

DATE: July 3, 2002.

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-12452

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esquire, Department Counsel

FOR APPLICANT

James L. Bradford, III, Esquire

SYNOPSIS

This 36-year-old-man was arrested on four occasions, 1983, 1989, 1993, and 1999. This history of offenses makes him ineligible to hold a security clearance. No mitigation was established. In addition, the 1983 offense was a burglary, for which he was sentenced to two years imprisonment, brings him under 10 U.S.C. 986, which prohibits a person so sentenced from holding a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On February 14, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 1987, as amended and modified, 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 March 4, 2002, 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 me on May 2, 2002. A Notice of Hearing was issued on June 3, 2002 and the hearing was conducted on June 11, 2002. At the hearing, Department Counsel offered three exhibits, which were marked as Government Exhibits (GX) 1 - 3. Applicant testified on his own behalf, called one additional witness, and offered three exhibits, which were marked for identification as Applicant's Exhibits (AX) A - C. Without objection by either party, all above exhibits were admitted into evidence as marked. Another document offered by Applicant, a copy of a relevant state statute, which was accepted and marked as Official Notice document (ON) 1. The transcript (Tr) was received at DOHA on June 20, 2002.

FINDINGS OF FACT

Applicant is a 36-year-old computer operator for a defense contractor. His employer is seeking a Secret security

clearance for Applicant in connection with his employment.

Based on the contents of the case file, including Applicant's testimony and all exhibits, I make the following findings of facts as to each SOR allegation.

GUIDELINE E (Personal Conduct)

1.a. - On November 23, 1983, Applicant was arrested for Simple Burglary (three counts). He pleaded guilty to one count of Simple Burglary and was sentenced to two years in the Parish Prison (sentence suspended). Applicant was placed on active probation for three years, concurrent with his sentence.

1.b. - On March 28, 1989, Applicant was arrested for Criminal Damage to Property. On May 24, 1989, this charged was dismissed after a settlement was reached by Applicant with the victim.

1.c. - On June 25, 1993, Applicant was arrested for Driving Under the Influence. He pleaded guilty, was fined and attended alcohol awareness classes for six months. His blood alcohol level exceeded the state standard level.

1.d. - On December 18, 1999, Applicant was arrested for Driving Under the Influence. Applicant refused to submit to a blood alcohol test. Applicant was initially found guilty in a lower court and fined \$852.00. He appealed to a higher court where he could obtain a jury trial. In that court, the case was dismissed when the officer failed to appear in court.

GUIDELINE J (Criminal Conduct)

2.a. - As described in SOR 1.a., above, Applicant was arrested on November 23, 1983 for Simple Burglary (three counts). He was sentenced to two years in the Parish Prison (sentence suspended) and placed on probation for three years (concurrent with his sentence).

2.b. - Due to the facts alleged in SOR 2.a., above, 10 U.S.C. 986 disqualifies Applicant from having a security clearance granted or renewed by the Department of Defense.

Applicant is strongly supported by his supervisor (Tr at 25 - 32).

POLICIES

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

GUIDELINE E (Personal Conduct)

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules or regulations could indicate that the person may not properly safeguard classified information.

Condition that could raise security concerns and may be disqualifying include:

5. A pattern of dishonesty or rule violations.

Conditions that could mitigate security concerns include:

None that are applicable under the facts of 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 security concerns and may be 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.

Conditions that could mitigate security concerns include:

None that are applicable under the facts of this case.

Under Section E2.2.1 of Enclosure 2 of the Directive, each adjudicative decision must include an assessment of the facts under 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. I have carefully considered all nine factors, individually and collectively, in reaching my overall conclusion.

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, an 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."

In addition to the general and specific guidelines found in Directive 5220.6, a federal statute, 10 U.S.C. 986 imposes restrictions that, among other things, prohibit granting a clearance to anyone who has been convicted of a crime and sentenced to more than one year imprisonment, regardless of the amount of time, if any, actually served. The only exception to this prohibition is that the Secretary of Defense or Secretary of one of the Military Services may grant a waiver in cases they find to be meritorious. Pardons, expungements, and/or post conviction acquittals are not mentioned in 10 U.S.C. 986 as exceptions to the general rule. For purposes of determining security clearance eligibility, the fact of the original conviction and sentence alone make 10 U.S.C. 986 applicable. The additional facts and circumstances are relevant only on the issue of whether they a meritorious case for a waiver by the Secretary of Defense or the Secretary

of one of the Military Services.

CONCLUSIONS

The single most significant part of the overall evidence in this case relates to Applicant's 1983 arrest, conviction, and sentence to more than one year imprisonment. These facts clearly bring this matter within the coverage of 10 U.S.C. 986. Applicant's attorney stated that he understood this to be the case and was focusing on the possibility of a waiver (Tr at 21, 22). It is also a fact that the age of the conviction (1983) does not affect the applicability of the statute, which imposes an absolute restriction, subject only to the one exception noted above. I conclude that, under the statute, Applicant is disqualified from holding a DoD security clearance.

Counsel for Applicant stated that his focus was on showing that this is a meritorious case for a waiver to be granted by the Secretary of Defense or Secretary of one of the Military Services. Applicant has a record that must be considered. The SOR contains additional allegations, as cited and discussed under Findings of Fact, above. The record establishes that Applicant has a long history and pattern of problems involving personal and/or criminal misconduct. For a 36-year-old man, arrests in 1983, 1989, 1993, and 1999, cover a major part of his life since he was 17, and the last incident was only two and a half years ago. I have carefully considered Applicant's explanations as to what happened and what the ultimate outcomes were in each case. In his response to the SOR, Applicant admits all six allegations, 1.a. - 1.d., 2.a., and 2.b.

As to 1.a., Applicant admits that fact of arrest, conviction, and sentencing to two years in the Parish Prison. He does not deny the underlying facts of the offense (Response to SOR and attached court documents). In his testimony, he states that he was duped into driving a getaway car for friends who had stolen some car stereos without his knowledge (Tr at 41, 42). The fact remains, however, that he was convicted of the charge indicated in the SOR, and I am required to accept the fact of the conviction and sentence.

As to 1.b., Applicant admits the arrest in 1989 for criminal damage, but denies doing any damage to property. The charge was dismissed (GX 3, FBI Identification Record, and attachment to Applicant's Response to SOR), but the reason is not documented. Applicant states his ATM card was stuck in a bank machine and he hit the machine in an effort to make it eject the card. That didn't work, and he returned to the bank the next day, only to find that the bank had notified the police that Applicant had damaged the machine and that charges had been filed. Applicant went to the police

spoke with the police, and then talked again to bank officials, resulting in the charges being dismissed (Tr at 45 - 47). Applicant testified that he and the bank "settled" the matter (Tr at 47). This matter is not alleged as Criminal Conduct, but it does qualify as questionable personal conduct.

As to 1.c., Applicant was arrested for Driving Under the Influence in 1993. He had consumed "a few drinks," while watching TV at home, "left to . . . get something to eat," got stopped and arrested for DUI, pleaded guilty, paid a fine, and had to take classes for six months (Tr at 47, 48). His blood alcohol level was .12 %, while the state "legal" standard was .10% (Tr at 48).

As to 1.d., Applicant again admits the 1999 charge, but denies he was under the influence. Applicant was driving behind another car, which turned suddenly, causing Applicant to run into the side of the other car. He admits he was driving (Tr at 78). He claims he had not been drinking and his testimony suggests he believes the police checked his driving record, saws he had a prior DUI, and assumed he was under the influence again (Tr at 49). Applicant refused to take a breathalyzer test because he had been taking some medication (Nyquil and some sinus medication) and was afraid it might register as alcohol (Tr at 68). There is nothing in the file corroborating that Applicant so informed the police officer (Tr at 78). Failure to submit to a test under the cited circumstances makes it impossible to scientifically determine a person's blood alcohol level, if any, but it does not inspire confidence in Applicant's integrity.

A court document (Applicant's Exhibit C) documents the reason for the dismissal as being the unavailability of the only witness who could establish that Applicant was driving the vehicle, thus preventing the Government from proving its case. In plain language, the case was dismissed because the arresting officer did not appear in court (Tr at 70). This allegation SOR 1.d, like 1.a., 1.b., and 1.c., is made under the Personal Conduct guideline, although 1.a. is repeated

under the Criminal Conduct guidelines as 2.a. From the totality of the evidence, I conclude that Applicant's conduct in this incident was questionable, if not criminal.

Considering the evidence in the context of the guidelines in the Directive, I find that under:

Guideline E - Disqualifying Condition (DC) 5, a pattern of dishonesty or rule violation, has been established, while none of the possible Mitigating Conditions (MC) have been established.

Guideline J - DC 1, allegations or admissions of criminal conduct, and DC 2, a single serious crime or multiple lesser offenses apply. However, none of the possible Mitigating Conditions have been established. Specifically, under MC 1, the criminal conduct, in the context of Applicant's history, is considered to be recent; under MC 2, Applicant's criminal conduct is far more than an isolated incident; and under MC 6, there is no clear evidence of successful rehabilitation. ⁽¹⁾ore time without incident is necessary for the conclusion to be reached that Applicant presently possesses the high level of judgment, reliability, and trustworthiness required of anyone seeking access to the nation's secrets.

Finally, I conclude that Applicant's ineligibility to hold a security clearance is not based solely on the applicability of 10 U.S.C. 986, but is based on the totality of the evidence against him, as discussed above.

FORMAL FINDINGS

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

Guideline E (Personal Conduct) Against the Applicant

Subparagraph 1.a. - 1.d. Against the Applicant

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. 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. I do not find the setting aside and dismissal of the 1983/1984 arrest and conviction to be an acquittal, as it was not a finding that Applicant was factually innocent of the crime.