

DATE: September 14, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-07001

DECISION OF ADMINISTRATIVE JUDGE

MARY E. HENRY

APPEARANCES

FOR GOVERNMENT

Jason Perry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1997, as the result of a plea agreement, Applicant plead guilty to simple assault, following his arrest for aggravated assault, a felony. His concurrent misdemeanor charge for drunk in public was dismissed. Four years later, Applicant was charged with Driving Under the Influence, a misdemeanor criminal offense. When completing his SF-86, Applicant stated that he had used the illicit drug ecstasy twice, when in fact he had used it three times. The security concerns raised by his criminal and personal conduct have been mitigated by the passage of time, his successful rehabilitation, and his unintentional failure to identify his last time using ecstasy. Clearance is granted.

STATEMENT OF THE CASE

On April 15, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR details reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Specifically, the SOR set forth security concerns arising under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct, of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On May 16, 2005, Applicant submitted a notarized response to the allegations. He elected to have his case decided on the written record in lieu of a hearing.

Department Counsel prepared a File of Relevant Material (FORM) and provided Applicant with a complete copy on June 29, 2005. Applicant had 30 days from receipt of the FORM to file objections and submit material in refutation, extenuation, or mitigation. He did not submit additional evidence. This case was assigned to me on August 24, 2005.

FINDINGS OF FACT

Applicant admitted with explanation the allegations in subparagraphs 1.a, 1.b and 2.a of the SOR.⁽¹⁾ Those admissions are incorporated herein as findings of fact. After a complete review of the evidence in the record and upon due consideration, I make the following additional findings of fact:

Applicant is a 28-year-old staff consultant for a defense contractor.⁽²⁾ Applicant has worked for this contractor for three years.⁽³⁾ Applicant completed a security clearance application (SF 86) in February 2003.⁽⁴⁾

Applicant was born in the United States (U.S.) and is a U.S. citizen.⁽⁵⁾ His parents are South Korean immigrants who now reside in the U.S. and are U.S. citizens.⁽⁶⁾ He graduated from a major university with a Bachelor of Science degree.⁽⁷⁾ His finances are good and he travels on his U.S. passport.⁽⁸⁾ He has never served in the military.⁽⁹⁾

In July 1997, while a college student, Applicant got drunk one evening and assaulted a police officer.⁽¹⁰⁾ He was arrested and charged with aggravated assault and battery, a felony,⁽¹¹⁾ and drunk in public, a misdemeanor.⁽¹²⁾ As the result of a plea agreement, he plead guilty to simple assault, a misdemeanor.⁽¹³⁾ The court sentenced Applicant to 365 days in jail, suspending 363 days, fined him \$100.00, and placed him on one year of unsupervised probation.⁽¹⁴⁾ The State *nolle prosequit* the drunk in public charge.⁽¹⁵⁾

Four years later, on April 7, 2001, the police arrested and charged Applicant with Driving Under the Influence (DUI).⁽¹⁶⁾ Applicant plead not guilty to the charge on May 11, 2001.⁽¹⁷⁾ On the same date, the court found him guilty, fined him \$800.00 (with \$400.00 suspended), sentenced him to 30 days in jail (suspended), referred him to an alcohol safety program, and suspended his driver's licence for twelve months.⁽¹⁸⁾

Applicant used illegal drugs on a few occasions between August 1996 and May 2001.⁽¹⁹⁾ Specifically, he used marijuana on five occasions and ecstasy on three occasions.⁽²⁰⁾ In his security clearance application, he acknowledged using ecstasy twice, not three times.⁽²¹⁾ Applicant completed the SF-86 under short time constraints and simply forgot this third use of ecstasy.⁽²²⁾

Subsequent to his arrest in April 2001, Applicant attended alcohol counseling for three months.⁽²³⁾ Applicant has not been arrested for any alcohol related offenses since April 2001⁽²⁴⁾ nor has he used drugs since that time. He has changed his lifestyle to avoid risks which can cause him legal problems.⁽²⁵⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudication guidelines which must be considered in the evaluation of security suitability. An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the adjudicative process provision in Paragraph E2.2, Enclosure 2 of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Included in the guidelines are disqualifying conditions and mitigating conditions applicable to each specific guideline. In addition, each security clearance decision must be 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, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. 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.⁽²⁶⁾ The government has the burden of proving controverted facts.⁽²⁷⁾ The burden of proof is something less than a preponderance of the evidence.⁽²⁸⁾ Once the government has met its burden, the burden shifts to the applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽²⁹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽³⁰⁾

No one has a right to a security clearance⁽³¹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽³²⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽³³⁾ Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." The decision to deny an individual a security clearance is not necessarily a determination as to the allegiance, loyalty, and patriotism of an applicant.⁽³⁴⁾ 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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulation could indicate that the person may not properly safeguard classified information.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

The government has established its case under Guideline J. Criminal Conduct Disqualifying Condition E2.A10.1.2.1(*Allegation or admission of criminal misconduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2(*A single serious crime or multiple lesser offenses*) apply. In 1997, the police arrested and charged Applicant with aggravated assault, a felony, and drunk in public, a misdemeanor. In 2001, the police arrested and charged him with DUI, a misdemeanor criminal offense, and directed him to appear in traffic court, not criminal court, which he did on May 11, 2001.

I considered the Criminal Conduct Mitigating Conditions and conclude that E2.A10.1.3.1(*The criminal behavior was not recent*); and E2.A10.1.3.6(*There is clear evidence of successful rehabilitation*) apply. Applicant drank too much one night while a 20-year-old college student, and assaulted a police officer. In the eight years since this incident, Applicant has not been charged with any crimes of assault or any other felonious criminal conduct. His assault charge occurred not from designed criminal activity, but as the result of a night of too much drinking with his college friends. He is not a career criminal and has corrected his behavior towards persons in a position of authority, such as the police. Nearly four years later, the police arrested Applicant and charged him with DUI, a less serious alcohol related driving offense. He not only complied with the court's directive to receive counseling, but he accepted the philosophy behind it. He corrected his behavior and remained free of alcohol behavior problems. His single DUI is now four years old. I conclude that the Applicant has successfully mitigated and overcome the government's case under Guideline J.

The government has not established its case under Guideline E. For Personal Conduct Disqualifying Conditions E2.A5.1.2.2(*The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.*) to apply, the government must establish that Applicant's omission, concealment or

falsification in regards to his third use of the illicit drug ecstasy was a relevant and material fact and was deliberate. (35) Applicant made no attempt to hide his prior use of this drug on two occasions and has freely admitted the use of this drug on a third occasion. He had no reason to hide his third use of ecstasy, particularly since it occurred within a few months of the January 2001 end date listed on his SF-86 form. He credibly explained that in his hurry to complete the SF 86 form in a timely manner, he merely overlooked this conduct. His oversight does not equal intentional misconduct.

Finally, I 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 Applicant has shown a significant change in his behavior. He has not been arrested for any felonious criminal activity since his 1997 arrest. As a college student, he drank too much occasionally. He did not quit drinking following the 1997 drinking related criminal arrest, as evidenced by his subsequent arrest for DUI, not Driving While Intoxicated, the more serious charge. After this arrest, Applicant participated in alcohol counseling, which changed his attitude and behavior towards alcohol. He has remained out of trouble for the last four years. Concerning his omission about a third use of the drug ecstasy, his failure to list it was merely an oversight, not intentional misconduct. I conclude that the Government has failed to show that Applicant's conduct under Guideline E was intentional and material and relevant, and that the Applicant has successfully mitigated and overcome the government's case under Guideline J. Accordingly, for the reasons stated, I find that it is clearly consistent with the national interest to grant a security clearance to 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, Guideline J (Criminal Conduct): FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 1, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant a security clearance for Applicant. Clearance is granted.

Mary E. Henry

Administrative Judge

1. Item 3 (Applicant's response to SOR, dated May 16, 2005) at 1.
2. Item 4 (Security Clearance Application, dated February 18, 2003) at 2-3.

3. *Id.*

4. *Id.* at 1.

5. *Id.*

6. *Id.* at 4.

7. *Id.* at 2.

8. *Id.* at 7 and 10.

9. *Id.* at 6.

10. *Id.* at 7; Item 5 (Federal Bureau of Investigation's Criminal Record Report on Applicant, dated April 2, 2003) at 2; Item 7 (Warrant for Arrest with court documents, dated July 20, 1997) at 1.

11. The Warrant of Arrest identified this charge as a criminal felony charge. Item 7, *supra* note 10, at 1.

12. *Id.*

13. *Id.* at 2-4.

14. *Id.*

15. Item 4, *supra* note 2, at 8.

16. *Id.*; Item 6 (state uniform summons document and related court documents, dated April 7, 2001).

17. *Id.* at 4.

18. *Id.*

19. Item 4, *supra* note 2, at 9.

20. *Id.*; Item 3, *supra* note 1, at 1.

21. Item 4, *supra* note 2, at 9.

22. Item 3, *supra* note 1, at 1.

23. Item 4, *supra* note 2, at 9.

24. Item 5, *supra* note 10, at 2.

25. Item 3, *supra* note 2, at 1.

26. ISCR Case No. 96-0277 (July 11, 1997) at 2.

27. ISCR Case No. 97-0016 (App. Bd., December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.

28. *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

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

30. ISCR Case No. 93-1390 (App. Bd. Decision and Reversal Order, January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.

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

32. *Id.*

33. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

34. Executive Order No. 10865 § 7.

35. Applicant admitted to this allegation (subparagraph 2.a) with explanation. The effect of his explanation is a denial of

the allegation.