

KEYWORD: Criminal Conduct

DIGEST: This 32-year-old man was convicted in 1988 for Kidnaping and Extortion, and was sentenced to a total of ten years. He served more than five years, and was on probation for three more years, ending in 1996. There was insufficient evidence of mitigation. Moreover, this violation is governed by 10 USC 986, which prohibits the granting of a security clearance to anyone convicted of a crime and sentenced to more than one year imprisonment. Clearance is denied.

CASENO: 01-08961.h1

DATE: 03/22/2002

DATE: March 22, 2002

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 01-08961

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

On October 3, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On November 8, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The case was assigned to another Administrative Judge but was transferred to me on January 30, 2002. A Notice of Hearing was issued on February 11, 2002 and the matter was heard on March 1, 2002. At the hearing, the Government offered four exhibits, to which the Applicant stipulated their admissibility.

The exhibits were marked and admitted as Government Exhibits (GX) 1 - 4. Applicant testified on his own behalf and offered one exhibit, which was admitted as Applicant's Exhibit (AX) A. The transcript (Tr) was received on March 11, 2002.

FINDINGS OF FACT

Applicant is a 32-year-old "Move Coordinator" for a defense contractor that is seeking a security clearance for Applicant. Applicant admits both SOR allegations, 1.a. and 1.b. He contends, however, that he merits a waiver and should be granted a security clearance.

Based on Applicant's testimony and all documentary evidence, I find the following as to both allegations:

Guideline J (Criminal Conduct)

1.a. - Applicant was charged on June 9, 1988 with (1) Kidnaping, a felony, (2) Extortion, a felony, and (3) Kidnaping for Ransom, a felony. On March 24, 1989, [\(1\)](#) he pleaded guilty to Kidnaping and Extortion, for which he was sentenced to a total of ten years imprisonment. The Kidnaping for Ransom charge dismissed (Tr at 18 - 22, 27 - 29 and GX 1, 2, 3, and 4).

1.b. - The Finding of Fact as to SOR 1.a., above, bring this matter within the specific prohibition of 10 USC 986©)(1), which states that anyone convicted of a crime and sentenced to more than one year imprisonment is disqualified from obtaining or retaining a security clearance.

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

Conditions that could raise a security concern and maybe disqualifying include:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
2. *A SINGLE SERIOUS CRIME* or multiple lesser offenses. [\(2\)](#)

(Emphasis added)

Conditions that could mitigate security concerns:

1. The criminal behavior was not recent.
2. The crime was an isolated incident.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

CONCLUSIONS

I have considered the evidence in light of the appropriate legal standards and factors, and have assessed Applicant's credibility based on the entire record. I conclude the totality of the evidence establishes a case as to both SOR allegations, which in turn establishes a nexus or connection with Applicant's security clearance eligibility. The crime for which Applicant was convicted in 1989 is clearly serious, by any reasonable definition.

Although Applicant claims he drove a truck for friends but did not know the friends were planning to kidnap someone and get away using the truck, he has not provided any corroboration for his claim of innocent (GX 2). What is corroborated is that Applicant pleaded guilty to the charges cited in SOR 1.a., and received a "high term sentence pursuant to plea bargain" (GX 4, at p. 1). That sentence was "10 years confinement" (GX 3), which consisted of "eight years in jail plus two years enhancements" (GX 2). Applicant served five years in prison and was then paroled for three years. He was released from parole in 1996 (*Id.*, and Tr at 18 - 22, 27 - 29). Based on the totality of the record, I conclude that Applicant's explanations, which seek to minimize his involvement in the serious criminal activity, did not convince the judge in the criminal case and does not convince me.

I have carefully considered his explanations and the evidence as to his present "character, trustworthiness, and dedication" offered by a work colleague (AX A). While helpful, this last document does not outweigh the negative aspects of the evidence supporting the Government's case.

Disqualifying Condition (DC) 1 clearly applies. DC 2 also applies because Applicant's criminal conduct qualifies as a "single serious crime." I cannot conclude that Applicant has sufficiently mitigated the Disqualifying Conditions. Under Mitigating Condition (MC) 1, while the crime occurred in 1988, and Applicant was sentenced to prison in March 1989, he was not released from prison until about 1993 and was not discharged from parole until 1996. In the context of the nature of the crime and the timing of his imprisonment and parole, I conclude that it is still too recent to establish rehabilitation and mitigation. Likewise, while the crime cited in the SOR is "isolated (MC2)," that fact does not outweigh the serious nature of the offense. And finally, under MC 6, there is not enough evidence to allow a conclusion that Applicant has demonstrated "successful rehabilitation." Under these facts and circumstances, I conclude that Applicant is not currently eligible to be granted access to the nation's secrets.

10 USC 986

This statutory provision is applicable under the facts of this case. There is a conviction and sentence of more than one year (GX 1, 2, 3, and 4). The statute does not contain any statute of limitations, so it applies regardless of how long ago the conviction and sentence occurred. Under these circumstances, the fact of the conviction and sentence makes Applicant ineligible to hold a security clearance. As discussed above, this is not a case where my decision is "solely a result of 10 USC 986." Accordingly, pursuant to DOHA Operating Instruction No. 64, dated July 10, 2001, I am not making any recommendation as to whether a waiver should be granted.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 2.a. 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. The SOR uses the incorrect date 1999. This was amended at the hearing, without objection, to conform to the evidence (Transcript (Tr) at 12, 13).

2. In addition, although not cited in the Directive as a Disqualifying Condition, the language of 10 USC 986 ©)(1) prohibits giving a security clearance to anyone convicted and sentenced to more than one year imprisonment.