

DATE: December 22, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-20410

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Thirty-three-year old Applicant's 1991 arrest for carrying concealed weapon, break or enter a motor vehicle, and injury to personal property, when he was 19-years old, and his subsequent conviction of injury to personal property (a misdemeanor), following a plea agreement, led to a sentence of probation for 24-months, a fine, and community service. The absence of any subsequent criminal conduct has mitigated the government's security concerns. The application of 10 U.S.C. § 986 does not apply. Clearance is granted.

STATEMENT OF THE CASE

On June 18, 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 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 a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated July 8, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on October 2, 2003. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by November 15, 2003, and it appears he chose not to do so. The case was assigned to me on December 3, 2003.

FINDINGS OF FACT

Applicant has admitted the factual allegations 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 33-year old employee of a defense contractor, and is seeking to obtain a security clearance the level of which has not been specified.

Applicant was involved in one criminal incident which occurred approximately 13 years ago. In January 1991, when he was 19-years-old, Applicant was arrested and charged with carrying concealed weapon (a misdemeanor), break or enter a motor vehicle (a felony), and injury to personal property (a misdemeanor).⁽²⁾ On April 11, 1991, he was convicted, following a plea agreement, of injury to personal property and, according to court records, sentenced to probation for 24 months, a fine, and community service.⁽³⁾ The FBI Identification Record notes the arrest occurred in January 1991,⁽⁴⁾ contrary to the SOR allegation which states April 1991. Applicant's recollection of the sentence differs from that information which appears in the court records, as he was under the impression the sentence included imprisonment for 24 months, suspended.⁽⁵⁾ Since neither the court records nor the FBI records indicate the disputed portion of the purported sentence, and the distant memory of individuals may not be entirely accurate, I have chosen to accept the contemporaneous official records as more accurate than current memory of a lay person. Accordingly, the sentence did not include imprisonment for 24 months.

Immediately prior to the arrest, Applicant, his brother, and two friends were driving around in Applicant's automobile. As they dropped off one of the friends at his apartment complex, Applicant's brother and one friend started looking into parked cars to see if there was anything worth taking. Applicant knew what they were doing but took no steps to stop them.⁽⁶⁾ Instead, he drove over to a nearby service station to use the facilities. As he was returning to the apartment complex he noticed a woman yelling at his brother and the friend and everyone scattered. Applicant's brother ran home but the friend jumped into Applicant's car and they drove home as well. The police showed up and arrested Applicant and his friend.

Since his January 1991 arrest, Applicant has avoided any further incidents with the authorities. He was married in 1996. Applicant has been employed as a supply clerk by the same company since August 2001. The quality of his performance has not been developed in the record.

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 guidelines 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 this adjudicative guideline are set forth and discussed in the Conclusions section 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," ⁽⁷⁾ 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 allegation set forth in the SOR:

With respect to Guideline J, the government has established its case. By his own admission, when he was 19-years-old, Applicant was arrested and charged with carrying concealed weapon (a misdemeanor), break or enter a motor vehicle (a felony), and injury to personal property (a misdemeanor). He was eventually convicted, following a plea agreement, of injury to personal property and, according to court records, sentenced to probation for 24 months, a fine, and community service. Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), and DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*). However, neither the court records nor the FBI records support the SOR allegation that Applicant was sentenced to imprisonment for 24 months (suspended). To the contrary, those official records indicate Applicant was sentenced to probation for 24 months, thus nullifying the applicability of 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*).

It has been approximately 13 years since the criminal conduct of early 1991. Since that time, Applicant has not been involved in any additional criminal conduct. Those facts would seem to activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1. (*the criminal behavior was not recent*). Moreover, by virtue of his spotless record since the arrest, there is clear evidence of successful rehabilitation, thus activating MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). In addition, his subsequent maturity and involvement in family and job activities seem to have overcome his prior immaturity, activating MC E2.A10.1.3.4. (*the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*).

A person should not be held forever accountable for misconduct from the past, especially the indiscretions of his early adulthood, when there is a clear indication of subsequent reform, remorse, or rehabilitation. Under these circumstances, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case, and the allegation of the SOR is concluded in favor of Applicant.

Applicant's criminal conduct in this regard has been alleged to fall within 10 U.S.C. § 986. While he may have admitted his sentence was imprisonment for 24 months (suspended), as compared to probation for 24 months, as noted above, neither the court records nor the FBI records support his admissions. It appears his memory was faulty and inconsistent with those records. I have chosen to accept the contemporaneous official records as more accurate than current memory of an individual unschooled in matters of law. Accordingly, the sentence did not include imprisonment for 24 months, and 10 U.S.C. § 986 does not apply. Consequently, I conclude Applicant is eligible for a security clearance. Accordingly, allegations 1.a. and 1.b. of the SOR, are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is 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: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

DECISION

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

Robert Robinson Gales

Chief Administrative Judge

1. The government submitted seven items in support of its contentions.
2. Item 5 (Federal Bureau of Investigation (FBI) Identification Record, dated October 3, 2001), at 3-6.
3. Item 7 (Defense Security Service Report of Investigation, undated), at 2.
4. Item 5, *supra* note 2, at 3.
5. Item 7, *supra* note 3, at 3; Item 3 (Response to SOR, dated July 8, 2003), at 3.
6. *Id.* Item 7, at 2.
7. 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.)