

KEYWORD: Criminal Conduct

DIGEST: The evidence of reform and rehabilitation is sufficient to mitigate the criminal conduct security concern stemming from Applicant's commission of numerous robberies during 1984 - 1986. Convicted and sentenced to confinement in two adjoining jurisdictions, he was confined for several years until his release in November 1992. He began regular, gainful employment in March 1993, which continues to date. There have been no further indications of criminal conduct since his release from confinement about 13 years ago. In addition, 10 U.S.C. § 986(c)(1), which prohibits the Defense Department from granting or renewing a security clearance to persons who are convicted and incarcerated for more than one year, does not apply here because Applicant is not an employee of a contractor of the Defense Department. Clearance is granted.

CASE NO: 03-12805.h1

DATE: 04/19/2006

DATE: April 19, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-12805

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL H. LEONARD**

**APPEARANCES**

**FOR GOVERNMENT**

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

The evidence of reform and rehabilitation is sufficient to mitigate the criminal conduct security concern stemming from Applicant's commission of numerous robberies during 1984 - 1986. Convicted and sentenced to confinement in two adjoining jurisdictions, he was confined for several years until his release in November 1992. He began regular, gainful employment in March 1993, which continues to date. There have been no further indications of criminal conduct since his release from confinement about 13 years ago. In addition, 10 U.S.C. § 986(c)(1), which prohibits the Defense Department from granting or renewing a security clearance to persons who are convicted and incarcerated for more than one year, does not apply here because Applicant is not an employee of a contractor of the Defense Department. Clearance is granted.

**STATEMENT OF THE CASE**

This case arose when the Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On March 15, 2004, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleged a security concern under Guideline J for criminal conduct. Applicant replied to the SOR on May 4, 2004, and he requested a hearing. The case was initially assigned to an administrative judge on November 8, 2004, and reassigned to second administrative judge on December 8, 2005. The processing of the case was delayed due to a moratorium imposed on all cases involving allegations of 10 U.S.C. § 986, the so-called Smith Amendment. The moratorium was lifted on August 15, 2005, and then the case was reassigned to me on August 25, 2005.

A notice of hearing was issued scheduling the hearing for October 13, 2005. Applicant appeared without counsel and the hearing took place as scheduled. The record was left open to allow Applicant to submit additional documentary evidence, which was received and admitted without objections as Exhibit D. DOHA received the transcript on October 26, 2005.

## FINDINGS OF FACT

Applicant admitted to the criminal conduct allegations in SOR subparagraphs 1.a, 1.b, 1.c, and 1.d, and he did not respond to the allegation in subparagraph 1.e. In addition, I make the following findings of fact.

Applicant is a 45-year-old man who is seeking a security clearance for his employment with a contractor of the State Department. <sup>(2)</sup> He has worked for this contractor or its successor since March 1993. He was initially hired as a data entry clerk, and he now works as a budget analyst.

It does not appear that Applicant has previously held a security clearance. But in November 2002, the State Department reviewed Applicant's investigative file for a moderate risk public trust position and concluded that Applicant was cleared for access through August 2006, contingent on his employment duties and a valid need-to-know basis (Exhibit D).

Applicant has a history of criminal conduct (Exhibits 3, 4, 5, and 6). To support his heroin addiction, Applicant committed a series of armed (with a knife) robberies during 1984 - 1986. The typical target for a robbery was a convenience store or a similar store. He used a knife instead of a firearm because he knew he could get a stiffer sentence using a firearm. He used the knife as a scare tactic. If he was challenged during the robbery, he would run away, and he did so more than once. He typically stole anywhere from \$50 to \$300 during a robbery, and \$500 was probably the high amount. The robberies took place in two adjoining jurisdictions.

He was arrested in 1986, and he was thereafter convicted and sentenced to confinement in the two adjoining jurisdictions. He was imprisoned for multiple years in both jurisdictions until his release in November 1992. While in prison, Applicant successfully underwent a drug treatment program for his heroin addiction. He no longer uses any illegal drugs, and he does not associate with people who use drugs or who engage in criminal conduct. He completed parole or probation in 1997 or 1998, and he is no longer under any type of court-ordered supervision.

Applicant began regular, gainful employment in March 1993, which continues to date as an employee of a contractor for the State Department. He was initially hired as a data entry clerk. His diligence and hard work have been rewarded with a series of promotions. He now works as a budget analyst and he has won much praise for his efforts (*See Exhibits A and C; testimony of project manager and government supervisor*). One of the awards Applicant received is the Assistant Secretary's Award for Excellence in 2004 for his work at the G8 Summit at Sea Island, Georgia.

His project manager since 2002 described Applicant as an ethical and punctual employee with integrity. She believes

Applicant serves the company well and has often gone beyond the call of duty. On a scale of one to ten, she would rate Applicant a ten--an exceptional employee.

The government supervisor, a manager at the State Department, has been Applicant's direct supervisor on a day-to-day basis for the last three to four years. The supervisor describes Applicant as the best employee he has ever had the chance to work with. He describes Applicant as a hard-working, proactive employee who keeps customers very happy. The supervisor notes Applicant is one of the few people who take suggestions seriously and attempts to implement the suggestions to improve his performance. Accordingly, the supervisor has seen Applicant grow and has regularly increased Applicant's responsibilities. The supervisor is aware of Applicant's criminal history, and the supervisor believes Applicant is a new person, someone he cannot say enough good things about.

Applicant has spoken to groups about his experience in the criminal-justice system. For example, from September 2000 to September 2003, he was a volunteer group facilitator at a detention center where he led a group of inmates in various discussions (Exhibit B).

Based on the record evidence as a whole, I make the following specific findings of fact:

1. Applicant is an employee of a contractor of the State Department (*See* Exhibit 1 at 2, Exhibits A, C, and D, and testimony of Applicant, project manager, and government supervisor).
2. Applicant has substantial experience in his field of work. It appears he has the necessary skills and competence to perform his duties in an exemplary manner.
3. Applicant has complied with the terms and conditions of his sentences to confinement. He is no longer under any type of court-ordered supervision.
4. It appears that there have been no further indications of criminal conduct.
5. Applicant recognizes the wrongfulness and seriousness of his criminal conduct for which he was convicted and imprisoned, and it appears he has learned from this experience.

### **POLICIES**

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

A person granted access to classified information enters into a special relationship with the government. The

government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security

clearance is not a determination of an applicant's loyalty.<sup>(3)</sup> Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

This case also involves the so-called Smith Amendment.<sup>(4)</sup> In 2000, a federal statute was enacted that prohibited the Defense Department from granting or continuing a security clearance for an applicant who was convicted of an offense in a U.S. court and was sentenced to more than one year in jail. 10 U.S.C. § 986 (c)(1) (2001). "In a meritorious case," the Secretary of Defense could authorize an exception to the prohibition. As amended in 2004, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited to those who were sentenced to more than one year in jail and were in fact incarcerated as a result of that conviction for not less than one year. 10 U.S.C. § 986(c)(1) (2004).

## BURDEN OF PROOF

The only 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.<sup>(5)</sup> There is no presumption in favor of granting or continuing access to classified information.<sup>(6)</sup> The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.<sup>(7)</sup> An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.<sup>(8)</sup> In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>(9)</sup>

As noted by the Supreme Court in *Department of Navy v. Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(10)</sup> Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

### *1. Criminal Conduct*

Under Guideline J, <sup>(11)</sup> criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. 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.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant engaged in serious criminal conduct by committing about 20 armed robberies during 1984 - 1986. These were serious crimes, as indicated by the use of a weapon and the stiff sentences Applicant received. Given these circumstances, both DC 1 <sup>(12)</sup> and DC 2 <sup>(13)</sup> apply against Applicant. His history of criminal conduct raises a security concern about his judgment, reliability, and trustworthiness.

I reviewed the mitigating conditions under the guideline and conclude the evidence of reform and rehabilitation is sufficient to mitigate the security concern. First, Applicant engaged in criminal conduct about 20 years ago, he was released from prison in 1992, and he completed parole or probation in 1997 or 1998. Given these circumstances, I conclude his criminal behavior was not recent. <sup>(14)</sup> Second, while in prison Applicant participated in a drug rehabilitation program and successfully overcame his heroin addiction. In addition, he has been gainfully employed for many years. Given these circumstances, the factors leading to his criminal behavior (the need for money to feed a drug addiction) are unlikely to recur. <sup>(15)</sup> Third, the evidence of reform and rehabilitation is clear and obvious. <sup>(16)</sup> Not only has Applicant successfully addressed his drug addiction, he served his punishment and he is no longer in the criminal-justice system. He has been gainfully employed for many years and has performed his duties exceedingly well. He has become a law-abiding citizen who has not been involved in any further incidents of criminal conduct. Taken together, Applicant has presented sufficient evidence to mitigate the security concern. Accordingly, subparagraphs 1.a, 1.b, 1.c, and 1.d are decided for Applicant.

## ***2. Applicability of 10 U.S.C. § 986***

Subparagraph 1.e alleges that Applicant is disqualified, as a matter of law, from having a security clearance based on his convictions and incarceration for several years. The statute, however, has limited application because it applies to only certain "covered persons." 10 U.S.C. § 986(b). Concerning employees of contractors, a covered person is "[a]n officer or employee of a contractor of the Department of Defense." 10 U.S.C. § 986(b)(3). Therefore, I conclude that 10 U.S.C. § 986, as amended, does not apply to Applicant because he is not a covered person within the plain meaning of the statute. The record evidence is clear that Applicant has been and is now an employee of a contractor of the State Department. Accordingly, the so-called Smith Amendment is inapplicable to this case and subparagraph 1.e is decided for Applicant.

To conclude, Applicant has met his ultimate burden of persuasion to obtain a favorable clearance decision. By all appearances, Applicant is a textbook case of reform and rehabilitation, and the record evidence shows his criminal conduct is a thing of the past unlikely to recur. In reaching my decision, I considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

## **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline J: For Applicant

Subparagraphs a - e: For Applicant

## **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. By mutual agreement, the Directive extends to other federal agencies, including the Department of State.
3. Executive Order 10865, § 7.
4. For some background information on the origin of this statutory prohibition, see Attorney Sheldon I. Cohen's publication *Loss of a Security Clearance Because of a Felony Conviction: The Effect of 10 U.S.C. § 986, the "Smith Amendment,"* which can be found at [www.sheldoncohen.com/publications](http://www.sheldoncohen.com/publications).
5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
6. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
7. Directive, Enclosure 3, Item E3.1.14.
8. Directive, Enclosure 3, Item E3.1.15.
9. Directive, Enclosure 3, Item E3.1.15.
10. 484 U.S. at 528, 531 (1988).
11. Directive, Enclosure 2, Attachment 10.
12. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
13. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
14. E2.A10.1.3.1. The criminal behavior was not recent.
15. E2.A10.1.3.4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
16. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.