

DATE: December 9, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17102

REMAND DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted of several offenses in 1980 and sentenced to more than a year in jail. He has delinquent debts totaling more than \$25,000. Applicant mitigated his criminal conduct, but was denied a security clearance because of 10 U.S.C. § 986 and financial considerations security concerns. Applicant appealed. The Appeal Board remanded the case for reconsideration in light of the amendments to 10 U.S.C. § 986. The bar to obtaining a security clearance under 10 U.S.C. § 986 no longer applies to Applicant, but Applicant failed to mitigate the financial considerations security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 18 July 2003, DOHA issued a Statement of Reasons (SOR)⁽¹⁾ detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct) and Guideline F (Financial Considerations) of the Directive. Applicant answered the SOR in writing on 13 August 2003 and elected to have a hearing before an administrative judge. The case was originally assigned to another judge, but was reassigned to me on 13 January 2004. On 16 March 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 25 March 2004. I kept the record open to permit Applicant to provide a current credit report. Applicant provided the report through Department Counsel on 22 March 2004, and it was admitted into evidence as Exhibit E.

In a decision dated 27 April 2004, I denied Applicant a clearance. I found Applicant had mitigated the criminal conduct security concerns, but the Department of Defense was prohibited from granting him a clearance under 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. I also concluded Applicant had failed to mitigate the financial considerations security concern. 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. 02-17102 at 4 (App. Bd. Nov. 5, 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 the 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 matter 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 for the Board, the Appeal Board could have asked Department Counsel to submit the views of the Department of Defense.

The adverse decision in Applicant's case was also based on his failure to mitigate the security concerns raised by his financial situation. Unless the Board determined the administrative judge erred in finding against Applicant on Guideline F (Financial Considerations), the applicability of 10 U.S.C. § 986 was moot.

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 43-year-old aircraft mechanic who works for a defense contractor. Tr. 16; Ex. 1 at 1, 2. He served 13 years as a voluntary firefighter and emergency medical technician. Ex. 2 at 3.

In December 1979, when Applicant was 19 years old, he lived with a friend whom he believed was not paying his fair share of the bills. Applicant stole from his employer by taking money from the cash register. Later that month, Applicant stole three checks from his roommate and used them by forging his roommate's signature. Tr. 17-18.

In January 1980, Applicant was indicted on three counts of criminal possession of a forged instrument. In February 1980, Applicant pled guilty to, and was convicted of, the three counts. He was sentenced to two years' confinement on each offense, with the sentences to run concurrently. As a result, Applicant was jailed until November 1980, when he was released on parole. Ex. 3.

In May 1980, Applicant pled guilty to, and was convicted of, theft by failure to make required disposition of the money he took from his employer's cash register. The court sentenced him to a year in jail, to run concurrently with his sentence for the possession of the forged instruments. Ex. 3.

In his Answer to the SOR, Applicant admitted 9 of the 11 delinquent debts alleged. He denied the debts alleged in ¶¶ 2.b. and 2.c. were delinquent and the credit report he submitted into evidence confirms those debts were paid, although after they had been charged off as bad debts. Ex. E at 4.

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 in 1980 on three counts of criminal possession of a forged instrument (¶ 1.a.) and one count of failure to make required disposition (¶ 1.b.). DOHA further alleged his sentences as a result of the possession of forged instruments disqualified him from holding a security clearance absent a waiver from

the Secretary of Defense. ¶ 1.c. 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 in the SOR. Applicant has a history of criminal conduct involving serious and lesser offenses. DC E2.A10.1.2.2. However, the criminal conduct is not recent-it all occurred almost 25 years ago. MC E2.A10.1.3.1. At the time of the offenses Applicant was only 19 years old and he has not committed had any further criminal conduct. There is clear evidence of successful rehabilitation. MC E2.A10.1.3.6. Finding is for Applicant on ¶¶ 1.a. and 1.b.

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 does not bar Applicant from receiving a clearance.

Guideline F-Financial Considerations

In the SOR, DOHA alleged Applicant had 11 delinquent debts. ¶ 2.a.-2.k. An applicant who is financially overextended is at risk of having to engage in illegal acts to generate funds. Directive ¶ E2.A6.1.1.

The Government established by substantial evidence and Applicant's admissions that Applicant has a history of not meeting his financial obligations (DC E2.A6.1.2.1) and is unable or unwilling to satisfy his debts (DC E2.A6.1.2.3.). Some of the debts alleged as delinquent in the SOR, and admitted to by Applicant in his answer, do not appear on the credit report Applicant submitted. Ex. E. However, Applicant failed to demonstrate that these debts had been paid rather than just removed from the credit report for lack of payment. Ex. E confirms the delinquent nature of several debts including those alleged in SOR ¶¶ 2.a., 2.h., 2.i., and 2.k. In addition, Applicant refuses to pay the debt alleged in ¶ 2.f. The delinquent debts total well over \$25,000. Applicant failed to demonstrate that any of the mitigating conditions listed under the guideline apply. After reviewing all of the evidence, and without viewing each debt in isolation, I find against Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Paragraph 2. Guideline F: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Subparagraph 2.f.: Against Applicant

Subparagraph 2.g.: Against Applicant

Subparagraph 2.h.: Against Applicant

Subparagraph 2.i.: Against Applicant

Subparagraph 2.j.: Against Applicant

Subparagraph 2.k.: Against Applicant

DECISION

In light of all of 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.

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 the Board--whether the amendments apply to a case on appeal.