KEYWORD: Criminal Conduct

DIGEST: Applicant was sentenced to 15 years imprisonment (seven years suspended) for dispensing cocaine and possession with intent to dispense cocaine, and served 15 months in prison. The provisions of 10 U.S.C. § 986 require denial of his clearance. Clearance denied.

CASENO: 03-19663.h1

DATE: 11/03/2005

DATE: November 3, 2005

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-19663

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

Nichole Ligon Noel, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was sentenced to 15 years imprisonment (seven years suspended) for dispensing cocaine and possession with intent to dispense cocaine, and served 15 months in prison. The provisions of 10 U.S.C. § 986 require denial of his clearance. Clearance denied.

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STATEMENT OF THE CASE

Applicant challenges the 21 July 2004 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of criminal conduct.[(1)] Applicant answered the SOR on 4 August 2004 requested a hearing. DOHA assigned the case to me 5 November 2004 and I scheduled a hearing for 15 December 2004. On 14 December 2004 Department Counsel moved to continue the case pending resolution of the moratorium that had been imposed on this case the same day. On 3 August 2005, the moratorium was lifted and I convened a hearing on 23 September 2005. DOHA received the transcript on 6 October 2005.

RULINGS ON PROCEDURE

On 14 December 2004, this case became subject to a moratorium on all cases involving application of 18 U.S.C. 986 pending receipt of implementing guidance for statutory changes made in October 2004.

The background of the statutory changes to 18 U.S.C. 986 and affecting such cases may be summarized as follows:

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 provided 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 precluded the initial granting or renewal of a security clearance by the Department of Defense under 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 indicated 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."

On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 was approved and adopted, amending portions of Subsection (c)(1) of section 986 of Title 10, United States Code, thereby altering it to read as follows:

(1) has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, *and was incarcerated as a result of that sentence for not less than one year.* (Emphasis of change supplied)

On 14 December 2004, a moratorium was established on all cases involving 10 USC 986, including cases that would have been covered by the statute prior to its revision the month earlier. The moratorium was lifted on 3 August 2005. I was subsequently advised by Department Counsel that the SOR in this case would not be withdrawn as a result of the statutory changes, and I scheduled the case for hearing.

FINDINGS OF FACT

Applicant admitted the factual allegations of the SOR; accordingly, Applicant's admissions are incorporated as findings of fact. He is a 45-year-old company president seeking access to classified information. He had not previously held a clearance.

In the mid 1980s, Applicant had three drug-related criminal encounters with police. In October 1986, he was charged with possessing cocaine because he was holding a friend's cocaine when the police stopped them. He pled guilty and was sentenced to 28 days in jail, suspended, and five years probation. In July 1988, Applicant was charged with possessing cocaine when the drug was found in his car after a traffic stop for speeding. The charges were dropped when one of Applicant's passengers later admitted that the cocaine belonged to him. In August 1988, Applicant was charged with dispensing cocaine and possession with intent to dispense cocaine. He had been selling cocaine for a friend. He later pled guilty and was sentenced to fifteen years in prison, seven years suspended, and three years of supervised probation. He ultimately served 15 months in prison.

His arrest for selling cocaine served as a wake-up call for Applicant. He realized the adverse consequences of associating with the friends he had chosen. While he was pending trial, he moved in with the pastor of his church and the pastor's wife. His pastor was an advocate of "tough love" and confronted Applicant about his poor life choices and the consequences of those choices. Applicant experienced a religious conversion.

Applicant completed his prison sentence without incident, and completed the requirements of his probation. He married while he was in prison and took classes. When he was released from prison, he worked a number of menial jobs to support his family until he could find work in his field. He and his wife have three children, ages 14, 12, and 6. He has no criminal conduct since August 1988.

Applicant's partner[(2)] and his pastor testified credibly about the positive changes in Applicant since his August 1988 arrest and his transformation to being a good father and solid citizen. His work references (AE A) attest to his exemplary work record and his academic and technical achievements since leaving prison.

POLICIES

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guideline is Guideline J (Criminal Conduct).

BURDEN OF PROOF

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[(3)]

CONCLUSIONS

The government established a Guideline J case by demonstrating that Applicant was convicted of dispensing cocaine and possessing cocaine with intent to dispense, was sentenced to 15 years imprisonment, and served 15 months.

Nevertheless, I would ordinarily find the conduct mitigated. Applicant's three crimes occurred within a two-year period over 17 years ago. Applicant had no criminal conduct before these incidents and no criminal conduct since.[(4)] Applicant's character references and his work record demonstrate the extent to which he has transformed his life since his arrest.[(5)]

Unfortunately, Applicant's criminal conduct cannot be mitigated under 10 U.S.C. § 986, even as amended. The statute requires that I not grant Applicant's clearance because he was sentenced to 15 years imprisonment and served a total of 15 months in prison.[(6)] Accordingly, I conclude Guideline J against Applicant.

Having denied Applicant's clearance solely because of the requirements of 10 U.S.C. § 986, OI 64 requires me to make a recommendation--without explanation--whether this case should be considered for meritorious waiver.[(7)] OI 64 implements the requirements of the Deputy Secretary of Defense emorandum of 7 June 2001.[(8)] However, the Appeal Board has recently ruled that administrative judges lack the legal authority to make the required recommendation under the amendments to the waiver language in the statute.[(9)] The Appeal Board equates a recommendation for waiver by the Administrative Judge with a decision by the Secretary concerned to grant a waiver and it presumes that no appropriate guidance exists for processing waiver requests. Nevertheless, the amended waiver language[(10)] does not void--expressly or by implication--the requirements of OI 64, which are ministerial only. Nor does it void the procedural requirements of the 7 June 2001 Memorandum.[(11)] The administrative judge is not the waiver authority under either version of 10 U.S.C. § 986, and the waiver authority is not bound in any fashion to follow the recommendation. Further, the required recommendation is made without explanation, and thus without reference to any factors, whether mandated by implementing guidance or instructions to the original statute or later mandated in compliance with the new statutory language. Consequently, any waiver recommendation made in compliance with OI 64 complies with the plain language of the amended waiver provision. Alternatively, any error in making the required recommendation is, at worst, harmless error. I conclude that I may note my recommendation as directed by the waiver authority without prejudicing Applicant's case. Recognizing my recommendation is not binding on the waiver authority, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: Against the Applicant

DECISION

In light of all 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).

2. Applicant and his partner were co-workers in 1988 and later became friends and business partners.

3. *See*, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

4. E2.A10.1.3.2. The crime was an isolated incident.

5. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

6. 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 (As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.).

7. E2.A10.1.3.7. Potentially disqualifying conditions 3. . ., 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 (Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.).

8. The memorandum required "all addressees with the responsibility for granting or denying security clearances or other classified access in DoD" to submit "procedures for considering meritorious cases and for submitting them to the Secretary concerned." The memorandum further provided that were a clearance would be denied solely because of the statute, "the authority responsible for making that decision may recommend to the Secretary of Defense. . .that the case merits a waiver."

9. ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).

10. "In 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." 10 U.S.C. § 986(d) (2004).

11. The 7 June 2001 Memorandum would be void only where its terms directly conflict with the amended statutory language. For example, the Memorandum's policy guidance stated that the statute applied to crimes where an applicant had been sentenced to more than a year in prison regardless of the amount of time actually served. The amended statute specifies that the criminal provisions apply only to cases where an applicant is sentenced to more than a year in prison

and serves more than a year in prison.