KEYWORD: Criminal Conduct

DIGEST: Appellant is a computer systems network engineer for a defense contractor. He served in and retired from the United States Army Reserve. He also retired from the United States Civil Service. In 1984, he was convicted of bribery of a public official and served approximately 13 months in prison. The provisions of 10 U.S.C. § 986 apply. Applicant has no criminal incidents since he served his prison term. He has excellent performance ratings both with the U.S. Government and private contractors. His finances are in excellent condition and he has accumulated funds and has no delinquent debts. A waiver of the provisions of 10 U.S.C. § 986 is recommended.

CASENO: 03-12100.h1

DATE: 08/29/2005

DATE: August 29, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-12100

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

<u>APPEARANCES</u>

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Patrick J. O'Guinn, Sr., Esq.

SYNOPSIS

Appellant is a computer systems network engineer for a defense contractor. He served in and retired from the United States Army Reserve. He also retired from the United States Civil Service. In 1984, he was convicted of bribery of a public official and served approximately 13 months in prison. The provisions of 10 U.S.C. § 986 apply. Applicant has no criminal incidents since he served his prison term. He has excellent performance ratings both with the U.S. Government and private contractors. His finances are in excellent condition and he has accumulated funds and has no delinquent debts. A waiver of the provisions of 10 U.S.C. § 986 is recommended.

STATEMENT OF THE CASE

On May 7, 2004, the Defense Office of Hearing and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to not grant a security clearance to Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan 2, 1992), as amended and modified (Directive). Applicant acknowledged receipt of the SOR on May 13, 2004. The SOR alleges security concerns under Guideline J (Criminal Conduct) of the Directive.

Applicant answered the SOR in writing on June 1, 2004, admitting all of the allegations under Guideline J, and requested a hearing before an administrative judge. The request was received by DOHA on June 4, 2004, and Department Counsel was prepared to proceed with the case on September 27, 2004. The case was assigned to me on October 1, 2004, and a notice of hearing was issued on October 13, 2004. The hearing convened on November 19, 2004. Six government exhibits, six Applicant exhibits, the testimony of the Applicant, and the testimony of another Applicant witness were received during the hearing. DOHA received the transcript (Tr.) on November 29, 2004. The decision in this case was delayed by the December 14, 2004, moratorium on decisions to be rendered in cases affected by 10 U.S.C. § 986. The moratorium was lifted on August 3, 2005. Department counsel was required by August 15, 2005, to notify the administrative judge if any case affected by the moratorium was to be terminated. No such notice was provided by department counsel in this case.

FINDINGS OF FACT

Applicant is a 69-year-old computer network systems engineer for a defense contractor. He is retired from the U.S. Army Reserve and also served in the U.S. Air Force Reserve. He is also retired from the U.S. civil service.[1]

Applicant was arrested in February 1984 for conspiracy to defraud the United States Government and Bribery of a Public Official. At the time, Applicant was employed as a computer data administrator for the federal government, and held a government security clearance. He pled guilty in July 1984 to bribery, and was sentenced to 18 months confinement. He served 13 months confinement in a federal prison. Applicant also resigned from government service. [2]

After serving his prison sentence, Applicant worked for various companies until he went back to work for the federal government. He worked for various U.S. government agencies, including the Department of Defense, before retiring from the civil service. After retiring from government service, he worked for government contractors. He was not required to have a security clearance until employed by his present defense contractor.[3]

Since serving his prison sentence, Applicant's job performance has been excellent, and he has accumulated significant savings and investments. He significantly contributed to his community, and provided significant volunteer services for his church.[4] Other than the conviction for bribery, Applicant has no other criminal incidents.[5] Applicant has accumulated over $75,000.00 in his bank account.[6] He has been officially commended for his excellent work performance as a civil service employee.[7] His resume shows his computer skills and experience.[8] His work performance with defense contractors has been excellent.[9] He managed an activity for his church with no financial irregularity.[10] His latest credit report shows his credit rating is clear.[11]

POLICIES

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."[12] Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.[13]

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.[14] An administrative judge should consider: (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 applicant'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 of recurrence.[15]

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.[16] It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.[17] Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts.[18] An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."[19] "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability."[20] "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."[21]

Based upon a consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J - Criminal Conduct: There is a security concern because 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 would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions section below.

Additionally, 10 United States Code § 986, prohibits the Department of Defense from granting or renewing a security clearance to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, was sentenced to imprisonment for a term exceeding one year, and was incarcerated for more than one year. The statute also provides that, in meritorious cases, the Secretary of Defense or his designee may authorize a waiver of the prohibition.

CONCLUSIONS

I carefully considered all of the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The government has established its case under Guideline J. Applicant's arrest and conviction for bribery of a public official raise a security concern under Criminal Conduct Disqualifying Conditions E2.A10.1.2.1 (*allegation or admission of criminal conduct...*), and E2.A10.1.2.2 (*a single serious crime...*). Applicant admits to being convicted of the felony offense of bribery of a public official. I conclude the above criminal conduct disqualifying conditions have been established.

The Criminal Conduct Mitigating Conditions relevant to Applicant's case are E2.A10.1.3.1 (*the criminal conduct was not recent*), E2.A10.1.3.2 (*the crime was an isolated incident*), and E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). The crime is not recent since it happened over 20 years ago. It is isolated since it is the only crime committed by Applicant in his 69 years. There is substantial evidence of rehabilitation. Applicant has been gainfully employed since serving his sentence, even retiring from the U.S. civil service. He has been a good citizen contributing to his community. He has significant savings and is in good financial condition. I conclude Applicant has been rehabilitated and has mitigated the disqualifying conditions.

Mitigation of the disqualifying conditions is not sufficient to grant Applicant a security clearance. Under the provisions of 10 United States Code § 986, known as the Smith Amendment, absent a waiver from the Secretary of Defense, the Defense Department cannot grant a security clearance for any person convicted and sentenced in any court in the United States for a crime and incarcerated as a result of that sentence for more than one year. Applicant was convicted of and sentenced to imprisonment for bribery of a public official and was incarcerated in the federal prison system for more

than one year. The provisions of 10 U.S.C. § 986 apply.

Applicant cannot be granted a security clearance absent a waiver by the Secretary of Defense. For the same reasons Applicant has mitigated the security concerns for criminal conduct, he should be granted a waiver under 10 U.S.C. § 986. He held a security clearance since his release from prison while working for the U.S. government. He has been a good citizen contributing to the success of his community and accumulated wealth. He has shown successful rehabilitation from his prior criminal conduct. Accordingly, a waiver is appropriate.

I carefully considered all of the circumstances in light of the "whole person" concept. I conclude Applicant is not eligible for access to classified information. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

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 APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

DECISION

In light of all of 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. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Thomas M. Crean

Administrative Judge

1. Tr. 30-32; Government Exhibit 1 (Security clearance application, dated Mar. 1, 2001).

2. Tr. 67-78; Government Exhibit 3 (Applicant's statement, dated Apr. 10, 2002) at 2; Government Exhibit 4 (FBI file, dated Sep. 17, 1984); Government Exhibit 5 (Case file, dated Jul. 10, 1984).

3. Tr. 33-46.

4. Tr. 87-91.

5. Tr. 47-60.

6. Appellant Exhibit A (Account statement, dated Nov. 10, 2004).

7. Appellant Exhibit B (Performance citations, dated Jul. 27, 1998, May 10, 1997, and Jun. 15, 1998).

8. Appellant Exhibit C (Resume, undated).

9. Appellant Exhibit D (Performance and Development Partnership Form, undated).

10. Appellant Exhibit E (Report to Board of Trustees, dated Mar. 22, 2003).

11. Appellant Exhibit F (Credit Bureau Report, dated Jun. 30, 2004).

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

13. Directive ¶ E2.2.1.

14. *Id.*

15. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

16. *See* Exec. Or. 10865 § 7.

17. Directive ¶ E3.1.14.

18. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.

19. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

20. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

21. *Egan,* 484 U.S. at 531; *see* Directive ¶ E2.2.2.