

DATE: August 24, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-12294

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Nicole Noel, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested numerous times between March 1999 and September 2002, abused a variety of controlled substances during that time, and deliberately provided false answers in response to questions asked of him in a security clearance application he executed in December 2003. Clearance is denied.

STATEMENT OF THE CASE

On December 7, 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. ^(u) The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J (criminal conduct), Guideline E (personal conduct), and Guideline H (drug involvement). Applicant submitted an answer to the SOR that was received by DOHA on January 9, 2006, admitted all Guideline J and H allegations, denied all Guideline E allegations, and requested a clearance decision based on the written record. After submission of his written SOR answer, Applicant notified Department Counsel he wished to have a hearing. (Tr. pp. 15-17)

The case was assigned to me on February 17, 2006. A notice of hearing was issued on February 27, 2006, scheduling the hearing for March 24, 2006. The hearing was conducted as scheduled. The government submitted two documentary exhibits that were marked as Government Exhibits (GE) 1 and 2, and admitted into the record without objection. Applicant testified and submitted one document that was marked as Applicant's Exhibit (AE) 1, and admitted into the record without objection. The transcript was received on April 7, 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 a 28-year-old man who has been employed by a defense contractor as a welder since December 2003. He previously worked with the same employer through a staffing agency from arch 2003 until December 2003. He graduated from high school in 1998, attended one year of community college, and held a variety of unskilled jobs until being hired by his present employer. He has been married since February 2004, and has two young children.

Applicant was arrested six times between March 1999 and June 2001 and charged with possession of marijuana and other related offenses. On each occasion, with the exception of an arrest that occurred in March 2001, Applicant was either found guilty or had adjudication of guilt withheld pending payment of a fine. Applicant failed to appear for arraignment in connection with the March 2001 arrest and those charges were thereafter either nolle prossed or discharged.

Applicant was arrested for loitering/prowling in September 1999 after he cut through school property. Adjudication of guilt was withheld and he was placed on six months unsupervised probation and ordered to pay a fine. Applicant was arrested for allowing minors to drink at a party at his house in August 2000. He was held for a short time in jail and the charge was apparently dismissed.

In September 2002, Applicant was fired from a job and arrested as a result of his actions in tampering with lottery tickets he was to sell in order to determine which were winning tickets that he would then purchase himself. He was charged with petit theft, convicted and sentenced to two days in jail, and fined \$50.00. In April 2003, an order of conversion to final judgment was filed for non payment of the fine and court costs. He was thereafter ordered to pay a \$250.00 fine and costs.

Applicant used marijuana from about 1997 to sometime in late 2002. He used the substance on a daily basis while in high school and about three to five times a week thereafter. He purchased about \$30.00 worth of marijuana weekly, and, on occasion, would sell the excess that he did not use himself. Applicant used cocaine about ten times in 2000 and LSD on three occasions between 1998 and 2001. Applicant quit using drugs completely in 2002 at his now wife's urging based upon her religious beliefs that he has now accepted as his own.

Applicant executed a security clearance application (SF 86) on December 31, 2003, subject to the criminal penalties imposed by 18 U.S.C. § 1001. In response to the applicable questions, he failed to disclose, as required, that he had been employed at the location from which he was fired in September 2002, all of his drug related arrests with the exception of a single 1999 marijuana possession charge, his arrest for petit theft, the full extent of his marijuana abuse, and his use of cocaine and LSD. In his response to the SOR and during his initial testimony, Applicant indicated the false answers were either due to his not remembering the specifics about the events or the dates on which they occurred. During cross-examination, Applicant acknowledged the omissions were because he feared disclosure of the information would make him look bad and jeopardize his ability to obtain a security clearance.

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 itigating 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 (criminal conduct), Guideline E (personal conduct), and Guideline H (drug involvement), 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than

a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ 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.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

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.

Applicant was arrested, charged with, and convicted of numerous criminal offenses between 1999 and September 2002. Additionally, he deliberately provided false answers in the SF 86 he executed subject to the criminal penalties imposed by 18. U.S.C. § 1001 in December 2003. 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 criminal activity consisted of numerous offenses committed over the course of several years. He was ordered to pay an increased fine for not complying with the terms of a sentence as recently as April 2003. Considering the length of time Applicant's criminal conduct continued and the number of charges, I find Mitigating Condition (MC) 1: *The criminal behavior was not recent* does not apply.

Although not alleged in the SOR, Applicant testified he was convicted of driving under the influence of alcohol (DUI) in either 2004 or 2005 and had to pay a substantial fine. While not a basis for finding a disqualifying condition because it was not alleged in the SOR, the DUI charge does support a conclusion that MC 4: *. . . the factors leading to the violation are not likely to recur*; and MC 6: *There is clear evidence of successful rehabilitation* do not apply. I have considered the remaining Guideline J mitigating conditions, and none apply. Guideline J is decided against Applicant.

Under Guideline E, personal conduct 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 deliberately failed to disclose relevant adverse information about his drug use, criminal charges, and employment history, in the security clearance application he executed in December 2003.

DC 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* applies. I have considered all Guideline E mitigating conditions, and none apply. Guideline E is decided against Applicant.

Under Guideline H, improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse of dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Applicant used, purchased and sold marijuana on numerous occasions between 1997 and late 2002. He also used cocaine on a number of occasions in 2000, and LSD several times between 1998 and 2001. DC 1: *Any drug abuse*; and DC 2: *Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution* apply.

Applicant used marijuana heavily, and the other drugs much less frequently, until he decided to quit in late 2002 at his wife's urging. The only drug abuse program he ever attended was while in high school, which of course was followed by

years of further drug abuse. He more recently, in either 2004 or 2005, was convicted of DUI indicating the potential for abuse still exists. Accordingly, I find no mitigating condition exists. Guideline G is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has failed to mitigate the security concern caused by his criminal and personal conduct and drug involvement. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a-j: Against Applicant

SOR ¶ 2-Guideline E: Against Applicant

Subparagraphs a-d: Against Applicant

SOR ¶ 3-Guideline H: Against Applicant

Subparagraphs a-f: Against 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.

Henry Lazzaro

Administrative Judge

1. ⁰ 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.