.
3. The penal code section on the sentencing order (GE 5) makes reference only to the Assault and Battery charge, indicating the Public Intoxication charge was dismissed.
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.