

KEYWORD: Criminal Conduct

DIGEST: Forty-five year old Applicant's September 1987 arrest, at the age of 31, for robbery and grand larceny, both felonies (and subsequent indictment for grand larceny), and his subsequent plea and conviction of grand larceny, along with his sentence to imprisonment for eight years; his subsequent December 1992 arrest, conviction, and imprisonment for petty larceny, theft; and the absence of clear evidence of successful rehabilitation raise grave questions and doubts as to his security eligibility and suitability. Furthermore, the application of 10 U.S.C. 986 disqualifies him from such eligibility. Clearance is denied, and further consideration of this case for a waiver of 10 U.S.C. 986 is not recommended.

CASENO: 01-17355.h1

DATE: 12/26/2001

DATE: December 26, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17355

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-five year old Applicant's September 1987 arrest, at the age of 31, for robbery and grand larceny, both felonies (and subsequent indictment for grand larceny), and his subsequent plea and conviction of grand larceny, along with his sentence to imprisonment for eight years; his subsequent December 1992 arrest, conviction, and imprisonment for petty larceny, theft; and the absence of clear evidence of successful rehabilitation raise grave questions and doubts as to his security eligibility and suitability. Furthermore, the application of 10 U.S.C. 986 disqualifies him from such eligibility. Clearance is denied, and further consideration of this case for a waiver of 10 U.S.C. 986 is not recommended.

STATEMENT OF THE CASE

On August 27, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed 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, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated September 4, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the Government's written case on September 25, 2001. A complete copy of the file of relevant material (FORM)⁽¹⁾ was provided to Applicant, and he was afforded an opportunity, until November 1, 2001, to file objections and submit material in refutation, extenuation, or mitigation. He chose not to do so. The case was assigned to this Administrative Judge on December 3, 2001.

FINDINGS OF FACT

Applicant has admitted all of the factual allegations pertaining to criminal conduct under Guideline J (subparagraphs 1.a. through 1.f. There is no subparagraph 1.e.). Those 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 45 year old male employed by a defense contractor, and is seeking to obtain a security clearance.

Applicant has been involved in four criminal incidents. In August 1975, one month shy of his 19th birthday, he was arrested and charged with embezzlement.⁽²⁾ The events which culminated in the arrest commenced when Applicant's friend refused to repay a debt of about \$30.00 or \$40.00. In an effort to motivate repayment, Applicant took his friend's 10-speed bicycle, and they eventually agreed to an exchange where the debt was to be considered satisfied and Applicant would keep the bicycle. He subsequently sold the bicycle to a third party. After learning of the sale, the friend reported the incident to the police. The court eventually dismissed the charge.⁽³⁾

Six years later, in August 1981, Applicant was arrested and charged with strong-armed robbery.⁽⁴⁾ The events which culminated in this arrest commenced when he was hanging out with a group of 15 to 20 friends one night and one of his friends negotiated a drug sale with two strangers. The friend, who resembled Applicant, took the money but failed to produce the drugs. As a result, the two would-be drug purchasers reported the incident to the police but omitted the drug issue and claimed they had been robbed by Applicant.⁽⁵⁾ The charge was dismissed (*nolle prossed*)⁽⁶⁾ when the complainants failed to appear in court.

Six years after that incident, on September 16, 1987, when he was about 31 years old, Applicant was involved in another incident. At about 8 p.m. that day, after consuming a six pack of beer and an unspecified amount of "hard" liquor, he entered a dry cleaners and requested change for a dollar. Once the cash register was opened, he grabbed a hand-full of bills, totaling between \$100.00 and \$200.00, and ran.⁽⁷⁾ He was arrested two weeks later for robbery.⁽⁸⁾ In November 1987, Applicant was indicted by a grand jury for grand larceny.⁽⁹⁾ On December 4, 1987, he pled guilty to grand larceny,⁽¹⁰⁾ and was sentenced to serve eight years in the penitentiary (four years suspended conditioned on good behavior) and four years probation.⁽¹¹⁾ He was released from prison after serving eight months,⁽¹²⁾ and his probation was reduced and terminated in May 1991.⁽¹³⁾

One and one-half years later, on December 19, 1992, when he was about 36 years old, Applicant was again arrested and charged with petty larceny, theft. He was eventually found guilty and sentenced to 180 days in jail, with 150 days suspended. [\(14\)](#)

Since his release from prison, Applicant has held a number of positions with a variety of organizations, including his most recent one--in maintenance--which he commenced in March 1998. Although he claims to be "doing well" on his job, the quality of Applicant's performance was not documented. He currently resides with his girl friend and their two children, a son born in 1985 and a daughter born in 1990.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision found in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Criminal Conduct - Guideline J]: 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 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;
- (3) conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.

Conditions that could mitigate security concerns include:

- (1) the criminal behavior was not recent;
- (5) acquittal.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. 986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;
- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The memorandum also notes that the statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," ⁽¹⁵⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case

which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

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 include, by necessity, consideration of the possible risk 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.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline J, the Government has established its case. By his own admission, Applicant was arrested on four occasions, with the two most recent incidents resulting in convictions and sentences to jail. In the most recent incident, in December 1992, he was convicted of petty larceny, theft. But the more serious incident occurred in September 1987, for which he was charged with robbery and grand larceny, both felonies, and eventually convicted, upon his plea, for grand larceny, a felony, and sentenced to be imprisoned for a term of eight years in the penitentiary, with four years suspended conditioned on good behavior, and four years probation. He was released from prison after serving eight months. Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1., DC E2.A10.1.2.2., and DC E2.A10.1.2.3.

Applicant admitted the crimes and acknowledged they should be the basis for revoking his security clearance application: "I think these crimes should revoke my clearance."⁽¹⁶⁾ He did, however, comment the criminal behavior was not recent. It true that nine years have passed since his criminal conduct resulted in the conviction for petty larceny, theft, and 14 years, since his conviction for grand larceny. Aside from those two incidents, Applicant was, unfortunately involved in two other alleged criminal incidents, but the charges for both of those incidents were dismissed. He has apparently not been involved an any additional criminal conduct. Those facts alone might seem to activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1. The dismissal of the charges for the earlier two incidents activates, in my estimation, MC E2.A10.1.3.5.

However, while a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future. In this case, there is no psychological profile to describe his past motivation for either crime for which he was convicted or his present status. The record is silent as to Applicant's motivation for the petty larceny, theft, or the grand larceny, and aside from some brief references to subsequent jobs and concerns for his family, there is nothing as to rehabilitation efforts. Simply characterizing himself at the time he hung out in the streets as "young and foolish," and claiming those incidents helped him learn a lesson, is insufficient to indicate meaningful rehabilitation on his part. To the contrary, Applicant may have been foolish, but he certainly was not young. He was in his 30s when he committed both acts of criminal conduct. And, claiming he would not return to a life of crime because he could not do that to his children, also avoids the obvious. When Applicant committed the grand larceny in 1987 he already had one child, and when he committed the petty larceny, theft in 1992, he already had both children.

Moreover, despite spending time in prison, and later on probation, for grand theft, he responded shortly thereafter by involving himself in another criminal venture, the petty larceny, theft. Recidivism does not engender confidence in purported rehabilitation. Without more, I simply do not believe the period of time from the most recent incident to the closing of the record, is sufficient to persuade me recurrence of such criminal conduct is unlikely. Under these circumstances, I am unable to find any evidence of successful rehabilitation, and the potential application of MC E2.A10.1.3.6. (there is clear evidence of successful rehabilitation) fails. Consequently, I conclude that Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded against Applicant.

Applicant's criminal conduct--the grand larceny--in this regard also falls within the application of 10 U.S.C. 986. He was convicted in a state court of a crime and sentenced to imprisonment for a term of eight years, a term which obviously exceeds the one year period envisioned in the new law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of more than one year, regardless of the amount of time actually served. In this instance, Applicant was fortunate enough to be released from prison long before the full term of his sentence was actually served, but that fact does not help him in this issue. Consequently, by virtue of 10 U.S.C. 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegation 1.f., as it applies to allegation 1.b. of the SOR, is concluded against Applicant.

As to the two allegations regarding the criminal charges which were dismissed (subparagraphs 1.c. and 1.d. of the SOR), I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case. Accordingly, those allegations are concluded in favor of Applicant.

Applicant is now fully accountable for his past actions and activities. In this instance, I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against 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

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.f.: 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. Moreover, I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

Robert Robinson Gales
Chief Administrative Judge

1. The Government submitted seven items in support of its contentions.
2. *See* Item 5 (Federal Bureau of Investigation Criminal Justice Information History, undated), at 3.
3. *Ibid.* *See also*, Item 7 (Statement of Subject, dated September 30, 1999), at 3.
4. *Ibid.* , Items 5 and 7.
5. *Id.*, Item 7, at 3-4.
6. *Id.*, Item 5, *supra* note 2, at 3.
7. *Id.*, Item 7, *supra* note 3, at 4.
8. *Id.*, Item 5, *supra* note 2, at 3. The warrant of arrest stated, in part: "did rob. . . an employee of. . . U.S. currency in excess of one dollar, by force, violence, and putting her in fear of serious bodily harm." *See* Item 6 (Warrant of Arrest - Felony, one of various court and police documents), at 1.
9. *Id.*, Item 6 (Indictment for Grand Larceny, dated November 16, 1987, one of various court and police documents), at 3.
10. *Id.*, Item 6 (Indictment for Grand Larceny - Final Order, dated May 28, 1991, one of various court and police documents), at 4. Despite the information appearing in the official court records, Applicant contends he pled guilty to robbery. *See* Item 7, *supra* note 3, at 4.
11. *Ibid.*, Item 6.
12. *Id.*, Item 7, *supra* note at 4.
13. *Id.*, Item 6, *supra* note 10, at 4.
14. It should be noted that while Applicant has admitted "these crimes," as alleged in the SOR, to include the allegation as to this particular incident, the record is otherwise silent as to any aspect of this incident, and his admission is not otherwise corroborated.
15. *See* Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see* Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly

consistent with the interests of national security" (*see* Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)

16. *See* Item 3 (Response to SOR, dated September 4, 2001).