

DATE: February 17, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01154

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Sixty-three-year old Applicant's 1985 arrest for federal income tax evasion, when he was 45-years old, and his subsequent conviction, upon his plea of guilty, led to a sentence of 15 months imprisonment. The absence of any subsequent criminal conduct would normally mitigate the government's security concerns. However, the application of 10 U.S.C. § 986 disqualifies him from eligibility. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

STATEMENT OF THE CASE

On September 16, 2003, 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 statement, dated October 14, 2003, 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 December 29, 2003. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. On January 26, 2004, Applicant submitted additional documents to which Department Counsel offered no objection. The case was assigned to me on February 13, 2004.

FINDINGS OF FACT

Applicant has admitted one of the factual allegations (subparagraph 1.a.) pertaining to criminal conduct under Guideline J. That admission is incorporated herein as a finding of fact. He has denied the remaining allegation.

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 63-year-old employee of a defense contractor, and is seeking to obtain a security clearance, the level of which has not been indicated. He had previously been granted a TOP SECRET security clearance in October 1963.⁽²⁾ In November 1999, Applicant had a security clearance denied, suspended, or revoked,⁽³⁾ but it is not known which specific action was taken or the reason therefor.

Applicant was involved in a series of related criminal incidents which began approximately 24 years ago. In 1979, Applicant learned of a method to avoid paying a portion of his federal income tax liability which he subsequently contended was a legitimate tax loop-hole.⁽⁴⁾ Under the scheme, he established a bogus in-home branch of a church and began making "charitable" contributions to the church account with those contributions being considered by him as tax-deductible "charitable" contributions.⁽⁵⁾ He never surrendered control over the money and continued to enjoy the benefit of the money.⁽⁶⁾ The contributions purportedly reduced his income tax liability. Applicant used the accountant where his wife was employed to complete his income tax forms for him, but never informed him of his relationship to the church.⁽⁷⁾

In 1982, the Internal Revenue Service (IRS) commenced an investigation into the setup, and in December 1985, when Applicant was 45-years old, he was arrested and arraigned on three counts of income tax evasion.⁽⁸⁾ Upon acceptance of his plea on February 14, 1986,⁽⁹⁾ two of the charges were dismissed, and the prosecution agreed not to prosecute Applicant for other criminal tax offenses which occurred prior to the date of his plea.⁽¹⁰⁾ Applicant also agreed that his true tax liability, including tax, penalty, and interest, for the years covered by the Indictment, covering the tax years 1979 through 1981 was \$35,613.67, as of March 21, 1986.⁽¹¹⁾ On that date, Applicant's plea was accepted and he was sentenced to 15 months imprisonment.⁽¹²⁾ He was immediately transferred to a city jail where he remained briefly before being transferred to a county jail and then to a longer-term federal facility.⁽¹³⁾ On October 17, 1986, Applicant was released from the correctional facility and placed in a parole status until June 19, 1987.

Applicant's motivation for the tax evasion was to reduce his tax liability to retain money sufficient to enable him to care for the basic and educational needs of his wife and five teenage children.⁽¹⁴⁾ In addition to his regular job, he also worked part-time every evening and weekend, and held a partnership position in two laundries.⁽¹⁵⁾

Since his October 1986 release from prison, Applicant has avoided any incidents with the authorities. He married for the fourth time in January 1990.⁽¹⁶⁾

Applicant attended a service academy but was forced to leave in 1961 because he was not meeting the academic requirements.⁽¹⁷⁾ He continued his education for 10 more years at another university but has never obtained his degree.⁽¹⁸⁾

Applicant has been employed by the same company as a programmer/analyst specialist since January 2000. The quality of his performance has not been developed in the record.

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 provides 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 precludes 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 indicates 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."

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," ⁽¹⁹⁾ 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:

With respect to Guideline J, the government has established its case. By his own admission, Applicant was involved in federal tax evasion that resulted in his arrest. Upon his plea of guilty, he was sentenced to 15 months imprisonment. 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*).

It has been approximately 24 years since the series of criminal conduct incidents began and 18 years since Applicant was released from prison. Since then, Applicant has not been involved in any additional criminal conduct and has apparently turned his life around, or at least returned it to the way it was before he became involved in the criminal endeavors. Those facts would seem to activate Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*).

Moreover, by virtue of his spotless record since the arrest, there is substantial evidence of successful rehabilitation, thus possibly activating CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). However, while I do not dispute Applicant's remorse over his conviction for tax evasion, I also sense a degree of resentment over the entire situation. Applicant attributes much of his problem to harassment and unwelcome tactics by the IRS during the investigation of his criminal activities. ⁽²⁰⁾ He also attributes his sentence to IRS zeal to make an example of him and ineffective representation by his attorney because he felt the attorney had been intimidated by the IRS. ⁽²¹⁾ He also disputes his actual tax liability, claiming he lost valid deductions which were disallowed by the IRS. ⁽²²⁾ This lengthy period of simmering resentment over his investigation, conviction, sentence, and income tax liability, minimizes the totality of his rehabilitation, thus rendering it less than *clear*.

In addition, while there was only one conviction, since this course of criminal conduct occurred during 1979-82, I cannot comply with Applicant's desire that I 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. Under other circumstances, I might conclude Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case, and the allegations of the SOR would be concluded in favor of Applicant.

However, Applicant's criminal conduct also falls within 10 U.S.C. § 986. He was convicted in a federal court of a crime and sentenced to 15 months imprisonment--a term which obviously exceeds the one year period envisioned in the law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of *more than* one year, regardless of the amount of time actually served. In this instance, Applicant was fortunate enough to have his prison term reduced rather than actually served, but that fact does not help him in this issue. Consequently, by virtue of 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegations 1.a. and 1.b. of the SOR, are concluded against Applicant.

In this instance, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

For the reasons stated, I conclude Applicant is not 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: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.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. Moreover, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Robert Robinson Gales

Chief Administrative Judge

1. The government submitted eight items in support of its contentions.
2. Item 4 (Security Clearance Application, dated July 25, 2002), at 9.
3. *Id.*
4. Item 5 (Statement, dated October 16, 2002), at 2.
5. Item 7 (U.S. District Court Presentence Report, dated March 21, 1986), at 2.
6. *Id.*, at 2-3.
7. *Id.*, at 3.
8. *Id.*, at 1.
9. *Id.*
10. *Id.*, at 2.
11. *Id.*
12. Item 8 (U.S. District Court Judgment and Probation/Commitment Order, dated March 21, 1986), at 1.

13. *Id.*, at 2-3.

14. Item 7, *supra* note 5, at 4.

15. *Id.*

16. Item 4, *supra* note 2, at 4.

17. Item 7, *supra* note 5, at 6.

18. Item 4, *supra* note 2, at 1

19. 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.)

20. Response to FORM, dated January 26, 2004, at 1.

21. *Id.*

22. *Id.*