KEYWORD: Criminal Conduct

DIGEST: Applicant was sentenced to 18-30 months imprisonment for aggravated assault, and served 13 months in prison. The provisions of 10 U.S.C. § 986 require denial of his clearance. Clearance denied.

CASENO: 03-20626.h1

DATE: 09/29/2005

DATE: September 29, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-20626

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR.

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was sentenced to 18-30 months imprisonment for aggravated assault, and served 13 months in prison. The provisions of 10 U.S.C. § 986 require denial of his clearance. Clearance denied.

PROCEDURAL RULINGS

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.

The memorandum lifting the moratorium contained no additional guidance for implementing the October 2004 statutory changes in cases subject to the moratorium. Nevertheless, as it appeared that the new statutory language might have some bearing on the outcome of this case, on 23 August 2005, I solicited the parties' views--by way of written closing argument--of the applicability of the new statutory language to the facts of this case. I gave the parties until 2 September 2005 to provide their additional closing argument.

On 1 September 2005, I received Department Counsel's closing argument, a copy of which he provided to Applicant. As

of the date of this decision, I have received no additional closing argument from Applicant.

STATEMENT OF THE CASE

Applicant challenges the 2 February 2004 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of Applicant's clearance because of criminal conduct.[(1)] Applicant answered the SOR and requested hearing on 27 February 2004. The case was assigned to me on 15 July 2004. I convened a hearing on 9 August 2004. DOHA received the transcript on 20 August 2004.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR. Accordingly, I incorporate these admissions as findings of fact.

Applicant--a 28-year-old computer programmer for a defense contractor since June 2002--seeks access to classified information. He has not previously had a clearance.

On 24 August 1997, Applicant--then 21 and attending an out-of-state college--was arrested and charged with, among other things, aggravated assault when he and three friends got into a fist fight outside a bar in a college town in his home state. Applicant and his friends had drunk quite a bit, as had the putative victims. Applicant was the only one arrested, as his friends escaped the police and Applicant refused to identify them. He was later convicted of aggravated assault, sentenced to 18-30 months imprisonment, and served approximately 13 months (July 1998 to August 1999), divided equally between the regular prison population and a state-run boot camp program.

Applicant's crime and punishment were life-altering events, both good and bad. At the time of his crime, he had completed his third year at the out-of-state school where he was enrolled in a five-year program that was to culminate in receiving both his undergraduate and master's degrees in education. He was also an inter-collegiate wrestler on the varsity wrestling team. Although he was able to postpone his trial and complete his fourth year of the program, his conviction and sentence kept him from completing the program and obtaining his degrees. Applicant had hoped to emulate his father, a life-long educator and coach.

However, Applicant responded to his new circumstances extremely well. He was the honor graduate of his boot camp program and was successfully discharged from parole in July 2001. When he left prison in August 1999, he started classes at the local community college. He worked at a variety of jobs to support himself. He later transferred to the state university and received his degree in computer science in December 2001. After Applicant got a job in his new career field in June 2002, he and his childhood sweetheart bought a house in July 2002. They married in December 2002. They had their first child in June 2004.

Applicant's character witnesses included his wife, mother-in-law, father, co-workers and supervisors from his current job, and supervisors from his earlier jobs. Each was aware of Applicant's criminal record. Each witness who knew Applicant both before and after the August 1997 crime considered the crime an aberration. Each considered him an honest and trustworthy individual. His co-workers and supervisors praised the quality of his work and his work ethic.

Applicant has no record of violent conduct since the 1997 arrest. He did have a DUI offense in 2003 that he disclosed to Department Counsel during pre-hearing preparations.[(2)]

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).

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, § 986 [the Smith Amendment], precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy

Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001. 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 §986 of Title 10, United States Code, to provided, in pertinent part , that Applicants be both sentenced to prison for more than one year and be "incarcerated as a result of that sentence for not less than one year." The amendments further provided that waivers "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."

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 judgement, 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 aggravated assault in 1998, was sentenced to 18-30 months imprisonment, and served 13 months divided between prison and a state boot camp.[(4)] Nevertheless, I would ordinarily find the conduct mitigated. The crime occurred in August 1997.[(5)] Applicant had no criminal conduct before this incident and no violent conduct since.[(6)] Applicant's character references and his work record demonstrate the extent to which he has transformed his life since his arrest.[(7)]

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 18-30 months imprisonment and served a total of 13 months in prison and boot camp.[(8)] 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.[(9)] OI 64 implements the requirements of the Deputy Secretary of Defense emorandum of 7 June 2001.[(10)] 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.[(11)] 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[(12)] 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.[(13)] 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 what my recommendation would have been had I the authority to do so. Recognizing my recommendation is not binding on the waiver authority, I would have recommended 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: 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. Clearance denied.

John G. Metz, Jr.

Administrative Judge

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

2. The government did not move to amend the SOR to include this offense, either as criminal conduct or alcohol consumption. However, I have considered it for whatever bearing it might have in assessing the Guideline J offense that was alleged or any potential recommendation under OI 64. The record reflects that the DUI occurred when Applicant, his wife, and several friends went out to a going-away dinner for friends of his from work. Applicant states he had four beers over the time they were out and did not think he was too impaired to drive. However, he was stopped and failed a B.A.C. test, registering .11%. He completed the requirements of his sentence, including an alcohol awareness course. He has not been assessed as alcohol dependent or an alcohol abuser. He currently drinks moderate amounts of alcohol over the course of a weekend, but does not drive.

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

4. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

5. E2.A10.1.3.1. The criminal behavior was not recent.

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

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

8. 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.).

9. 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.).

10. 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."

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

12. "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).

13. 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.