

DATE: November 23, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21991

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a 30-year history of arrests and convictions between 1958 and 1988, the last 19 years of which consist solely of alcohol-related driving offenses. Although none of the offenses are recent, the number of offenses, the serious nature of several of the offenses, and the fact there is no clear evidence of rehabilitation preclude me from finding for Applicant. Absent a waiver from the Secretary of Defense, the Department of Defense is precluded from granting Applicant a clearance because he was incarcerated for 18 months as a result of a robbery conviction. 10 U.S.C. § 986. 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 25 May 2004, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 6 July 2004 and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on 16 August 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on 27 August 2004 and failed to respond within the allotted 30-day period. The case was assigned to me on 16 November 2004.

FINDINGS OF FACT

Applicant is a 67-year-old employee of a defense contractor.

In September 1958, Applicant was charged with larceny and wrongful possession of marijuana. He was convicted by court-martial and sentenced to one year in jail and a bad conduct discharge.

In 1959, he was arrested and charged with simple battery. He was convicted of the offense and fined \$250.

In August 1961, Applicant was arrested and charged with robbery. The charge was later dismissed. In January 1962, he was charged with robbery. He was convicted and sentenced to five years to life in prison. He served 18 months.

In December 1965, he was charged with attempted kidnaping. The charge was later dismissed.

In April 1968, he was arrested and charged with burglary. He was arrested and charged with prostitution in June 1968. The disposition of those charges is unknown.

In May 1969, Applicant was arrested and charged with petty theft. He was convicted of the offense and sentenced to 30 days in jail. He was also arrested in July 1969 and charged with petty theft. He was convicted of the offense and sentenced to six months in jail, with all but 15 days suspended.

Since 1969, all of his arrests and convictions have been for alcohol-related driving offenses. In June 1971, he was arrested and charged with driving under the influence (DUI) of alcohol. He was arrested in February 1972 and charged with drunk driving. The disposition of these offenses is unknown. Applicant was arrested in March 1976 and charged with drunk driving on a highway. He was convicted of the offense and sentenced to 10 days in jail, suspended, and fined \$315 with \$125 suspended. He was arrested in February 1978 and charged with DUI. He was convicted and sentenced to 36 months probation and fined \$250. He was arrested in October 1988 and charged with DUI and driving with an alcohol level in his blood greater than .08%. He pled guilty to driving with an excessive level of alcohol in his blood, was convicted, and sentenced to jail for four days and fined \$1,000.

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 personnel 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

In the SOR, DOHA alleged Applicant was convicted of larceny and possession of marijuana in 1958 (¶ 1.a), convicted of committing a simple battery in 1959 (¶ 1.b), charged with robbery in 1961 (¶ 1.c), convicted of robbery and sentenced to five years to life in prison in 1962 (¶ 1.d), charged with attempted kidnaping in 1965 (¶ 1.e), charged with burglary in 1968 (¶ 1.f), charged with prostitution in 1968 (¶ 1.g), convicted for petty theft in 1969 (¶ 1.h), convicted of another petty theft charge in 1969 (¶ 1.i), arrested for DUI in 1971 (¶ 1.j), charged with drunk driving in 1972 (¶ 1.k), convicted of a 1976 drunk driving incident (¶ 1.l), convicted of DUI in 1978 (¶ 1.m), convicted of driving with a blood-alcohol level greater than .08% (¶ 1.n), and because of his sentence to five years in prison as a result of his robbery conviction in 1962, he is disqualified from holding a security clearance absent a waiver from the Secretary of Defense (¶ 1.o). 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 30-year history of criminal activity, some of it serious. DC E2.A10.1.2.2. The criminal incidents are not recent--MC E2.A10.1.3.1--the last being in 1988. The only evidence of rehabilitation is that he has not been arrested, charged, or convicted in the past 16 years. *See* MC E2.A10.1.3.6. After carefully considering all the evidence, I am unable to conclude Applicant mitigated the security concerns raised by his serious criminal conduct. I find against Applicant on ¶¶ 1.a.-1.n.

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who, as a result of a conviction by any court in the U.S., has been sentenced to confinement for more than one year and served at least one year. 10 U.S.C. § 986 (2004). Applicant is subject to 10 U.S.C. § 986 as a result of being sentenced to five years to life and having served 18 months in confinement for robbery. Having found against Applicant on other allegations, it is not appropriate to make a recommendation on waiver. *See* DOHA OI 64 ¶ 3.e (Jul. 10, 2001).

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraphs 1.a-1.n: Against Applicant

Subparagraph 1.o: Against Applicant

DECISION

In light of all of the circumstances presented 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 (Directive).