

DATE: January 6, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-25284

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Rita O'Brien, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

In 1970, Applicant was convicted, pursuant to his guilty pleas, of two counts of grand larceny, a felony. He was sentenced on each count to two years imprisonment, suspended, with the sentences to run concurrently. He has been gainfully employed and has not been in trouble with the law since then. He has held a security clearance for a number of years. However, 10 U.S.C. § 986 prohibits the Department of Defense from granting Applicant a security clearance absent a waiver by the Secretary of Defense. Applicant's security clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

### **STATEMENT OF THE CASE**

On 12 August 2002, pursuant to Executive Order No. 10,865, *Safeguarding Classified Information Within Industry*, dated 20 February 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated 2 January 1992, as amended and modified, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant that 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. DOHA recommended referral to an administrative judge to determine whether clearance should be denied or revoked.

Applicant answered the SOR in writing on 7 September 2002. The case was originally assigned to Administrative Judge Jack Burt Smith on 21 November 2002. Due to Judge Smith's caseload, the case was transferred to me on 22 November 2002. On 16 December 2002, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of four exhibits. Applicant testified on his own behalf and submitted 22 exhibits. A transcript (Tr.) of the proceeding was received on 26 December 2002.

In the SOR, the Government alleged Applicant is disqualified from obtaining a security clearance because of criminal conduct (Guideline J), based on his conviction on two counts of grand larceny, for which he was sentenced to two years

imprisonment on each count, with the sentences to run concurrently. In his answer, Applicant admitted the criminal conduct and sentence, but denied that this represented a history or pattern of criminal activity that creates a doubt about his judgment, reliability, and trustworthiness. He requests that the Secretary of Defense provide an exception to 10 U.S.C. 986.

### FINDINGS OF FACT

In 1970, when he was 19 years old, Applicant was charged with two counts of grand larceny for stealing wheels and tires off motor vehicles. Upon the advice of his attorney, Applicant pled guilty and was sentenced to two years confinement for each offense, with the sentences to run concurrently. As this was his first offense, the sentence was suspended and Applicant was placed on probation for two years and ordered to get some mental health counseling. Tr. 25, 28. Applicant complied with the order and received mental health counseling. Tr. 27. Because of Applicant's good behavior, supervised probation was terminated after 18 months. Ans. at 1; Ex. 3.

Applicant is now 51 years old and works for a defense contractor as a technical librarian. Ex. 1. Applicant has lived in the same neighborhood his whole life. In the past 32 years, Applicant has not been involved in any criminal conduct, although he was fined for speeding in 1972 or 1973. Ex. 3; Tr. 26. Applicant has not tried to conceal his convictions from investigating authorities. In 1975, he admitted the offenses to an agent investigating his eligibility for access to classified information. Ex. 3. Despite his convictions, Applicant has been granted security clearances in the past. At the time of the hearing, Applicant still had access to classified information. Tr. 28. His performance reports document that Applicant has met or exceeded all performance standards.

### 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. Order No. 12,968, *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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Exec. Order No. 10,865 § 2. *See* Exec. Order No. 12,968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at \*6-8 (App. Bd. May 9, 2001). The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Order No. 12,968 § 3.1(b).

A security risk may exist under Guideline J when an individual has a history or pattern of criminal activity because it

"creates doubt about a person's judgment, reliability and trustworthiness." Directive, ¶ E2.A10.1.1. Applicable conditions that could raise a security concern under Guideline J and may be disqualifying include the following:

- (1) Allegations or admission of criminal conduct, regardless of whether the person was formally charged. Directive, ¶ E2.A10.1.2.1.
- (2) A single serious crime or multiple lesser offenses. Directive, ¶ E2.A10.1.2.2.

Applicable conditions that could mitigate the security concerns include the following:

- (1) The criminal behavior was not recent. Directive, ¶ E2.A10.1.3.1.
- (2) The crime was an isolated event. Directive, ¶ E2.A10.1.3.2.
- (2) There is clear evidence of successful rehabilitation. Directive, ¶ E2.A10.1.6.

Regardless of any mitigation, absent the granting of a waiver by the Secretary of Defense or the secretary of the military department concerned, the Department of Defense is prohibited from granting or renewing a security clearance for a person who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." 10 U.S.C. § 986.

### **CONCLUSIONS**

After reviewing the evidence of record and observing Applicant as he testified, I am convinced that his convictions in 1970 were one-time, isolated criminal acts. Applicant has demonstrated that he has been rehabilitated over the past 30 years. He has been steadily employed, performed well at his job, and has demonstrated his good judgment and reliability. Applicant is supported by his supervisor for the past 15 years, who finds Applicant to be "mature, honest, and reliable." Ex. A. Thus, absent 10 U.S.C. § 986, I would find Applicant has demonstrated that it is in the national interest to grant him a security clearance. However, unless Applicant is able to obtain a waiver from the Secretary of Defense, the Department of Defense is prohibited by 10 U.S.C. § 986. from granting Applicant a clearance.

### **FORMAL FINDINGS**

Formal Findings as required by the Executive Order No. 10,865 § 3, ¶ 7 (*See* Directive, ¶ E3.1.25), are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: 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 renew a security clearance for Applicant. The Department of Defense is prohibited from granting or renewing his clearance absent a waiver from the Secretary of Defense. 10 U.S.C. § 986. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

**James A. Young**

**Administrative Judge**