DATE: December 9, 2004

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-30045

REMAND DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Bill Burdock, Esq.

SYNOPSIS

Applicant mitigated the criminal conduct security concerns raised by his history of criminal conduct and the personal conduct security concerns raised by his failure to list one of his convictions on his security clearance application. Nevertheless, he was barred from receiving a clearance by 10 U.S.C. § 986. Applicant appealed. The Appeal Board remanded the case for reconsideration in light of amendments to 10 U.S.C. § 986. As Applicant did not serve at least one year in jail, 10 U.S.C. § 986 no longer bars him from being granted a clearance. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 3 March 2003, DOHA issued a Statement of Reasons[(1)] (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 22 March 2003 and elected to have his case decided on the written record in lieu of a hearing. By letter dated 5 August 2003, Applicant's attorney requested a hearing before an administrative judge. The case was originally assigned to another judge who scheduled a hearing for 18 December 2003. The hearing was canceled due to a conflict with Applicant's counsel's schedule. The case was assigned to me on 13 January 2004 due to circuit rotation. On 5 April 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 14 April 2004.

In a decision dated 9 June 2004, I denied Applicant a clearance solely on the basis of 10 U.S.C. § 986. That statute provided that, absent a waiver from the Secretary of Defense, the Department of Defense was prohibited from granting or continuing a security clearance for any applicant who, as a result of a conviction in any U.S. court, had been sentenced to more than a year in jail. Applicant appealed that decision.

THE REMAND

On 28 October 2004, the President signed into law amendments to 10 U.S.C. § 986. The statute now provides that the

prohibition on granting security clearances to applicants convicted of crimes for which they were sentenced to more than one year in jail applies only to cases in which the applicant actually served at least a year in jail.

As a result of that change, the Appeal Board remanded Applicant's case "for further processing consistent with [its] decision." ISCR Case No. 02-30045 at 4 (App. Bd. Nov. 8, 2004). The avowed purpose of the remand was "to allow the parties an opportunity--consistent with basic principles of due process--to present their views on the effect of Section 1062[(2)] on Applicant's case." *Id.* at 3. The Board further required the administrative judge to "allow the Department Counsel the opportunity to obtain guidance and direction from appropriate Department of Defense officials as to the legal effect of Section 1062 on pending cases and how the Department of Defense proposes to implement the statute." *Id.*

The Appeal Board is required to review issues raised by the parties "to determine whether harmful error occurred." Directive ¶ E3.1.32. The Board's scope of review is limited to determining whether:

(1) The administrative judge's findings of fact are supported by the evidence. Directive ¶ E3.1.32.1.

(2) The administrative judge adhered to the procedures of the Directive. Directive ¶ E3.1.32.2.

(3) The administrative judge's ruling or conclusions are arbitrary, capricious, or contrary to law. Directive ¶ E3.1.32.3.

The Board has the authority to "[r]emand the case to an Administrative Judge to correct identified error." Directive ¶ E3.1.33.2.

In this case, the Board had before it a question of whether or not to apply to Applicant's case on appeal amendments to 10 U.S.C. § 986 that had not been in effect at the time the administrative judge rendered his decision. Such an issue is a question of appellate law and one the Appeal Board is clearly responsible for answering. If the purpose of the remand was merely to obtain the views of the parties on the applicability of the amendments to 10 U.S.C. § 986, the Appeal Board could have requested briefs from the parties without remanding the case. Similarly, if the purpose of the remand was to have policymakers in the Department of Defense decide the legal effect of the amendments to 10 U.S.C. § 986, the Appeal Board could have asked Department Counsel to submit the views of the Department of Defense.

The Appeal Board does not have authority to remand a case to an administrative judge without identifying an error to be corrected,[(3)] and the Board did not identify such an error in Applicant's case. Nevertheless, I am not at liberty to disregard the Appeal Board's remand. *See* ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004) (an administrative judge must follow the Appeal Board's decision even if he disagrees with it). I will consider the Board's remand as setting aside my decision and ordering a new decision considering the applicability of the amendments of 10 U.S.C. § 986 to Applicant's case.[(4)]

As the Board required, I sought the views of the parties. Both parties informed me by telephone that they thought the amendments applied to Applicant's case and they did not wish to file additional briefs. Department Counsel declined the opportunity to seek the views of the Department of Defense policy makers, as whether the amendments are retroactive is a matter of law.

FINDINGS OF FACT

Applicant is a 49-year-old over-the-road truck driver for a defense contractor. Ex. 1 at 1; Tr. 20. He and his wife haul munitions for the military. Two drivers are required to perform these duties. One drives while the other sleeps. They are required to check the seals on the trailers every two hours to ensure the integrity of the load. After the attacks on 11 September 2001, the Department of Defense required the drivers to obtain security clearances. Tr. 82. Applicant's wife has a security clearance, he does not. A driver without a security clearance is not permitted in the tractor.

Applicant enlisted in the U.S. Navy in 1972, but was discharged for "disciplinary problems resulting from unauthorized absences and missing a ship's movement." Ex. 3 at 1.

In January 1975, when he was 19 years old, Applicant was arrested for, charged with, and convicted of larceny under $5. Answer. In February 1975, he was arrested for simple assault. The charge was later dismissed. Answer.

In October 1975, two police officers went to Applicant's residence and informed him he was the prime suspect in a shotgun murder, and they believed he had the shotgun in his residence. Applicant permitted the officers to search his residence. They found 14 ounces of marijuana, but no shotgun. Ex. 12 at 9. The marijuana consisted of several growing plants and other marijuana in baggies. Tr. 69. Applicant was indicted for possession of more than four ounces of marijuana. On 17 March 1977, Applicant pled guilty to the offense and was sentenced to confinement for four years. The sentence was suspended and Applicant was placed on probation for four years. As a result of Applicant satisfactorily fulfilling all conditions of the probation, the judgment of conviction was set aside and the indictment dismissed in March 1981. Ex. 11 at 3.

In February 1982, Applicant was arrested for theft by check ($20-$200). He was released and the case was dismissed after he made restitution. Ex. 10 at 3.

Applicant was arrested on 19 August 1983 and charged with carrying a prohibited weapon. On 9 September 1983, he was indicted for intentionally and knowingly threatening with immediate bodily injury and with use of a deadly weapon. Applicant pled guilty to aggravated assault with serious bodily injury in September 1985. His sentence included 10 years incarceration (suspended) and 10 years probation.

While on probation in June 1986, Applicant was arrested for illegal possession of a controlled substance-amphetamine. The charge was dismissed on 30 August 1988.

On 12 June 1993, a capias (arrest warrant) was issued for Applicant for failure to report to the probation officer and failure to pay court costs, probation fees, and restitution as ordered by the court in his sentence resulting from the September 1983 indictment. Answer.

Applicant completed a security clearance application on 4 January 2002. Question 24 asked Applicant if he had ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant answered "yes" and listed his arrest for possession of amphetamine . He failed to list his conviction for possession of over four ounces of marijuana. He did not list the marijuana offense as a felony in response to question 21, either.

Applicant and his wife are well-respected drivers who have compiled an excellent safety record and have won awards for handling loads without any security or safety violations.

POLICIES

"[N]o 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 that 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. Or. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

Guideline J-Criminal Conduct

In the SOR, DOHA alleged Applicant was convicted of larceny in January 1975 (¶ 1.a.), arrested for simple assault in February 1975, convicted of possession of marijuana over four ounces, a felony (¶ 1.c.), arrested and charged with theft by check in 1982 (¶ 1.d.), arrested and charged with carrying a prohibited weapon (¶ 1.e.), convicted of aggravated assault and sentenced to 10 years in prison in 1985 (¶ 1.f.), charged with illegal possession of amphetamine in 1986 (¶ 1.g.), named in a capias for failure to report to his probation officer and to pay court costs, probation fees, and restitution (¶ 1.h.), and is disqualified from obtaining a security clearance under 10 U.S.C. § 986 (¶ 1.i.). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1..

The Government established by substantial evidence and Applicant's admissions each of the allegations contained in the SOR. Applicant has a history of criminal allegations being lodged against him (DC E2.A10.1.2.1.), at least two of which were serious offenses (DC E2.A10.1.2.2.). Appellant had a turbulent life until 1986-arrests for assaults, weapons, and drugs over a span of 11 years. In 1993, he was still having trouble reporting to his probation officer as required and paying the costs associated with his previous conviction. Nevertheless, it is clear from the record that Applicant has turned his life around. He has been gainfully employed and not been in trouble in 11 years. His criminal behavior was not recent (MC E2.A10.1.3.1.) and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). After carefully weighing all of the evidence, as well as the disqualifying and mitigating conditions and the adjudicative factors in ¶ 6.3 of the Directive, I find for Applicant on SOR ¶¶ 1.a.-1.h.

On 30 October 2000, the President signed 10 U.S.C. § 986 into law. The law provided that, absent a waiver from the Secretary of Defense, the Department of Defense could not grant or continue a security clearance for any applicant who had been sentenced by a U.S. court to confinement for more than one year. 10 U.S.C. § 986. By memorandum dated 7 June 2000, the Deputy Secretary of Defense issued implementing criteria for the statute that required its application to cases in which the applicant did not actually serve any time in jail and cases that had previously been resolved favorably for an applicant. Therefore, 10 U.S.C. § 986 applied to Applicant even though he had not served any time in jail as a result of his convictions and his criminal convictions occurred well before the statute came into effect.

The 2004 amendments to 10 U.S.C. § 986 provide that the prohibition on granting an applicant a clearance for criminal conduct applies only if he actually served at least a year in jail for his offense. On reconsideration, I must determine whether to apply the amendments to Applicant.

Whether to apply a statute retroactively is generally a matter of congressional intent.

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i. e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Products et al., 511 U.S. 244, 280 (1994).

Congress did not expressly prescribe whether the amendments to 10 U.S.C. § 986 should apply retroactively. Application of the amendments retroactively would not "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* Therefore, there is no reason not to apply the amendments to Applicant's case. I conclude 10 U.S.C. § 986 no longer bars Applicant from being granted a clearance.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant deliberately falsified his SCA by failing to list his 1975 felony conviction for possession of marijuana (¶ 2.a.). Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

The Government established by substantial evidence and Applicant's admissions that Applicant failed to list his 1975 felony marijuana conviction in answer to question 24 on his SCA. But to be disqualifying, such a failure must have been deliberate. After reviewing his SCA, and the several offenses he listed, and observing his demeanor and listening carefully to his testimony, I am convinced his failure to list the offense was an oversight. I find for Applicant on ¶ 2.a.

FORMAL FINDINGS

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

Paragraph 1. Guideline F: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

2. The 28 October 2004 amendments to 10 U.S.C. § 986.

3. Directive ¶ E3.1.33.2. Administrative judges and boards of appeal are creatures of statute and regulation. They typically do not have the "inherent powers" regularly understood to be held by federal judges.

4. Whether the amendments to 10 U.S.C. § 986 apply to Applicant on reconsideration still does not necessarily answer the question that was squarely before Board--whether the amendments apply to a case on appeal.