

DATE: May 28, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-16490

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

**APPEARANCES**

**FOR GOVERNMENT**

Jason Perry, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Forty-eight-year old Applicant's 1978 arrest--when he was 22-years-old--for aggravated trafficking in drugs and possession of LSD and marijuana resulted in his conviction on both counts. He was eventually sentenced to serve no less than three years to no more than 15 years imprisonment. Although he has a spotless record since 1978, and is considered rehabilitated, the application of 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

**STATEMENT OF THE CASE**

On November 25, 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 December 26, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on March 11, 2004. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded, until April 26, 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 May 14, 2004.

**FINDINGS OF FACT**

Applicant has admitted the factual allegations (subparagraphs 1.a. and 1.b.) pertaining to criminal conduct under

Guideline J. 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 same, I make the following additional findings of fact:

Applicant is a 48-year-old president and employee of a defense contractor, <sup>(2)</sup> and is seeking to obtain a SECRET security clearance.

Applicant was involved in two separate criminal incidents over 25 years ago. In June 1976, when he was 20-years-old, Applicant was arrested by members of the sheriff's office and charged with receiving stolen property. <sup>(3)</sup> Applicant claims he was fined an unspecified amount without further action. <sup>(4)</sup> Information furnished by the Federal Bureau of Investigation (FBI) indicates he was "incarcerated" on \$1,000.00 bond. <sup>(5)</sup> There is no other evidence in the record to indicate further action. Accordingly, I have chosen to accept Applicant's rendition regarding the extent of his punishment for the incident. Applicant contended he was not involved when two men met at his residence where one sold a stereo receiver to the other. He also claimed he informed the police as to the identity of the thief. <sup>(6)</sup> There is no government evidence to rebut his contentions and I accept them as fact.

In September 1978, when he was 22-years-old, Applicant was arrested by members of another sheriff's office and charged with aggravated trafficking in drugs and possession of LSD and marijuana. <sup>(7)</sup> He was eventually convicted of both charges and sentenced to confinement of not less than three years to no more than 15 years. <sup>(8)</sup> The conviction and sentence were affirmed on appeal. <sup>(9)</sup> Applicant was taken into custody and imprisoned in March 1981, and was eventually released in August 1983. <sup>(10)</sup> No other evidence pertaining to the events or motivation leading to the arrest was presented.

Applicant has been drug free since his 1978 arrest--25 years ago--and has abstained from alcohol since August 1986--nearly 18 years ago--and has acknowledged what he did was wrong. <sup>(11)</sup>

He married for the fourth time in June 1994, <sup>(12)</sup> and has five children and stepchildren. <sup>(13)</sup>

Applicant is a truck driver with his own trucking company that has been in business since February 1993. He has a lease relationship with another larger government contractor to transport classified shipments. <sup>(14)</sup> The quality of his performance has not been developed in the record.

### **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 provides 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 precludes 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."

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," <sup>(15)</sup> 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. <sup>(16)</sup> By his own admission, Applicant was involved in criminal behavior in 1978 that resulted in his arrest and conviction. As a result, he was sentenced to no less than three years to no more than 15 years imprisonment. Two years earlier, in 1976, he was also involved in other unrelated criminal behavior that resulted in a fine. 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*).

It has been over 25 years since that major conviction and sentence. The 1978 criminal conduct is not considered recent. And Applicant has not been involved in any more recent criminal conduct and has apparently turned his 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 his spotless record since 1978, 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 two criminal counts, Applicant's earlier unrelated criminal conduct occurred in 1976, and I cannot find that it was isolated as set forth in CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

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. In this instance, as it pertains to the 1976 criminal conduct, I believe Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Accordingly, allegation 1.b. of the SOR is concluded in favor of Applicant.

However, Applicant's 1978 criminal conduct also falls within 10 U.S.C. § 986. He was convicted in a state court of two crimes and sentenced to no less than three years to no more than 15 years imprisonment--a term which obviously exceeds the one year period envisioned in the law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of *more than* one year, regardless of the amount of time actually served." Here, Applicant was fortunate enough to have his prison term reduced rather than actually served, but that fact does not help him in this issue. Consequently, under 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegation 1.a. of the SOR is concluded against Applicant.

In this instance, I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

For the reasons stated, I conclude Applicant is not 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: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

**DECISION**

In light of all 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. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986. Clearance is denied.

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Robert Robinson Gales

Chief Administrative Judge

1. The government submitted seven items in support of its contentions.
2. Item 5 (Questionnaire for National Security Positions, dated September 3, 2002), at 3.
3. Item 3 (Response to SOR, dated December 26, 2003).
4. Item 5, *supra* note 2, at 7.
5. Item 6 (U.S. Department of Justice, FBI, Information Record, dated August 27, 2002), at 1.
6. Item 3, *supra* note 3.
7. *Id.*
8. Item 6, *supra* note 5, at 1.
9. *Id.*, at 2; Item 3, *supra* note 3.
10. *Id.*, Item 6.
11. Item 3, *supra* note 3.
12. Item 5, *supra* note 2, at 5-6.
13. *Id.*, at 5.
14. Item 4 (Letter from government contractor, dated December 18, 2003).
15. 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.)
16. Other than admissions made by Applicant in his Questionnaire for National Security Positions and his Response to SOR, the government's entire case rests on limited information appearing in an FBI Identification Record--a document which is unsigned and unverified. Nevertheless, Applicant has not objected to the document.