DATE: March 27, 2003

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-23923

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Esq., Department Counsel

FOR APPLICANT

Reid W. Kennedy, Esq.

SYNOPSIS

In 1972, Applicant was convicted of a misdemeanor firearms offense and the felony offense armed robbery for his role in a bank robbery. He received concurrent sentences to confinement for 12 months and 10 years, respectively. Paroled in 1975, Applicant received a first-offender pardon for both offenses in 1978. Since his parole, he has been a law-abiding citizen (except for three minor brushes with the law) and continuously and gainfully employed. Under 10 U.S.C. § 986, the Department of Defense (DoD) is prohibited from granting Applicant a security clearance based on his sentence to confinement exceeding one year unless the Secretary of Defense waives the statutory prohibition; a waiver is not recommended. Clearance denied.

STATEMENT OF THE CASE

On August 8, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[(1)] The SOR, which is in essence the administrative complaint, put Applicant on notice by detailing the grounds for the action and referred to the security guidelines of criminal conduct (Guideline J) and personal conduct (Guideline E). On August 23, 2002, Applicant answered the SOR, and he requested a clearance decision based on a hearing record.

On October 23, 2002, DOHA assigned this case to me to conduct a hearing and issue a written decision. Thereafter, a notice of hearing was issued to the parties scheduling the hearing for November 12, 2002, at a location near Applicant's workplace.

At the hearing, Department Counsel offered four documentary exhibits that were admitted into the record; no witnesses were called. Applicant appeared with counsel, offered his own testimony, and offered seven documentary exhibits that were admitted into the record. DOHA received the transcript on November 21, 2002.

The SOR alleges a security concern under Guideline E for personal conduct based on Applicant's answers to two questions about his police record on his security-clearance application. The SOR also alleges a security concern under Guideline J for criminal conduct based on Applicant's 1972 state conviction for armed robbery of a bank and the previously mentioned falsification of his security-clearance application violating 18 U.S.C. § 1001. In addition, the SOR alleges that Applicant is ineligible for access to classified information under 10 U.S.C. § 986--the so-called Smith Amendment--based on his 1972 bank robbery conviction and sentence to confinement exceeding one year.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 54-year-old never married man seeking to obtain a security clearance in conjunction with his employment with a defense contractor at a U.S. Air Force base. His telecommunications work experience dates back to January 1989 and he has worked in positions of progressive responsibility since then.[(2)] He is currently employed as a senior telecommunications technician providing solutions for analog and digital telecommunication systems. He is the father of a 22-year-old daughter whom he has supported over the years in the absence of a court order or formal support agreement.

Applicant is a high-school graduate. After high school, he attended a technical school where he learned the trade of x-ray technician. More recently, he has taken various college courses in electronics, but he has not earned a formal degree.

In 1969, Applicant was drafted to serve in the U.S. Army. He served on active duty as an enlisted soldier from approximately April 1969 to November 1970. Other than basic and advanced training, Applicant's military service was in Vietnam where he served as a missile crewman for an infantry fighting vehicle for about six months and as a x-ray technician for a medical battalion for about six months. Applicant was honorably discharged shortly after his return from Vietnam.

Upon his return to the U.S. and discharge from military service in 1970, Applicant struggled. He experienced substantial difficulties obtaining regular and gainful employment. He attributes those difficulties to potential employers' bias against or suspicion of Vietnam veterans.

During sometime in 1972, Applicant was working as a laborer laying rail ties. Although working, money was still less than plentiful. He was living in a day-to-day boarding house and met another boarder who suggested they improve their financial standing by robbing a bank. Initially reluctant, Applicant eventually agreed. Since he had a car, Applicant agreed to drive.

On July 24, 1972, the then 24-year-old Applicant entered the bank with the other robber. Both were armed as his partner had provided Applicant with a pistol. Upon entering the bank, his partner fired his weapon into the ceiling. Applicant asked the tellers for money and collected nearly $5,000 in a bag brought along for that purpose. The two fled the bank and they were arrested, without incident, after driving about five miles. Applicant pulled the car over and was arrested in the car while his partner ran into an apartment building where he was arrested. Subsequently, on September 19, 1972, Applicant pled guilty and was sentenced to confinement for 10 years for the armed robbery offense.[(3)]

He was paroled in July 1975 after serving about three years of confinement. Applicant attended college via the GI bill and worked some temporary jobs. He found permanent employment with a youth development center where he worked for three and a half years. Applicant wanted to work for the fire department and starting working on obtaining a pardon. In that process, he met with the trial judge who sentenced him and eventually he was issued a first-offender pardon[(4)] from the relevant state agency in March 1978.[(5)] The pardon was for both offenses and it was unconditional. The remaining sentence was commuted to time served. All civil and political rights lost as a result of the offenses were restored.

Since receiving the pardon, Applicant has had three minor law-enforcement incidents.[(6)] The first was in 1983 involving a bad check that Applicant wrote to a men's clothing store where he was a regular customer. Applicant was [(7)]

charged with a misdemeanor bad check offense, although the record does not reflect formal disposition of the charge. Applicant apparently resolved the matter by paying the merchant and paying some court costs.

The second incident took place in 1986 when Applicant was charged with the misdemeanor offense the simple battery. This incident took place when a former girlfriend arrived at Applicant's apartment when he was entertaining his present girlfriend. Conflict resulted when the former girlfriend refused to leave the apartment and stripped naked. Applicant engaged in a bit of self-help when he picked up the naked woman, carried her out the door, and locked her out of the apartment. The police were called and Applicant was arrested based on an allegation of pushing or shoving by the former girlfriend. According to Applicant, he went to court several times, but the complaining witness never showed resulting in the judge dismissing the case. The record reflects the charge was *nolle pros*, which I take to mean the prosecution decided to abandon or relinquish the action.[(8)]

The third incident occurred in 1993 when Applicant was charged with theft of cable TV. Applicant formerly worked for the cable TV company installing cable TV. Accordingly to Applicant, the charges were eventually dismissed after Applicant agreed to sign a document releasing the cable TV company from any potential civil liability. The record does not reflect formal disposition of the charges.[(9)]

Although never arrested or charged, one additional matter warrants discussion. Department Counsel presented Exhibit 4, which was admitted into the record evidence. Exhibit 4 consists of three FBI reports concerning an attempted bank robbery. The second report indicates that on September 12, 1972, Applicant, who was then being held on the armed robbery charge, was briefly interviewed as a possible subject for the offense. Otherwise, there is scant evidence in the exhibit connecting Applicant to the offense. Indeed, the third report indicates the federal prosecutor declined prosecution on the case. Although admitted, I indicated I would give the exhibit the weight it deserved in light of all the facts and circumstances of the case. During closing argument, Department Counsel conceded that Exhibit 4 did not prove Applicant was involved in the attempted bank robbery.[(10)] Consistent with that concession and based on my own review, I give Exhibit 4 no weight in any part of this decision.

Applicant completed a security-clearance application (SF 86)[(11)] in January 2001. The application required him to answer various questions about his background, including Questions 21, 22, 23, 24, 25, and 26 about his police record. He answered all questions "No" thereby denying any police record within the scope of the questions. In particular, he answered Question 21 in the negative thereby denying ever being charged with or convicted of any felony offense. He also answered Question 22 in the negative thereby denying ever being charged with or convicted of a firearms offense.

In August 2001, Applicant was interviewed as part of his background investigation. He provided a sworn statement wherein he addressed various subjects, including his history of criminal conduct. There is no mention in the sworn statement about any possible falsifications of his SF 86. Accordingly, I presume the Defense Security Service, the agency responsible for investigating such matters, did not view the possible falsifications as an issue worthy of inclusion.

In his Answer of August 2002, Applicant said he answered no to Questions 21 and 22 due to his 1978 pardon and his conversation with the trial judge who supported the pardon. During the hearing, Applicant testified that the trial judge indicated his record was clear due to the pardon.[(12)]

He said he answered Questions 21 and 22 no because he believed no was correct in light of the pardon. He also said since his pardon he answered similar questions on job applications in the negative. Based on the record as a whole, I find Applicant's explanation, for his answers to Questions 21 and 22, credible as opposed to an attempt to fabricate excuses.

Applicant is known as a professional, reliable, and mature employee.[(13)] Both the security officer and the base chief of emergency management are of the opinion that Applicant can be trusted with access to classified information.[(14)]

Applicant has lived in the same community or area for many years. He's been a homeowner since 1994.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the record evidence as a whole, Guideline E for personal conduct and Guideline J for criminal conduct are most relevant here. In addition, this case involves application of 10 U.S.C. § 986 based on Applicant's 1972 bank robbery conviction and sentence to confinement exceeding one year.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.(15) The government has the burden of proving controverted facts.(16) The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.(17) The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.(18) "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."(19) Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.(20) In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.(21)

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."(22) Under *Egan,* Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Section 1-Personal Conduct

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or otherwise reasonably believed the arrest or drug use did not need to be reported.

Here, the record evidence fails to establish Applicant deliberately omitted or concealed information about his 1972 bank robbery conviction and related firearms offense when he answered no to Questions 21 and 22. Although his answers to those questions were mistaken, Applicant has successfully rebutted the allegations that he deliberately provided false answers. I'm persuaded he reasonably believed he was not required to report those matters. His belief was reasonable in light of the 1978 pardon, his conversation with the trial judge who supported the pardon, and his history of answering similar questions the same way. Cumulatively, those factors could lead a reasonable person to answer Questions 21 and 22 in the negative. Accordingly, Guideline E is decided for Applicant.

Section 2-Criminal Conduct

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to

break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

In addition, under 10 U.S.C. § 986, the DoD and the military departments may not grant or renew a security clearance for any DoD officer or employee, an employee, officer, or director of a DoD contractor, or a member of the armed forces on active duty or in an active status who falls under any of four statutory categories.[(23)] The statutory category at issue here is § 986(c)(1), which provides: "The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The statute also provides that the Secretary of Defense or the secretary of the relevant military department may, in a meritorious case, authorize an exception to the statutory prohibition for persons in two of the four statutory categories; namely, paragraphs (1) and (4) of § 986(c). The statute does not define, explain, or describe a "meritorious" case.

In June 2001, the Deputy Secretary of Defense issued official policy guidance designed to assist the DoD and military departments in uniformly implementing 10 U.S.C. § 986. Concerning criminal convictions, the policy guidance is the statute disqualifies persons with convictions in both state and federal courts, including military courts, with sentences imposed for more than one year regardless of the amount of time actually served. Like the statute, the policy guidance does not define, explain, or describe a "meritorious" case.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. Applicant's 1972 bank robbery and firearms convictions are evidence of a history or pattern of illegal behavior that creates doubt about his judgment, reliability, and trustworthiness. Accordingly, disqualifying condition DC 2[(24)] applies raising a security concern. Indeed, the record evidence shows Applicant entered into a criminal conspiracy to rob a bank. The essence of a conspiracy is an agreement to commit an unlawful act. The agreement is a distinct evil separate from the substantive criminal offense. Pursuant to this agreement, he and his partner put the lives of innocent people in jeopardy when they entered the bank armed with pistols. At bottom, Applicant stands convicted of serious criminal conduct not easily mitigated or extenuated.

In addition to the normal security concerns under Guideline J, Applicant's 1972 armed robbery conviction and 10-year sentence, adjudged by a state court, falls within the scope of 10 U.S.C. § 986. Accordingly, absent a waiver by the Secretary of Defense, Applicant is ineligible for access to classified information.[(25)]

I have reviewed the mitigating conditions (MC) under Guideline J and three apply in Applicant's favor. First, the bank robbery took place about 30 years ago, and so, the criminal behavior is not recent.[(26)] Second, his felonious conduct in 1972 took place when Applicant was a young Vietnam veteran, experiencing difficult circumstances, who allowed himself to be influenced by another person. He is now a productive citizen who has found his niche working in telecommunications. Under these circumstances, the factors that contributed to the 1972 bank robbery are unlikely to recur.[(27)] Third, Applicant has reformed and rehabilitated[(28)] himself since his bank robbery conviction and incarceration as demonstrated by (1) the 1978 pardon; (2) his steady and productive employment, mostly notably in the telecommunications field since at least 1989; (3) living in the same community for many years and owning a home since 1994; and (4) no further felonious conduct since his release from confinement. The remaining mitigating conditions do not apply given the record evidence.

To sum up under Guideline J, I have weighed the disqualifying and mitigating conditions and the record evidence as a whole, and I conclude Applicant's positive actions, attributes, and achievements, although substantial, are insufficient to mitigate or extenuate the negative security concerns stemming from his serious criminal conduct. In other words, I view Applicant's felonious conduct in 1972 as so serious as to create a reasonable doubt about his security suitability despite the passage of time and his good works. Under the clearly consistent standard, that doubt must be resolved against Applicant. Accordingly, Guideline J is decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a : Against the Applicant

Subparagraph b: For the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph b: For 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. In addition, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry*, dated Feb. 20, 1960, as amended and modified, and DoD Directive 5220.6, *Defense Industrial Personnel Security Review Program*, dated Jan. 2, 1992, as amended and modified (hereinafter called "Directive").

2. Exhibit F.

3. Exhibit G.

4. In general, pardon means to excuse, without further penalty, a person who has been convicted or punished for a crime. Bryan A. Garner, *A Dictionary of odern Legal Usage*, at 181(*see* commute (B)) (2d. ed. 1995).

5. Exhibit B.

6. Although these matters are not alleged in the SOR, it is proper to consider these matters on at least two issues: one, Applicant's reform and rehabilitation; and two, whether a recommendation for a waiver of 10 U.S.C. § 986 is appropriate.

7. Exhibit 3.

8. Exhibit 3.

9. Exhibit 3.

10. Transcript at p. 105.

11. Exhibit 1.

12. Transcript at p. 49.

13. Exhibits C, D, and E.

14. Exhibits C and D.

15. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

16. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

17. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

18. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

19. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

20. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

21. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

22. *Egan*, 484 U.S. at 528, 531.

23. 10 U.S.C. § 986(c)(1) through (c)(4).

24. DC 2 ("A single serious crime or multiple lesser offenses.").

25. 10 U.S.C. § 986 applies regardless of the state pardon. ISCR Case No. 01-00407 (Sept. 18, 2002) at pp. 3-4.

26. MC 1 ("The criminal behavior was not recent.").

27. MC 3 ("The person did not voluntarily commit the act and/*or the factors leading to the violation are not likely to recur*.") (emphasis added).

28. MC 6 ("There is clear evidence of successful rehabilitation.").