

DATE: November 29, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-32252

ECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Nygina T. Mills, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was a cocaine and marijuana abuser. His January 1980 arrest for sale of cocaine--when he was 21 years old--resulted in his March 1980 conviction and a sentence, in part, to serve seven years imprisonment. Shortly thereafter, upon his motion, Applicant's sentence was suspended and he was placed on probation for five years. In September 1980, upon Applicant's appeal, the court of criminal appeals dismissed the "case." It remains unclear if the charge or the appeal was dismissed. Applicant has a spotless record since 1980. While the application of 10 U.S.C. § 986 previously would have disqualified him from eligibility for a security clearance, the recently amended 10 U.S.C. § 986 no longer serves as an automatic disqualification in this case. Clearance is granted.

STATEMENT OF THE CASE

On January 26, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. 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, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written answer, dated March 18, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on May 28, 2004. A complete copy of the file of relevant material (FORM) ⁽¹⁾ was provided to Applicant, and he was afforded, until July 21, 2004, an opportunity to file objections and submit material in refutation, extenuation, or mitigation. No further response was made. The case was assigned to me August 13, 2004.

FINDINGS OF FACT

Applicant has admitted a portion of the factual allegation (subparagraph 1.a.) pertaining to criminal conduct under Guideline J. Those admissions are incorporated herein as findings of fact. He did not address the conclusory allegation (subparagraph 1.b.), and his silence will be treated as a denial.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 46-year-old employee of a defense contractor, and is seeking to obtain a security clearance the level of which has not been divulged.

Applicant was a substance abuser who, with a college classmate, threw parties once or twice a month in a trailer they rented. (2) The partygoers consumed alcohol and used marijuana and cocaine. (3) Several months after one such party, in January 1980, Applicant was arrested by the police and charged with the sale of cocaine upon the affidavit of a police informant. (4) Applicant denied ever selling cocaine, (5) and entered a plea of not guilty. He was tried by a jury in March 1980 and found guilty as charged. (6) He was sentenced to seven years imprisonment and assessed a fine of \$1,000.00. (7) Shortly thereafter, upon his motion, Applicant's sentence was suspended and he was placed on probation for five years. (8) He served only three days in jail while awaiting trial. (9) Applicant filed a notice of appeal, and in September 1980, the court of criminal appeals took a final action. (10) The SOR alleges the court of criminal appeals "dismissed the case." (11) The FORM uses the identical language. (12) Unfortunately, the best available copy of the court of criminal appeals' order is too blurry to be accurately read, and on its face, it appears the appeal was dismissed rather than the case.

On June 16, 1981, the supervised portion of the probation was terminated, (13) and Applicant was continued on unsupervised probation. (14) After about another 18 months of unsupervised probation, that too was terminated. (15)

Since his arrest, Applicant has abstained from using any illegal substances including cocaine and marijuana. (16) He attributed his earlier use to succumbing to peer pressure and the desire to be accepted socially by his classmates. (17) He continues to deny he ever was involved in the purchase or sale of any illegal drugs. (18) With added maturity, he has turned his life and lifestyle around since 1980, and vows to never become involved with any illegal substance in the future. (19)

Applicant was married in 1991.

Applicant is a senior technical engineer with the same employer since March 2001. (20) He had previously worked for 20 years with another government contractor where he was a manager. The quality of his work performance has not been divulged.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all

available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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 individual'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 or recurrence.

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

Criminal Conduct - Guideline J: 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 could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the conclusions below.

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 situation described above involves one of those 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 10 USC § 986, 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)

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," ⁽²¹⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship 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. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

The government has established its case under Guideline J. By his own admission, Applicant was involved in criminal behavior in 1979-80 that resulted in his arrest and conviction. As a result, he was sentenced to seven years imprisonment--shortly thereafter suspended--and replaced with five years probation. He served only three days in jail while awaiting trial. Applicant's criminal conduct clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and CC DC 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*). I acknowledge CC DC E2.A10.1.2.3. has not yet been formally amended to conform with the recent change in the law, and no implementing guidance has yet been provided. Nevertheless, in complying with the mandate that these security clearance review decisions be fundamentally fair commonsense decisions, I have concluded that the new law was intended to be applied retroactively.

It has been over 24 years since that conviction and sentence. The 1979-80 criminal conduct is not considered recent. Applicant has abstained from further substance abuse since 1980 and has apparently turned his life around and avoided further criminal endeavors. Those facts support the application of Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*). However, given the frequency of his criminal conduct, I cannot find that it was isolated as set forth in CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

A person should not be held forever accountable for misconduct from the past when there is a substantial indication of subsequent reform, remorse, or rehabilitation. Moreover, Applicant's 1979-80 criminal conduct no longer falls within 10 U.S.C. § 986. While he was convicted in a state court of a crime and sentenced to seven years imprisonment--a term that obviously exceeds the one-year period envisioned in the law, that sentence was suspended and replaced with five years probation. He served only three days in jail while awaiting trial. Consequently, under 10 U.S.C. § 986, Applicant is no longer automatically disqualified from eligibility for a security clearance. Considering all of the above, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Accordingly, allegations 1.a. and 1.b. of the SOR are concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is 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: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Robert Robinson Gales

Chief Administrative Judge

1. The government submitted six items in support of its contentions.
2. Item 5 (Statement, dated September 23, 2002), at 2.
3. *Id.*
4. *Id.*
5. *Id.*
6. Item 6 (Court Records-Case Action Summary, entry dated March 4, 1980), at 5.
7. *Id.*
8. *Id.*, at 7.
9. *Id.*
10. *Id.* (Court Records-Court of Criminal Appeals Order, dated September 12, 1980).
11. Subparagraph 1.a.
12. FORM, dated May 28, 2004, at 4.
13. Item 6 (Court Records-Conditional Release from Supervision, dated June 16, 1981).
14. *Id.*
15. Item 5, *supra* note 2, at 3.
16. *Id.*
17. *Id.*
18. *Id.*

19. *Id.*, at 4.

20. Item 4 (Security Clearance Application (SF 86), dated April 3, 2002), at 2.

21. Exec. Or. 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)