

DATE: September 30, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-22917

DECISION OF ADMINISTRATIVE JUDGE

BURT SMITH

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In approximately 1969 Applicant was convicted of drug offenses and larceny, and he was sentenced to confinement in prison for two concurrent terms, each term exceeding one year. The provisions of 10 U.S.C. section 986 therefore preclude a grant of clearance, absent waiver by the Secretary of Defense as a meritorious case. Applicant does not furnish persuasive evidence in mitigation, and waiver is not recommended. Clearance is denied.

STATEMENT OF THE CASE

On June 6, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to Applicant. The SOR details 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. It recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked. In an undated, notarized answer, Applicant responded to the SOR, and he elected to have his case decided on the written record in lieu of a hearing.

A complete copy of the Government's File of Relevant Material (FORM) was provided to the Applicant on August 2, 2002, and he was afforded thirty days to file objections and submit further material in refutation, extenuation, or mitigation. Applicant received the FORM on August 14, 2002, and he submitted a one-page handwritten document dated August 19, 2002. The case was assigned to me September 5, 2002.

FINDINGS OF FACT

The Applicant is fifty-four years old, and he is employed by a defense contractor as a software engineer. He seeks a DoD security clearance in connection with his employment in the civilian defense industry. The Government opposes the Applicant's request for a security clearance on the basis of allegations set forth under Paragraph 1 of the SOR. The following findings of fact are entered as to the allegations.

Paragraph 1 (Guideline J- Criminal Conduct). The Government alleges in this paragraph that Applicant is ineligible for clearance because of two felony convictions and concurrent sentences that disqualify him for clearance under 10 U.S.C. section 986. This Federal law prohibits the grant of access to classified information to an applicant who has been convicted of crimes resulting in imprisonment for more than one year, absent a waiver by the Secretary of Defense.

In subpara. 1.a. of the SOR, the Government alleges that in June 1968 Applicant was arrested and charged with unlawful sale and possession of marijuana to an undercover officer. The Government further alleges that in 1969 Applicant was convicted of this offense and sentenced to 2 - 5 years incarceration. In his response to the SOR, Applicant admits to the allegation but he adds that when the crime occurred "I was 19 years old, 35 years ago." (FORM, Item 4.)

In subpara. 1.b. of the SOR, the Government alleges that in 1968 the Applicant was arrested for car theft, and in 1969 he was convicted of larceny and sentenced to 1 - 2 years incarceration, to be served concurrent with his drug sentence. Applicant denies the allegation, but persuasive evidence of Applicant's conviction and imprisonment is found in other parts of the record.

Applicant's FBI arrest sheet (FORM, Item 7) reflects that during the period 1965 - 1971 Applicant was arrested approximately 15 times for various misdemeanor and felony offenses, some of which were not prosecuted. Included in this record is an arrest for larceny on February 25, 1969, which resulted in a sentence of 1 - 2 years. Furthermore, Applicant admitted in a sworn statement of July 18, 1984, that as a result of the above convictions he served 13 months' incarceration in a state correctional facility. (FORM, Item 6, p.2.) Therefore, the factual allegations set forth under subparagraphs 1.a. and 1.b. of the SOR are found against the Applicant.

In mitigation, Applicant requests that consideration be given to his youthful age at the time of the offenses. He also points out that the offenses occurred approximately thirty-five years ago. According to the record, Applicant earned a bachelor's degree in engineering in 1983, and he now has a wife and four children. Applicant claims to be "born again," and the record reflects no further misconduct by Applicant since his last arrest in 1971.

However, in his response to the Government's case against him, Applicant presents no records, documents, statements or other evidence to support a finding as to Applicant's state of reform and rehabilitation since 1971.

POLICIES

Enclosure 2 of the Directive, as amended by DepSecDef Memorandum dated June 7, 2002, sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. The guidelines are divided into those that may be considered in deciding whether to deny or revoke an Applicant's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant access to classified information (Mitigating Conditions).

Based upon a consideration of the entire record, I find the following adjudicative guidelines have application in this case:

Guideline J - Criminal Conduct. *The concern:* A history of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Disqualifying Conditions applicable:

1. Allegations or admission 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, and sentenced to imprisonment for a term exceeding one year;

Mitigating Conditions applicable:

1. The criminal behavior was not recent.

The whole person concept. In addition to the above guidelines, the Directive provides in Para. E.2.2.1. that under the "whole person concept" the Administrative Judge shall also consider (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.

Title 10 U.S.C., section 986. Notwithstanding the above Policies, under Title 10 U.S.C. section 986, a Federal law, the Department of Defense may not grant or renew a security clearance to an Applicant who has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year, regardless of the amount of time actually served. However, the Secretary of Defense or the Secretary of the Military Department concerned may authorize a waiver of this prohibition in certain meritorious cases. (Copies of DoD regulations which implement this law were furnished to the Applicant. See FORM, Item 2.)

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours a day. The Government is therefore appropriately concerned where reliable information indicates an Applicant for clearance may be involved in criminal activities demonstrating a lack of trustworthiness and respect for the law. On a commonsense basis, this unfavorable personal characteristic might easily lead to a compromise or loss of classified defense secrets.

With regard to burden of proof in DOHA cases, the Government must prove all controverted facts that tend to demonstrate Applicant is ineligible for clearance. Once this burden is met, the Applicant must overcome the Government's case, if he or she is to prevail, by persuasive evidence in refutation, mitigation, or changed circumstances. However, the Applicant always bears the ultimate and overall burden of proving that it is clearly consistent with the national interest to grant him or her a security clearance. Furthermore, the Directive provides that "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, Para. E2.2.2.) Thus, the Applicant's burden is a heavy one.

Title 10 U.S.C. section 986 applies here because in 1969 the Applicant was convicted of drug sales and larceny, and he was sentenced to two terms of confinement (concurrent), each exceeding one year. The record does not indicate the convictions and sentences were ever appealed, modified, or reduced. Therefore, the Department of Defense may not lawfully grant a security clearance to Applicant unless the Secretary of Defense authorizes a waiver of this statutory prohibition as a meritorious case.

In order to evaluate whether a case governed by 10 U.S.C. section 986 is meritorious for waiver purposes, the evidence is adjudicated in accordance with current regulatory guidance, to include applicable due process procedures. Accordingly, the evidence of this case is considered against the Disqualifying Conditions and Mitigating Conditions applicable to Guideline J as well as the whole person concept, set forth above.

In this case it is concluded that Disqualifying Conditions 1, 2, and 3 of Guideline J have application and must be considered against the Applicant. The basis for application of these Disqualifying Conditions is self-evident. Applicant was convicted of two felony offenses in 1969, and he served 13 months in prison for his crimes.

With regard to the Mitigating Conditions of Guideline J, only conditions 1 and 6 have possible application. Mitigating Condition 1 is applicable where the criminal behavior "was not recent," and in this case the last occurrence of criminal conduct occurred over thirty years ago. By any reasonable standard Applicant's last criminal misconduct was not recent, and Mitigating Condition 1 is applied in his favor.

Mitigating Condition 6 may be applied where there is "clear evidence of successful rehabilitation," and in this area Applicant has made noteworthy progress. He is married with four children, and, judging from his responses, he has developed sincere spiritual beliefs. Furthermore, he earned an engineering degree in 1983, and he has been generally employed in this field.

Nevertheless, the Applicant has not submitted detailed and persuasive evidence needed to support a overall conclusion that his rehabilitation is complete. To be sure, Applicant's offenses occurred in the distant past. Also, he has pursued an education and he is now married with a family. This evidence is commendable, but standing alone it does not dispel all doubt as to his trustworthiness, given the facts of his two felony convictions resulting in lengthy prison sentences.

It may be possible to infer or presume Applicant's rehabilitation based upon the lack of any recorded misconduct since his teenage years. However, in the absence of positive evidence of reform this would require a troubling degree of speculation and conjecture. Applicant was informed of his opportunity to present documentary evidence to support his claim of reform, but he presents nothing more than his present spiritual beliefs, his marriage and education, and a reminder that he was young when he was convicted and imprisoned for two felony offenses. Under these circumstances, Mitigating Condition 6 is not sufficiently supported to justify its consideration.

The whole person concept has also been considered, and all or part of factors (3); (4); (6); and (8) may be applied in Applicant's favor. Applicant's criminal conduct was not recent, having last occurred over thirty years ago. There is evidence of rehabilitation, although qualified; the Applicant is not susceptible to blackmail; and it is not likely the criminal conduct will recur. However, factors (1); (2); (5); (7) and (9) operate against a recommendation for waiver. Applicant's crimes were serious; they were carried out with full knowledge despite Applicant's maturity; and they were motivated by a desire for illegal gain.

On balance, after considering the entire record and applying DoD policies, guidance, and regulations, it is concluded that this case is controlled by the provisions of 10 U.S.C. section 986, and Applicant must be denied clearance. I do not recommend further consideration of this case for a waiver of 10 U.S.C. section 986.

FORMAL FINDINGS

Formal findings For or Against the 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.

Subparas. 1.a.-1.c.: 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 Applicant's request for a security clearance.

Burt Smith

Administrative Judge