

DATE: June 1, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13649

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

Kris Miller, Esq., Department Counsel

FOR APPLICANT

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SYNOPSIS

Applicant is 39 years old. He works for a defense contractor. He was arrested in 1983

when he was 19 years old on several theft charges. He was sentenced on those charges to more than one year in jail, but they were suspended and he served three years probation. Since that time he has married, been employed steadily, and is a law-abiding resident of his state. Applicant mitigated the criminal justice security concerns. The Smith Amendment (10 U.S.C. § 986) applies and disqualifies him for a security clearance without a waiver. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

STATEMENT OF THE CASE

On July 22, 2003, the Defense Office of Hearings and Appeals (DOHA), under 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 under the personnel security Guideline J (Criminal Conduct) 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated August 23, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was assigned to me on December 22, 2003.

A Notice of Hearing was issued on January 20, 2004 setting the hearing for February 3, 2004. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance.

The Government presented ten exhibits, all of which were admitted into evidence, except Exhibit 8 which was withdrawn. Applicant appeared and testified, presented two witnesses, and offered no exhibits. I received the transcript (Tr.) of the hearing on February 11, 2004.

FINDINGS OF FACT

Applicant admitted all of the allegations contained in subparagraphs 1.b. of the SOR, and denied parts of subparagraphs 1.a. and 1.c. Those admissions are incorporated herein as findings of fact. The Government withdrew subparagraph 1.c. at the hearing because it was duplicative of subparagraph 1.a. (Tr. 29). After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 39 years old, married, and has an 11-year-old daughter. He is employed as a supervisor at a defense contractor. He is a machinist by training and experience. (Tr. 10, 11, 18, and 19; Exhibit 1 at 1 and 2)

Applicant left his mother's home during his high school years to live with his father. Then he had to move out of his father's house, and lived in his van his senior year of high school. He was homeless that year. He did not finish high school, but got a GED certificate that same year. (Tr. 14, 20, 25, 27)

Applicant was arrested in 1983 for breaking and entering into a golf course club house. He was 19 years old at that time. He sat in jail for five months, and was arrested there by another county's sheriff for theft of some power tools in the second county. Applicant pled guilty and "no contest" to all charges and cooperated with the police and prosecutor. He was convicted on his plea of "no contest" of grand theft, a third degree felony in his home state, of stealing from the golf club. He was also convicted of theft, a fourth degree felony, for the theft of the power tools. For both offenses, he was sentenced to at least one year in jail, and not more than 10 years in jail on the first charge, and not more than five years on the second charge. Those sentences were suspended, and Applicant was put on three years probation after serving six months in jail, including the five months he waited in jail for a trial on the first charge. Both county judges agreed to the suspension of the jail sentences and the imposition of three years probation, each to run concurrently with the other probation. Applicant successfully completed his probation. (Tr. 13 - 16, 23, 29, 30; Exhibits 2 to 7)

Applicant is a wonderful father and husband. He is well-thought of by his mother-in-law. Applicant attended a local university to get a college degree until 2001 part-time until he was diagnosed with multiple sclerosis, and decided to spend more time with his family. (Tr. 21, 36 to 41)

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 judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing he 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 predicted upon the applicant meeting the security guidelines contained in the Directive.

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. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

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).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance.: ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Exec. Or. 12968 § 3.1(b).

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:

Guideline J - Criminal Conduct

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

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. ⁽¹⁾

E2.A10.1.3. Conditions which could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying condition E2.A10.1.2.3 may not be mitigated

unless, where meritorious circumstances exist, the Secretary of Defense or the

Secretary of the Military Department concerned has granted a waiver. [\(2\)](#)

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than a year, according to the terms of 10 U.S.C. § 986 (Smith Amendment).

Smith Amendment

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 of Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of that Act. The amendment was added to Title 10, United States Code, adding 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 Directive was amended in Guideline J to incorporate the new Disqualifying Conditions and procedural guidance on the waiver process when the conviction and sentencing condition is applicable. The situation described in this case involves the conviction and sentencing Disqualifying Condition and the waiver procedural guidance.

The statutorily required Disqualifying Condition applies to any employee of a DoD contractor, who is under consideration for the issuance or continuation of eligibility for access to classified information and who has been convicted in any court of the United States or a crime and sentenced to imprisonment for a term exceeding one year, regardless of the time actually served.

Under Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, I drew those inferences and conclusions which have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

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

With respect to Paragraph 1 and Guideline J, two Disqualifying Conditions (DC) in the Guideline J apply: DC 1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and DC 2 (*a single serious crime or multiple lesser offenses*). Applicant was arrested twice in 1983 for theft, and was sentenced to more than a year in jail. The Government proved its case of these allegations.

I find two Mitigating Conditions (MC) apply in this case. MC 1 (the criminal behavior is not recent) applies because the offenses took place in 1983, 21 years ago. MC 6 (there is clear evidence of successful rehabilitation) applies. Applicant has not been in any criminal trouble since then. Instead, he is gainfully employed, married, and raising an 11-year-old daughter. Furthermore, the Government in its closing argument acknowledged that the passage of time mitigated the security concerns (Tr. 23, 29, 43). I find Applicant and his family members' testimony credible and persuasive on this issue. The non-Smith Amendment C here outweighs the non-Smith Amendment DC, and under those circumstances separately, I would find for the Applicant. However, the disqualifications contained in the Smith Amendment control here, as explained in this Decision.

Regardless of the analysis under the Guideline J that would grant Applicant a security clearance, the Smith Amendment,

10 U.S.C. § 986, precludes the granting or renewal of a security clearance to those applicants for access who have been convicted in any Federal or State court and sentenced to more than one year, regardless of the time actually served. Applicant was convicted in 1983 of two offenses, and for both offenses he received sentences of more than one year confinement in the state penitentiary or reformatory. Therefore, he falls within the purview of the Smith Amendment. Therefore, DC 3 applies. MC 7 (which in some memoranda documents is lettered "g" under the mitigating conditions heading labeled "E2.A10.1.3", but I label it here as "MC 7" for consistency in the Directive), the procedural guidance stated above, applies here. Applicant is ineligible for a clearance without a waiver. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline J: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Withdrawn

DECISION

In light of all the circumstances and facts 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 recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Philip S. Howe

Administrative Judge

1. Added by the implementing memorandum of June 2, 2001, to be added to the next revision of the Directive.
2. Added by the implementing memorandum of June 2, 2001, to be added to the next revision of the Directive