

DATE: December 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12950

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

On May 1972, when Applicant was 35 years of age, he was indicted and charged with one count of Grand Larceny for stealing a 1968 Caterpillar bulldozer. Applicant was found guilty of Grand Larceny on September 12, 1972. He was sentenced to an indeterminate term of one to ten years imprisonment. The provisions of Title 10 U.S.C. 986 apply. Mitigation has not been shown. Clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

STATEMENT OF THE CASE

On February 14, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 clearance should be denied or revoked.

In two signed and sworn statements, dated March 13, 2003, and May 5, 2003, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. On July 25, 2003, Department Counsel submitted the Department's written case, which was prepared on May 24, 2003. A complete copy of the file of relevant material (FORM) was provided to the Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant filed a response to the FORM on July 16, 2003. The case was assigned to this Administrative Judge on July 30, 2003.

In the FORM, Department Counsel offered 13 documentary exhibits (Exhibits 1 - 13). Applicant's one page response to the FORM has been identified and entered into the record as Exhibit A.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct) of the Directive. The SOR contains four allegations 1.a., 1.b., 1.c., and 1.d. under Guideline J. In his response to the SOR, Applicant admits all allegations except 1.b. The admitted allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 67 years old and married. He is employed by a defense contractor, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector.

Guideline J (Criminal Conduct)

Applicant was arrested in 1962 and charged with HOLD JNV-DC. He was ordered to pay a \$50.00 fine and serve three days in jail.

On May 11, 1972, when Applicant was 35 years of age, he was indicted and charged with one count of Grand Larceny for stealing a 1968 Caterpillar bulldozer. Applicant was found guilty of Grand Larceny on September 12, 1972. He was sentenced to an indeterminate term of one to ten years imprisonment.

On July 3, 1985, Applicant was arrested and charged with Driving Under the Influence. He was found guilty and was fined \$250.00, sentenced to 30 days in jail and his driver's license was suspended for six months.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (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, Section E2.2.1. of Enclosure 2).

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)

The Concern: 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:

- 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. Convictions in a Federal or State court . . . of a crime and sentence to imprisonment for a term exceeding one year;

Conditions that could mitigate security concerns include:

g. Potentially disqualifying conditions c. and., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense . . . has granted a waiver.

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the U.S. Government that is predicated upon trust and confidence. Where 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guideline J:

The Government has established its case under Guideline J. Applicant's conduct that is the basis for allegation of 1.b. of the SOR is criminal and did result in his receiving an indeterminate term of one to ten years imprisonment. Under the provisions of Title 10 U.S.C. §986, a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment to a term exceeding one year, may not be granted or have renewed access to classified information. I resolve Guideline J against the Applicant.

Under Guideline J, I conclude that Disqualifying Conditions a, b, and c apply because Applicant's conduct did involve three criminal offenses over several years, including the one that resulted in the sentence of one to ten years. Applicant has not offered any evidence to rebut the Government's case regarding his criminal conduct. No Mitigating Conditions apply.

FORMAL FINDINGS

Formal Findings, as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive, are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1. a.: Against the Applicant

Subparagraph 1. b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

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

Martin H. Mogul

Administrative Judge