



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 10-04763
)	
Applicant for Security Clearance)	

Appearances

For Government: Gina Marine, Esq., Department Counsel
For Applicant: *Pro se*

September 6, 2011

Decision

LAZZARO, Henry, Administrative Judge

On October 10, 2009, Applicant was charged with Driving Under the Influence (DUI) and Possession of Marijuana. An order of Nolle Prosequi was entered on April 13, 2011, dismissing all charges with the case to be refiled as a Reckless Driving offense. Applicant admits he was driving under the influence and credibly testified the marijuana did not belong to him. His overall conduct and reputation are exemplary. Clearance is granted.

On March 10, 2011, 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 alleges a single security concern under Guideline E (personal conduct). On March 28, 2011, Applicant's response to the SOR was received by DOHA. He admitted the SOR allegation and requested a hearing.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to me on June 29, 2011. A notice of hearing was issued on July 11, 2011, scheduling the hearing for August 10, 2011. The hearing was conducted as scheduled. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4 and admitted into the record without objection. Applicant testified, called one character witness, and submitted one documentary exhibit that was marked as Applicant's Exhibit (AE) 1, and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit an additional document in support of his case. That document was timely received, marked as AE 2, and admitted into the record without objection. Department Counsel's forwarding memorandum indicating she had no objection to AE2 was marked as Appellate Exhibit (App. Ex.) I and is included in the file. The transcript was received on August 17, 2011.

Findings of Fact

Applicant's admission to the SOR allegation is incorporated herein. After a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 52-year-old man. In April 1977, he enlisted in the Army National Guard and served continuously as a drilling guardsman until he was honorably discharged in April 1984. He learned to be a mechanic from the Guard and has worked in that field almost exclusively since 1977. He has worked for his current defense contractor employer as a motor rewinder since September 1986. He also has collateral duties with his employer as a maintenance mechanic. Applicant has possessed a security clearance since about 2004, and there has not been any allegation that he mishandled or risked the compromise of classified information.

Applicant was first married in March 1986. His wife passed away suddenly in February 2002. He has a 22-year-old daughter from that marriage who resides with Applicant and his current wife. He has been remarried since December 2003.

Applicant has resided on a 30-acre farm since March 2001. He has known two of the people he listed as knowing him well in his security clearance application since 1986. He has known the third, the character witness he called at the hearing, since about 1972. They have remained friends since junior high school, work for the same employer, visit with each other at work on occasion, attended professional football games together last year, hunt deer together, and occasionally visit at each other's houses. Applicant's character witness has possessed a security clearance for about ten years. He has never seen Applicant use or possess marijuana. He has never seen Applicant abuse alcohol or drive an automobile after consuming any alcohol. He testified that Applicant may have drunk a single beer when they attended football games last year. Applicant's character witness vouches for Applicant's integrity, honesty, and patriotism.

On October 10, 2009, Applicant drove to a city about 18 miles from his farm to find and employ a couple of day laborers to pick up rocks and sticks on his farm. He picked up two men whom he had never met before about 8:30 or 9:00 AM, drove them to his farm, and worked with them in the field until around 5:00 PM. The day laborers picked up the rocks and sticks while Applicant drove a tractor with a bucket on front for them to deposit the material in. He drank soda most of the day and the laborers drank water. He made

sandwiches for them to eat around noon. The laborers were wearing jackets when Applicant picked them up in the morning, but they left those in his truck while working.

Applicant drove the laborers back to the location where he had picked them up immediately after they finished working. A short while after the laborers exited his truck, he saw a tall thin medicine bottle laying on the floor of the truck. He opened it and discovered two or three marijuana cigarettes inside. He recognized it as marijuana because he used marijuana once while attending a party in high school. He has not used or possessed marijuana since the single time in high school. Applicant placed the medicine bottle with the marijuana cigarettes in his pocket intending to dispose of it in a location where other people would not find it. Although he never saw the laborers with the bottle that contained the marijuana, he believes it must have fallen out of one of their coat pockets.

Applicant's wife was out of town visiting her son in another state on October 10, 2009, so he decided to stop at a bar/restaurant on his way home to watch a college football game. He consumed a couple of beers in the bar and about four mixed drinks. He also had some whiskey and soda in a cooler in his truck that he consumed before he entered the bar and on a couple of occasions when he walked outside the bar. Applicant testified he had a pint bottle of whiskey in his barn/workshop that he had mixed toward the end of the day while working with the laborers and he put it in a cooler in the back of his truck when he left his farm to drive the laborers back to the pickup site.

Applicant was stopped by police for erratic driving at about 9:30 PM. He failed a field sobriety test and a breathalyzer test that was administered when he was stopped. He was placed under arrest and a search of his person disclosed the container with the marijuana cigarettes. Applicant was administered a breathalyzer at the police station and his blood alcohol concentration (BAC) was determined to be 0.170. He was charged with two counts of DUI and Possession of Marijuana, less than one ounce.

Applicant retained an attorney to represent him. The first time he appeared in court on the charges was April 15, 2011. At that time, an order of Nolle Prosequi was entered as to all charges contemplating that the case will be redrawn. Applicant's understanding, based on discussions with his attorney, is that he will eventually be charged with Reckless Driving to which he will enter a plea of guilty and be fined \$1,000 and required to perform 80 hours of community service.

Applicant's attorney submitted a letter (AE 2) in which he states that in the rural county where the charges are pending Applicant's case is proceeding "rather rapidly by local standards." He confirmed that the district attorney will someday charge Applicant with Reckless Driving to which he expects Applicant to plead guilty. However, no charge is currently pending.

Applicant has not consumed any hard liquor since the day he was arrested. He now occasionally drinks one or two beers. He does not drive a vehicle after consuming any amount of beer. Applicant informed his employer of the pending charges after he spoke with his friend who told him that as a security clearance holder he was expected to do so.

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 and mitigating conditions for each applicable guideline. Clearance decisions must be fair and impartial decisions that are based upon 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. While 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. Guideline E (personal conduct), with its disqualifying and mitigating conditions, is most relevant in this case.

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 clearance⁹ 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

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

³ ISCR Case No. 97-0016 (December 31, 1997) at 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 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at 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.

Analysis

Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. (AG 15)

I had the opportunity to closely observe Applicant's appearance and demeanor while he testified, including during a rather lengthy cross-examination. I also had the opportunity to closely observe the appearance and demeanor of Applicant's friend and character witness while he testified. I was able to judge their credibility and form a reliable opinion about the veracity of their testimony. I am convinced both individuals were totally honest and forthright about everything to which they testified. Accordingly, I am convinced that the marijuana that was found on Applicant at the time of his arrest did not belong to him and that he has not used marijuana other than on one occasion while he was in high school.

Applicant's 2009 arrest for DUI, combined with his admission that he was driving under the influence of alcohol at that time, calls into question his judgment and reliability. However, the issues concerning his judgment and reliability are overwhelmingly mitigated by the totality of evidence in this case. Applicant is a 52-year-old man without any prior criminal history. He has worked for the same defense contractor for 25 years. He has resided on and worked the same farm for over ten years. His first marriage lasted 16 years and only ended when his wife suddenly passed away. He has been remarried for almost eight years. He served honorably in the Army National Guard for seven years where he learned a trade in a field that he has worked in for about 34 years. Applicant's character witness has known him for almost 40 years and vouches for his integrity, honesty, and patriotism. He has known the other people he identified in his security clearance as potential character references for 25 years.

Applicant resides in a rural community in which the court system obviously operates at a leisurely pace. As a result, the offenses for which he was arrested almost two years ago have not yet been resolved. However, Applicant's testimony and the letter from his attorney clearly indicate he will plead guilty to a greatly reduced charge for which a substantial fine and community service will be imposed. The lack of resolution of the charges has not been caused by Applicant, and the continuation of the case does not create any security concern.

Having found the marijuana accusation to be unfounded and that a whole-person assessment weighs heavily in Applicant's favor, I conclude that Disqualifying Condition (DC) 16(c): *credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information* does not apply.

For the same reasons, and the fact that Applicant's DUI offense is covered under another guideline (Guideline J, criminal conduct), DC 16(d): *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (2) disruptive, violent, or other inappropriate behavior in the workplace does not apply.*

In the event it is determined that one or more of the above disqualifying conditions should apply to Applicant's conduct, I conclude, based on the totality of the evidence available in the case, the following Mitigating Conditions (MC) apply: MC 17(c): . . . *the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*; MC 17(d): *the individual has acknowledged the behavior and . . . taken positive steps to alleviate the . . . circumstances, or factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur*, and MC 17(e): *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.*

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, I find Applicant mitigated the personal conduct security concern. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance. Guideline E is decided for 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 E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

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

