

DATE: April 16, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01090

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-one-year old Applicant was arrested in 1980, when he was 18 years old, and charged with (1) possession of marijuana, (2) possession of cocaine, (3) possession of paraphernalia, (4) 13 counts of theft, and (5) four counts of breaking and entering. Upon his pleas of guilty, he was convicted and sentenced for each charge individually. The various sentences included periods of confinement of six months, 12 months, 18 months, and four years, much of which was subsequently suspended. The application of 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. 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 October 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 28, 2003, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to, and received by, me on November 20, 2003. A notice of hearing was initially issued on November 20, 2003, scheduling the hearing for December 17, 2003, but it was subsequently cancelled. Another notice of hearing was issued on February 23, 2004, and the hearing was held before me on March 17, 2004. During the course of the hearing, five Government Exhibits and the testimony of one Applicant witness (the Applicant) were received. The transcript (Tr.) was received on March 29, 2004.

RULINGS ON PROCEDURE

During the hearing, Department Counsel moved to amend subparagraphs 1.a., 2.a., and 2.b. of the SOR. Specifically, he sought to amend subparagraph 1.a. thereof, to conform to the expected evidence, by deleting the date "March 11, 1981" from the second sentence and substituting therefor the date "September 10, 1981."⁽¹⁾ He sought to amend subparagraph 2.a. thereof, because the information therein had been mitigated by Applicant, by deleting the entire portion of the subparagraph commencing on the ninth line with the words "In addition," and continuing to the end of the subparagraph.⁽²⁾ He sought to amend the SOR further by deleting the entire subparagraph 2.b. because the information therein had also been mitigated by Applicant.⁽³⁾ There being no objection interposed by Applicant, I granted the motions.⁽⁴⁾

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 ignored the remaining allegation under that guideline and denied the allegations pertaining to personal conduct under Guideline E.

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 41-year-old employee of a defense contractor, and is seeking to retain his TOP SECRET security clearance which was granted to him in June 1998.⁽⁵⁾

Applicant was a poly-substance abuser involved in a series of criminal incidents which began approximately 24 years ago. In November 1980, over the course of a few nights, Applicant and an acquaintance broke into parked cars in apartment complex parking lots in one city and stole radios, purses, and "anything that wasn't nailed down."⁽⁶⁾ They also broke into a house his acquaintance knew in another city and stole other items possibly including stereo equipment.⁽⁷⁾ They used some of their stolen items and pawned the remainder.⁽⁸⁾ On November 8, 1980, their automobile was stopped by the police for reasons unspecified, and when the officer approached them he could smell the marijuana Applicant was smoking at that time.⁽⁹⁾ Upon searching the automobile, the police found drugs and certain items which had previously been stolen from the parked cars.⁽¹⁰⁾ As a result, Applicant was arrested and charged with (1) possession of marijuana, (2) possession of cocaine, (3) possession of paraphernalia, (4) 13 counts of theft, and (5) four counts of breaking and entering.⁽¹¹⁾ Applicant was 18 years old and no longer residing with his parents because of a dispute, and lacked direction in his life.⁽¹²⁾

Upon his pleas of guilty, Applicant was convicted and sentenced for each charge individually. For the charge of possession of a controlled dangerous substance (the substance was not specified) he was sentenced to 18 months confinement and 36 months probation, with all but five months of confinement suspended. For another charge of possession of a controlled dangerous substance (the substance was not specified) he was sentenced to one year confinement, with all but five months of confinement suspended. For another charge of possession of a controlled dangerous substance (the substance was not specified) he was sentenced to four years confinement, with all but five months of confinement suspended. For the charge of theft, he was sentenced to four years confinement, with all but five months of confinement suspended. And for the charge of breaking and entering, he was sentenced to six months confinement.

In December 1980, Applicant entered the residential portion of a substance abuse treatment program where he resided until December 1982.⁽¹³⁾ He continued the outpatient portion of the treatment program, and successfully completed it in May 1983.⁽¹⁴⁾

On June 4, 1983, while visiting friends in another state, Applicant was arrested with the other occupants of a dormitory room following a search of that room which turned up a variety of illegal substances.⁽¹⁵⁾ He was charged with (1) possession of marijuana (hashish), (2) possession of dangerous drugs (psilocybin) (a felony), (3) possession of marijuana under 20 grams, and (4) possession of narcotic equipment.⁽¹⁶⁾ Later that month, all charges were dismissed without Applicant ever having to attend any courtroom activities.⁽¹⁷⁾ The reasons for the dismissal were not indicated.

On August 4, 1984, Applicant was arrested and charged with (1) disorderly intoxication and (2) disorderly conduct.⁽¹⁸⁾ The first charge was eventually dismissed, and on September 10, 1984, Applicant was convicted of the second charge and sentenced to confinement for two months.⁽¹⁹⁾

Other than an arrest on charges for assault and battery in April 1981, the disposition of which was not indicated,⁽²⁰⁾ Applicant has had no other reported incidents of criminal conduct.

Applicant attended college from September 1989 until he graduated with a Bachelor of Science degree in Mechanical Engineering in June 1993.⁽²¹⁾ He was married in 1997, and has one child.

On March 12, 2002, Applicant completed a Security Clearance Application (SF 86),⁽²²⁾ and in response to an inquiry pertaining to his police record ("Have you ever been charged with or convicted of any felony offense"),⁽²³⁾ Applicant responded "no." He certified that his response was true, complete, and accurate. It may have been, for there is no evidence to indicate it was not. Applicant denied his response was made knowingly with intent to falsify or conceal the truth and explained he did not know that any of the charges against him were felonies.⁽²⁴⁾ The government has offered no evidence to rebut Applicant's contention.

Applicant has been employed by the same company as a mechanical engineer since April 1995. The quality of his performance is such that he is an award-winning performer whose performance is generally characterized as "exceeds expectations."⁽²⁵⁾ Family, friends, coworkers, and former teachers characterize him in glowing terms and attest to his moral character, integrity, dependability, tenacity, and professional demeanor.⁽²⁶⁾

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 guidelines 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.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to each of the adjudicative guidelines 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," ⁽²⁷⁾ 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 activity in 1980, as described above, that resulted in his arrest. Upon his plea of guilty, for one of the charges of possession of a controlled dangerous substance, he was sentenced to 18 months confinement and 36 months probation, with all but five months of confinement suspended; and for the other charge of possession of a controlled dangerous substance, he was sentenced to four years confinement, with all but five months of confinement suspended. 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*). The criminal activity of 1981, 1983, and 1984, is uncharged criminal conduct as it was not alleged in the SOR, and is discussed only for the purposes of describing the whole-person in the context of this security clearance review proceeding.

It has been approximately 24 years since the series of criminal conduct incidents began and slightly less time since Applicant was released from prison. Since then, except for the activities of 1981, 1983, and 1984, Applicant has not been involved in any additional criminal conduct and has apparently turned his life around. Those facts would seem to activate Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*).

By virtue of his spotless record since 1984, as well as his successful completion of substance abuse treatment, and his abstinence from further marijuana abuse since November 1980, there is substantial evidence of successful rehabilitation, thus activating CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). However, as the conduct in question occurred over a period of days in different cities, I cannot find that the criminal conduct 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 state court of several crimes and sentenced to 18 months and four years for two of those charges--terms which obviously exceed 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 terms 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.

The government has not established its case under Guideline E. Examination of Applicant's actions when he was 18 years old reveals a pattern of conduct involving questionable judgment and criminal conduct. He was arrested and convicted of a number of crimes in 1980, but there is no evidence to support the government's contention that any of the crimes for which he was charged or convicted, stemming out of his criminal activity of 1980, were felonies. In the absence of evidence, I refuse to speculate whether a crime for which a sentence of over one year was imposed by a state court was a felony. Furthermore, neither the state court nor the FBI record identify the particular charges as felonies. In this instance, it is understandable that the teenage defendant might not have known the crimes for which he was charged and convicted were felonies, and I accept his explanations regarding the same.

Likewise, while the 1983 charge of possession of dangerous drugs (psilocybin) was a felony, Applicant again denied knowing that fact. Furthermore, the government was satisfied with his explanation and withdrew so much of the allegation that referred to the 1983 incident. No Personal Conduct Disqualifying Conditions apply in this case. Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to the issue of personal conduct. Accordingly, allegation 2.a., as modified, is concluded in favor of Applicant. Allegation 2.b.

was withdrawn by the government.

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

Paragraph 1. Guideline E: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Withdrawn

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. Tr., at 15.

2. Tr., at 11.

3. Tr., at 10.

4. Tr., at 14, 32.

5. Government Exhibit 1 (Security Clearance Application, dated March 12, 2002), at 7.

6. Tr., at 71-73.

7. Tr., at 74.

8. Tr., at 74-75.

9. Tr., at 76-77.

10. Tr., at 77.

11. Government Exhibit 3 (U.S. Department of Justice, Federal Bureau of Investigation, FBI Identification Record, dated March 19, 2003), at 3.

12. Tr., at 65-66.

13. Applicant Exhibit B (Letter from rehabilitation center, dated December 16, 2003).

14. *Id.*

15. Government Exhibit 2 (Statement, dated April 1, 2002), at 3.

16. *Id.*, at 5.

17. *Id.*, at 6.

18. Government Exhibit 3, *supra* note 11, at 6.

19. *Id.*

20. *Id.*, at 4.

21. Government Exhibit 1, *supra* note 5, at 1.

22. Government Exhibit 1, *supra* note 5.

23. Question 21.

24. Response to SOR, dated October 28, 2003, at 2.

25. Applicant Exhibit F (numerous performance and development summaries, awards, certificates of achievement, citations, and articles).

26. Applicant Exhibit C (numerous letters of reference and recommendation).

27. 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.)