

KEYWORD: Criminal Conduct

DIGEST: Applicant is a 53-year-old employee of a defense contractor who was arrested and convicted of two armed robberies when he was 21 years old and served three years and six months in confinement. While in prison, Applicant realized the foolishness of his ways, changed his attitudes and conduct, and that has been the model for his life. Since his confinement, Applicant has led an exemplary life working with a national community service agency on rehabilitation of young persons. Applicant has held a security clearance since 1989. However, the law requires that the finding must be adverse since he was incarcerated for more than one year. I recommend further consideration of this case for a waiver of 10 U.S.C. 986 and am joined by the government in that recommendation. Clearance is denied.

CASENO: 03-13820.h2

DATE: 10/27/2005

DATE: October 27, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13820

REMAND DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 53-year-old employee of a defense contractor who was arrested and convicted of two armed robberies when he was 21 years old and served three years and six months in confinement. While in prison, Applicant realized the foolishness of his ways, changed his attitudes and conduct, and that has been the model for his life. Since his confinement, Applicant has led an exemplary life working with a national community service agency on rehabilitation of young persons. Applicant has held a security clearance since 1989. However, the law requires that the finding must be adverse since he was incarcerated for more than one year. I recommend further consideration of this case for a waiver of 10 U.S.C. 986 and am joined by the government in that recommendation. Clearance is denied.

STATEMENT OF CASE

On December 31, 2003, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, 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 which 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. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On January 28, 2004, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on May 12, 2004. A notice of hearing was issued on June 15, 2004. A hearing was held on June 22, 2004. The Government introduced two exhibits. The Applicant introduced seven exhibits with sub-parts to each. All of the exhibits were admitted into evidence. The Applicant was the only witness. The transcript was received on July 1, 2003. I issued a decision on October 19, 2004, concluding that the provisions of 10 U.S.C. 986 and the implementing regulations precluded a finding for Applicant because of his conviction and sentence to more than one year in jail. I recommended further consideration of the case for a waiver under the provisions of DOHA Operating Instruction No. 64 ¶ 3.e (July 10, 2001). The Director, DOHA, declined to recommend a waiver.

In 2004, Section 986 was amended by Section 1062 of the National Defense Authorization Act for Fiscal Year 2005 limiting the prohibition on granting security clearances to those who are not only convicted and sentenced to more than one year but who were incarcerated as a result of the conviction for at least one year. Applicant appealed to the Appeal Board on November 20, 2004, and the matter was remanded to me on August 9, 2005, to take additional evidence, to issue a new decision consistent with the Directive, and to determine if Section 1062 has any effect on Applicant's case. I issued an order on September 6, 2005, giving an opportunity to both Applicant and the government to submit additional evidence.

FINDINGS OF FACT

After a complete review of the evidence in the record and upon due consideration of the record, the following findings of fact are made:

Applicant is a 53-year-old employee of a defense contractor who was arrested and convicted of armed robberies in two different counties in 1971 when he was 21 years old and sentenced to a total of 5 to 12 years of confinement. He served three years in one county and six months in another.

The crimes were the result of falling in with a bad crowd who were committing robberies. He joined them on two robberies in two counties. No one was injured in either robbery and Applicant was the

only one of the group who was apprehended and tried. He pled guilty. While in prison, Applicant realized the foolishness of his transgressions and changed his attitudes and conduct, and that has been the model for his life since then. He studied in prison, obtained skills, and received recommendations from the prison supervisors to shorten his sentence.

Since his confinement, Applicant has led an exemplary life working with a national community service agency on rehabilitation of young persons. In 1985 he was named the organization's outstanding young man of the year. Applicant and his wife have taken in 27 foster children over the years and are active in community affairs.

Applicant is highly regarded by his employer and has received numerous corporate and civic awards as illustrated in his lengthy exhibits. He held a security clearance since 1989 with no security violations. Pursuant to my Order of September 6, 2005, both Applicant and Department Counsel submitted additional evidence. Applicant related his loss of employment and inability to find meaningful employment as a result of the loss of his security clearance. Department Counsel noted that Applicant's conduct since his conviction in 1971 presents a compelling case for the grant of a waiver.

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the 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. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "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, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

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 all allegations set forth in the SOR:

Based on the evidence of record, including Applicant's admissions, the Government established reasons to deny him a security clearance because of criminal conduct. The applicable Disqualifying Condition Criminal Conduct (DC) 2 is applies to Applicant in that he was convicted of a serious crime and sentenced to a five year term in prison. Having established such reasons, the Applicant has the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001). Applicant's criminal conduct is mitigated by Mitigating Conditions (MC) 1, the conduct was not recent; 2, the crime was an isolated incident; 4 the factors leading to the violations are not likely to recur; and 5, there is clear evidence of successful rehabilitation.

Having observed Applicant at the hearing, I conclude he is a person of serious demeanor who has been totally rehabilitated since his release from prison. He is an active member of his community. He receives credit under the whole person concept for long and continuous service to his community and dedication to work with others who might be in a similar position as he was as a young man. The record is replete with documentation of his accomplishments and honors since his release from prison.

The record in this matter is confusing in that the reports indicate several more offenses than occurred since transfers of confinement facilities are reported as if they were the product of additional offenses. Applicant has clarified this to my satisfaction. He is completely rehabilitated and has not had any legal difficulties since his release from prison in 1975. He has a stable marriage of 25 years. His employment record is impressive having been recognized on numerous occasions for service to his company and country.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. 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. The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

The provisions of 10 U.S.C. 986 and the implementing regulations are unequivocal that a person is disqualified from holding a security clearance if convicted of a crime and sentenced to more than one year of imprisonment. Although that provision has been amended to require incarceration of one year for disqualification from holding a security clearance , and that amendment is applicable to Applicant since he did serve more than one year, a waiver is still required for obtaining a security clearance. Thus, the only relief available to Applicant is through a waiver by the Secretary of Defense so I must find against the Applicant.

However, applying the whole person concept to Applicant's case, I believe that he has successfully been rehabilitated and is worthy of future trust by the government. I adhere to my original recommendation, and conclude that a compelling case has been made for the grant of a waiver in this matter so that his security clearance can be restored. Applicant has made a most compelling case for rehabilitation and qualification for a waiver. His case is bolstered by the recommendation for a waiver from Department Counsel.

In view of the continued applicability of Section 986, I must conclude that he is not eligible for access to classified information absent a waiver. Thus, I find against the Applicant.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: 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 renew a security clearance for Applicant. The provisions of 10 U.S.C. 986 and the implementing regulations preclude such a finding because of Applicant's conviction, sentence, and the period of time served. However, I adhere to my original recommendation for further consideration of the case for a waiver under 10 U.S.C. 986. Clearance is denied.

Charles D. Ablard
Administrative Judge