

DATE: March 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-27066

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-two year old Applicant's 1983 arrest for assault in the 1st degree (reduced to assault in the 2nd degree), when he was 22 years old, and his subsequent conviction of the reduced charge, led to a sentence of imprisonment for three years (suspended). In May 1990, his civil and political rights were restored. The clear evidence of successful rehabilitation, and the absence of any subsequent criminal conduct, would normally mitigate the Government's security concerns. However, the application of 10 U.S.C. §986 disqualifies him from such eligibility. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. §986 is recommended.

STATEMENT OF THE CASE

On September 24, 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 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, 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 October 30, 2002, Applicant responded to the allegations set forth 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 January 7, 2003. A complete copy of the file of relevant material (FORM) ⁽¹⁾ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did so on February 10, 2003. The Government did not object to the submission. The case was assigned to this Administrative Judge on March 6, 2003.

FINDINGS OF FACT

Applicant has admitted portions of the factual allegation pertaining to criminal conduct under Guideline J. Those admissions are incorporated herein as 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 additional findings of fact:

Applicant is a 42-year old employee of a defense contractor, and is seeking to obtain a security clearance.

Applicant has been involved in one criminal incident. The scenario which follows was furnished largely by Applicant, is un rebutted by the Government, and in the absence of evidence questioning Applicant's credibility, is accepted as findings of fact. On October 22, 1983, one month shy of his 23rd birthday, Applicant was driving along a highway when the operator of another motor vehicle commenced a series of road maneuvers in which he repeatedly cut in front of Applicant's vehicle and slammed on his brakes in an apparent attempt to have Applicant rear-end his vehicle. (2) This situation continued for approximately two miles when the other vehicle suddenly pulled off to the side of the road and stopped. Applicant was afraid to pass the other, more powerful, vehicle so he simply stopped about 150 feet behind that vehicle. The driver backed his vehicle towards Applicant and accelerated towards him. (3) Applicant retrieved his licensed handgun from the glove box (4) and attempted to out-manuever the other vehicle and make a run for it. As he did so, the other driver swerved out onto the highway and tried to ram Applicant's vehicle. At that point, fearing for his life, Applicant fired what he intended to be a warning shot over the hood of the other vehicle. (5) Applicant's aim was faulty, and the shot hit the other vehicle in the side, unbeknownst to Applicant at that time. (6) Applicant managed to escape, and drove home.

Upon arriving home, Applicant called the local police department to report the incident, but was told he had to report it in the jurisdiction where it had occurred. He did so. (7) Upon the arrival by the police, Applicant was placed under arrest and taken in for questioning. He was released on bail, pending trial. (8) At the time of his arrest, Applicant was charged with assault in the 1st degree. (9) During the testimony of the "victim" - the other driver, the prosecutor offered Applicant a plea bargain to which, after discussing the matter with his attorney, Applicant agreed. (10) In exchange for his plea to the reduced charge of assault in the 2nd degree, (11) on June 25, 1984, he was sentenced to three years confinement (suspended), three years probation, costs, and community service for 12 Saturdays. (12)

Applicant satisfactorily completed his probationary period, paid his costs, and completed his community service. (13) On May 7, 1990, upon his petition, and because he had proven to the State Board of Pardons and Paroles that he had "so conducted himself as to demonstrate his reformation and to merit pardon with restoration of civil rights," (14) his civil and political rights, forfeited as a result of the conviction, were restored. (15)

Since his restoration of civil and political rights, Applicant has held a number of positions with a variety of organizations, including his most recent one--as a CIS/MIS specialist--which he commenced in June 2000. The quality of Applicant's performance was not documented. He has attended community college, ended an unhappy marriage in 1987, and currently resides with his second wife, whom he married in 1991, and one child.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the

Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Criminal Conduct - Guideline J]: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

- (1) allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses;
- (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.

Conditions that could mitigate security concerns include:

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident;
- (4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
- (6) there is clear evidence of successful rehabilitation.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. §986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD 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 an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;
- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or

(4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," ⁽¹⁶⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

With respect to Guideline J, the Government has established its case. By his own admission, Applicant fired a handgun in the direction of another motorist during a highway dispute, and was eventually arrested and charged with criminal conduct in October 1983. The original charge of assault in the 1st degree was eventually reduced to assault in the 2nd degree, and Applicant entered a plea of guilty to the reduced charge. He was sentenced, in part, to be imprisoned for a term of three years confinement (suspended). Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1., DC E2.A10.1.2.2., and DC E2.A10.1.2.3.

It has been 19 years since the criminal conduct of late 1983. Since that time, Applicant has not been involved in any additional criminal conduct. Those facts would seem to activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1. as well as MC E2.A10.1.3.2. Moreover, as acknowledged by the State Board of Pardons and Paroles, and by virtue of his spotless record since the incident, there is clear evidence of successful rehabilitation, thus activating MC E2.A10.1.3.6. In addition, the appearance that his subsequent maturity and involvement in family and church-related activities seem to have eliminated the factors leading to the violation and are not likely to recur, activating MC E2.A10.1.3.4. A person should not be held forever accountable for misconduct from the past when there is a clear indication of subsequent reform, remorse, or rehabilitation. Under other circumstances, I would conclude Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case, and the allegation of the SOR would be concluded in favor of

Applicant.

However, Applicant's criminal conduct in this regard also falls within the application of 10 U.S.C. §986. He was convicted in a state court of a crime and sentenced to imprisonment for a term of three years, a term which obviously exceeds the one year period envisioned in the law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of more than one year, regardless of the amount of time actually served. In this instance, Applicant was fortunate enough to have his prison term suspended rather than actually ordered and served, but that fact does not help him in this issue. Consequently, by virtue of 10 U.S.C. §986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegation 1.a. of the SOR, is concluded against Applicant.

In this instance, I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

FORMAL FINDINGS

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: 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. However, I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

Robert Robinson Gales

Chief Administrative Judge

1. The Government submitted six items in support of its contentions.
2. *See* Item 6 (Statement of Subject, dated August 21, 2001), at 3.
3. *Id.*, at 4.
4. Applicant was licensed to carry a concealed handgun in the state. *Ibid.*
5. *Ibid.*
6. *Ibid.*
7. *Ibid.*
8. *Ibid.*
9. *See* Item 5 (Uniform Arrest Report, undated), at 1.
10. *See* Item 6, *supra* note 2, at 4.
11. *See* Response to SOR, dated October 30, 2002, at 2.
12. *See* Item 5 (Additional Arrest Narrative Continued, undated).

13. *See* Item 6, *supra* note 2, at 4.

14. *See* attachment to Response to SOR (Certificate of Pardon with Restoration of Civil and Political Rights, dated May 7, 1990).

15. *Ibid.*

16. *See* Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (*see* Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (*see* Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)