

DATE: March 11, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26271

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Esq., Attorney-Advisor to Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1984, Applicant was indicted and pled guilty to aggravated battery with a deadly weapon, a felony for which he was convicted and sentenced to a term of three years. Two and one-half years of the sentence were suspended. After four months, he was released for good time served. Thereafter, Applicant completed his undergraduate education and has been continuously employed. In 1992, the Governor of his State issued Applicant a Certificate of Pardon and Restoration of Citizenship. By operation of law, the provisions of 10 U.S.C. § 986 preclude a grant of clearance to the Applicant, absent meritorious waiver by the Secretary of Defense. Applicant requests a waiver and provides persuasive evidence of mitigation. Clearance is denied. Waiver is recommended.

STATEMENT OF THE CASE

On August 9, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*," dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program*" (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied or revoked.

In a sworn written statement, dated August 26, 2002, Applicant responded to the allegations set for the in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the Government's written case on November 25, 2002. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He subsequently did so without any objection being interposed by Department Counsel. The case was assigned to, and received by, this Administrative Judge on January 21, 2003.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant is 40 years old. In 1988, he received a bachelor of science degree in mechanical engineering, and he has subsequently been gainfully employed in his profession. (Item 3, Attachments 5 and 6.) He seeks a security clearance as an employee of a government contractor. Applicant has been married for 13 years and resides in the same State in which he was born, raised, and pursued his higher education. With the exception of four years of employment in a neighboring State, he has been employed in his home State since earning his degree in mechanical engineering.

On November 25, 1983, when Applicant was 21 years old, he fired a 22 caliber pistol at an individual with the intent to wound, an act that resulted in his indictment and conviction for the felony crime of aggravated battery with a deadly weapon. (Item 3, Attachment 1; Item 6g.) He was sentenced to a term of imprisonment of three years, two and one-half years of which were suspended. (Item 6g.) Pursuant to a plea agreement, Applicant was sentenced to serve six months at a county detention center and was released to attend school and to work. (Item 6g.) After serving four months of the six-month sentence, Applicant was released for good behavior. (Item 3, Attachment 3.) On December 21, 1992, the Governor of the State issued him a Certificate of Pardon and Restoration of Citizenship, which reads in pertinent part, as follows: "Whereas, the sentence of this person has been fully discharged, and investigation indicates conduct to have been in a law-abiding manner; now Therefore I . . .by virtue of the authority in me vested, do hereby restore citizenship rights to [Applicant]." (Item 3, Attachment 4.)

Applicant offers, in explanation of the offense, that the individual he shot was his roommate, and that he shot him because the roommate had previously assaulted him physically and verbally and had mocked his commitment to higher education and study. (Response to Directive, Attachment E2.A10, Guideline J, Criminal Conduct, mitigating condition 3.) Applicant states that he held "Q" clearance with another Federal agency at the time of his conviction and sentencing, and for approximately four years thereafter. (Applicant's Response entitled "Review of DoD Directive 5220.6," citing mitigating conditions related to item E2.A10, Guideline J.)

Applicant reviewed the FORM and filed a statement, which reads, in pertinent part, as follows:

I can only say that per the regulations that were provided to me, I have done my best to provide proof of mitigation and redemption in the nearly twenty years since the worst mistake of my life. If I were going to surrender to a downward spiral that most others in my situation could have, it would have happened long ago. Instead I rebounded from a devastating experience and grew up very quickly in the process.

In closing, as you review this case, please keep in mind the person behind it and the obstacles I have faced and overcome over nearly two decades. I sincerely regret what happened then, it was *the* big mistake of my life. Since then, I have worked hard to successfully achieve a modicum of respect and career. . . . One mistake does not indicate a pattern of mistakes and I hope that the pattern you see in my life is not inconsistent with my current job and its duties.

(Applicant's Letter, dated 12/24/02, at 1; emphasis in original.)

POLICIES

General Policy Considerations and Whole Person Concept

"[No] 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 the 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. 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.

Paragraph E2.2.1 of Enclosure 2 to the Directive, as amended, provides adjudicative guidelines for determining eligibility for access to classified information and defines the adjudicative process as "the careful weighing of a number of variables known as the whole person concept." In following this policy precept, adjudicators must examine a sufficient period of a person's life to determine whether the individual is eligible for a security clearance and they should consider available and reliable past and present information about the Applicant that is both favorable and unfavorable. In evaluating the relevance of an individual's conduct, the adjudicator should 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. *See Directive*, Enclosure E2, Part E2.2., Sub-parts E2.2.1.1 to E2.2.1.9.

Criminal Conduct and 10 U.S.C. § 986

In addition to the policy guidelines discussed above, adjudicators must follow additional guidance on the granting or renewal of security clearances mandated by more recent legislative action. By Memorandum dated June 7, 2001, the Deputy Secretary of Defense promulgated policy guidance for implementing Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Chapter 49 of Title 10 of the United States Code by adding a new section, enumerated 10 U.S.C. § 986. 10 U.S.C. § 986(c)(1) provides, in pertinent part, that a person is disqualified from being granted a security clearance if "[t]he 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 Deputy Secretary's memorandum specifies that the provisions of 10 U.S.C. § 986(c)(1) apply "to any DoD [Department of Defense] officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in inactive status, who is under consideration for the issuance or continuation of eligibility for access to classified information"

Attachment 1 to the Deputy Secretary's Memorandum of June 7, 2001, provides general guidance for DoD adjudicators charged with making determinations of an individual's suitability for a security clearance under the provisions of 10 U.S.C. § 986. That guidance states that the disqualification from eligibility for security clearance under 10 U.S.C. § 986 applies to "persons with convictions in both State and Federal courts, including UCMJ [Uniform Code of Military Justice] offenses, with sentences imposed of more than one year, regardless of the amount of time actually served."

Also attached to the Deputy Secretary's Memorandum of June 7, 2001, are revised adjudication guidelines, originally promulgated by the Special Assistant to the President for National Security Affairs in March 1997, pursuant to Executive Order 12968, which pertain to criminal conduct, drug involvement, and emotional, mental and personality disorders. The Deputy Secretary's Memorandum states that these adjudication guidelines have been revised to reflect the provisions of 10 U.S.C. § 986.

The relevant revised adjudication guideline pertaining to the instant case is Guideline J: Criminal Conduct, which reads, in pertinent part, as follows:

The Concern: A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;
- c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year [footnote omitted];

...

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent;

b. The crime was an isolated incident;

...

f. There is clear evidence of successful rehabilitation.

g. Potentially disqualifying condition... c. ... 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.

Footnote 1 in revised adjudication Guideline J reads: "Under the provisions of 10 U.S.C. § 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition."

Burden of Proof

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.

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue applicant's security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government, predicated upon trust and confidence. Where the 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 is nevertheless security worthy. The U.S. Supreme Court has held that the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan, supra*, at 531.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to the adjudicative guidelines at Enclosure E2.2 and E2.2.3.10, Criminal Conduct Guideline J:

On November 25, 1983, Applicant brought his conduct within the first, second, and third disqualifying conditions of criminal conduct (a,b,c) under Guideline J, as revised pursuant to the Deputy Secretary's Memorandum of June 7, 2001, when he admitted to and was convicted of the commission of a single serious crime identified as Aggravated Battery with a Deadly Weapon and was sentenced to imprisonment for a term exceeding one year.

Applicant's subsequent conduct meets mitigating conditions a and b under revised Criminal Conduct Guideline J because his criminal behavior was not recent, having occurred over 19 years ago, when Applicant was 21 years of age and has never been repeated, making it an isolated incident. Applicant's case in mitigation is strengthened as there has been no criminal conduct by Applicant since 1983, and the record demonstrates clear evidence of successful rehabilitation. (Revised Guideline J, mitigating conditions a, b, and f.) Additionally, in 1992, Applicant received from

the Governor of his State a Certificate of Pardon and Restoration of Citizenship which indicated a finding that his conduct was "in a law-abiding manner."

I find that the evidence presented by Applicant under Mitigating Conditions a, b, and f of revised Guideline J is more than enough to overcome Applicant's one incident of criminal conduct on November 25, 1983. However, notwithstanding strong persuasive evidence of mitigation under Guideline J, the provisions of 10 U.S.C. § 986 prohibit the Department of Defense 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." Pursuant to the statute, only the Secretary of Defense or the secretary of the military department concerned has the authority to authorize an exception to the prohibition against granting or renewing a security clearance under these circumstances. See 10 U.S.C. § 986(d). Absent the prohibition imposed by 10 U.S.C. § 986, I would find that Applicant has demonstrated that it is in the national interest to grant him a security clearance.

FORMAL FINDINGS

Formal Findings For or Against Applicant on the allegations set forth in the SOR as required by Enclosure 3, subsection E3.1.25 of Directive 5220.6 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 continue a security clearance for Applicant. Clearance is denied. However, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Joan Caton Anthony

Administrative Judge