

KEYWORD: Criminal Conduct

DIGEST: Applicant is a systems engineer for a defense contractor. He was convicted in 1983 for distribution of illegal drug to an undercover police officer, and sentenced to five years incarceration suspended for five years while Applicant was on probation. In September 1986, he was arrested for possession of a controlled substance, and his probation was revoked. He was incarcerated for 22 months in a state prison. The provision of 10 U.S.C. § 986 apply. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

CASENO: 03-19440.h1

DATE: 10/31/2005

DATE: October 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19440

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a systems engineer for a defense contractor. He was convicted in 1983 for distribution of illegal drug to an undercover police officer, and sentenced to five years incarceration suspended for five years while Applicant was on probation. In September 1986, he was arrested for possession of a controlled substance, and his probation was revoked. He was incarcerated for 22 months in a state prison. The provision of 10 U.S.C. § 986 apply. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

STATEMENT OF THE CASE

On July 13, 2004, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on July 16, 2004. The SOR alleges security concerns under Guideline J (Criminal Conduct) of the Directive.

Applicant answered the SOR in writing on July 19, 2004, admitting the two allegations under Guideline J. He elected to have the matter decided on the written record in lieu of a hearing.

Department Counsel submitted the Government's written case on September 22, 2004. Applicant received a complete file of relevant material (FORM) on October 11, 2004, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. His response was due November 10, 2004. Applicant has not provided a response to the FORM. The case was assigned to me on August 24, 2005. The processing of this case was delayed by the December 14, 2004 moratorium on cases affected by 10 U.S.C. § 986. The moratorium was lifted on August 3, 2005.

FINDINGS OF FACT

Applicant is 44 years old and a systems administrator for a defense contractor. He has a certificate from a technical school, and has never been married.⁽¹⁾

Applicant admits he was arrested for and convicted of possession of marijuana and a controlled substance, distribution of the marijuana and the controlled substance, and possession with intent to distribute methamphetamine to an undercover police officer in July 1983. He was sentenced to incarceration for five years. His sentence was suspended, and he was placed on probation for five years. Applicant admits he was arrested for possession of a controlled substance in September 1986.⁽²⁾ His probation was revoked and he served his original sentence to a prison term from November 10, 1987, until released on parole on July 12, 1989.⁽³⁾

In addition to the above two criminal activities, Applicant admitted to other criminal acts not listed in the SOR. In December 1979, Applicant was arrested for possession of controlled substance. Applicant was sentenced to times served and one year probation. In June 1982, Applicant was arrested for possession of a controlled substance. These charges were dropped. In February 1984, Applicant was arrested for assault and battery but the charges were not prosecuted. Applicant admits to using illegal drugs from 1979 to 1989. He has been drug free since 1989. While serving probation in the early 1980s, Applicant was enrolled in a residential drug treatment program. He completed the program as well as a work release program. Applicant admits to using drugs even after completion of the drug abuse program. Applicant admits using drugs until 1988/1989, when he realized he needed to stop using drugs.⁽⁴⁾ There is no information that he has been or is presently enrolled in any drug treatment programs or drug abuse assistance program.

POLICIES

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."⁽⁵⁾ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.⁽⁶⁾

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽⁷⁾ An administrative judge should consider: (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 applicant'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 of recurrence.⁽⁸⁾

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.⁽⁹⁾ 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 present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.⁽¹⁰⁾ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.⁽¹¹⁾ An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹²⁾ "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability."⁽¹³⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽¹⁴⁾

Based upon a consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct: A security concern exists because 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 would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions section below.

Additionally, 10 United States Code § 986, prohibits the Department of Defense from granting or renewing a security clearance to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, was sentenced to imprisonment for a term exceeding one year, and was incarcerated for more than one year. The statute also provides that, in meritorious cases, the Secretary of Defense or his designee may authorize a waiver of the prohibition.

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The government has established its case under Guideline J. Applicant's arrest and conviction for possession and distribution of illegal drugs, and his violation of parole brings the matter under Criminal Conduct Disqualifying Conditions E2.A10.1.2.1 (*allegation or admission of criminal activity. . .*), and E2.A10.1.2.2 (*a single serious crime. . .*). Applicant's admission to the arrest and conviction for possession and distribution of drugs, his admission to violating parole, and his imprisonment for over one year establishes the government's case. The government bolstered its case by presenting the court documents listing the arrest, conviction, and sentence, the probation report on parole violation, and the criminal information sheet on his sentence served in prison. The above disqualifying conditions have been established.

The Criminal Conduct Mitigating Conditions relevant to Applicant's case are E2.A10.1.3.1 (*the criminal behavior was not recent*), E2.A10.1.3.2 (*the criminal behavior was an isolated incident*), and E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). Applicant's last criminal activity was in 1989, over 16 years ago, so the criminal behavior is

not recent. While committing criminal acts, Applicant's crimes were not isolated. Applicant admitted more criminal acts than listed in the SOR. I have not considered these additional criminal acts as Disqualifying Conditions under Guideline J, but I have considered them in regard to application of the Mitigating Conditions. From 1979 to 1987, Applicant engaged in a variety of criminal acts mostly triggered by the use, possession, and distribution of illegal drugs. It has been 16 years since Applicant has completed his prison sentence, and there is no evidence of any further criminal activity. Applicant completed a drug treatment program but continued to use drugs thereafter. However, he has not engaged in any criminal acts since his release from prison in 1989. I conclude Applicant's statement to security agents that he has not used drugs or engaged in criminal acts since 1989 is credible. I conclude Applicant has established that he has mitigated the security concerns for his criminal conduct.

Even though I concluded Applicant mitigated the security concerns, the mitigation is not sufficient to grant Applicant a security clearance. In 2000, a federal statute was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who was convicted of an offense in a United States court, and sentenced to more than one year in jail.⁽¹⁵⁾ "In a meritorious case," the Secretary of Defense could authorize an exception to the prohibition. The Secretary was not authorized to delegate that authority.⁽¹⁶⁾ In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, directed that, in cases in which the decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not recommending further consideration of the case for a waiver of the prohibition.⁽¹⁷⁾

As amended in 2004, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited to those who are sentenced to more than one year in jail and were incarcerated as a result of that conviction for at least one year.⁽¹⁸⁾ The waiver provision was also amended. It now provides that an exception to the prohibition on granting a clearance may be authorized "[i]n a meritorious case, . . . if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President."⁽¹⁹⁾ No such executive order or other guidance has been issued by, or under the authority of, the President.

Notwithstanding the Director's direction in DOHA Operating Instruction 64 that the administrative judge make a recommendation whether the statute's prohibitions should be waived, the Appeal Board has concluded that, under the 2004 amendments to 10 U.S.C. § 986, the administrative judge has

no authority to make a waiver recommendation. According to [the amendments], any waiver decision 'may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.' Without such standards and procedures, the Judge had no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. § 986.⁽²⁰⁾

I disagree with the Appeal Board's conclusion. The Appeal Board conflated making a recommendation to waive with

making a decision to waive. The amendment limits the authority to grant a waiver, not to recommend whether a waiver should or should not be granted. Nevertheless, I am not at liberty to disregard the Appeal Board's decision even though I disagree with it. ⁽²¹⁾ However, to avoid the possibility of a remand if guidance is later issued by or under the authority of the President, I believe it is appropriate to note what my recommendation would have been had I the authority to make one. Recognizing my recommendation is not binding on the waiver authority, I recommended further consideration of this case for a waiver of 10 U.S.C. § 986.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not 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 AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: 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 recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Thomas M. Crean

Administrative Judge

1. Government Exhibit 1 (Security Clearance Application, dated Feb. 22, 2001).
2. Government Exhibit 5 (Applicant's Statement, dated Jul. 7, 2003) at 3-5; Government Exhibit 7 (Criminal Court Documents, dated Aug. 29, 1989); Government Exhibit 10 (Court Documents, dated Sep. 21, 1983).
3. Government Exhibit 12 (Probation Report, dated Mar. 12, 1987); Government Exhibit 13 (Criminal Justice Information Services, dated May 3, 2001) at 3.
4. *Id.* at 4.
5. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
6. Directive ¶ E2.2.1.
7. *Id.*
8. Directive ¶¶ E2.2.1.1 through E2.2.1.9.
9. *See* Exec. Or. 10865 § 7.
10. Directive ¶ E3.1.14.
11. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.
12. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).
13. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))
14. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.
15. 10 U.S.C. § 986 (c)(1) (2001).
16. 10 U.S.C. § 986 (d) (2001).
17. DOHA Operating Instruction No. 64 ¶ 3.e (Jul. 10, 2001).
18. 10 U.S.C. § 986(c)(1) (2004).
19. 10 U.S.C. § 986(d) (2004).
20. ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).
21. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004).