

DATE: June 8, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-07804

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Marc Curry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 41-year-old software engineer for a defense contractor. In 1986, at the age of 23, he drove drunk from a party after a college football game, and seriously injured two pedestrians. He pled guilty to two charges of assault, was sentenced to 10 years in jail, and other punishments. He only served 30 days on work release, and five years probation. Since then he has not been in any trouble, and is very active in his community with volunteer activities. The Smith Amendment (10 U.S.C. § 986) applies and disqualifies him for a security clearance without a waiver. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

STATEMENT OF THE CASE

On September 29, 2003, the Defense Office of Hearings and Appeals (DOHA), under 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 under the personnel security Guideline J (Criminal Conduct) 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. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated October 24, 2003, Applicant responded to the SOR allegations. Applicant admitted all the allegations. He requested a hearing.

This case was assigned to me on January 14, 2004. On January 20, 2004, a Notice of Hearing was issued setting the hearing date for February 4, 2004.

On that date I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented seven exhibits, all of which were admitted into evidence.

Applicant appeared and testified, and offered 11 exhibits, which were admitted into evidence. I received the transcript (Tr.) of the hearing on February 13, 2004.

FINDINGS OF FACT

Applicant admitted all allegations in the subparagraphs of the SOR. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant drove his car into two women crossing a street when he was leaving a social gathering after a college football game in 1986. The two pedestrians were severely injured. Applicant had been drinking at the party. He was charged with Assault and Operating a Motor Vehicle under the Influence of Intoxicants (OMVI). His blood alcohol content was .21. He did not contest the charges, and regrets the entire event. His sentence on the assault charge was 10 years' confinement on each of two counts. On the OMVI charge he was sentenced to 30 days in jail to be served in the "Community Treatment Center," which was a work release program. Judgment was withheld and Applicant was put on five years probation, and order to perform 400 hours of community service and pay restitution. Applicant also has a civil judgment against him for \$10 million. In case he should receive some type of windfall, that money would go to the victims' families. Applicant successfully completed his probation. (Exhibits 2 to 7; Tr. 10, 21 to 36)

Applicant is married and has two small children. He is 41 years old. At the time of the accident, he was 23 years old and studying for his master's degree. He is a software engineer. He enjoys working on the government projects in which he is involved, and on which he was one of the first engineers hired. (Tr. 10, 21, 33 to 35)

Applicant submitted several character letters from executives and other officials working with him at his place of employment. Applicant also submitted a certificate of appreciation, a meritorious service award, four evaluations, and documents pertaining to his bonuses and other awards from work. (Tr. 6 to 17; Exhibits A to K)

Applicant is remorseful about the incident, and is sorry it happened. Applicant does not drink and drive. He is very involved in youth sports programs, continuing his community service work even though he is not required to do so. He fulfilled the terms of his probation, including making monetary payments to the victims and driving them to their medical appointments during their recovery period. (Tr. 9, 10, 22, 24 to 27; Exhibit A)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The president has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing he use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* Section 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;

- (3) how recent and frequent the behavior was;
- (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 (See Directive, § E2.2.1., Enclosure 2).

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. See *Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. See Directive Para E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive Para. E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see Exec. Or. 12968 Section 3.1(b).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

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:

Guideline J - Criminal Conduct

E2.A10.1.1. The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

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. [\(1\)](#)

E2.A10.1.3. Conditions which could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying condition E2.A10.1.2.3 may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver. (2)

Smith Amendment

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 of Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of that Act. The amendment was added to Title 10, United States Code, adding 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 Directive was amended in Guideline J to incorporate the new Disqualifying Conditions and procedural guidance on the waiver process when the conviction and sentencing condition is applicable. The situation described in this case involves the conviction and sentencing Disqualifying Condition and the waiver procedural guidance.

The statutorily required Disqualifying Condition applies to any employee of a DoD contractor, who is under consideration for the issuance or continuation of eligibility for access to classified information and who has been convicted in any court of the United States or a crime and sentenced to imprisonment for a term exceeding one year, regardless of the time actually served.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline J (Criminal Conduct) is quite clear in its statement that "A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness." The Disqualifying Conditions (DC) applicable here are 1 (Allegations or admission of criminal conduct, regardless of whether the person was formally charged) and 2 (A single serious crime or multiple lesser offenses). Applicant has one conviction on two counts from 1986. That conviction carried a sentence of 10 years on each of two assault counts. The Government proved its case on these allegations under this guideline.

The Mitigating Conditions (MC) applicable on these facts in this case are MC 1 (The criminal behavior was not recent) and 6 (There is clear evidence of successful rehabilitation). Applicant's terrible accident situation was 18 years ago. He has changed and improved himself. He regrets the incident. He is a law-abiding citizen of his community. Based on his sincerity and demeanor, and the facts in evidence, I believe his testimony. The non-Smith Amendment MC here outweigh the non-Smith Amendment DC, and under those circumstances separately, I would find for the Applicant. However, the disqualifications contained in the Smith Amendment control here, as explained in this Decision.

Regardless of the analysis under the Guideline J that would grant Applicant a security clearance, the Smith Amendment, 10 U.S.C. § 986, precludes the granting or renewal of a security clearance to those applicants for access who have been convicted in any Federal or State court and sentenced to more than one year, regardless of the time actually served. Applicant was convicted in 1986 of the two counts of assault and one of OMVI. The plea to the assault counts brought 10 year confinement sentences on each count. Therefore, he falls within the purview of the Smith Amendment. DC 3 applies. MC 7 (which in some memorandum documents is lettered "g" under the mitigating conditions heading labeled "E2.A10.1.3, but I label here as "MC 7" for consistency in the Directive), the procedural guidance stated above, applies here. Applicant is ineligible for a clearance without a waiver. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline J: Against Applicant

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

DECISION

In light of all the circumstances and facts 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 recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Philip S. Howe

Administrative Judge

1. Added by the implementing memorandum of June 2, 2001.
2. Added by the implementing memorandum of June 2, 2001.