

DATE: September 24, 2003

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 01-24138

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Thirty-two-year-old Applicant from a dysfunctional family engaged in several criminal acts when he was between 16 and 19 years old. He was sentenced to imprisonment for 10 years for burglary and 5 years for malicious shooting. Since his release from prison, Applicant has been a model citizen, working several jobs, completing his associate's and bachelor's degrees, and working on a master's degree. Applicant fully mitigated the criminal conduct security concerns. However, absent a waiver from the Secretary of Defense, Applicant is barred from receiving a clearance. 10 U.S.C. § 986. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 19 March 2003, DOHA issued a Statement of Reasons (SOR) under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive<sup>(2)</sup> detailing the basis for its decision—failure to meet the criminal conduct (Guideline J) personnel security guideline of the Directive. Applicant answered the SOR in writing on 1 April 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 14 July 2003. On 19 August 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on 26 August 2003.

### **FINDINGS OF FACT**

Applicant is 32 years old. Ex. 1 at 1; Ex. 3 at 1. Applicant was raised in a dysfunctional home. Ex. 4 at 18; Ex. 2 at 1. By the time he was 17, he had stopped attending school, did not obey his mother, used marijuana, and engaged in underage drinking. Ex. 3 at 2. His mother eventually kicked him out of the house and he was living from place to place. Tr. 43-44.

In December 1989, when he was 18, Applicant were riding around town in a car when Applicant's friend (W) stopped at

his residence and picked up a shotgun. They drove to the residence of an individual W did not like. Applicant attempted to stop W from taking the shotgun out of the car, but W prevailed. W got out of the car, walked up to the house and fired the shotgun into the house. Later that evening, W fired into the house of a judge and into a market. Applicant was arrested and charged with malicious shooting, destroying private property, and destroying, defacing, or injuring property. Ex. 3 at 2. He was released on bond on 7 February 1990. Ex. 4 at 14.

On 14 February 1990, while out on bond and awaiting trial, Applicant was arrested for driving on a suspended operator's license, failing to stop at the scene of an accident, destroying private property, and reckless driving. On 12 March 1990, the Grand Jury issued indictments on these charges. Ex. 5 at 1-4.

On 26 April 1990, Applicant pled guilty to malicious shooting, destroying private property, and destroying, defacing or injuring property. His sentencing was scheduled then rescheduled for July 1990. Ex. 4 at 12-13.

On 31 May 1990, Applicant was arrested and charged with statutory rape. Ex. 4 at 14; Answer. The charge was Nolle Prossed when the alleged victim failed to appear on two different trial dates. Ex. 3 at 3; Tr. 44-45.

On 9 July 1990, Applicant pled guilty to reckless driving and leaving the scene of an accident. He was sentenced to six months in jail suspended for two years. Ex. 5 at . The remaining offenses were Nolle Prossed. Ex. 5 at 9, 10.

Applicant was sentenced for the malicious shooting to five years in jail, with two years suspended. He was sentenced to 12 months in prison (suspended) on each of the other charges. He was imprisoned from August 1990 to June 1991. Ex. 3 at 2-3.

On 5 July 1991, Applicant drove the "getaway car" for W, who broken into a sporting goods store and stole pistols and rifles. On 12 November 1991, the Grand Jury returned indictments against Applicant for burglary and grand theft. Ex. 6 at 4-5. As a result of a plea agreement, Applicant pled guilty to burglary and the grand larceny indictment was Nolle Prossed. Ex. 6 at 6-9. Applicant was eventually sentenced to 10 years in prison with five years suspended. Ex. 3 at 3.

On 13 January 1992, the court revoked the suspension of the execution of the sentence to imprisonment for two years from the shooting incident. Ex. 4 at 20. Applicant was released from prison on 24 October 1995.

When Applicant was released from prison, it is clear he was a different person. He sought employment and went back to school. He received degrees from a junior college and from a four-year college, the latter with high honors. Exs. C, G. Applicant has been employed ever since leaving prison. During his schooling, he sometimes worked two jobs. He has worked for a defense contractor for the past three years, during which time he was "exposed to classified information" for two years until the SOR was issued. Tr. 8, 37.

Applicant is engaged to be married and has bought a home. For the past year, Applicant and his fiancée have had custody of his fiancée's cousin who comes from a dysfunctional home and has had considerable troubles at school. This individual has made substantial progress in developing as a student since moving in with Applicant and his fiancée. Tr. 35-36.

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3. Doubts are resolved against the applicant.

### CONCLUSIONS

In the SOR, DOHA alleged Applicant was arrested in 1989 and convicted in 1990 of shooting into an occupied dwelling and sentenced to five years in prison (¶ 1.a.), arrested and convicted in 1990 of reckless driving and leaving the scene of an accident (¶ 1.b.), arrested and charged with statutory rape in 1990 (¶ 1.c.), and arrested and convicted in 1991 of burglary and sentenced to 10 years in prison (¶ 1.d.). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. However, absent a waiver from the Secretary of Defense, the Department of Defense (DOD) may not grant or renew a security clearance for an applicant who has been convicted in a state or federal court and sentenced to imprisonment for a term exceeding one year. 10 U.S.C. § 986.

The Government established by substantial evidence each of the allegations contained in the SOR. Applicant engaged in several serious criminal offenses. DC 1. Although Applicant was arrested and charged with statutory rape when he was 19 (¶ 1.1.c.), there is no evidence whatsoever to believe that he committed the offense. He has admitted all of the other criminal conduct, but vehemently denies having sexual contact with the complainant in the statutory rape offense. The complainant failed to appear on two different trial dates. Finding is for Applicant on ¶ 1.c.

Applicant established that his criminal behavior, while extensive, was not recent. MC 1. Applicant's last conviction occurred when he was 19 years old. Furthermore, there is clear evidence of his successful rehabilitation. He has been a model citizen since 1995 when he was released from prison. There is no potential for exploitation because of these convictions. While Applicant is not proud of his criminal past, he has not tried to keep it a secret. After considering all the evidence of record the likelihood of recurrence is extremely remote. *See* Directive ¶ E2.2.1, Adjudicative Process factors. Applicant has sufficiently mitigated the criminal conduct personnel security concerns on each of the four allegations contained in the SOR. Even the Department Counsel conceded as much. Tr. 51-52.

However, as a result of his sentence to imprisonment for 10 years for burglary (¶ 1.d.) and five years for malicious shooting (¶ 1.a.), Applicant is ineligible for a security clearance absent a waiver from the Secretary of Defense. 10 U.S.C. § 986(d). Finding must be against Applicant on ¶¶ 1.a. and 1.d. As 10 U.S.C. § 986 is the sole reason Applicant is being denied a security clearance, a recommendation for waiver of the clearance bar is appropriate. *See* DOHA Operating Instruction 64, *Processing Procedures for Cases Subject to 10 U.S.C. § 986* ¶ 3.e. (Jul. 10, 2001). I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

### FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: Against Applicant

**DECISION**

In light of all of 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. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

**James A. Young**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.