

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant was convicted of Assault with Intent to Murder, Assault and Battery, and Assault in August 1981 for his part in a bar fight in which one of the participants was seriously injured. He was sentenced to jail for ten years (the final five years suspended), and actually served about 24 months in jail. Although he would otherwise be able to mitigate the security concern created by his criminal conduct, he is prohibited from doing so because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied. I do not recommend further consideration of this case for a waiver.

CASENO: 03-18738.h1

DATE: 08/31/2005

DATE: August 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18738

REMAND DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Eric H. Borgstrom, Esq., Department Counsel

FOR APPLICANT

Henry L. Scott, Jr., Personal Representative

SYNOPSIS

Applicant was convicted of Assault with Intent to Murder, Assault and Battery, and Assault in August 1981 for his part in a bar fight in which one of the participants was seriously injured. He was sentenced to jail for ten years (the final five years suspended), and actually served about 24 months in jail. Although he would otherwise be able to mitigate the security concern created by his criminal conduct, he is prohibited from doing so because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied. I do not recommend further consideration of this case for a waiver.

STATEMENT OF THE CASE

On February 4, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed.

Applicant submitted a sworn answer to the SOR, dated March 22, 2004, and requested a hearing. Applicant admitted the SOR allegation concerning his criminal conduct without commenting on the allegation of the applicability of 10 U.S.C. § 986 to the case.

This case was assigned to me on August 18, 2004. A notice of hearing was issued on August 26, 2004, scheduling the hearing for September 13, 2004. The hearing was conducted as scheduled. The government submitted eight documentary exhibits that were marked as Government Exhibits (GE) 1-8, and admitted into the record without objection. Applicant testified at the hearing, and submitted twenty-six documentary exhibits that were marked AE 1-26, and admitted into the record without objection. The transcript was received on September 23, 2004.

PROCEDURAL MATTERS

Department Counsel moved in writing to amend the SOR to allege two allegations under Guideline E for personal conduct. Applicant did not object to the amendment, and the amendment was allowed in the form contained in the written motion. Applicant denied the allegation contained in subparagraph 2.a., and admitted the allegation contained in subparagraph 2.b.

The DOHA Appeal Board remanded this case with instructions that I reopen the record to allow the parties to present new evidence that is pertinent to the applicability of the amendment to this case if I conclude there is good cause for so doing; and for me to determine what effect the amendment of 10 U.S.C. § 986 has on this case.

At the time of the hearing in this case, 10 U.S.C. § 986 read, in applicable part, as follows:

(c) Persons disqualified from being granted security clearances. A person is described in this subsection if any of the following applies to that person:

(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year.

(d) Waiver authority. In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

The statute was amended, effective October 28, 2004, to read, in applicable part, as follows:

(c) Persons disqualified from being granted security clearances. A person is described in this subsection if any of the following applies to that person:

(1) The person 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.

(d) Waiver authority. In a meritorious case, an exception to the prohibition in subsection (a) may be authorized for a person described in paragraph (1) or (4) of subsection (c) if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.

As GE 2, GE 4, GE 5, and the transcript at pages 45 and 51 clearly evidence, Applicant actually served almost two years in prison for the offense of which he was convicted. That fact was clearly noted in the synopsis, findings of fact, and conclusions section of the original decision. Accordingly, I am prohibited from granting Applicant a security clearance under either version of 10 U.S.C. § 986. While the waiver authority has been changed, no Executive order or other guidance has been issued by the President as contemplated by the statute.

Accordingly, I specifically find in response to the directions provided in the remand order that there is no good cause for reopening the record to allow the parties to present new evidence on the applicability of the amendment of 10 U.S.C. § 986. The parties were aware at the hearing that if I found 10 U.S.C. § 986 applied in this case that I would be prohibited from granting Applicant a security clearance and his only option would be to seek a waiver. There is no information they could provide that would alter my decision on the applicability of the prohibition portion of the statute to the facts in this case. Further, absent issuance of an Executive order or other guidance by the President that would indicate additional factors are to be considered in making a waiver recommendation or determination, there is no reason to reopen the hearing to allow the parties to provide additional evidence concerning the granting of a waiver at this time.

The issue in this case is not the retroactive application of the statute because the statute mandates a prohibition against "granting" or "renewing" a security clearance in designated cases. As such, the date of issuance of an SOR or when a hearing is conducted is irrelevant. The only relevant date is the date upon which the decision to "grant" or "renew" a security clearance is made. If the decision was issued on or after October 28, 2004, the amended version of the statute applies. Because the decision in this case was issued on November 5, 2004, the amended version of the statute controls. As such, while he is disqualified from being granted a security clearance, the waiver provision of the amended statute will apply, whenever an Executive order or other guidance is issued by the President.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 58 years old, and has two children, ages 12 and 17, who reside with their mother. He has been employed as a truck driver for defense contractors at the same U.S. Army base since August 1989. The many letters of recommendation and award certificates he submitted attest to his reputation as an outstanding employee and co-worker, and for being a patriotic citizen. He entered active duty with the Army on February 2, 1966, served in Viet Nam, and was separated from active service on October 31, 1968. He was awarded an Army Commendation Medal in recognition of his meritorious service in a combat theater on October 22, 1968. He was honorably discharged on February 1, 1972.

Applicant was investigated by the Army for shipping by U.S. mail an M-2, caliber 30 carbine with two magazines, a North Vietnamese automatic rifle with two magazines, and a North Vietnamese submachine gun with one magazine to his home in the U.S. from Viet Nam in February 1968. He admits shipping the weapons, states he purchased them from other military personnel while in Viet Nam, and claims they had been rendered

nonfunctional prior to being shipped. He believes it was legal to send the weapons when he did, but that the law changed while they were in transit. No charges were ever filed or disciplinary action taken against him.

Applicant was charged with Driving Under the Influence of Drugs (DUID) in December 1969. The brakes on his car had failed, causing his to collide with a freight train. He sustained a concussion and several fractured vertebrae as a result of the collision that was not diagnosed until after he had been released from an emergency room at the hospital to which he had been taken. The police apparently presumed the accident occurred because Applicant had been under the influence of some substance and charged him with DUID and Failure to Yield Right of Way. He was found guilty of the right away offense and the DUID charge was dismissed.

Applicant was a member of a motorcycle gang in October 1973 when he was charged with Rioting, Resisting Arrest, Possession of Prohibited Weapons, Assault, and Failure to Disburse. He explained the incident occurred when he and other gang members went to a city in another state looking to meet up with still more gang members. The other members had gotten into a bar fight and the police were apparently searching for them when they came upon Applicant and his group. He was arrested, claims to have been severely beaten by the police, and was charged with the above offenses. He was found not guilty of all charges.

Applicant was arrested again in March 1981, while still a member of the motorcycle gang. He and a number of other gang members entered a bar and attacked and severely beat a patron using a cane as a weapon. The victim was unconscious when the police arrived, and was taken to a shock trauma center in critical condition with head injuries, including a depressed skull fracture. According to police reports (GE 6), Applicant's group entered the tavern looking for the victim because of an earlier confrontation with his brother, and beat and kicked him without provocation. At least one witness identified Applicant as an active participant in the assault, and the evidence, at least circumstantially, tends to indicate he may have been the person wielding the cane as a weapon. Applicant's version of the incident is that he was an innocent bystander when a bar fight erupted, he was struck in the face and his glasses were knocked off, and he struck and kicked his assailant in self-defense.

On August 19, 1981, Applicant was convicted, following a jury trial, of Assault with Intent to Murder, Assault and Battery, and Assault for his part in the arch 1981 incident. On the assault and battery charge, he was sentenced to ten years in jail (the final five years suspended), and placed on probation for five years following his release from custody. The assault charge was merged into the assault and battery charge, and no sentence was imposed on the assault with intent to murder charge. He was also ordered to pay \$9,933.34 as restitution and courts costs at the rate of \$20.00 per week while on probation. Applicant served about 24 months in jail, and successfully completed his probation sentence.

Applicant was charged with failing to send his daughter to school in June 2002. He credibly explains that he was having problems with his then 15-year-old daughter who was living with him, but frequently running away from home. When he was contacted by a truant officer about her failure to attend school, it was mutually decided to obtain the intervention of the juvenile court by filing this charge. The charge against him was dismissed.

On October 10, 2002, Applicant provided a sworn statement to a special agent (SA) from the Defense Security Service (DSS) in which he denied fighting with anyone during the March 1981 incident. He provided another sworn statement to a SA from DSS on December 30, 2002, and admitted at that time that he did punch and kick someone in self-defense. He also stated the reason he did not disclose his involvement in the fight when he provided the statement in October 2002 was because wanted to forget the incident, put it behind him, and he was mad about even being asked about the fight.

Applicant quit the motorcycle gang following his 1981 arrest and jail term and has not associated with any members since his release from the penitentiary. He quit drinking alcohol in 1986, following the birth of his daughter, because he felt as a parent he needed to be a more responsible person.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon 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. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are most relevant in this case.

BURDEN OF PROOF

The sole 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

In all adjudications the protection of our national security is the paramount concern. 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. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into

consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. 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.

The government has established its case against Applicant under Guideline J. In 1981, Applicant was convicted of Assault with Intent to Murder, Assault and Battery, and Assault, sentenced to ten years confinement (five years suspended), and actually served about 24 months. Although he was charged with various offenses on several other occasions, there is insufficient evidence to conclude he ever actually committed those offenses. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 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* apply in this case.

Applicant has not been arrested or charged with any offense since his 1981 conviction except the very minor offense pertaining to his daughter which he credibly explained was an attempt to involve the juvenile court in controlling her actions. Additionally, the letters of recommendation, employment awards and certificates, and Applicant's steady work history, attest to Applicant's rehabilitation and the unlikelihood that any similar conduct will ever again occur. I find mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* applicable. Applicant would be able to mitigate the security concern that arises from his 1981 criminal convictions, but for the statutory disqualification imposed by 10 U.S.C. § 986. ⁽¹²⁾ Guideline J is decided against Applicant.

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

There is insufficient evidence to attribute any security significance to the investigation conducted of Applicant's shipping weapons to his home from Viet Nam in 1968. He testified he believed it was legal to ship the weapons when he did so. The facts that he was not disciplined in any manner, that shortly after the investigation was concluded he was awarded an Army Commendation Medal, and that he received an honorable discharge all indicate the contemporaneous investigation did not lead anyone at the time to conclude his actions were illegal or warranted sanctions of any type.

However, Applicant deliberately provided false information to the SA from DSS when he was first interviewed about the 1981 incident. His active involvement in the altercation that led to his arrest and conviction, whether or not it was in self-defense, was relevant and material information bearing upon his clearance eligibility. DC 3: *Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination* applies.

Applicant freely disclosed the information about his 1981 arrest in a security clearance application (SF 86) he submitted in 2002. While attempting to negate his active participation in the incident, Applicant did provide truthful information about his membership in a motorcycle gang, the gang's involvement in the beating, and his conviction and sentence in the first statement. MC 2: *The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily* applies. Considering all evidence in this case, including the whole person factors, Applicant has mitigated the security concern caused by his personal conduct. Guideline E is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph a: For the Applicant

Subparagraph 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. Clearance is denied. I do not recommend this case for further consideration of a waiver.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.
12. 10 U.S.C. § 986 was amended following the hearing in this case to provide that it only applies where the person was actually incarcerated for not less than one year. Because Applicant was actually incarcerated for more than one year, that section is applicable to this case under both the prior and current version of the law.