

DATE: December 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-25444

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

Kathryn MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 33 years old. In 1991, at age 20, he was arrested and pled guilty to breaking into two businesses. He was sentenced to three years and six months imprisonment, with six months of the sentence to be served in work detention and the remaining three-year sentence suspended, subject to three years supervised probation upon release from work detention. By operation of law, the provisions of 10 U.S.C. §986 preclude a grant of clearance, absent meritorious waiver by the Secretary of Defense. Clearance is denied. Waiver is not recommended.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On June 3, 2003, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive and 10 U.S.C. §986. Applicant answered the SOR in writing on June 12, 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on July 31, 2003. On August 27, 2003, 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 transcript (Tr.) of the proceeding on September 17, 2003.

FINDINGS OF FACT

The SOR in this case contains three allegations of disqualifying conduct. Two of the allegations specify felonious conduct under Guideline J and one allegation recites that Applicant's felonious conduct under Guideline J disqualifies him from a security clearance under the provisions of 10 U.S.C. § 986. Applicant admitted the felonious conduct alleged in SOR subparagraph 1.a. and denied a second arrest for felonious conduct as alleged in SOR subparagraph 1.b.⁽³⁾ He offered evidence to mitigate his felonious conduct and requested that his case be considered for a waiver of the

provisions of 10 U.S.C. § 986. Applicant's admissions are incorporated as findings of fact.

Applicant is now 33 years old. In 1991, when he was 20, Applicant, at nighttime, with two companions, broke into two places of business, an ice cream store and a restaurant. They stole a safe from the restaurant containing approximately \$1800 in receipts, and they stole cash and food items from the ice cream store in the combined amount of less than \$300. They forced open and damaged the outside door of the ice cream store, and they damaged 16 ice cream containers and a video game machine within the ice cream store.

Applicant was arrested on June 19, 1991, and August 22, 1991, and charged with felonious conduct. He pled guilty to two counts of storehouse breaking and, in January 1992, he was sentenced to three years and six months of imprisonment. Six months of his sentence were ordered to be served in work detention, with the remaining three years of his sentence subject to three years of supervised probation upon his release from work detention. (Ex. 5, at 5-6.) Applicant's supervised probation was abated on August 24, 1994.

In the nine years since his release from probation, Applicant has committed no other felonies. In 1992, while still on supervised probation, Applicant undertook and completed a course of study in architectural and engineering drafting. He has been with his present employer for two years and presents a positive work record. Applicant has been married and divorced. He is the father of one child. He plans to marry his current fiancée, who has two children. Applicant was diagnosed with seasonal depression and was treated by a health professional in 1994 and 1995. He continues to take antidepressant medication to treat his condition. (Tr. 27-28.)

Applicant was cited for driving under the influence of alcohol in 2001 and 2002. In 2002 his driving privileges were restricted for a period of 30 days and he paid a \$150 fine. At the time of his hearing, Applicant was serving one year of unsupervised probation on the driving under the influence violations. (Tr.32-37.) Applicant stated that he drank to intoxication approximately two months prior to his hearing. (Tr. 49.) He said he drinks to intoxication about three times a year. (Tr.50.) Applicant said he no longer drinks and drives. (Tr. 50.)

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 and mitigating conditions 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.

Criminal Conduct and 10 U.S.C. § 986

In addition to the policy guidelines discussed above, adjudicators must follow additional guidance on the granting or renewal of security clearances mandated by more recent legislative action. By Memorandum dated June 7, 2001, the Deputy Secretary of Defense promulgated policy guidance for implementing Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Chapter 49 of Title 10 of the United States Code by adding a new section, enumerated 10 U.S.C. § 986. 10 U.S.C. § 986(1) provides, in pertinent part, that a person is disqualified from being granted a security clearance if "[t]he person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The Deputy Secretary's memorandum specifies that the provisions of 10 U.S.C. § 986(1) apply "to any DoD [Department of Defense] 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 inactive status, who is under consideration for the issuance or continuation of eligibility for access to classified information."

Attachment 1 to the Deputy Secretary's Memorandum of June 7, 2001, provides general guidance for DoD adjudicators charged with making determinations of an individual's suitability for a security clearance under the provisions of 10 U.S.C. § 986. That guidance states that the disqualification from eligibility for security clearance under 10 U.S.C. § 986 applies to persons with convictions in State courts, "with sentences imposed of more than one year, regardless of the amount of time actually served."

Also attached to the Deputy Secretary's Memorandum of June 7, 2001, are revised adjudication guidelines, originally promulgated by the Special Assistant to the President for National Security Affairs in March 1997, pursuant to Executive Order 12968, which pertain to criminal conduct. The Deputy Secretary's memorandum states that these adjudication guidelines have been revised to reflect the provisions of 10 U.S.C. § 986.⁽⁴⁾

The adjudication guideline pertaining to the instant case is revised Guideline J, Criminal Conduct, which contains the following relevant disqualifying conditions:

- 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. Conviction in a Federal or State court, including a court-martial of a crime and sentence to imprisonment for a term exceeding one year [footnote omitted];

Conditions that could mitigate Guideline J security concerns include:

- a. The criminal behavior was not recent;
 - b. The crime was an isolated incident;
 - f. There is clear evidence of successful rehabilitation.
- g. Potentially disqualifying condition... c. ... above, 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.

CONCLUSIONS

DOHA alleged that Applicant's felonious conduct, as specified in subparagraphs 1.a. and 1.b. of the SOR, and for which he received a prison sentence of three years and six months, suspended to six months served and three years of supervised probation, raised security concerns under revised Guideline J, Criminal Conduct. Further, DOHA alleged in

subparagraph 1.c of the SOR that, by operation of law, Applicant's admitted criminal conduct, and the sentence imposed by a State court for that conduct, disqualified him from a grant of a security clearance absent a meritorious waiver by the Secretary of Defense.

The security concern under Guideline J is that an individual's history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. Directive, ¶ E2.A10.1.1.

Footnote 1 in revised adjudication Guideline J reads: "Under the provisions of 10 U.S.C. § 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition." An Administrative Judge may recommend that an applicant's case be considered or not considered for a grant of Secretarial waiver only if the Judge's decision to deny or revoke a clearance is based solely on the provisions of 10 U.S.C. § 986.

Allegations set forth in subparagraphs 1.a. and 1.b of the SOR, and admitted by the Applicant, raise a concern under revised Guideline J that he lacks sufficient judgment, reliability and trustworthiness to be entrusted with classified material. Applicant's admissions of a history or pattern of criminal activity bring his conduct under disqualifying conditions **a.** and **b.** of revised adjudication Guideline J. His admission of allegation 1.a. of the SOR that he was arrested, convicted, and sentenced to three years and six months of incarceration for the felony of storehouse breaking brings his conduct under disqualifying condition **c.**

Applicant's criminal conduct, as alleged in SOR subparagraphs 1.a. and 1.b. occurred 12 years ago and thus would appear to meet mitigating conditions **a.** and **b.** of revised Guideline J because it was not recent and was an isolated incident. However, at his hearing, Applicant admitted to more recent conduct which causes a security concern and must be weighed, pursuant to the adjudicative process identified in Enclosure 2, ¶¶ E2.2.1.-E2.2.1.9., against his earlier conduct. Applicant's arrests for driving under the influence of alcohol in 2001 and 2002, for which his driver's license was restricted for 30 days and he was placed on one year of probation, give evidence that his criminal conduct is recent and is not comprised solely of an isolated incident which occurred 12 years ago. Thus, mitigating conditions **a.** and **b.** are not applicable to this case. Mitigating condition **f.** is also inapplicable, for there is no clear evidence of successful rehabilitation. Under the whole person concept, I find against the Applicant on SOR allegations 1.a. and 1.b. under revised Guideline J.

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 one year. (10 U.S.C. § 986; revised Guideline J, disqualifying condition ¶ **c.** and mitigating condition ¶ **g.**) Applicant is subject to the provisions of 10 U.S. C. § 986 by virtue of being sentenced to three years and six months in confinement as a result of his convictions on two counts of storehouse breaking. The provisions of the statute apply even though Applicant's sentence was suspended and he served only six months in confinement and three years in supervised probation. ISCR Case No. 01-13566 at 5 (App. Bd. Apr. 15, 2003). Under the circumstances, I am required to find against Applicant on allegation 1.c of the SOR.

FORMAL FINDINGS

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

Paragraph 1. Guideline J.: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

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

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. Applicant denied the element of SOR allegation 1.b. which stated that he was arrested for a second time on August 22, 1991. He acknowledged being charged with two counts of storehouse breaking on the night of June 19, 1991, and averred that he was only arrested once for the two crimes. The record shows that Applicant was served with an arrest warrant on August 22, 1991, for breaking into the ice cream store on the night of June 19, 1991. (Ex. 5, at 13-16.) The FBI Identification Record for Applicant lists two arrests, one on June 19, 1991 and the other on August 22, 1991. (Ex. 3, at 2.) In his signed, sworn statement, dated August 2, 2001, Applicant acknowledged two convictions for storehouse breaking. (Ex. 2, at 2.) Thus, the record renders Applicant's denial of the second arrest unpersuasive.
4. The revised adjudication guidelines modify Guideline H (Drug Involvement), Guideline I (Emotional, Mental, and Personality Disorders), and Guideline J (Criminal Conduct). The modified Guidelines reflect Department of Defense policy relating to 10 U.S.C. §986. The modified Guidelines identify disqualifying and mitigating conduct by alphabetical letters and not by the Enclosure 2 code of alphabetical letters and numbers found in DoD Directive 5220.6. (See, e.g., Guideline E disqualifying and mitigating conditions.) The policy promulgated in the revised adjudication guidelines changes DoD 5200.2-R, and, according to the July 7, 2001, memorandum of the Deputy Secretary of Defense, will be codified in the next revision of the regulation.