

DATE: August 17, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28109

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is unable to successfully mitigate the security concern stemming from his long-term history of criminal conduct. In addition, he is ineligible for access to classified information under 10 U.S.C. § 986 due to a criminal conviction resulting in his serving approximately 13 months of confinement. Clearance is denied.

STATEMENT OF THE CASE

On April 26, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. Also, the SOR alleges Applicant is ineligible for access to classified information based on application of 10 U.S.C. § 986, the so-called Smith Amendment. Applicant replied to the SOR on or about May 18, 2004. He admitted to all the SOR allegations and requested a hearing.

The case was assigned to me August 10, 2004. A notice of hearing was issued on September 2, 2004, scheduling the hearing for October 5, 2004. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the hearing transcript October 19, 2004. Issuing a decision in this case was delayed due to a moratorium imposed on all cases involving 10 U.S.C. § 986, and that moratorium was recently lifted or rescinded.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following findings of fact:

Applicant is a 53-year-old married man who is a native-born U.S. citizen. Since 1979, Applicant has worked for a company providing services to the U.S. Navy. He is seeking to retain a security clearance for this employment.

The SOR alleges, and Applicant does not dispute, a long-term history of criminal conduct. Starting in 1969 and continuing into 1996, Applicant was arrested 13 times for various offenses, including breaking and entering, drug offenses, and drunk driving. More recently in 2004, Applicant was arrested for the 14th time and was convicted of drunk driving for the fourth time. Many but not all of the arrests led to convictions. Some of these offenses are highlighted here.

In 1970 or 1971, Applicant was convicted of breaking and entering with intent to steal less than \$100.00. He was sentenced to 18 months of confinement, which was suspended and he was placed on probation.

In 1971, Applicant was convicted of breaking and entering with intent to steal less than \$100.00. He was sentenced to 18 months of confinement, and he served about 13 months.

In 1972, Applicant was convicted of possession of marijuana. He was sentenced to 12 months of confinement, served about 4 months, and was placed on 12 months probation.

In April 1973 or 1974, Applicant was arrested for possession of marijuana. A few months after his arrest, fearing a return to confinement, Applicant fled when an opportunity presented itself. Subsequently, in 1975, Applicant was arrested for carrying a concealed weapon in another state and the outstanding warrant for felony escape was discovered. Applicant was returned to his home state, convicted of the felony escape offense, and sentenced to five years of confinement. He served about five months in jail and was placed on five years probation.

Starting in 1981 and ending in 2004, Applicant was arrested five times for drunk driving. Concerning the first arrest in 1981, Applicant denies consuming any alcohol and indicates he paid a fine simply so he could continue on his out-of-state trip. The other four arrests, however, all led to convictions. In 1982, Applicant was convicted of driving under the influence of alcohol and sentenced to, among other things, 60 days in jail, suspended. In 1987, Applicant was convicted of driving under the influence of alcohol and sentenced to, among other things, 30 weekends of incarceration. In 1996, Applicant was convicted of driving under the influence of alcohol and sentenced to, among other things, 10 days in jail. Although not alleged in the SOR, it was discovered during the hearing that in 2004, Applicant was arrested for drunk driving during an out-of-state business trip. He was convicted and sentenced to, among other things, three years of probation. At the time of the hearing, he was pending a hearing concerning suspension or revocation of his driver's license in his home state.

Applicant addressed his consumption of alcohol in a June 2002 sworn statement. He indicated that before his 1996 drunk driving arrest, he drank alcohol in greater quantities compared with his current rate of consumption. Applicant felt he had a problem with alcohol and pointed to his drinking of 15 to 18 beers each weekend day. He described his then current drinking as consisting of having a couple of glasses of wine while eating out or while socializing with friends.

Applicant has worked for the same employer since 1979 and he has performed his job well. Exhibits A, B, C, D, and E attest to Applicant's attributes as a dependable, loyal, hardworking employee and family man.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽²⁾ There is no presumption in favor of granting or continuing access to classified information. ⁽³⁾ The government has the burden of proving controverted facts. ⁽⁴⁾ The U.S. Supreme Court has

said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁵⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.⁽⁸⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

In addition to Guideline J, under the so-called Smith Amendment, the Defense Department and the military departments may not grant or renew a security clearance for any DoD officer or employee, an employee, officer, or director of a DoD contractor, or a member of the armed forces on active duty or in an active status who falls under any of four statutory categories.⁽¹¹⁾ The statutory category at issue here is § 986(c)(1). As initially enacted by the U.S. Congress, this subsection of the statute provided as follows: "the person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." Effective October 28, 2004, subsection 986(c)(1) was legislatively amended to read as follows: "the person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year." In other words, the prohibition was lessened in that a sentence to confinement for more than one year no longer triggers the *per se* disqualification of an applicant for a security clearance. Now the *per se* disqualification applies only if an applicant was confined for more than one year.

The statute also provides that, in a meritorious case, the appropriate authority may authorize an exception to the statutory prohibition for persons in two of the four statutory categories; namely, paragraphs (1) and (4) of § 986(c). The statute does not define, explain, or describe a "meritorious" case. DOHA issued Operating Instruction 64, dated July 10, 2001, which requires, among other things, administrative judges to take the following action concerning waiver recommendations:

If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement 'I recommend further consideration of this case for a waiver of 10 U.S.C. 986' or 'I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.'

Here, based on the record evidence as a whole, the government established its case under Guideline J. The record evidence is crystal clear--Applicant has a long-term history of criminal conduct that creates doubt about his judgment, reliability, and trustworthiness. Given these circumstances, both DC 1⁽¹²⁾ and DC 2⁽¹³⁾ apply against Applicant. Many of the offenses are quite stale taking place during the 1970s in what was a wild period of Applicant's life. Indeed, in 1979 when Applicant began what is still his current job, he appears to have put the street crime and drug offenses behind him. Replacing these activities, however, was the irresponsible use of alcohol resulting in alcohol-related criminal conduct. Taken together, Applicant's history of criminal conduct shows a chronic lack of good judgment.

In addition to these matters, his 1971 conviction and 18-month sentence to confinement, adjudged by a state court, resulting in Applicant serving 13 months in confinement falls within the scope of 10 U.S.C. § 986, as amended. Accordingly, Applicant is, absent a waiver, ineligible for a security clearance.

I reviewed the six mitigating conditions⁽¹⁴⁾ under Guideline J and conclude none apply. Because the SOR was not amended to allege the 2004 drunk driving incident, I have not decided this case against Applicant on this basis. But I have considered the 2004 drunk driving incident in determining the applicability of the mitigating conditions and on the general question whether Applicant presented sufficient evidence to mitigate the criminal conduct security concern. Given his history of criminal conduct spanning more than 30 years--and his fourth drunk driving conviction in 2004--the record evidence of reform and rehabilitation is insufficient to conclude that Applicant has genuinely cleaned up his act. Lacking here is (1) the passage of time without further criminal conduct, and (2) clear evidence of successful rehabilitation, which would include evidence of responsible use of alcohol. Absent such evidence, Guideline J is decided against Applicant.

Because I am deciding this case against Applicant based on Guideline J in general--and not solely as a result of 10 U.S.C. § 986--a wavier recommendation is not called for. In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraphs a - n: 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. Clearance is denied.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
10. *Egan*, 484 U.S. at 528, 531.
11. 10 U.S.C. § 986(c)(1) through (c)(4).

12. "Allegations or admissions of criminal conduct, regardless of whether the person was formally charged."

13. "A single serious crime or multiple lesser offenses."

14. Set forth in the Directive, Enclosure 2, Attachment 10.