

DATE: January 21, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-04676

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Esq., Department Counsel

FOR APPLICANT

Roxane MacGillivray, Personal Representative

SYNOPSIS

In the 1960's, Applicant was involved in four incidents of criminal conduct ending in 1968 when he pled guilty to offenses stemming from a burglary of a TV store. He was twice sentenced to one to five years confinement, the second occasion in 1968 when he served about two and one-half years until his discharge from prison in April 1971. He has since been a law-abiding citizen and continuously employed. He has worked for the same major defense contractor since 1984, holding a security clearance without incident since 1985. Under 10 U.S.C. § 986, the Department of Defense is prohibited from renewing Applicant's security clearance based on his two sentences to confinement unless the prohibition is waived by the Secretary of Defense. Applicant's case is meritorious and a waiver is recommended. Clearance is revoked.

STATEMENT OF THE CASE

On May 22, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) On June 14, 2002, Applicant answered the SOR, and he requested a clearance decision based on a hearing record.

On August 8, 2002, DOHA assigned this case to me to conduct a hearing and issue a written decision. Thereafter, on August 15, 2002, a notice of hearing was issued to the parties scheduling the hearing for September 11, 2002, at a location near Applicant's place of employment.

At the hearing, Department Counsel offered three documentary exhibits admitted without objections; no witnesses were called. Applicant appeared with a personal representative, offered his own testimony and that of two witnesses, and offered seven documentary exhibits admitted without objections.

After adjournment, the record remained open for Applicant to offer additional documentary exhibits. Applicant did so in

a timely manner, and, Department Counsel having no objections, those documents are marked and admitted into the record as Exhibit H-performance evaluations from September 1984 through December 2001. DOHA received the transcript on September 25, 2002, and the record closed on September 30, 2002.

The SOR alleges a security concern under Guideline J for criminal conduct based on Applicant's involvement in four incidents of criminal conduct starting in 1963 and ending in 1968; the SOR also alleges that Applicant is ineligible for access to classified information under 10 U.S.C. § 986--the so-called Smith Amendment--based on his 1968 sentence to confinement exceeding one year. In his Answer, Applicant admits to the allegations in SOR subparagraphs 1.a., 1.b., 1.c., and 1.d., and he requests a hearing to establish the basis for a waiver of the prohibition in 10 U.S.C. § 986.

PROCEDURAL MATTERS

After the parties had rested their cases, on my own motion, I moved to amend the SOR by

amending subparagraph 1.e. (the Smith Amendment allegation) to include reference to subparagraph 1.b. based on Applicant's sentence to confinement exceeding one year in 1963.⁽²⁾ After discussing the proposed amendment with the parties, subparagraph 1.e. was amended. I did so because nothing in the statute or the DoD policy guidance stated that the Smith Amendment did not apply to a case where the disqualifying conviction and sentence were subsequently vacated and set aside. Subsequently, a few weeks after this case was heard, the DOHA Appeal Board reached a similar conclusion.⁽³⁾ Accordingly, consistent with agency caselaw, SOR subparagraph 1.e. is amended to include reference to both subparagraphs 1.b. and 1.d.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

1. Applicant is a 59-year-old widowed man seeking to retain a secret security clearance first granted to him in February 1985. He works as a staff engineer for software quality for a major defense contractor with core business areas of systems integration, aeronautics, space, and technology services. He has worked for this company since 1984, and his current responsibilities are reviewing, critiquing, and testing software.
2. Applicant testified during the hearing, and I accept his testimony as credible and true.
3. In March 1963, when he was 19-years-old, Applicant was arrested for a bad-check offense, auto theft, and carrying a deadly weapon. He pled guilty to the bad-check offense in municipal court and was sentenced to one-year probation.
4. In July 1963, Applicant was arrested and charged with burglary (breaking and entering). Thereafter, he was indicted for grand larceny. In October 1963, according to a review of court records, he pled guilty and was sentenced to not less than one year, but no more than five years, in the state penitentiary. He was released from confinement in March 1965. Subsequently, in October 1966, Applicant's conviction and sentence were vacated and set aside when a state court determined that his guilty plea was defective or invalid because he was not fully advised of his constitutional rights.
5. Shortly after his release from the penitentiary in March 1965, Applicant, now 21-years-old, was detained by local police after legally crossing the U.S.-Mexican border. He was charged with being drunk, unlawfully carrying a firearm, public intoxication, and vagrancy. On March 23, 1965, he was found guilty of being drunk and vagrancy, and he was fined \$200. He was on parole at the time, so he was returned to the penitentiary in May 1965 for violating parole. He was there for an unknown period until his release that year.
6. In August 1968, Applicant and at least one other person, broke into a store and stole some televisions. They used the store's van to transport the stolen goods, and, thereafter, they ditched the van in the desert setting the van on fire. Applicant was arrested and charged with burglary, arson, auto theft, and embezzlement. In September 1968, the now 25-year-old Applicant pled guilty to burglary and was sentenced to not less than one year, but no more than five years, in the same state penitentiary. He was discharged from confinement on April 28, 1971, after serving about two and one-half years. While in confinement, Applicant taught electronics, vocational math, trigonometry, and geometry to other prisoners.
7. After his release from the penitentiary, Applicant took a look at his life and didn't like what he saw. He decided to grow up, settle down, and make something of himself. Subsequently, he married in October 1972 and remained married until his wife's unexpected death in May 1998. The marriage produced one child, a daughter. His daughter, son-in-law, and their two children live with Applicant, and he provides them financial assistance. A few years after his wife's death, a granddaughter was discovered face down in a neighbor's pool after several minutes; she eventually recovered several days later after being placed in an induced coma. Following his wife's death and during his granddaughter's near-drowning, Applicant experienced the normal emotions associated with such events, but otherwise behaved reasonably and rationally.

8. In August 1972, about four months after his release from the penitentiary, Applicant was confronted by his former associates who sought to involve him in their criminal activities. Applicant declined, and he eventually reported the matter to law-enforcement officials. Subsequently, Applicant worked with the state police on an insurance fraud case. The result was four persons were arrested, Applicant testified at trial, and convictions were obtained.⁽⁴⁾ Applicant also worked for a county sheriff's office, he was commissioned a special deputy sheriff in January 1975,⁽⁵⁾ and he was trained and allowed to carry a firearm for his duties.

9. Aside from a single two to three month period, Applicant has been continuously employed since his release from confinement in 1971. In September 1984, Applicant started work for a company that, through a business merger and acquisition, is now his current employer. Starting as an engineering associate, despite not having a college degree, he worked his way up to his current position of staff engineer where he leads others and critiques software for various projects routinely involving classified information.

10. Applicant is a loyal, reliable, and productive employee with a high-degree of technical competence, and he has received very favorable performance evaluations from his current employer.⁽⁶⁾ His manager, who has known him since 1985, relies on him for difficult projects as well as to train and mentor new employees.⁽⁷⁾ One co-worker describes Applicant as "a hard worker," "a digger," "spirited," "detailed," "methodical," and as someone you do not want to audit you.⁽⁸⁾ On one occasion Applicant discovered errors in software that may have prevented the loss of life or property or both (the F-16 software incident), and on another occasion prevented the unauthorized release of certain software to a foreign customer.⁽⁹⁾

11. He has held a security clearance without incident since February 1985. The manager of industrial security/facility security officer reviewed the relevant records and discovered no negative, adverse, or derogatory information concerning Applicant's safeguarding and handling of classified information, including the classified container assigned to Applicant.⁽¹⁰⁾ Throughout his current employment Applicant has worked on projects involving classified information. Whenever asked or required, Applicant has revealed his criminal history to employers and the government.⁽¹¹⁾

12. Applicant is a registered voter. He has lived in the same community since 1984 and at the same address since 1994, the home he and his wife bought. Since his release from confinement in 1971, other than a couple of traffic tickets, Applicant has been a law-abiding person.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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 for criminal conduct,⁽¹²⁾ with its respective disqualifying and mitigating conditions, is most relevant here. In addition, this case involves application of 10 U.S.C. § 986 based on Applicant's 1963 and 1968 convictions and sentences to confinement exceeding one year.

BURDEN OF PROOF

The only 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.⁽¹³⁾ The government has the burden of proving controverted facts.⁽¹⁴⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽¹⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽¹⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽¹⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽²⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

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.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. Applicant's four incidents of criminal conduct, starting in 1963 and ending with his confinement in 1968, is evidence of a history or pattern of illegal behavior that creates doubt about his security suitability. Accordingly, disqualifying condition (DC) a-(21) and DC b-(22) apply.

In addition, under 10 U.S.C. § 986, a person who has been convicted in a federal or state court, including trial by courts-martial, and sentenced to imprisonment for a term exceeding one year, will not be granted or have renewed access to classified information. The law applies regardless of the amount of time actually served. The only exception is in a meritorious case, the Secretary of Defense may authorize a waiver of the statutory prohibition. The prohibition applies here based on Applicant's 1963 and 1968 convictions and sentences to confinement of not less than one year, but no more than five years, in the state penitentiary. Accordingly, Applicant is ineligible for access to classified information under 10 U.S.C. § 986.

I have reviewed the mitigating conditions (MC) under Guideline J and conclude that Applicant has successfully mitigated the security concern. First, the crimes occurred between 1963 and 1968, and so, the criminal behavior was not recent, has not recurred, and is mitigated by the passage of time. (23) Second, although C b-(24) does not apply since Applicant was involved in more than one crime, his criminal behavior can be viewed as isolated in the sense that it took place during a five-year period when Applicant was young and dumb, a period he has wisely left behind. Third, he assisted and worked for law enforcement in the 1970's, and he no longer associates with persons involved in criminal activity. In 1975 he left the state where he had his troubles, and he has been a law-abiding and productive citizen since his release from confinement. Accordingly, MC d-(25) applies in his favor. Fourth, Applicant has reformed and rehabilitated-(26) himself since the 1960's as demonstrated by the following examples:

- Continuous and productive employment since his release from confinement in 1971.
- Successful employment with a defense contractor since 1984.
- Despite his criminal history, possessing a security clearance since 1985 without a single negative, adverse, or derogatory incident.
- Living in the same community since 1984; a homeowner since 1994.
- Married for more than 25-years, raised a daughter, and currently providing financial assistance to his daughter, son-in-law, and two grandchildren.

These, and other facts and circumstances evident in the record, are clear evidence of successful rehabilitation. (27) These circumstances are also evidence of a self-reliant, mature, steady, responsible, and trustworthy individual.

To sum up under Guideline J, the record shows Applicant was involved in criminal conduct as a young man in the 1960's. More than three decades have since passed without recurrence, and I assess the likelihood of additional criminal conduct as remote. Accordingly, absent the prohibition in 10 U.S.C. § 986, I would decide Guideline J for the Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a : For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: 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 or continue a security clearance for Applicant. In addition, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Transcript at pp. 106-110.
3. ISCR Case No. 01-06337 (September 24, 2002) at pp. 3-4 (For purposes of 10 U.S.C. § 986, a state court conviction and sentence to imprisonment for a term exceeding one year is not negated by a state court action setting aside the conviction.).
4. Exhibit A at p. 2.
5. Exhibit A at p. 1.
6. Exhibits B, C, F, G, and H.
7. Exhibit F.
8. Transcript at p. 35.
9. Transcript at pp. 28-31.
10. Transcript at p. 52-55.
11. *E.g.*, Exhibits 1, 2, and D.
12. As revised by the Deputy Secretary of Defense in a memorandum, dated June 7, 2001.
13. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
14. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
15. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
16. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
17. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
18. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
19. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
20. *Egan*, 484 U.S. at 528, 531.
21. "Allegations or admissions of criminal conduct, regardless of whether the person was formally charged."
22. "A single serious crime or multiple lesser offenses."
23. MC a ("The criminal behavior was not recent.").
24. "The crime was an isolated incident."
25. "The person did not voluntarily commit the act and/or *the factors leading to the violation are not likely to recur.*" (emphasis added).
26. MC f ("There is clear evidence of successful rehabilitation.").
27. In closing argument, Department Counsel conceded Applicant was rehabilitated.