

DATE: January 9, 2003

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 02-10398

**DECISION OF ADMINISTRATIVE JUDGE**

**BURT SMITH**

**APPEARANCES**

**FOR GOVERNMENT**

Jonathan A. Beyer, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

During the period 1975 to 1987 Applicant was convicted of several criminal offenses, one of which resulted in a sentence to confinement for two years, thus requiring denial of security clearance under the provisions of Title 10 United States Code section 986. However, Applicant furnishes evidence of reform, rehabilitation, and changed behavior sufficient to support a recommendation for meritorious waiver in his case. Clearance is denied.

**STATEMENT OF THE CASE**

On May 17, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, 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. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In a notarized answer dated July 11, 2002, Applicant responded to the SOR, and he elected to have his case decided on the written record in lieu of a hearing.

A complete copy of the Government's File of Relevant Material (FORM) was provided to the Applicant on August 14, 2002, and he was afforded thirty days to file objections and submit further material in refutation, extenuation, or mitigation. Applicant received the FORM on September 11, 2002, and he submitted a two-page response dated October 8, 2002. The case was assigned to me October 23, 2002.

**FINDINGS OF FACT**

The Applicant is 46 years old, and he is employed by a defense contractor as a pipe fitter. He seeks a DoD security clearance in connection with his employment in the civilian defense industry. The Government opposes the Applicant's request for a security clearance on the basis of allegations set forth under Paragraph 1 of the SOR. The following findings of fact are entered as to the allegations.

Paragraph 1 (Guideline J- Criminal Conduct). The Government alleges in this paragraph that Applicant is ineligible for clearance because of criminal misconduct, convictions, and sentences that cast doubt on his personal reliability and also disqualify him for clearance under Title 10 United States Code section 986. This Federal law prohibits the grant of clearance to an applicant who has been convicted of crimes resulting in imprisonment for more than one year, absent a meritorious waiver by the Secretary of Defense.

In subparas. 1.a. through 1.g. of the SOR, the Government alleges and the Applicant admits that Applicant was involved in the following criminal misconduct:

1.a. In 1975 Applicant was charged with possession of marijuana while he was on active military duty.

1.b. In 1975 Applicant was arrested and convicted of unauthorized use of a motor vehicle. Applicant received a fine.

1.c. In 1975 Applicant was convicted of Petty Larceny, and he was sentenced to six months' confinement.

1.d. In September 1978 a state court found Applicant to be a habitual offender, and he was ordered not to operate a motor vehicle on state highways.

1.e. In October 1978 Applicant was arrested and convicted of violating the above order, and he was sentenced to one year of confinement in the state penitentiary.

1.f. In March 1980 Applicant was again arrested for violating the September 1978 order, and he was sentenced to serve two years in the penitentiary. Applicant served 18 months of this sentence, and he was placed on parole.

1.g. In 1987 Applicant was charged with DUI. He received a year of probation and a fine.

In subpara. 1.h. of the SOR the Government alleges further that the facts set forth in subpara. 1.f. (criminal conviction and sentence to two years in the penitentiary) require denial of a security clearance under the provisions of 10 U.S.C. 986, unless a meritorious waiver is granted by the Secretary of Defense.

In his response to the SOR, Applicant does not contest the Government's factual allegations in subparas. 1.a. through 1.g. Instead, Applicant states "I am applying for a waiver" under the relief provisions of the cited statute. In support of his request, he states credibly he has been honest with the Government at all times; he has held a security clearance since 1966; he has a good work record; he has learned from his mistakes; and he points out that the offenses took place in the distant past without further occurrence in the last fifteen years.

By way of mitigation Applicant submits letters of character reference from two senior employees in his company. Applicant's service manager states he has been Applicant's supervisor for six years, and he has observed Applicant's work performance on numerous projects. The service manager states that Applicant is "one of my most reliable and trusted" employees. Applicant's security officer states he has known Applicant for twelve years, and he regards Applicant as "trustworthy and professional about his work." (Applicant's answer to SOR, attachments.)

## POLICIES

Enclosure 2 of the Directive, as amended by DepSecDef Memorandum dated June 7, 2001, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline J - Criminal Conduct. *The concern:* A history of criminal activity creates doubt about a person's judgment,

reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses;
3. Conviction in a Federal or State court, including a court-martial, and sentenced to imprisonment for a term exceeding one year;

Mitigating Conditions applicable:

1. The criminal behavior was not recent.
6. There is clear evidence of successful rehabilitation.

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (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) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Title 10 U.S.C., section 986. Notwithstanding the above DoD policies, under Title 10 U.S.C. section 986, a Federal law, the Department of Defense may not grant or renew a security clearance to an Applicant who has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year, regardless of the amount of time actually served. However, the Secretary of Defense or the Secretary of the Military Department concerned may authorize a waiver of this prohibition in certain meritorious cases.

### CONCLUSIONS

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be involved in criminal activities demonstrating a lack of trustworthiness and respect for the law. On a commonsense basis, this unfavorable personal characteristic might easily lead to a disregard of laws, rules and regulations designed to protect classified defense secrets from unauthorized disclosure.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving that it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

In this case, Applicant admits that he engaged in numerous instances of illegal conduct during the period 1975 to 1980 when he was between the ages of 19 and 24<sup>(1)</sup>, and in 1980 he was sentenced to prison for two years. The Government has therefore met its burden of proving factual allegations in the SOR, and Disqualifying Conditions 1, 2, and 3 must be considered against the Applicant.

However, Applicant is now 46 years old, married for eight years, and he has been successfully employed by the same firm for ten years. By any reasonable and commonsense standard, Applicant's good conduct for well over a decade

indicates he has reached a level of reform and rehabilitation sufficient to conclude that he has overcome his mistakes of the distant past. Therefore, Mitigating Conditions 1 and 6 may be considered in his favor. Under ordinary circumstances (i.e., in the absence of a statutory prohibition against clearance) Applicant's evidence in mitigation would be sufficient to outweigh the disqualifying evidence, and clearance could be favorably considered.

However, 10 U.S.C. 986 applies in this case because Applicant's arrest in March 1980 resulted in a felony conviction and a sentence to two years in the penitentiary. Under these circumstances the Department of Defense may not lawfully grant a security clearance to Applicant unless the Secretary of Defense authorizes a waiver of this prohibition as a meritorious case.

In order to evaluate whether a case governed by 10 U.S.C. section 986 is meritorious for waiver purposes, the evidence is adjudicated in accordance with current regulatory guidance, to include applicable due process procedures. Accordingly, the evidence of this case is considered against the Disqualifying Conditions and Mitigating Conditions applicable to Guideline J as well as the whole person concept, set forth above.

As discussed above, Disqualifying Conditions 1, 2, and 6 of Guideline J have application and must be considered against the Applicant. The basis for application of these Disqualifying Conditions is self-evident. Beginning in 1975, Applicant engaged in numerous illegal activities, and in 1980 he was sentenced to a two-year prison sentence.

However, Mitigating Conditions 1 and 6 of Guideline J also have application. Mitigating Condition 1 is applicable because the criminal behavior "was not recent", *i.e.*, the last occurrence of disqualifying criminal conduct occurred over twenty years ago (isolated 1987 DUI excepted). Under any reasonable analysis, Applicant's last disqualifying misconduct was not recent, and Mitigating Condition 1 may be applied in his favor.

Mitigating Condition 6 may be applied where there is "clear evidence of successful rehabilitation," and in this area Applicant has made noteworthy progress. He is married, successfully employed for ten years, and his superiors regard him as an honest and trustworthy employee. Also, Applicant's credible response to the SOR makes clear that he has learned a serious lesson from mistakes of his youth, and they are not likely to be repeated.

The whole person concept has also been considered, and all or part of factors (1); (2); (3-frequency); (5); and (7) must be applied against the Applicant. However, factors (3-recency); (4); (6); (8); and (9) are mitigating factors which must be considered in Applicant's favor because the offenses occurred in the distant past; Applicant was immature at the time; there exists persuasive evidence of rehabilitation and behavioral changes; there is no potential for pressure or coercion; and there is little likelihood of recurrence.

On balance, after considering the entire record and applying DoD policies, guidance, and regulations, it is concluded that this case is controlled by 10 U.S.C. 986, and Applicant must be denied clearance.

### **FORMAL FINDINGS**

Formal findings For or Against the 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: AGAINST THE APPLICANT.

Subparas. 1.a.-1.h.: Against the 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 Applicant's request for a security clearance. However, I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

Burt Smith

Administrative Judge

1. Also, an arrest and probation for DUI occurred in 1987 but was never repeated. (SOR, subpara. 1.f.) This isolated arrest has little relevance here.