KEYWORD: Criminal Conduct

DIGEST: Applicant was convicted of smuggling goods into the United States in February 1973. He was sentenced to serve four years imprisonment, and actually served approximately 15 months in jail. Although he would otherwise be able to mitigate the security concern created by his criminal conduct, he is prohibited from doing so because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied.

CASENO: 03-06548.h1

DATE: 01/30/2006

DATE: January 30, 2006

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-06548

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Candace Le'I, Esq., Department Counsel

FOR APPLICANT

Robert M. Martinez, Personal Representative

SYNOPSIS

Applicant was convicted of smuggling goods into the United States in February 1973. He was sentenced to serve four years imprisonment, and actually served approximately 15 months in jail. Although he would otherwise be able to mitigate the security concern created by his criminal conduct, he is prohibited from doing so because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF THE CASE

On June 22, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[(1)] The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed. Applicant submitted a sworn answer to the SOR that was received by DOHA on July 26, 2004, and requested a hearing. Applicant admitted the SOR allegation concerning his criminal conduct and the applicability of 10 U.S.C. § 986 to his case.

This case was assigned to me on August 24, 2005. A notice of hearing was issued on October 3, 2004, scheduling the hearing for October 28, 2005. At Applicant's request, the hearing was continued, and an amended notice of hearing was issued on October 12, 2005, rescheduling the hearing for November 1, 2005. The hearing was conducted as rescheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5. GE 1-4 were admitted into the record over Applicant's objection, and administrative notice was taken of GE 5 over Applicant's objection. Applicant testified at the hearing, called two witnesses to testify on his behalf, and submitted 16 documentary exhibits that were marked as Applicant's Exhibits (AE) 1-16, and admitted into the record without objection. The transcript was received on November 16, 2005.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 56 years old, has been married since March 1982, has one stepdaughter who is 37 years old, and a three-year-old granddaughter. He has been steadily employed by a defense contractor since May 1984. Initially hired as a tester, Applicant has been promoted to the position of engineering test technician involved in the installation of live warheads on a variety of missiles at an annual salary of $48,000.00.

Applicant expressed particular pride in the fact that his job allows him to be in a position to provide meaningful and direct support of this country's warfighters. The testimony of his witnesses, interdepartmental correspondence, and letters of commendation and recommendation he submitted attest to his reputation as a responsible, motivated, hardworking and valuable employee. Those who are in a position to know him well believe him to be conscientious, dependable, honest and trustworthy.

Applicant has possessed a secret security clearance since December 1987. There have not been any complaints made alleging he has mishandled classified material or otherwise exposed such material to possible compromise. To the contrary, he is known to consistently handle classified material in accordance with established security procedures.

Applicant was arrested in July 1971 while in the company of his brothers who were attempting to smuggle a large quantity of cocaine and marijuana into the United States from Mexico. The charges against him were dismissed. Applicant was arrested again in March 1972, and charged with Smuggling goods into the United States, 18 U.S.C. § 545. He was convicted of that offense on February 6, 1973, following a jury trial. Specifically, he was found to have "knowingly and with intent to defraud the United States of America, import and bring into the United States of America from Mexico approximately six (6) ounces of procaine and approximately two (2) ounces of a mixture of procaine, benzocaine and caffeine. . . ." (GE 3)

Applicant's involvement in the March 1972 offense occurred as a result of him attempting to raise money to hire an attorney for his brother who was in jail and awaiting trial. He traveled to Mexico hoping to borrow money, but was instead provided with the procaine (a "cutting" material used to "cut" controlled substances) which he believed he would be able to sell for about $50.00 per ounce.

Applicant was sentenced to serve four years imprisonment and pay a $5,000.00 fine. Following unsuccessful appeals of his conviction, he surrendered himself on or about March 27, 1974. He was paroled on June 16, 1975, his first eligible parole date, having served approximately 15 months in jail.

Applicant attended a community college following his release from prison and earned an associate of arts degree in general studies in May 1981. He returned to the community college and earned a certificate of completion of various electronics courses in February 1984. In May 1988, Applicant

was awarded an associate of applied science degree in communications electronics technology from the same community college.

Applicant's wife testified that he has been a wonderful husband, father to her daughter, and grandfather. He has never used an illegal controlled substance since they have been married, and he rarely consumes alcohol. Applicant was involved in little league coaching in his younger days during their marriage. He also was active in a union sponsored career enrichment program that established an educational program for his employer's hourly workforce.

Applicant and his wife have lived in the same home for the past 15 years. They also jointly own a second house which she owned prior to their marriage that is now occupied by her sister. They jointly have approximately $10,000.00 in a savings account. Applicant has accumulated $176,000.00 in a 401K account, and will have an additional $350,000.00 in a retirement account in approximately four years, which is when he plans to retire.

Applicant has not been arrested or accused of any criminal offense since being paroled in June 1975. His only arrest, other than the two discussed earlier, was as a juvenile for loitering and drinking under age. He has no contact with the non-relative people involved in his criminal offenses, and exceptionally minimal contact with his two brothers who were involved in the criminal offenses. His contact with those brothers only occurs when one or the other happens to be present when he visits his elderly mother.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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, pertaining to criminal conduct, with its disqualifying and mitigating conditions is most relevant in this case.

BURDEN OF PROOF

The sole 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.[(2)] The government has the burden of proving controverted facts.[(3)] The burden of proof in a security clearance case is something less than a preponderance of evidence[(4)], although the government is required to present substantial evidence to meet its burden of proof.[(5)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(6)] Once the government has met its burden,[(7)]

the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(8)]

No one has a right to a security clearance[(9)] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(10)] Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.[(11)]

CONCLUSIONS

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

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. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. 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.

The government has established its case against Applicant under Guideline J. In 1973 he was convicted of attempting to smuggle a substance into the U.S. without declaring it as required. He was sentenced to serve four years in prison, and actually served about 15 months before being paroled. Disqualifying Condition (DC) 2: *A single serious crime or multiple lesser offenses* applies.

Applicant has not been arrested or charged with any offense since his 1974 conviction. The testimony of his character witnesses, his employment records, community involvement, steady work and family history, and his accumulation of substantial financial assets attest to Applicant's rehabilitation and the unlikelihood that any similar conduct will ever again occur. Additionally, Applicant has no contact with the non-family members who were involved in his criminal conduct and minimal contact with his brothers. I find Mitigating Conditions (MC) 1*: The criminal behavior was not recent*; MC 4: . . . *the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* applicable. Applicant would be able to mitigate the security concern that arises from his 1983 criminal conviction but for the statutory disqualification imposed by 10 U.S.C. § 986.[(12)] Accordingly, while I find SOR subparagraph 1.a. for Applicant, I have no discretion in the matter and am required to find subparagraph 1.b. against him. Guideline J is decided against Applicant.

In 2000, a federal statute was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who had been convicted in any court of the United States of a crime and sentenced to

imprisonment for a term exceeding one year. 10 U.S.C. § 986 (c)(4) (2001). "In a meritorious case," the Secretary of Defense could authorize an exception to the prohibition. The Secretary was not authorized to delegate that authority. 10 U.S.C. § 986(d) (2001). In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, directed that, in cases in which the decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not recommending further consideration of the case for a waiver of the prohibition. DOHA Operating Instruction No. 64 ¶ 3.e (Jul. 10, 2001).

The waiver provision was also amended in 2004. It now provides that an exception to the prohibition on granting a clearance may be authorized "[i]n a meritorious case, . . . if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." 10 U.S.C. § 986(d) (2004). No such executive order or other guidance has been issued by, or under the authority of, the President.

Notwithstanding the Director's direction in DOHA Operating Instruction 64 that the administrative judge make a recommendation whether the statute's prohibitions should be waived, the Appeal Board has concluded that, under the 2004 amendments to 10 U.S.C. § 986, the administrative judge has

no authority to make a waiver recommendation. According to [the amendments], any waiver decision 'may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.' Without such standards and procedures, the Judge had no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. § 986.

ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).

The Appeal Board has conflated making a recommendation to waive with making a decision to waive. The amendment limits the authority to grant a waiver, not to recommend whether a waiver should or should not be granted. Nevertheless, I am not at liberty to disregard the Appeal Board's decision even though I disagree with it. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004). However, to avoid the possibility of a remand when/if guidance is later issued by or under the authority of the President, I believe it is appropriate to note what my recommendation would have been had I the authority to make one. Recognizing my recommendation is not binding on the waiver authority, I would recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: For Applicant

Subparagraph b: Against 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

9. *Egan*, 484 U.S. at 528, 531.

10. *Id* at 531.

11. *Egan*, Executive Order 10865, and the Directive.

12. 10 U.S.C. § 986 was amended following issuance of the SOR but before the date of the hearing in this case. The amendment has no effect on

the applicability of 10 U.S.C. § 986 to this case.