

DATE: January 9, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-23723

DECISION OF ADMINISTRATIVE JUDGE

NOREEN A. LYNCH

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 68-year-old civilian employee who has 42 years of exemplary service with the federal government. He maintained a top secret clearance throughout his career. On April 3, 1959, he was convicted by a General Court Martial for manslaughter. His confinement was less than a year, under military law at that time. Thus, 10 U.S.C. § 986, does not apply. He has mitigated security concerns based on criminal conduct by time and rehabilitation. Clearance is granted.

STATEMENT OF THE CASE

On February 15, 2002, Applicant submitted a renewal security clearance application. On April 9, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Specifically, the SOR set forth security concerns arising under Guideline J (Criminal Conduct) of the Directive. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. In a sworn statement, dated May 5, 2004, Applicant responded to the SOR allegations and requested a hearing.

This matter was assigned to me on November 8, 2006. A notice of hearing was issued on November 16, 2006, scheduling the hearing for December 13, 2006. The hearing was conducted as scheduled. The government submitted ten exhibits that were marked as Government Exhibits (GE) 1-10. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, and submitted fourteen exhibits that were marked as Applicant's Exhibits A through P. ⁽²⁾ The exhibits were admitted without objection. Applicant testified in his own behalf. DOHA received the hearing transcript (Tr.) on December 21, 2006.

FINDINGS OF FACT

Applicant admitted the allegations under Guideline J in his response.⁽³⁾ After a complete review of the evidence in the record and upon due consideration, I make the following findings of fact:

Applicant is a 68-year-old employee of a defense contractor. Shortly after graduating from high school in 1956, he joined the National Guard. In 1957, he enlisted in the U.S. Army.⁽⁴⁾ He received a discharge under Honorable Conditions in 1962.⁽⁵⁾ From June 1962 until his retirement in September 2001, Applicant served in the federal government.⁽⁶⁾ At the time of his retirement, Applicant was the Personnel Director for the Executive Office for the Department of Justice.⁽⁷⁾ He maintained a top-secret security clearance throughout his career. Since 2003, Applicant has been with his current employer. He is married with three children and two grandchildren.⁽⁸⁾

In December 1958, Applicant was a specialist (E-4) in the United States Army serving on active duty in Korea. On the evening of December 14, 1958, Applicant and three other soldiers left an enlisted club after drinking. They decided to visit a Korean night club, and stayed until closing time. When Applicant left, he had an altercation with the hat check assistant. After exiting the club, Applicant pulled out a knife at some point during a fight and fatally stabbed a Korean man.

He was apprehended in the early morning hours of December 15, 1958, charged with unpremeditated murder (Article 118, Uniform Code of Military Justice (UCMJ), and placed in pretrial confinement. At his court-martial, Applicant pled not guilty, but was convicted of voluntary manslaughter (Article 119, UCMJ). On April 3, 1959, he was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, confinement at hard labor for five years, and reduction to the grade of E-1.⁽⁹⁾

The convening authority suspended the dishonorable discharge and reduced the period of confinement to three years. On May 18, 1959, Applicant was released from confinement and returned to active duty military.⁽¹⁰⁾ The U.S. Army Board of Review affirmed the findings of the court-martial and the sentence was approved by the convening authority. After completing a period of retraining, Applicant was released from confinement on January 29, 1960, and restored to duty.⁽¹¹⁾ His dishonorable discharge was remitted.⁽¹²⁾

After leaving the military in 1962, under Honorable Conditions, Applicant transitioned to the civilian world. In 1963, he applied for a position with the U.S. Army. On his application he listed his arrest and conviction for the 1958 incident.⁽¹³⁾ For the next 35 years, Applicant progressed from a GS-3 to a GS-15. During the course of his civilian employment, he received countless awards and commendations. He was an invaluable asset to the Department of Defense and other federal agencies. His extensive training and expertise in the federal personnel system, earned him outstanding performance evaluations, and positive client feedback.⁽¹⁴⁾ Among the many awards, he received the Meritorious Civilian Service Award, the Human Relations Commission Liberty Bell Award, Chairman of the Army Civilian Committee, Commander's Award for Civilian Service, and Superior Civilian Service Award.⁽¹⁵⁾

Applicant joined another federal agency and served with distinction until his retirement on September 15, 2001. He had 42 years of federal service.⁽¹⁶⁾ His record is replete with honors, promotions, and performance awards. He is described as "extremely reliable," trustworthy and extremely dedicated to the support of the mission. Since the beginning of his civilian career, he has received citations as an outstanding leader and a volunteer.

The Commander's Award for Civilian Service highlights and summarizes Applicant's career in federal service with the following words:

for providing urgent and sensitive personnel services to a cadre of DoD civilian employees engaged in clandestine activities. When the mission was compromised, there was potential adverse impact to national security and the employment status of affected employees. Applicant's dedication and professionalism served to limit the damage and preserve other vulnerable program capabilities. His selfless dedication to this mission and the results achieved reflect great credit upon himself, the U.S. Army Military District of Washington, and the U.S. Army.

In 2003, Applicant gained employment with a government defense contractor. He is a key staff employee. In his three

years with the company, he is rated outstanding, noting an exemplary job performance, leadership abilities. He was entrusted with access to sensitive and classified information during the course of his extensive career with the federal government, and his present employer recommends him for any secure position based on his three years with the company, as well as his federal experience. ⁽¹⁷⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, with its respective DC and MC, applies in this case. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽¹⁸⁾ The government has the burden of proving controverted facts. ⁽¹⁹⁾ The burden of proof is something less than a preponderance of evidence. ⁽²⁰⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against

him. ⁽²¹⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽²²⁾

No one has a right to a security clearance and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽²³⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. ⁽²⁴⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. ⁽²⁵⁾ 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.

Based upon 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: The security concern is a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Statutory Requirements

A person convicted in any court of the United States of a crime who "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*" is disqualified from being granted a security clearance. 10 U.S.C. § 986 (c) (1). (Emphasis added). In meritorious cases a waiver to the disqualification may be granted if there are mitigating factors. 10 U.S.C. § 986 (d).

CONCLUSIONS

Upon consideration of the facts in evidence, and after application of all appropriate adjudicative factors, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J Criminal Conduct

The government has established its case under Guideline J. Based on Applicant's admissions, his testimony, and his 1959 conviction for manslaughter by general court-martial, Criminal Conduct Disqualifying Condition (CC DC) E.2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and CC DC E.2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) apply to this case.

With the government's case established, the burden shifts to Applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Here, Applicant's arrest was in 1958. This is almost 50 years ago. It is his only arrest. Therefore, Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1(*the criminal behavior was not recent*) and CC MC E2.A10.1.3.2 (*the crime was an isolated incident*) are established.

Applicant has worked in a civilian capacity for 42 years. His career is exemplary. His final federal service position was as Director of Civilian Personnel, GS-15. He is recommended highly and received many awards and distinctions over the years.

Applicant satisfactorily completed his retraining in the military, and was returned to active duty. For more than 45 years, he has been a law abiding citizen. He is 68 years old. He is married and raised two children. He continued for two years in the military after the 1959 court martial. He was discharged under Honorable conditions. He was 19 years old at the time of the conviction. For almost 50 years he has lived his life without incident. He has shown responsibility and trustworthiness with a security clearance throughout his long career. He has received accolades from all levels. The record is devoid of evidence of any personal or professional difficulties. CC MC E2A10.1.3.6 (*there is clear evidence of successful rehabilitation*) applies in this case.

Although Applicant argued that CC MC E2.A10.1.3.3 (*the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life*) and CC MC E2.A10.1.3.4 (*the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) apply in his case, I do not find his argument regarding coercion persuasive or a condition that could be applied after his conviction in this forum. I do believe that given Applicant's actions in the past 50 years, the factors leading to the violation are not in his life, or would recur. Thus MC 4 is established.

Applicant was incarcerated from December 15, 1958 until January 29, 1960--a period of 410 days. Department Counsel asserts that the Department of Defense is prohibited from granting Applicant a clearance under 10 U.S.C. § 986, absent a waiver. Department Counsel correctly notes that under current law, both pre- and post-trial confinement are considered incarceration for determining the period of confinement under 10 U.S.C. § 986, as the period of pretrial confinement is subtracted for an accused's sentence to confinement. ISCR Case No. 03-02181 at 3 (App. Bd. ay 24, 2006).

Historically, pretrial confinement in the military was not considered punishment but rather a necessary tool for the administration of justice. Special rules applied for persons so incarcerated to distinguish them from sentenced prisoners. An accused's sentence to confinement was not offset by the time he served in pretrial confinement. *United States v. Davidson*, 14 M.J. 81, 84 (C.M.A. 1982). Since then, the military has adopted the federal standard. An accused is entitled to day-for-day credit against his adjudged sentence for time spent in pretrial confinement. *United States V. Roche*, 52 M.J. 154, 156 (C.A.A.F. 1999); *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984).

Applicant served his sentence under the pre-1984 pretrial confinement rules. He did not receive day-for-day credit for his pretrial confinement, and his pretrial confinement was not considered punishment or part of the sentence. Therefore, he was "incarcerated as a result of that sentence" from April 13, 1958 until January 29, 1960, a total of 291 days. Applicant was not "*incarcerated as a result of that sentence*" for the requisite year, so he is not disqualified from being granted a security clearance under 10 U.S.C. § 986.

Whole Person Analysis

Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

As noted above it is also important to consider other factors discussed in DoD Regulation 5200.2-R, Appendix 8. I considered all the facts and circumstances surrounding this matter, including the "whole person" concept. Applicant was

convicted when he was 19 years old, and in the military. However, he spent two years on active duty after his confinement ended in 1960 and was discharged under Honorable Conditions. He served the federal government in a civilian capacity for 42 years, and even held a top-secret security clearance. He never kept his past a secret. It was part of his personnel record. His professional and personal character references reveal a man who has lived his life for the past 50 years as a model citizen. It is clear from his demeanor and actions that he takes this matter seriously and is fully rehabilitated. He has spent his life in exemplary service since 1959.

In all adjudications, the protection of our national security is the paramount concern. Security clearance decisions are not intended to assign guilt or to impose further punishment for past transgressions. Rather, the objective of the security clearance process is the fair-minded, common sense assessment of a person's judgment and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of his or her acts and omissions, including all disqualifying and mitigating conduct. In my evaluation of the record, I have carefully considered each piece of evidence in the context of the evidence and under all of the Directive guidelines that were generally applicable or might be applicable to the facts of this case. Under the "whole person" concept, I conclude that Applicant has sustained his burden of proof in demonstrating his eligibility to hold a security clearance. He is not automatically barred from a security clearance in this case because the Smith Amendment does not apply for the reasons discussed above.

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: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Smith Amendment 10 U.S.C. § 986 (c) as amended, does not apply. Clearance is Granted.

Noreen A. Lynch

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Applicant Exhibit A is letter from his current program manager, dated December 7, 2006. Applicant Exhibit B is a professional character reference, dated November 30, 2006. Applicant Exhibit C is a news clipping concerning his Award for Civilian Service, dated August 15, 1979. Applicant Exhibit D is an article citing the Applicant's promotion to Head of Civilian Personnel, dated December 17, 1981. Applicant Exhibit E is a new article concerning the Liberty Bell Award, dated May 3, 1983. Applicant Exhibit F is certificate of top clearance, dated February 9, 1990. Applicant Exhibit G is a memo from the U.S. Army Military Directorate of Civilian Personnel reflecting Applicant's acceptance of chairmanship of the DA Civilian Committee in 1994. Applicant Exhibit H is a performance appraisal, dated August 10, 1994. Applicant Exhibit I is a certificate of security determination for top secret clearance, dated March 29, 1995. Applicant Exhibit J is a senior system civilian evaluation report, dated August 19, 1995. Applicant Exhibit K is a commander's Award for Civilian Service, dated November 28, 1995. Applicant Exhibit L is a Superior Civilian Service Award, dated February 10, 1997. Applicant Exhibit M is certificate of investigation, dated May 1997. Applicant Exhibit N is a performance award letter, dated October 1998. Applicant Exhibit O is a performance appraisal record, dated May 11, 1999. Applicant Exhibit P is an acknowledgment of 42 years of federal service upon retirement, dated September

- 15, 2001.
3. Applicant's response to the SOR, dated May 5, 2004.
4. Government Exhibit 1 (Security Clearance Application), dated February 15, 2002 at 1.
5. Government Exhibit 10 (Form DD 214), dated March 8, 1962.
6. Applicant Exhibit 1 at 1.
7. Tr. 51.
8. Tr. 48.
9. Government Exhibit 5(Board of Review Decision), dated October 2, 1959 at 2-6.
10. Government Exhibit 2 (General Court-Martial Order), dated May 18, 1959.
11. Government Exhibit 4 (Action Memorandum), dated May 18, 1959.
12. Government Exhibit 7 (General Court Martial Order), dated January 29, 1960.
13. Tr. 23.
14. Applicant Exhibit A.
15. Applicant Exhibits C, D, E, G, K, and L.
16. Applicant Exhibit P.
17. Tr. 24.
18. ISCR Case No. 96-0277 at 2 (App. Bd. Jul. 11, 1997).
19. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
20. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
21. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
22. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
23. *Egan*, 484 U.S. at 531.
24. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
25. Executive Order 10865 § 7.