

KEYWORD: Criminal Conduct

DIGEST: Applicant was arrested in 1990 for sexual abuse, 1st degree, a felony, for engaging in sexual contact with a female under the age of 12-years-old, when he was 34-years-old. Under a plea agreement calling for no imprisonment, he entered a plea of guilty to the charge, and was sentenced, in part, to three years imprisonment (suspended), and placed on parole for a like period. 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.

CASENO: 03-01675.h1

DATE: 08/10/2004

DATE: August 10, 2004

In Re:

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)
)
)
)

ISCR Case No. 03-01675

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was arrested in 1990 for sexual abuse, 1st degree, a felony, for engaging in sexual contact with a female under the age of 12-years-old, when he was 34-years-old. Under a plea agreement calling for no imprisonment, he entered a plea of guilty to the charge, and was sentenced, in part, to three years imprisonment (suspended), and placed on parole for a like period. 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 21, 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 an unsworn and undated written answer, ⁽¹⁾ Applicant responded to the SOR allegations, 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 10, 2004. A complete copy of the file of relevant material (FORM) ⁽²⁾ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He did so by submitting additional information on June 22, 2004. ⁽³⁾ The case was assigned to me August 9, 2004.

FINDINGS OF FACT

Applicant has admitted the factual allegations (subparagraphs 1.a. and 1.b.) pertaining to criminal conduct under Guideline J. Those admissions are incorporated herein as findings of fact. He did not address subparagraph 1.c.

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 49-year-old employee of a defense contractor, ⁽⁴⁾ and is seeking to obtain a security clearance the level of which has not been divulged.

Applicant was involved in two separate criminal incidents with the more serious one--a felony--occurring 14 years ago and the other one--a misdemeanor--occurring two years ago. In January 1990, when he was 34-years-old, Applicant was arrested by members of the sheriff's office and charged with sexual abuse in the 1st degree, a class D felony. ⁽⁵⁾ The Complaint alleged he had engaged in sexual contact with a female under the age of 12-years-old. ⁽⁶⁾ Applicant acknowledged that he, his "wife," and the 12-year-old daughter of their house-mate had slept in the same queen sized bed with the girl between them and that "[Applicant apparently touched the girl's genitals while [Applicant] was asleep." ⁽⁷⁾ The girl reported the incident to Applicant's "wife" and ultimately to the police. ⁽⁸⁾ Applicant denied intentionally having any type of inappropriate contact with the victim or ever engaging in any type of sexual activity with her. ⁽⁹⁾ He accepted legal representation from a court-appointed public defender ⁽¹⁰⁾ and, under a plea agreement calling for no imprisonment, entered a plea of guilty to the charge. ⁽¹¹⁾ Applicant was sentenced, in part, to three years imprisonment (suspended), placed on parole for a like period, and ordered to undergo therapy in a sexual abuse program. ⁽¹²⁾

When the state sex offender registration law went into effect several years ago, Applicant registered as such with the local city police department. ⁽¹³⁾ When he moved his residence to another location in the same city and county he failed to register his new address within 10 days with the county. ⁽¹⁴⁾ Unfortunately for Applicant, his failure to do so constituted a misdemeanor. ⁽¹⁵⁾ In June 2002, an information was filed, an arraignment scheduled, and a summons issued, ⁽¹⁶⁾ but Applicant failed to appear at the hearing. ⁽¹⁷⁾ As a result of his failure to appear, a warrant was issued to him. ⁽¹⁸⁾ Upon learning of the summons and warrant, Applicant turned himself in to the authorities and was again appointed a public defender. ⁽¹⁹⁾ He was subsequently released and advised he was being registered. ⁽²⁰⁾ The exact disposition of the court proceeding has not been revealed.

Applicant was an enlisted member of the U.S. Army during 1975-78. ⁽²¹⁾ He was a regular user of marijuana during a portion of his service and was eventually disciplined with non-judicial punishment and reduced two grades for using it. ⁽²²⁾ After attending drug and alcohol abuse counseling he decided to abstain, but eventually slipped and used it on one more occasion in the summer of 2000. ⁽²³⁾ He has vowed to abstain in the future.

Although Applicant claimed the woman in bed with him and the 12-year-old victim was, according to Applicant, his "wife," it appears that he was not actually married until June 1993. ⁽²⁴⁾ He and his wife were divorced in June 1994. ⁽²⁵⁾

Applicant is a truck driver and dispatcher with the same government contractor since August 2002. ⁽²⁶⁾ 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," [\(27\)](#) 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 behavior in 1990 that resulted in his arrest and conviction. As a result, he was sentenced to three years imprisonment. Parole was substituted for imprisonment. Ten years later he resumed his use of marijuana, albeit on only one occasion, for which he escaped detection and punishment. Two years after that, in 2002, he was again involved in criminal behavior, through a misunderstanding on his part and poor communications between the authorities of two different police jurisdictions, that apparently eventually resulted in a dismissal of the charge. 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 over 14 years since that major conviction and sentence, and as such, the conduct is not considered recent. Except for the one-time resumption of marijuana in 2000, which is not alleged in the SOR, and the misunderstanding regarding registration as a sex offender and the subsequent issuance of the warrant, Applicant has not been involved in any more recent significant criminal conduct and has apparently turned his life around and avoided further criminal endeavors. Those facts would appear to support the application of Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*).

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. In this instance, as it pertains to the 2002 criminal conduct, I believe Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Accordingly, allegation 1.a. of the SOR is concluded in favor of Applicant.

However, Applicant's 1990 criminal conduct also falls within 10 U.S.C. § 986. He was convicted in a state court of a

felony and sentenced to three years 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." Here, Applicant was fortunate enough to have his prison term suspended and replaced by a like period of parole rather than actually served, but that fact does not help him in this issue. Consequently, under 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegation 1.b. of the SOR is 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.: For the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: 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. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986. Clearance is denied.

Robert Robnson Gales

Chief Administrative Judge

1. Attempts were made to get Applicant to notarize his answer, but he either ignored or refused to comply with the requests. Item 5 (DOHA Memorandum for Record, dated March 19, 2004).
2. The government submitted 10 items in support of its contentions.
3. Response to FORM, dated June 22, 2004.
4. Item 4 (Security Clearance Application, dated July 31, 2002), at 3.
5. Item 8 (Court Records-Warrant for Arrest, dated January 30, 1990).
6. *Id.* (Court Records-Complaint, dated January 30, 1990).
7. Item 6 (Statement, dated September 17, 2002), at 2.
8. *Id.*
9. *Id.*, at 2-3.
10. Response to FORM, *supra* note 3, at 1.
11. *Id.*, at 1-2.
12. Item 8 (Court Records-Sentence and Judgment (including Order of Parole), dated June 4, 1990), at 1-4.
13. Item 7 (Statement, dated November 12, 2002), at 1.
14. *Id.*, at 1.
15. Item 9 (Court Records-Information, dated June 3, 2002).
16. *Id.* (Court Records-Docket Sheet, dated June 3, 2002).
17. *Id.* (Court Records-Docket Sheet, dated June 20, 2002).
18. *Id.*
19. Response to FORM, *supra* note 3, at 2.
20. *Id.*

21. Item 6, *supra* note 7, at 1.

22. *Id.*, at 1, 3.

23. *Id.*, at 3.

24. Item 4, *supra* note 4, at 5.

25. *Id.*

26. *Id.*, at 3.

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.)