

DATE: February 5, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00112

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

SYNOPSIS

In 1980, Applicant pled guilty to two charges of embezzling mail matter by a postal employee based on his stealing several hundred dollars from letters he handled as a postal employee. The federal district court sentenced Applicant to confinement for three years, of which all but 60 days was suspended and he was placed on probation. He has since been a law-abiding citizen and continuously employed by defense contractors. He has held a security clearance without an adverse incident or problem since approximately 1981. Under 10 U.S.C. § 986, the Defense Department is prohibited from granting or renewing Applicant's security clearance based on his sentence to confinement exceeding one year unless the prohibition is waived by the Secretary of Defense; a waiver is not recommended. Clearance is denied.

STATEMENT OF THE CASE

On July 31, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. In particular, the SOR alleges a security concern based on Applicant's 1980 criminal conviction in federal court on the charges of embezzlement of mail matter by a postal employee resulting in a sentence to confinement for three years. The SOR also alleges that Applicant is ineligible for access to classified information under 10 U.S.C. § 986--the so-called Smith Amendment--based on his sentence to confinement exceeding one year.

Applicant answered the SOR on August 15, 2003, and he requested a clearance decision based on a hearing record. In his answer, Applicant admitted to the factual allegation in SOR subparagraph 1.a.

On September 16, 2003, the case was initially assigned to another administrative judge. Applicant's counsel entered his appearance on or about September 22, 2003. Thereafter, on September 30, a notice of hearing was issued to the parties scheduling the hearing for Monday, October 27, 2003. Due to case load considerations, the case was reassigned to me October 7 and subsequently, I cancelled the scheduled hearing due to a serious medical problem experienced by

Applicant. On October 31, 2003, a notice of hearing was issued to the parties scheduling the hearing for Tuesday, December 2, 2003. Applicant appeared with counsel and the hearing took place as scheduled.

DOHA received the hearing transcript December 11, 2003. Subsequently, it was discovered that the transcript was incorrectly prepared and a second transcript was received January 23, 2004. This second transcript was missing pages 139 - 152. DOHA received the third and final transcript with the missing pages on February 4, 2004.

RULINGS ON PROCEDURE

By his counsel (Appellate Exhibit 1), Applicant requests that the processing of this case be held in abeyance in light of recent congressional action directing the Secretary of Defense to make an assessment of the Smith Amendment and report back to Congress within 60 days of enactment.⁽²⁾ Congress has directed the Secretary to review the effects of the four disqualifying grounds of the Smith Amendment and make such recommendations for legislative or administrative steps as deemed necessary by the Secretary. Department Counsel opposed the request for various reasons as set forth in his written reply (Appellate Exhibit 2). As an administrative judge, my authority is derived from an applicable federal statute, executive order, or federal regulation. I am aware of nothing in an applicable federal statute, Executive Order 10865, or the Directive that allows an administrative judge to hold in abeyance or suspend the processing of a security clearance case for any reason.⁽³⁾ Lacking such authority, Applicant's request is denied without addressing the merits.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 54-year-old married man seeking to retain a secret security clearance first granted to him in approximately 1981. He currently works as a network administrator for a defense contractor in support of the U.S. Navy. He has worked for this company since 1993. Previously, he was unemployed during 1993 until he accepted his current position on December 8, 1993. He worked for a defense contractor from June 1981 until January 1993. From 1980 to June 1981, Applicant worked for another defense contractor.

His first marriage in 1969 ended in divorce in 1974. He remarried the same year and that marriage ended in divorce in 1987. He married his third and current spouse in July 1994. His wife, who testified during the hearing, works as deputy director and accountant for a trade association. Applicant has no children.

Applicant enlisted in the U.S. Navy in 1968 and served from November 1968 until April 1973. He was honorably discharged at the pay grade of E-5.

Upon his discharge, Applicant applied to work for the U.S. Postal Service. Applicant was hired and worked for the postal service from 1973 until January 1980. In 1979, Applicant operated a letter-sorting machine, and he was responsible for training new employees how to operate the machine. In addition, Applicant was required to hand sort mail.

While hand sorting mail addressed to a zip code belonging to a certain religion-based broadcasting network, some money fell out of an envelope and Applicant decided to keep it. He knew that envelopes addressed to the same zip code often contained money. He also knew the monies were donations to the organization given by various individuals. Tempted, Applicant took some of the letters containing money. He did so two to three times weekly for five or six weeks or so. He estimates stealing several hundred dollars, but less than \$1,000. Applicant was not experiencing financial problems during this time. He used the money to buy automotive tools and to pay for events he attended as a member of a corvette club.

Applicant was caught when he was observed by postal inspectors. When he was arrested on or about October 15, 1979, the then 30-year-old Applicant possessed 18 envelopes containing about \$200. The postal service immediately suspended Applicant from work and he was allowed to resign in January 1980.

In November 1979, a federal grand jury charged Applicant with ten counts of embezzlement of mail matter by a postal

employee in violation of 18 U.S.C. § 1709. On January 22, 1980, Applicant appeared with counsel in federal court and pled guilty to counts 1 and 2 of the indictment. On the first count, the court sentenced Applicant to confinement for three years. The court suspended the confinement, except for 60 days, and placed him on probation for three years. Concerning the second count, the court suspended imposing the sentence and placed him on probation for three years to run concurrent with the probation term on count 1. The court dismissed the remaining counts (3 - 10). The court did not order Applicant to make restitution of the monies he stole, and he has not done so on his own initiative. Applicant's term of confinement began January 28, 1980.

Applicant served the 60-days confinement in a local jail. His probation started when he was released on or about March 28, 1980. He completed probation successfully. Indeed, his probation was terminated early in December 1981. Since completing his probation, Applicant has not been involved in additional criminal conduct and he appears by all accounts to be a law-abiding citizen.

For example, he now regularly participates in his community's neighborhood-watch program.

Shortly after his release, Applicant found employment with a defense contractor. In conjunction with his employment, Applicant was required to apply for a security clearance. In February 1981, he was interviewed during the background investigation. Sometime thereafter, the Defense Department granted Applicant a security clearance. He has since held that security clearance without an adverse incident or problem.

Aside from being unemployed during most of 1993, Applicant has been continuously employed since his release from confinement in 1980. Applicant is a loyal, reliable, and productive employee with a solid reputation among his Navy customers. Applicant presented favorable character evidence via the testimony of several witnesses and numerous exhibits (Exhibits A - K). In sum, Applicant is known as an honest person of high moral character; a person with sound judgment; a responsible, trustworthy, meticulous, competent, and intelligent person; and a team-player with an outstanding work ethic. By all appearances, since his 1980 felony conviction, Applicant has led an upstanding life.

Applicant is remorseful and very much regrets his actions believing he let down many people. He believes he has matured greatly since he committed the offenses in 1979. And he also believes he will not engage in any sort of behavior that will jeopardize his eligibility to hold a security clearance.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. 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. Considering the evidence as a whole, Guideline J for criminal conduct⁽⁴⁾ is most relevant here. This case also involves application of 10 U.S.C. § 986.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽⁵⁾ The government has the burden of proving controverted facts.⁽⁶⁾ The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.⁽⁷⁾ The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.⁽⁸⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁹⁾ Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.⁽¹⁰⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹¹⁾

As noted by the Court in *Egan*, "it should be obvious that 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." ⁽¹²⁾ Under *Egan*, Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

In addition to Guideline J, under an applicable federal statute, the Defense Department and the military departments may not grant or renew a security clearance for any DoD officer or employee, an employee, officer, or director of a DoD contractor, or a member of the armed forces on active duty or in an active status who falls under any of four statutory categories. ⁽¹³⁾ The statutory category at issue here is § 986(c)(1), which provides: "The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The statute also provides that the Secretary of Defense or the secretary of the relevant military department may, in a meritorious case, authorize an exception to the statutory prohibition for persons in two of the four statutory categories; namely, paragraphs (1) and (4) of § 986©). The statute does not define, explain, or describe a "meritorious" case.

In June 2001, the Deputy Secretary of Defense issued official policy guidance designed to assist the DoD and military departments in uniformly implementing 10 U.S.C. § 986. Concerning criminal convictions, the policy guidance is the statute disqualifies persons with convictions in both state and federal courts, including military courts, with sentences imposed for more than one year regardless of the amount of time actually served. Like the statute, the policy guidance does not define, explain, or describe a "meritorious" case.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. Applicant's criminal conduct in 1979 and the 1980 federal felony conviction are evidence of a history or pattern of illegal behavior that creates doubt about his judgment, reliability, and trustworthiness. Given these circumstances, DC 1-⁽¹⁴⁾ and DC 2 ⁽¹⁵⁾ apply. The record evidence shows Applicant--while working as a postal service employee--embezzled mail to enrich himself. His criminal conduct is considered serious because: (1) Applicant knew he was taking mail addressed to a religion-based broadcasting network; (2) Applicant knew the monies in the letters were donations intended for that organization; and (3) Applicant violated the special trust placed in him as a postal employee to properly handle and safeguard mail under his control. Moreover, when he committed these multiple offenses, Applicant was a 30-year-old married man and an honorably discharged Navy veteran. In other words, his actions were not that of an immature, youthful offender, as he plainly knew or should have known better. It's difficult to understand why the Defense Department granted Applicant a security clearance in 1981 given the seriousness and recency of his criminal conduct.

In addition to the normal security concerns under Guideline J, Applicant's 1980 conviction and three-year sentence, adjudged by a federal court, falls within the scope of 10 U.S.C. § 986. Accordingly, absent a waiver by the Secretary of Defense, Applicant is ineligible for access to classified information.

I have reviewed the mitigating conditions under Guideline J and two apply in Applicant's favor. First, the offenses took place in 1979, and so, the criminal behavior is not recent. ⁽¹⁶⁾ Second, Applicant has reformed and rehabilitated ⁽¹⁷⁾ himself since his release from incarceration. His reform and rehabilitation is demonstrated by: (1) his early completion of court-ordered probation; (2) his steady and productive employment since 1980 with defense contractors; (3) holding a security clearance without an adverse incident or problem since approximately 1981; and (4) conducting himself as a law-abiding citizen since his release from confinement. The remaining mitigating conditions do not apply given the facts and circumstances here. In particular, Applicant's criminal conduct is not considered an isolated incident ⁽¹⁸⁾ because he committed multiple offenses over a period of several weeks.

To sum up under Guideline J, the record evidence shows Applicant engaged in serious criminal conduct as a 30-year-old

man in 1979 when he abused his position as a postal employee by embezzling mail to enrich himself. Nearly 25 years have since passed without recurrence, and I assess the likelihood of additional criminal conduct as low to remote. Nevertheless, given the prohibition of 10 U.S.C. § 986, I decide this case against Applicant. In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, as well as the whole-person concept and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: 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 is denied. In addition, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Michael H. Leonard

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. National Defense Authorization Act for Fiscal Year 2004 (H.R. 1588, Sec. 1051) (Exhibit L).
3. For example, ¶ E3.1.25 of Enclosure 3 to the Directive requires administrative judges to make written clearance decisions in a "timely manner."
4. Guideline J is found at Attachment 10 to Enclosure 2 of the Directive, at page 37.
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
7. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).
8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.
12. *Egan*, 484 U.S. at 528, 531.
13. 10 U.S.C. § 986(c)(1) through (c)(4).
14. "Allegations or admissions of criminal conduct, regardless of whether the person was formally charged."
15. "A single serious crime or multiple lesser offenses."

16. MC 1 is "The criminal behavior was not recent."

17. MC 6 is "There is clear evidence of successful rehabilitation."

18. MC 2 is "The crime was an isolated incident."