

DATE: May 3, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28568

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-six-year old Applicant had a lengthy history of substance abuse starting in 1973 and continuing until the early 1990s despite holding a security clearance since 1975. He was arrested in 1976, when he was 19 years old, and charged with distribution of PCP and conspiracy to distribute PCP. Upon his plea, he was convicted and sentenced for each charge individually: three years confinement (suspended) and three years supervised probation. The application of 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

STATEMENT OF THE CASE

On November 7, 2003, 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. The SOR 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 answer, dated December 3, 2003, Applicant responded to the allegations in the SOR and requested a hearing. The case was assigned to, and received by, me on March 29, 2004. A notice of hearing was issued on that date, scheduling the hearing for April 12, 2004, and it was held as scheduled. During the hearing, four government exhibits, one multi-part Applicant exhibit, and the testimony of one Applicant witness (the Applicant) were received. The transcript (Tr.) was received on April 20, 2004.

FINDINGS OF FACT

Applicant admitted both of the factual allegations (subparagraphs 1.a. and 1.b.) 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 46-year-old employee of a defense contractor, and is seeking to obtain a security clearance the level of which has not been revealed. He had previously held a CONFIDENTIAL security clearance from 1975 until the early 1990s. (1)

Applicant was a poly-substance abuser who purchased, possessed, used, and sold marijuana; contributed to the purchase, possessed, used, and sold Phencyclidine (PCP) - a hallucinogen; purchased, possessed, and used cocaine - a stimulant; possessed and used heroin - a narcotic; purchased, possessed, and used Lysergic Acid Diethylamide (LSD) - a hallucinogen; possessed and used barbiturates - a depressant, and consumed alcohol to intoxication. (2) He also "probably" used hashish and amphetamines. (3) His substance abuse started in 1973, when he was about 16 years old and a student in high school, (4) and continued periodically until the early 1990s. (5) Applicant abused drugs while he held a security clearance. (6)

In November 1976, when he was 19 years old, Applicant sold an ounce of PCP for \$150.00 to an undercover state police narcotics officer. (7) He was arrested and charged with distribution of PCP and conspiracy to distribute PCP. (8) The following April, upon his plea, Applicant was convicted of both charges, and sentenced for each charge individually. (9) For the charge of distribution of PCP he was sentenced to three years confinement (suspended) and three years supervised probation. (10) He received an identical sentence for the other charge. (11) After one year's good behavior, Applicant's supervised probation was terminated. (12) Applicant abstained from substance abuse during his supervised probation, (13) but for the remaining period of unsupervised probation, due to peer pressure and wanting to appear "cool," (14) he resumed his substance abuse and used unspecified drugs. (15)

In May 1998, Applicant entered an intensive outpatient treatment program of an addiction center, and attended 19 sessions involving education, addiction counseling, group counseling, and Alcoholics Anonymous (AA) sessions for conditions diagnosed as alcohol dependence and cocaine dependence. (16) He successfully completed the program in June 1998. (17)

Applicant attended college from September 1994 until at least 2002. (18) He received an associate of arts degree in 2003 and hopes to eventually earn a BS degree in business management. (19) He was married in 1979, divorced in 1990, and has one child born in 1981. (20)

Applicant has been employed by the same government contractor since November 1975, (21) where he is now a program specialist. He has also held a part-time job as an upholsterer since October 1998. (22) Supervisors and managers from both employers, as well as co-workers, and neighbors, all support his application and attest to the high quality of his character and professional performance. He has been characterized as reliable, straightforward and honest, innovative and a self-starter, persevering, dependable, caring, and respected. (23) His most recent performance evaluations have him rated generally as "very effective," the second highest of the five possible levels. (24)

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 guideline 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, as well as those which could mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

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," (25) 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 drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided 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 allegations in the SOR:

The government has established its case under Guideline J. By his own admission, Applicant was involved in criminal activity between 1973 and the early 1990s, as described above, with some of that activity resulting in his arrest. Upon his plea, Applicant was convicted of distribution of PCP and conspiracy to distribute PCP. He was sentenced for each charge individually: three years confinement (suspended) and three years supervised probation. After one year's good behavior, Applicant's supervised probation was terminated. Applicant's criminal conduct clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and CC DC 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*). The criminal activity surrounding his arrest and conviction is uncharged criminal conduct as it was not alleged in the SOR, and is discussed only for the purposes of describing the whole-person in the context of this security clearance review proceeding.

Applicant briefly abstained from substance abuse during his supervised probation largely because he was scared, but thereafter, he resumed his substance abuse and used unspecified drugs. It is of substantial concern that Applicant had the opportunity to be abstinent after he had been granted a security clearance in 1975, but he failed to seize that opportunity. His overall substance abuse, including the sale and distribution of PCP, amounted to a sundering of his fiduciary relationship with the government. In so doing, he took that special relationship and effectively dashed the trust and confidence which he had previously enjoyed.

It has been approximately 27 years since his arrest for distribution of PCP and conspiracy to distribute PCP. Since then, except for the continuing criminal activities 1977-early 1990s, Applicant has not been involved in any additional criminal conduct and has apparently turned his life around. Those facts would seem to activate Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*).

By virtue of his spotless record since the early 1990s, as well as his successful completion of an intensive outpatient treatment program of an addiction center, his continued attendance at AA meetings, his abstinence from further substance abuse, and the absence of more recent criminal conduct, there is substantial evidence of successful rehabilitation, thus activating CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). Moreover, as the conduct in question occurred only one time, I find that the criminal conduct was isolated as set forth in CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

A person should not be held forever accountable for misconduct from the past when there is a substantial indication of subsequent reform, remorse, or rehabilitation. Under other circumstances, I might conclude Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case, and the allegations of the SOR would be concluded in favor of Applicant.

However, Applicant's criminal conduct also falls within 10 U.S.C. § 986. He was convicted in a state court of two crimes and sentenced to three years confinement (suspended) for each crime--terms which obviously exceed 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 terms suspended rather than actually served, but that 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, allegations 1.a. and 1.b. of the SOR, are concluded against Applicant.

In this instance, I do not 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

Subparagraph 1.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. Moreover, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Robert Robinson Gales

Chief Administrative Judge

1. Government Exhibit 2 (Statement, dated March 12, 2002), at 3.
2. *Id.*, at 1-2.
3. Tr., at 36.
4. Government Exhibit 2, *supra* note 1, at 1.
5. Tr., at 28-29, 41.

6. Government Exhibit 2, *supra* note 1, at 3.
7. *Id.*, at 2; Government Exhibit 3 (U.S. Department of Justice, Federal Bureau of Investigation (FBI), Identification Record, dated February 13, 2002), at 2.
8. *Id.*, Government Exhibit 3.
9. Government Exhibit 3, *supra* note 7, at 2.
10. *Id.*
11. *Id.*
12. Government Exhibit 2, *supra* note 1, at 2.
13. Tr., at 28.
14. Tr., at 39.
15. Tr., at 28.
16. Government Exhibit 4 (Addiction Center report, dated March 28, 2002), at 1.
17. *Id.*
18. Government Exhibit 1 (Security Clearance Application (SF 86), dated January 29, 2002), at 1.
19. Tr., at 34; Applicant Exhibit A (Education Tab-Degree Certificate, dated August 31, 2003).
20. Government Exhibit 1, *supra* note 18, at 2-3.
21. *Id.*, at 2.
22. Government Exhibit 1, *supra* note 18, at 1.
23. Applicant Exhibit A (Character Reference Tab, dated April 1-10, 2004).
24. Applicant Exhibit A (Employment Tab-Employment Summary Records, dated March 6, 2003 and March 15, 2004).
25. Exec. Or. 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" (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" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)