

DATE: May 24, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04362

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esquire, Department Counsel

FOR APPLICANT

Beverly R. Adams, Esquire

SYNOPSIS

Thirty-nine-year old Applicant's 1986 arrest for entering auto with intent to commit theft, a felony, and possession of tools used in commission of crime, when he was 21 years old, and his subsequent conviction, led to a sentence of confinement for five years on each of five counts, to be served concurrently, but so much of the confinement was to be served on probation. Since then, he has not been involved in any additional criminal conduct. By virtue of his spotless record since 1986, and a favorable work history, there is substantial evidence of successful rehabilitation. The absence of any subsequent criminal conduct would normally mitigate the government's security concerns. However, 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 recommended.

STATEMENT OF THE CASE

On September 29, 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 answer, dated October 24, 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 January 21, 2004. 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. A response was made on April 22, 2004. The case was assigned to me on May 10, 2004.

FINDINGS OF FACT

Applicant has admitted almost all of the factual allegations (portions of subparagraph 1.a.) pertaining to criminal conduct under Guideline J. Those admissions are incorporated herein as findings of fact. He has requested a waiver under 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 39-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 involved in five criminal incidents that occurred during the early morning hours of the same night approximately 17 years ago. In November 1986, when he was 21 years old, Applicant agreed to accompany his roommate as they broke into five vehicles parked at their apartment complex. (2) He did so simply for "the thrill" or for some fun. (3) To facilitate their actions, they used screwdrivers, wire cutters, pliers, gloves, flashlight, and a "Slim Jim" door tool. (4) During their crime spree, they stole, among other items, two speakers from one vehicle; money, wire cutters, speakers, and equalizer from another vehicle; an amplifier from another vehicle; a radar receiver from another vehicle; and an equalizer and speakers from the remaining vehicle. (5) Applicant concedes they were not very accomplished thieves for as soon as they left the scene of the crime they were arrested. (6) He was subsequently charged with four counts of entering auto with intent to commit theft, a felony, and one count of possession of tools used in commission of crime. (7) In April 1987, upon his negotiated plea, Applicant was found guilty of all felony charges and sentenced, in part, to confinement for five years on each count, to be served concurrently, but so much of the confinement was to be served on probation. (8)

Applicant has not been involved in any subsequent criminal conduct and has struggled to overcome the shame and embarrassment of what he did 17 years ago.

He married in 1991, and has three children. (9)

Applicant has been employed by the same company for approximately two and one-half years, and currently serves as a site manager for a particular project. While the quality of his performance has not been developed in the record, he has received three promotions in the past two and one-half years. (10)

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," ⁽¹¹⁾ 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 1986 that resulted in his arrest and conviction. As a result, he was sentenced, in part, to confinement for five years on each of five counts, to be served concurrently, but so much of the confinement was to be served on probation. 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 17 years since those convictions and sentence. Since then, he has matured and not been involved in any additional criminal conduct. Thus, it appears he has apparently turned his life around and avoided 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 1986, and a favorable work history, there is substantial evidence of successful rehabilitation, thus activating CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). While there were convictions on five separate counts, Applicant's overall course of criminal conduct occurred during the early morning hours of the same night, and I therefore concur 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 would 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 a crime and sentenced, in part, to confinement for five years on each of five counts, to be served concurrently, but so much of the confinement was to be served on probation--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 to probation rather than actually served as imprisonment, 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 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 recommend further consideration of this case for a waiver of 10 U.S.C. § 986. Clearance is denied.

Robert Robinson Gales
Chief Administrative Judge

1. The government submitted seven items in support of its contentions.
2. Item 5 (Statement, dated September 20, 2002), at 2.
3. *Id.*
4. Item 6 (Court Records-General Bill of Indictment, dated March 26, 1987), at 4.
5. *Id.* (Court Records-Criminal Warrant, dated November 17, 1987), at 1.
6. Item 5, *supra* note 2, at 2.
7. Item 6, *supra* note 5, at 1.
8. Item 7 (Court Records-Final Disposition, dated April 24, 1987), at 1-2.
9. Item 4 (Security Clearance Application (SF 86), dated April 10, 2001), at 3-4.
10. Item 3 (Response to SOR, dated October 24, 2003), at 3.
11. 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.)