

DATE: January 31, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17849

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between January 1980 and July 1990, the Applicant was arrested ten times. On his most recent arrest he was sentenced to five years in the state penitentiary. 10 U.S.C. § 986, which applies to any person convicted of a crime and sentenced to imprisonment for a term exceeding one year, disqualifies the Applicant from having a clearance. Clearance is denied.

STATEMENT OF THE CASE

On August 15, 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. In an undated response the Applicant answered the SOR and elected to have his case decided on the written record, in lieu of a hearing.

On November 19, 2001, the Applicant received a complete copy of the file of relevant material (FORM) dated October 25, 2001, and was given the opportunity to file objections and submit material in extenuation, mitigation, or refutation. The Applicant's response to the FORM was due on December 19, 2001. No response has been received. I was assigned the case on January 7, 2001, on which date the record in this case was closed. The Department Counsel presented eleven exhibits (Items).

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J). The Applicant admits all the allegations with explanation except for SOR subparagraph 1. l., which the Applicant neither admitted nor denied.

The Applicant is 49 years old, has worked for a defense contractor since September 1975, and was granted a secret clearance in January 1977.

In January 1980, the Applicant was arrested for grand theft. (Item 5) The Applicant purchased tires which he later

discovered were stolen property. After producing a receipt showing he had paid for the tires, the charge was *nolle prosequi*. In September 1983 he was arrested and charged with assault and discharging a firearm. He was found guilty of the misdemeanor of discharging a firearm. In mid-December 1985, the Applicant was arrested for Driving While Intoxicated (DWI). He was found guilty, fined \$300.00, and ordered to attend an Alcohol Safety Class. In late-December 1985, the Applicant was arrested for DWI and reckless driving. He was found guilty, fined \$300.00, and ordered to attend an Alcohol Safety Class. In February 1986, he was arrested for assault. The charge was dismissed. In March 1987, he was arrested for DWI and refusing to take a blood/breath test. He was found guilty, fined \$500.00, and his driver's license was suspended for six months.

In May 1988, he was charged with assault and battery. The charges were dismissed. In August 1988, the Applicant was determined to be a "habitual offender" (Item 6) and forbidden to operate a motor vehicle on the state highway for 10 years. In September 1988, he was arrested for trespass for which he paid a \$40.00 fine. The trespass was related to a domestic relationship argument between the Applicant and his then girlfriend, now wife.

In July 1990, the Applicant was charged with DWI. He was found guilty, sentenced to six months in jail, and his driver's license was suspended. The 1990 DWI resulted in the Applicant's February 1991 felony conviction, to-wit: "Habitual Offender" (Item 7). The Applicant was sentenced to confinement in the state penitentiary for five years. Three years and six months of the sentence were suspended. Upon release from the penitentiary Applicant was placed on five years supervised probation and ordered to attend an alcohol abuse program. The Applicant complied with all conditions of his probation, reported as instructed, maintained full-time employment, and paid all of his court ordered financial obligations. In October 1993, the Applicant was released from supervised probation. (Item 8)

The Applicant sees his final arrest as a "wake up call." Since getting out of jail he has decreased his drinking, remarried in 1994, attends church, and has found other ways to be happy. The Applicant has a sixth grade education.

Accompanying the SOR was a copy of 10 U.S.C. § 986 and Deputy Secretary of Defense Memorandum dated June 7, 2001.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, access, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following 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. (E2.A10.1.1.)

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.
- b. A single serious crime or multiple lesser offenses.

c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year;⁽²⁾

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent.

e. Acquittal;

f. There is clear evidence of successful rehabilitation;

g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness.

Between January 1980 and July 1990, the Applicant was arrested ten times. Four of the arrests were dismissed, *nolle prosequi*, or there is no evidence of a conviction. Mitigating Condition (MC) e.⁽³⁾ applies to these four arrests. There is also evidence of rehabilitation which applies to the ten arrests. MC f.⁽⁴⁾ I find for the Applicant as to SOR subparagraphs 1.a., 1.d., 1.e., and 1.h.

The Applicant's most recent arrest occurred more than 11 ½ years ago. MC a.⁽⁵⁾ applies to the seven other arrests that were neither dismissed nor *nolle prosequi*. I find for the Applicant as to SOR subparagraphs 1.b., 1.c, 1.f., 1.g., 1.i, 1.j., and 1.k.

However, as a result of the Applicant's five year sentence to the state penitentiary, with three and one half years of the sentence suspended, 10 U.S.C. § 986 applies, which disqualifies the Applicant from having a clearance. 10 U.S.C. § 986, applies to any person convicted of a crime and sentenced to imprisonment for a term exceeding one year. I find against the Applicant as to SOR subparagraph 1.i.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the

circumstance or conduct will continue or recur in the future.

I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

FORMAL FINDINGS

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

Paragraph 1 Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: For the Applicant

Subparagraph 1.h.: For the Applicant

Subparagraph 1.i.: For the Applicant

Subparagraph 1.j.: For the Applicant

Subparagraph 1.k.: For the Applicant

Subparagraph 1.l.: 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 the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.
3. MC e. Acquittal. (E2.A10.1.3.5.)
4. MC f. There is clear evidence of successful rehabilitation.

5. MC a. The criminal behavior was not recent. (E2.A10.1.3.1.)