

KEYWORD: Criminal Conduct

DIGEST: Applicant was convicted of numerous offenses in state and federal courts in 1971. He was sentenced to serve penitentiary sentences ranging from one year and one day to five years and was actually confined for approximately two years. Although he would otherwise be able to mitigate the security concern created by his criminal conduct, he is prohibited from doing so because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied.

CASENO: 04-06709.h1

DATE: 08/29/2007

DATE: August 29, 2007

_____)	
In re:)	
)	
-----)	ISCR Case No. 04-06709
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
HENRY LAZZARO**

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of numerous offenses in state and federal courts in 1971. He was

sentenced to serve penitentiary sentences ranging from one year and one day to five years and was actually confined for approximately two years. Although he would otherwise be able to mitigate the security concern created by his criminal conduct, he is prohibited from doing so because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF THE CASE

On August 30, 2006, 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, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. The SOR also alleges 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed. Applicant submitted a sworn answer to the SOR, dated September 11, 2006. He admitted all Guideline J allegations, did not respond to the allegation that 10 U.S.C. § 986 applied to his case, and requested a decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on April 11, 2007, that was mailed to Applicant on April 16, 2007. Applicant acknowledged receipt of the FORM on May 10, 2007. He thereafter did not object to anything contained in the FORM or submit additional information for consideration within the 30-day period provided to him. The case was assigned to me on August 15, 2007.

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:

The FORM contains very little information about Applicant or the offenses of which he was convicted. However, the following can be gleaned from the FORM. Applicant is a 59-year-old high school drop out. He has been employed as a truck driver and or owner-driver since at least 1996. Before becoming a truck driver, Applicant worked on off shore oil rigs and in overseas oil fields

Applicant was first married in May 1975. He has four adult children from that marriage. That marriage ended in divorce in either 1999 or March 2000. Applicant attributes the breakup of this marriage to his being away from home on work for long periods of time. He remarried in December 2000, and now works as a truck driving team with his wife. He has two adult step-children from his second marriage.

¹ This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

Applicant filed for Chapter 7 bankruptcy protection in October 1999, and apparently received a discharge sometime thereafter. He attributes the bankruptcy to the dissolution of his first marriage and his inability to handle his debts with the loss of his wife's income.

Applicant was convicted of three counts of forgery in a state court on January 1971, and sentenced to one year and one day incarceration on one count, two years incarceration on the second count, and five years incarceration on the third count. He was convicted of transporting and receiving stolen goods in a federal court in January 1971, and sentenced to three years incarceration to be served in a state penitentiary. He was convicted of forging and uttering a U.S. Treasury check in March 1971, and sentenced to three years incarceration to be served in a state penitentiary. Lastly, he was convicted of mail fraud and aiding and abetting mail fraud in May 1971, and sentenced to two years incarceration to be served in a state penitentiary.

Applicant pled guilty to all offenses of which he was incarcerated. The record is silent as to why the various federal convictions occurred on different dates, but it is clear he remained in custody at all times following his first conviction in state court and that all offenses occurred prior to the time he was originally arrested.

Applicant attributes the entire series of criminal incidents to youthful indiscretion. His description of each event that resulted in a criminal conviction indicates they were non-violent offenses that involved relatively small amounts of money used to provide for his transportation and support while he bummed around several states while a young man. He served approximately two years and possibly as much as two and one-half years in jail for the various convictions with the sentences all being served concurrently. Upon being released from the penitentiary, Applicant decided "I wanted to be a better person than I had been up to that time, so I vowed to myself that it would never happen again."² There is no indication he has committed any offense, other than minor traffic violations, since being released from the penitentiary in March 1973.

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, with its disqualifying and mitigating conditions is most relevant in this case.

BURDEN OF PROOF

² Form, Item 2.

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.³ The government has the burden of proving controverted facts.⁴ The burden of proof in a security clearance case is something less than a preponderance of evidence⁵, although the government is required to present substantial evidence to meet its burden of proof.⁶ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁷ 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.⁸ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

No one has a right to a security clearance¹⁰ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹²

CONCLUSIONS

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 trustworthiness and fitness for access to classified information. Indeed, the “whole person” concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

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

³ ISCR Case No. 96-0277 at 2 (App. Bd. July 11, 1997) at p. 2.

⁴ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁵ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁷ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁸ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁹ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

¹⁰ *Egan*, 484 U.S. at 528, 531.

¹¹ *Id* at 531.

¹² *Egan*, Executive Order 10865, and the Directive.

secrets. By its very nature, criminal conduct calls into question a person's ability or willingness to comply with laws, rules and regulations.

The government has established its case against Applicant under Guideline J. In 1971, he was convicted of numerous offenses in both state and federal courts. He was sentenced to terms of imprisonment ranging from one year and one day to five years. He actually served somewhere between about two years and two and one-half years before being released from custody. Disqualifying Condition (DC) 31(a): *A single serious crime or multiple lesser offenses*; and DC 31(f): *conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than one year* apply.

Applicant has not been arrested or charged with any offense, other than minor traffic violations, since his 1971 convictions. He has maintained a steady work history since being released from custody in 1973. He was married for almost 25 years and raised four children before being divorced as a result of his extended absences from home for work purposes. In his response to the SOR, Applicant indicates he is a trusted employee who has earned the right with his current wife to haul sensitive and high value cargo. The totality of evidence strongly indicates Applicant has been completely rehabilitated since his youthful criminal conduct and it is highly unlikely any similar conduct will ever again occur. I find Mitigating Conditions (MC) 32(a): *so much time has elapsed since the criminal behavior . . . it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*; and MC 32(d): *There is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity . . . (and) good employment record* applicable.

Applicant would be able to mitigate the security concern that arises from his 1971 criminal conviction but for the statutory disqualification imposed by 10 U.S.C. § 986. Accordingly, while I find SOR subparagraph 1.a. through 1.e for Applicant, I have no discretion in the matter and am required to find subparagraph 1.f. against him. Guideline J is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a-e: For Applicant

Subparagraph 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