

DATE: December 7, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15634

DEMAND DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esquire, Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-one-year old Applicant's 1988 arrest for trafficking a controlled substance, cocaine, and conspiracy to traffic a controlled substance, cocaine, following several sales of cocaine to an undercover narcotics agent for the sheriff's department, resulted in her conviction on three counts of trafficking a controlled substance, cocaine. She was eventually convicted and sentenced, in part, to serve nine years in prison on each of the three counts, to run concurrently, all of which was suspended except for time served (which was less than one year), and placed on five years probation. While the application of 10 U.S.C. § 986 previously would have disqualified her from eligibility for a security clearance, the recently amended 10 U.S.C. § 986 no longer serves as an automatic disqualification in this case. Clearance is granted.

STATEMENT OF THE CASE

On October 23, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to 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 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, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written answer, dated November 20, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have her case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on January 29, 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, and she was afforded, until March 28, 2004, an opportunity to file objections and submit material in refutation, extenuation, or mitigation. No further response was made. The case was assigned to me on April 27, 2004.

On April 28, 2004, I indicated that a person should not be held forever accountable for misconduct from the past when

there is a substantial indication of subsequent reform, remorse, or rehabilitation, and that under other circumstances, I could have concluded Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case, and the allegations of the SOR would be concluded in favor of Applicant. However, Applicant's criminal conduct also fell within 10 U.S.C. § 986. She was convicted in a state court of several crimes and sentenced to nine years in prison on each of three counts of trafficking a controlled substance, cocaine--terms which obviously exceed the one year period envisioned in the law as it stood at that time. Furthermore, I noted that implementing guidance indicated such a sentence would disqualify persons with "sentences imposed of *more than* one year, regardless of the amount of time actually served. Applicant was fortunate enough to have her prison terms suspended and reduced to time already served rather than actually served in their entirety, but, by virtue of 10 U.S.C. § 986, as it then existed, I concluded Applicant was not eligible for a security clearance. Accordingly, on April 28, 2004, I issued a Decision in which I found that it was not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Applicant subsequently filed a notice of appeal and submitted an appeal brief. Department Counsel submitted a reply brief. However, while the case was pending appeal, Congress amended 10 U.S.C. § 986. On November 5, 2004, the Appeal Board considered the issue as to whether the amendments should be applied retroactively and ruled, in part, as follows:

As a matter of fairness to the parties in this case and in recognition of the limits of the Board's authority under the Directive, the Board hereby remands the case to the Administrative Judge to allow the parties an opportunity--consistent with basic principles of due process--to present their views on the effect of Section 1062 on Applicant's case. On remand, the Administrative Judge must allow Department Counsel the opportunity to obtain guidance and direction from appropriate Department of Defense officials as to the legal effect of Section 1062 on pending cases and how the Department of Defense proposes to implement that statute.

On November 22, 2004, I issued an Order to both parties affording them an opportunity to present their respective written views regarding possible retroactive application of the revised statute with such views to be received by me no later than the close of business on December 6, 2004. Neither party responded directly to the Order.

FINDINGS OF FACT

The Findings of Fact set forth in my initial Decision, dated April 28, 2004, are hereby incorporated herein as though they were expressly re-written below.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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 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.

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

Criminal Conduct - Guideline J: 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 could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the conclusions below.

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 for Fiscal Year 2001*. The memorandum provided policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that precluded the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;
- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of *more than* one year, regardless of the amount of time actually served."

On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 was approved and adopted, amending portions of Subsection (c)(1) of section 986 of Title 10, United States Code, thereby altering it to read as follows:

- (1) has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, *and was incarcerated as a result of that sentence for not less than one year.* (Emphasis of change supplied)

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," ⁽¹⁾ or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship 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. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

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

The government has established its case under Guideline J. By her own admission, Applicant was involved in criminal behavior in 1987 that resulted in her arrest and conviction. As a result, she was sentenced to nine years imprisonment for each of the three counts of which she was convicted, to run concurrently, all of which were suspended except for time served (which was less than one year), with five years probation. Applicant's criminal conduct clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and CC DC 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*).

I acknowledge CC DC E2.A10.1.2.3. has not yet been formally amended to conform with the recent change in the law, and no implementing guidance has yet been provided. Nevertheless, in complying with the mandate that these security clearance review decisions be fundamentally fair commonsense decisions, I have concluded that the new law was intended to be applied retroactively.

It has been approximately 16 years since Applicant's conviction and sentence. Although Applicant successfully completed a two year treatment and rehabilitation program in 1991, she resumed substance abuse, and became addicted to heroin. Following methadone treatment, she was able to withdraw from it and vowed to abstain. Unfortunately, she was unable to keep her vow and soon fell back into the drug culture. In March 1995, she was again arrested and charged with unlawful possession of controlled dangerous substance, methamphetamine. Applicant was found not guilty of the charge in June 1995. It is to her credit that Applicant has abstained from any further substance abuse since 1995, and has vowed to continue abstaining in the future. While the 1987 criminal conduct for which Applicant was convicted is not considered recent, her other criminal conduct involving solely substance abuse, while uncharged in the SOR, continued until at least 1995. However, since 1995, Applicant has not been involved in any additional criminal conduct and has apparently turned her life around and avoided further criminal endeavors. Those facts support the application of Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*).

Moreover, by virtue of her spotless record since 1995, there is substantial evidence of successful rehabilitation, thus

activating CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). However, while there was only one significant conviction on three criminal counts, Applicant's overall course of criminal conduct occurred during November-December 1987, and I cannot comply with Applicant's desire that I find that it was isolated as set forth in CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

As noted above, in June 1995, following a federal jury trial, Applicant was acquitted of unlawful possession of controlled dangerous substance, methamphetamine. She provided a reasonable explanation to the jury as well as to DOHA, and the government has offered no evidence to rebut her contentions. I believe Applicant has, through evidence of extenuation and explanation, successfully mitigated or overcome the government's case with respect to that incident. Accordingly, allegation 1.b. of the SOR is concluded in favor of Applicant.

A person should not be held forever accountable for misconduct from the past when there is a substantial indication of subsequent reform, remorse, or rehabilitation. Moreover, Applicant's criminal conduct no longer falls within 10 U.S.C. § 986. While she was convicted in a state court of three crimes and sentenced to three concurrent terms of nine years imprisonment--a term which obviously exceeds the one year period envisioned in the law at that time, those sentences were suspended except for time served, and placed on five years probation. Applicant's actual period of incarceration was clearly less than one year. Consequently, under the newly amended 10 U.S.C. § 986, Applicant is no longer automatically disqualified from eligibility for a security clearance. Considering all of the above, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Accordingly, allegation 1.a. of the SOR is concluded in favor of Applicant.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

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: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the 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.

Robert Robinson Gales

Chief Administrative Judge

1. Exec. Or. 12968, "*Access to Classified Information*," as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)