

SYNOPSIS

Applicant is a 48-year-old telecommunications analyst employed by a federal contractor. In 1975 at age 16, he was involved in a drug store robbery. He was sentenced to 30 months and was incarcerated for 24 months. This triggers the *Smith Amendment*, 10 U.S.C. § 986(c)(1), which prohibits the issuance of a security clearance to anyone convicted, sentenced, and serving more than 12 months incarceration. He also made a false statement on each of two security clearance questionnaires. He successfully mitigated the security concerns about criminal conduct and personal conduct. I am denying or revoking his clearance solely as a result of 10 U.S.C. § 986(c)(1). Clearance is denied.

STATEMENT OF THE CASE

On April 12, 2005, Applicant submitted a Security Clearance Application (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6 ¶ E3.1.2 *Defense Industrial Personnel Security Clearance Review Program (Directive)*, dated January 2, 1992, as amended, modified, and revised, DOHA issued a Statement of Reasons (SOR) on October 6, 2006, detailing the basis for its decision – security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. The President issued revised adjudicative guidelines (AG) on December 30, 2005. DoD implemented them effective September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the AG are to be used in all cases when the SOR is issued on or after September 1, 2006. Because the SOR was issued after September 1, 2006, DOHA policy requires that this case proceed under the new guidelines.

Applicant answered the SOR in writing on November 8, 2006, and requested to have a decision without a hearing. On December 13, 2006, he faxed a letter to DOHA requesting a hearing before an administrative judge. The case was assigned to me on January 16, 2007, and a Notice of Hearing was dated on January 31, 2007. I convened a hearing on February 22, 2007, to consider whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. The government offered three exhibits, marked as exhibits 1-3. Applicant offered one exhibit, marked as exhibit A. DOHA received the transcript (Tr.) on March 9, 2007.

FINDINGS OF FACT

Applicant admitted the allegations contained in SOR. These admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 48-year-old telecommunications analyst employed by a federal contractor.² He married in 1983 and has two teenage children.³ He earned an associate's degree in electrical engineering.⁴ He has no prior military service, and he held a secret security clearance from 1996 to 2000.⁵

On May 31, 1975, at age 16, Applicant entered a drug store with another person. Applicant emerged from the drugstore first, the other person came out, indicated they should leave, and Applicant drove his car away. Applicant then realized a robbery had occurred. A police cruiser

¹Government Exhibit 1, Standard Form (SF) 86, Security Clearance Application, dated April 12, 2005.

²Tr. at 14, 17.

³*Id.* at 14.

⁴*Id.* at 14-16.

⁵*Id.*

pursued them with lights flashing, and Applicant did not promptly stop, as the passenger pulled a gun on him. He drove off into the woods where the passenger fled. Applicant stayed with the car.⁶

The police arrested Applicant and charged him with (1) robbery-business-gun-drug store and (2) weapon offense handgun, a felony. It is unclear whether he was charged as a juvenile or adult. He was convicted and sentenced to 30 months confinement. He served approximately 2 years in a state correctional training center.⁷

Applicant was arrested on June 20, 1978, and charged with possession of a hypodermic syringe. He was fined \$25 and \$15 court costs.⁸ Since 1978, he has had no arrests or criminal charges made against him.⁹

When Applicant executed his questionnaire for national security positions (Standard Form 86), on April 27, 1996, he answered “No” to the following question: “**23. Your police record a.** Have you ever been charged with or convicted of any felony offense? (Include those under Uniform Code of Military Justice).” He also answered “No” on a SF 86, executed by him on April 12, 2005, when he answered the following question: “**21. Your police record - felony offenses** For this item, report information regardless of whether the record in your case has been sealed or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. §844 or 18 U.S.C. §3607. Have you ever been charged with or convicted of any felony offense?” He failed to list information about his criminal convictions discussed in the previous section.¹⁰

Applicant answered these questions based on his understanding that because the incident occurred when he was 16 years old, his conviction was a juvenile offense. He did not know that the incident would show up as a criminal record on his adult history. He did not see the police report and never did a background check on himself to get any further information about it.¹¹

Applicant also received letters of support from his current project manager at an insurance agency. She has known Applicant for over 20 years. She told of his high degree of integrity, responsibility, and ambition. She recommended him as a team player with good judgement and a mature outlook.¹² Applicant also produced a letter of commendation from the president/CEO of a former employer for outstanding work provided to a government agency. The CEO stated: “I am

⁶*Id.* at 25-27.

⁷SOR, subparagraph 1.a.; and Government Exhibit 3 (FBI, Criminal Justice Record, dated August 26, 2005) at 3.

⁸SOR, subparagraph 1.b.; and Government Exhibit 3, *supra*, note 6, at 3.

⁹Tr. at 19-20.

¹⁰SOR

¹¹Tr. at 20.

¹²Applicant’s Exhibit A (Letter from Project Manager, dated February 14, 2007) at 2.

proud to have personnel of your caliber on the team in support of a customer with a very vital world wide national defense mission.”¹³

Applicant’s pastor stated:

I appointed him to be head deacon of the church. He is responsible for the personal supervision of twelve people and has direct responsibility over several other ministries within the church. He has proven to be very valuable asset in these positions. The high integrity and dedication that he demonstrates in serving people has dramatically increased his influence with those under his supervision. His attention to details and organizational skills is enabled his areas of ministry to excel. I believe that he possesses qualities that make an outstanding leader and person, which include honesty, integrity, self-discipline, dependability, perseverance, conscientiousness, and a strong work ethic.¹⁴

After prison, he attended college and received his associates degree. He has had steady employment, and has worked for a federal contractor the last 11 years without incident. He started a real estate development company on the side. He volunteers with his children’s schools, serving as a liaison between a school and a business helping to build a new school. He donates time to nonprofit organizations teaching occupational skills.¹⁵

His wife also testified:

These things that he did in the past were not a hindrance in our life and it was not a hindrance in our decision to get married. My husband is very communicable as far as people are concerned, he helps those that need help. He goes out of his way for people. I don’t see anything negative in his life that he is still carrying on those same old habits as a youth.

We do make mistakes when we’re young, and we do regret them as we get older, but not repeating those things that happened when we were young is the most important thing. And to learn from them. I believe my husband has learned from those mistakes that he did when he was younger and he is teaching other people how to not make those mistakes.¹⁶

POLICIES

¹³Applicant’s Exhibit A (Letter from President/CEO, dated December 2, 1997) at 6.

¹⁴Applicant’s Exhibit A (Pastor’s Letter, dated January 26, 2007) at 1.

¹⁵Tr. at 30-35.

¹⁶*Id.* at 41-42.

In an evaluation of an applicant's security suitability, an administrative judge must consider the "Adjudicative Guidelines for Determining Eligibility For Access to Classified Information" (Guidelines). In addition to brief introductory explanations for each Guidelines, the Guidelines are divided into Disqualifying Conditions and Mitigating Conditions, which are used to determine an applicant's eligibility for access to classified information.

These Guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these Guidelines in conjunction with the factors listed in the adjudicative process. Guidelines ¶ 2. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.¹⁷

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Guidelines ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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."

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."¹⁸ In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, facts must be established by "substantial evidence."¹⁹ The Government initially has the burden of producing evidence to establish a case which demonstrates, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence and prove a mitigating condition. Directive ¶ E3.1.15 provides, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion

¹⁷Guidelines ¶ 2(c).

¹⁸Guidelines ¶ 2(b).

¹⁹"Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

as to obtaining a favorable clearance decision.” The burden of disproving a mitigating condition never shifts to the Government.²⁰

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive and the Guidelines include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

The scope of an administrative judge’s decision is limited. Nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.²¹

CONCLUSIONS

Criminal Conduct

Guidelines ¶ 30. The Concern. Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

Guidelines ¶ 31. Conditions that could raise a security concern and may be disqualifying include:

(a) a single serious crime or multiple lesser offenses; and

(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 a year.

Applicant admitted his criminal conduct, which includes a felony conviction and a minor misdemeanor offense. He also admitted that because of his felony conviction he was sentenced to imprisonment for a term exceeding one year and was incarcerated as result of that sentence for more than one year.

Guidelines ¶32. Conditions that could mitigate security concerns include:

²⁰See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluates] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant has] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

²¹Executive Order 10865, § 7.

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement; and

(e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

Applicant's only serious crime occurred over 30 years ago when he was 16 years of age. Three years later, the court convicted and fined him for a misdemeanor offense. For nearly 30 years, he has complied with the law and lived a respectable life. Since that time, he has had no arrests, charges, or convictions. He has been married to the same woman for 24 years. He has two teenage children.

Since his youthful criminal activity, he received an associate's degree and has worked for a federal contractor for the past 11 years without incident. He started a real estate development company. He is involved his children's schools and he served as a liaison between school and a business on building new school. He donates time to nonprofit organizations.

His wife testified that his youthful indiscretions were not a hindrance in their decision to marry. She believes Applicant learned from his mistakes when he was young and he's teaching other people not to make the same mistakes that he did.

Character witnesses testified to his integrity, work ethic, and honesty.

Based upon the foregoing evidence, he has successfully rehabilitated himself. Mitigating conditions 32(a) and (d) are applicable. However, because Applicant was incarcerated for more than one year, 32(e) does not apply as the *Smith Amendment* disqualifies him from having a security clearance granted or a renewed by the Department of Defense. I am, therefore, precluded from granting Applicant a security clearance under 31(e) and 10 U.S.C. §986(c)(1).²²

²²10 U.S.C. § 986 (c) Persons Disqualified From Being Granted Security Clearances.— A person is described in this subsection if any of the following applies to that person:

(1) The person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year.

That law also provides that in a meritorious case, the Secretary of Defense may authorize an exception to this prohibition.²³

Personal Conduct

Guidelines ¶15. The Concern. 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.

Guidelines ¶16. Conditions that raise a security concern and may be disqualifying include:

(a) deliberate omission, concealment, or falsification of relevant 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.

Applicant denies that he deliberately falsified his answers to the questions on his SF 86, arguing that the major criminal activity occurred when he was 16 years of age. When a falsification allegation is controverted, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred.²⁴ The government must establish that Applicant's omission, concealment, or falsification in his answers was deliberate. Even though he was a juvenile, the record is not clear whether he was tried as an adult. Based upon his experience, his belief that this crime would not appear on records because he was a juvenile is a reasonable assumption for him to make. I find that his omissions are honest mistakes, and were not deliberately made with the intent to mislead the government. I conclude Guideline E for Applicant.

Whole Person Analysis

“The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance.”²⁵ “Available, reliable information about the person, past and present, favorable and unfavorable, should be

²³10 U.S.C. § 986(d) Waiver Authority.— In a meritorious case, an exception to the prohibition in subsection (a) may be authorized for a person described in paragraph (1) or (4) of subsection (c) if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.

²⁴See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun 9, 2004).

²⁵Directive ¶ E.2.2.1.

considered in reaching a determination.”²⁶ In evaluating Applicant’s case, in addition to the disqualifying and mitigating conditions, I also considered the “whole person” concept in evaluating Applicant’s risk and vulnerability in protecting our national interests.²⁷ I considered his age (48), his education, his employment, and his good record since 1978. Even though he did not correctly answers two security clearance applications, I find it was not deliberate. His record since he was a teenager has been circumspect. He has a stable marriage, he is actively involved with his children, their schools, and his church. He has had stable employment.

I observed Applicant during the hearing, and especially during his testimony. I find his testimony to be believable and find him to be a sincere and credible witness, because he answered questions directly, completely, and honestly. The totality of the record raises no reasonable or persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests.

I would grant Applicant a security clearance except for the prohibition stated in 10 U.S.C. §986, which precludes me from doing so. I am denying or revoking his clearance solely as a result of 10 U.S.C. § 986(c)(1).

Applicant has requested a waiver pursuant to 10 U.S.C. § 986(d). I have no authority to grant a waiver. *See* DOHA OPERATING INSTRUCTION No. 64, dated September 12, 2006, at 1-3.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2. Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

DECISION

²⁶*Id.*

²⁷*Id.*

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Christopher Graham
Administrative Judge