

DATE: October 2, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26026

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

Kathryn Antigone Trowbridge, Esquire, Department Counsel

FOR APPLICANT

Crystal A. G. Fisher, Esquire

SYNOPSIS

Applicant's conviction for malicious destruction and sentence to two years imprisonment required denial of his clearance under the provisions of 10 U.S.C. §986, notwithstanding that Applicant actually only served 60 days, with credit for time served before trial. Clearance denied.

STATEMENT OF THE CASE

On 3 July 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 24 July 2002, Applicant answered the SOR and requested a hearing. The case was assigned to me on 13 August 2002. I set the case on 23 August 2002, and issued a Notice of Hearing on 29 August 2002, for a hearing on 23 September 2002.

At the hearing, the Government presented four exhibits--three admitted without objection, one excluded by me despite there being no objection--and no witnesses; Applicant presented three exhibits and the testimony of two witnesses, including himself. DOHA received the transcript on 1 October 2002.

FINDINGS OF FACT

Applicant admitted the factual allegations of the SOR; accordingly, Applicant's admissions are incorporated as findings of fact.

Applicant--a 45-year old employee of a defense contractor--seeks access to classified information. Applicant retired from the Army as a Staff Sergeant (E-6) communications NCO in 1994. In his time in the Army, he was awarded the Good Conduct Medal (6 awards), Overseas Service Ribbon (3 awards), Professional Development Ribbon (3 awards),

National Defense Service Medal, Humanitarian Service Medal, Army Achievement Medal (2 awards), and the Army Commendation Medal (A.E. A). He also held a security clearance during most of his time in the Army (G.E. 1, Tr. 23-24). He qualified as an expert marksman with the M-16 (A.E. A, Tr. 38).

On 30 October 1996, Applicant was arrested and charged with two counts of assault in the first degree, reckless endangerment, and malicious destruction of property over \$300.00 value--a misdemeanor under his state's criminal code. He later pleaded guilty to the malicious destruction charge, and was sentenced to two years imprisonment, all but 60 days suspended. He served the 60 days through home detention, received credit for 35 days pre-trial restraint, and was placed on work-release. Applicant was also given 18 months supervised probation. The remaining counts were *nolle prosequi* (G.E. 3, 4). Applicant completed his probation without incident (A.E. B, Tr. 32).

On 4 April 2001, Applicant executed a Security Clearance Application (SF 86)(G.E. 1) on which he answered "yes" to the question designed to elicit his misdemeanor arrest record, and disclosed the above arrest.

In his answer to the SOR and at the hearing, Applicant acknowledged his responsibility for the incident. He described being awakened very early the morning of the incident by headlights coming in through his bedroom. Because of a recent spate of unsolved burglaries in the area, Applicant's observation of a suspicious-looking vehicle in the neighborhood in recent weeks, and the fact that his parents (who lived next door) had been burglarized twice in the past, Applicant got his shotgun and went into the yard and fired a shot at the rear bumper of the departing vehicle. Applicant had the wrong car; it was not the vehicle Applicant had seen in the neighborhood in recent weeks, but a similar-looking vehicle belonging to the parents' newspaper deliverer. After firing the shotgun, Applicant put the shotgun in his trailer and attempted to follow the car, but was unsuccessful. By the time he returned home, police had identified Applicant as the shooter, and he was arrested and charged as above shortly after arriving back at his trailer.

Applicant acknowledged that he did not attempt to contact local police any of the times he observed the suspicious-looking vehicle in the area, or on the night of the incident. He agrees he used poor judgment in shooting at the vehicle, even if it was just to frighten the occupants (Tr. 36, 50). Applicant completed technical training to move into the computer field in Month 2001.

Applicant's corporate supervisor (Applicant has an on-site supervisor who is an employee of the client) considers Applicant to be trustworthy and extremely reliable (Tr. 55). Applicant has been retained and promoted in the company when others have been laid off in a recent series of staff reductions. This supervisor has no social contact with Applicant and is not aware of the allegations of the SOR.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*, under an assessment of the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year. ⁽²⁾

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent.

E2.A10.1.3.2. The crime was an isolated incident.

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying conditions 3. . . , 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. ⁽³⁾

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, §986, precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001.

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

The Government has established its case under Guideline J. Applicant's criminal conduct in October 1996 was serious, a conclusion confirmed by the fact that Applicant was sentenced to two years in prison for a misdemeanor offense. Nevertheless, I conclude that the criminal conduct is otherwise mitigated, but for the application of 10 U.S.C. §986 to this case. First, the resolution of Applicant's criminal case tends to corroborate his explanations of his conduct. Without condoning Applicant's conduct in shooting at a retreating vehicle, the circumstances of his conduct are less serious than appear at first blush. All but 60 days of Applicant's sentence was suspended; Applicant was permitted to serve the remainder on house detention, with credit for the 35 days pre-trial restraint served. Although Applicant was forty at the time of this offense, and thus cannot be said to have acted out of youthful immaturity, there has been no repeat of the misconduct. Furthermore, the criminal conduct was not recent, having occurred nearly 6 years ago, and was isolated--there being no apparent criminal conduct either before or after the October 1996 incident. Finally, there is clear evidence of successful rehabilitation, documented both by Applicant's satisfactory completion of his probation and attainment of new educational qualifications since the incident, and by his character reference which, while not indicating any knowledge of Applicant's criminal past, nevertheless attest to his work performance.

Were this the end of the analysis under Guideline J., I would conclude Applicant's criminal conduct in 1996 mitigated. However, as alleged in subparagraph b. of the SOR, Applicant's case falls within the purview of 10 U.S.C. §986. Under the new regulations issued by the Deputy Secretary of Defense, because Applicant was convicted in state court and sentenced to imprisonment for more than one year, I may not mitigate his criminal conduct. Accordingly, I find Guideline J. against Applicant. However, because I do so solely because of the applicability of 10 U.S.C. § 986 to this case, I make the following statement as required by O.I. 64 in such a case: I recommend further consideration of this case for a waiver of 10 U.S.C. §986 .

FORMAL FINDINGS

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).
2. As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.
3. Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.