

DATE: October 23, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22951

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

Because of the Smith Amendment, Title 10 United States Code (USC) Section 986 (which bars security clearance access to those persons convicted of a crime in Federal or State court and sentenced to imprisonment for a term exceeding a year), fifty year old Applicant, employed for the past 22 years by the same employer, will lose his security clearance, which he has held for twenty-two of the last twenty-nine years. Thirty-five years ago, Applicant transported a stolen automobile from one State to another, knowing the automobile was stolen; he was sentenced to five years imprisonment in a juvenile facility. Applicant requested a waiver based on the length of time since his 1967 conviction and his successful career spanning 22 years. A waiver is recommended.

STATEMENT OF THE CASE

On May 21, 2002, 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, with modifications, 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 clearance should be denied or revoked. Applicant's notarized but undated answer was received by DOHA, and is identified as Item 4. Applicant elected to have his case decided on a written record. The Government provided a copy of the File of Relevant Material (FORM) on July 1, 2002. Applicant received the FORM on July 16, 2002. His response to the FORM is dated August 15, 2002. The case was received by the undersigned for decision on August 26, 2002.

FINDINGS OF FACT

The following factual findings are based on Applicant's Answer to the SOR, the FORM and Applicant's response. Applicant is 50 years old and has been employed with his present employer for the 22 years. He currently is a field service representative and manager of customer support for one of his employer's reliable programs. He seeks a secret

clearance.

On October 2, 1967 (subparagraph 1.a.), when Applicant was fifteen years old, he was charged in an official Federal criminal complaint under 18 USC 2312 for knowingly transporting a stolen vehicle across state lines, knowing such vehicle was stolen. The complaint was based on the information of two arresting police officers after Applicant and a co-defendant could not establish ownership of the stolen vehicle. Applicant later admitted the vehicle was stolen from another state.

On November 13, 1967, Applicant pled guilty to the complaint and was "...adjudged guilty of juvenile delinquency in that the said defendant did transport in interstate commerce a stolen vehicle, knowing at the time said vehicle to have been stolen." He was sentenced to five years in a juvenile facility. On December 7, Applicant began his sentence. Because of good behavior, Applicant served only eighteen months of the five year sentence.

Applicant was granted a secret clearance while in the United States Air Force (USAF) in 1973. He held that clearance until 1980 when he was honorably discharged. Applicant hired on with his current employer in 1980 and had his security clearance reinstated in 1986.

Applicant has been continuously employed since he was 16 years old.

Although Applicant has provided no explanation for the offense, peer pressure must be weighed carefully to explain why a fifteen year old would take a stolen vehicle from one state to another.

POLICIES

Enclosure 2 of the Directive sets forth policy factors which must be given binding consideration in making security clearance determinations. These factors must be considered in every case according to the pertinent criterion; however, the factors are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the entire realm of human experience or that the factors apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Factors most pertinent to evaluation of the facts in this case are:

Criminal Conduct

Conditions which could be disqualifying:

2. A single serious crime or multiple lesser offenses;
3. Conviction in Federal or State court, including a court martial of a crime and sentenced to imprisonment for a term exceeding a year (10 USC 986).
4. Discharge or dismissal from the Armed Forces under dishonorable conditions;

Conditions that could mitigate security concerns:

1. The criminal behavior was not recent;
2. The crime was an isolated incident;
3. The person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
4. There is clear evidence of successful rehabilitation.
7. Potentially disqualifying conditions 3. and 4. (irrelevant to the facts and circumstances of this case) 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.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must establish all the factual allegations under Guideline J (Criminal Conduct) which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to the sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

Any time a person violates the law, he exercises poor judgment. In October 1967, Applicant brought his conduct within the second disqualifying condition (DC) of the criminal conduct guideline when he transported a stolen vehicle from one state to another in October 1967.

The first mitigating condition (MC) under the criminal conduct guideline would easily mitigate Applicant's criminal conduct because the behavior was not recent, having occurred thirty-five years ago when Applicant was fifteen. Applicant's case in mitigation becomes stronger as there has been no criminal conduct by Applicant since 1967 (MC 2).

Even though there is no direct evidence of peer group pressure, it must be given some consideration to explain why Applicant would commit this kind of crime when he was only fifteen years old.

The evidence under MC 1, MC 2, and MC 6 (clear evidence of rehabilitation) would clearly be more than enough to overcome Applicant's criminal conduct thirty-five years ago. However, DC 3 (10 USC 986) precludes Applicant from a security clearance because he was sentenced to imprisonment for a term exceeding a year.

Under MC 7 of the criminal conduct guideline, DC 3 may not be mitigated unless there are meritorious circumstances to persuade the Secretary of Defense to grant a waiver. The meritorious circumstances are present since more than thirty years has passed without a criminal violation of any kind. Applicant's case in rehabilitation is praiseworthy. Applicant has held a security clearance for seven years while in the USAF. He has held a security clearance with his present employer since 1986.

Having reviewed the specific conditions of the criminal conduct and determined Applicant is precluded from access

because of DC 3 at this time, I now evaluate the more general factors of the whole person concept to determine whether Applicant should receive a security clearance. I find the age of the crime, the absence of similar conduct since 1967, and the persuasive evidence of rehabilitation, demonstrates to me Applicant will remain a law abiding citizen.

FORMAL FINDINGS

Having weighed and balanced the specific policy factors with the general policy factors (whole-person concept), Formal Findings required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1 (criminal conduct): AGAINST THE APPLICANT.

- a. For the Applicant.
- 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. I recommend further consideration of this case under 10 USC 986.

Paul J. Mason

Administrative Judge