

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: In 1981, Applicant received company grade non-judicial punishment for possession of a concealed and unregistered weapon. In 1986, he was convicted for endangering a child, and sentenced to four years confinement. He served 26 months in prison. He has a spotless record since 1986, and is considered rehabilitated. Notwithstanding, 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Clearance is denied.

CASENO: 04-06487.h1

DATE: 05/12/2006

DATE: May 12, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06487

ISION OF ADMINISTRATIVE JUDGE

JUAN J. RIVERA

APPEARANCES

FOR GOVERNMENT

Candace Le'i, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1981, Applicant received company grade non-judicial punishment for possession of a concealed and unregistered weapon. In 1986, he was convicted for endangering a child, and sentenced to four years confinement. He served 26 months in prison. He has a spotless record since 1986, and is considered rehabilitated. Notwithstanding, 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On October 8, 2005, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The SOR also alleges 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted. The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information. ^(U) On October 24, 2005, Applicant answered the SOR (Answer) and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on December 20, 2005. The FORM was mailed to Applicant on January 17, 2006. He acknowledged receipt of the FORM on February 8, 2006, and did not object to anything contained in the FORM or submit additional information for consideration within the 30-day time period provided to him. The case was assigned to me on March 28, 2006.

FINDINGS OF FACT

In his October 2005 answer to the SOR, Applicant admitted SOR allegations 1.a, 1.b, and 2.a. He failed to address

subparagraph 1.c, and I considered this allegation denied. Although he admitted the underlying facts alleged in SOR allegation 2.a, he claimed his failure to disclose the information on his 2002 security clearance application (SF 86) was a mistake, and that he had no intention to falsify or to mislead the government. Therefore, I considered SOR allegation 2.a denied. His admissions are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's statement, and the evidence, I make the following additional findings of fact:

Applicant is 46 years old. He married his wife in 1984, and they have two daughters, ages 24 and 21. He served on active duty in the U.S. Army from 1980 to 1986 and was honorably discharged as a sergeant, E-5. He attended college from 1990 to 1995, and then again from 1998 to 2001, obtaining his Bachelor's in Science degree in June 2001. According to his security clearance application (SF 86), Applicant has worked as a technician/training specialist for a company doing business with the Department of Defense (DOD) since 1988. He requires access to classified information to retain his current job.

In August 1981, while serving in the Army, Applicant's car was searched entering a military installation. When authorities searched Applicant's car, they found a concealed, unregistered .25 caliber pistol. Applicant received company grade non-judicial punishment under Article 15 of the Uniform Code of Military Justice for the offense of possession of a concealed/unregistered weapon, and was fined \$75. He explained that the pistol belonged to a friend, and he did not know it was in his car.

In September 1986, Applicant was convicted of endangering a child (felony) and sentenced to four years confinement. Applicant served two years and two months in prison, and was placed on supervised probation. He was released early from his supervised probation, because the court considered him to be rehabilitated. As part of his probation conditions, he attended an anger management course.

Applicant explained that after his discharge from the Army, he was not able to find a job and felt useless and depressed. He began to spend time with the wrong people, attended parties, drank alcoholic beverages, and was not a responsible father. His wife had been discharged from the Army a year earlier and had a full time job. Applicant was responsible for taking care of his then one-year-old and three-year-old daughters while his wife was working. He did not have the parental skills necessary to take care of his daughters, and on several occasions, while disciplining his three-year-old daughter, Applicant physically abused her by beating her to the point of fracturing her bones and scalding her with hot water.

In 1989, Applicant and his wife reconciled, purchased a home, and have lived as a family since. Applicant claimed that although he did not believe he had an alcohol problem, he stopped drinking alcoholic beverages in 1986. He has remained abstinent because he did not want to take the risk of placing his family in danger again. Except for one speeding ticket, he has not had any runs in with the law since 1986. Applicant stated he has matured and is now a different person. He changed his lifestyle and no longer drinks or attends parties with friends. He has become a family man with strong Christian values, and has worked hard to show his family, and society at large, that he has matured into a loving father and law-abiding citizen. There is no evidence that Applicant has been involved in any misconduct since 1986.

In 2002, the state criminal court considered Applicant rehabilitated, and issued him a Certificate of Rehabilitation and Pardon Application. The court also recommended him for consideration for a full pardon. His pardon application is pending investigation before consideration by the state governor.

In April 2002, Applicant submitted a SF 86 in which he failed to disclose that in 1981 he was charged for a firearm's violation. He answered "No" to question 22, which asked whether he had ever been charged with or convicted of a firearm offense. Applicant failed to disclose his 1981 Article 15 charge for possession of a concealed, unregistered firearm. Applicant stated he misunderstood question 22, and that he had forgotten about the incident. He alleged his omission was not deliberate or with the intent to mislead. He explained that in 1981 he was young and gullible and failed to realize his company commander had indeed charged him with a firearm violation. He believed he was just being counseled by his company commander.

POLICIES

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. The administrative judge must take into account both disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. The guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the granting or denial of access to classified information. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.⁽²⁾ Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) and Guideline E (Personal Conduct), are the applicable relevant adjudicative guidelines.

BURDEN OF PROOF

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁽³⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own.

The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish by substantial evidence⁽⁴⁾ a prima facie case that it is not clearly consistent with the national interest for the applicant to have access to classified information. The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries a heavy burden of persuasion.⁽⁵⁾ The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.⁽⁶⁾

CONCLUSIONS

Under Guideline J (Criminal Conduct), a history or pattern of criminal conduct is a security concern because it may indicate an unwillingness to abide by rules and regulations and may show the applicant to be lacking in judgment, reliability and trustworthiness.⁽⁷⁾ The government established its case under Guideline J by showing that in 1981 Applicant was charged with possession of a concealed/unregistered firearm, and in 1986 he was convicted of endangering a child, a felony. He was sentenced to serve four years in prison, and actually served 26 months before being paroled. Disqualifying Condition (DC) 1: *Allegations or admission of criminal conduct*,⁽⁸⁾ DC 2: *A single serious crime or multiple lesser offenses*,⁽⁹⁾ and DC 3: *Conviction of a crime and sentenced to imprisonment for a term exceeding one year*, apply.⁽¹⁰⁾

Applicant has not been involved in any criminal misconduct since his 1986 conviction. He reconciled with his wife in 1989, purchased a home, and has been a responsible father and family man since. Additionally, Applicant's daughters are grown up, he has abstained from alcohol, has maintained steady work for 18 years, and was considered rehabilitated by the state courts and recommended for a full pardon. In light of the totality of the circumstances, I find it is unlikely Applicant will engage in similar conduct again. Mitigating Conditions (MC) 1: *The criminal behavior is not recent*,⁽¹¹⁾ MC 4: . . . *the factors leading to the violation are not likely to recur*, and MC 6: *There is clear evidence of successful rehabilitation*, apply. Applicant would be able to mitigate the security concern that arises from his 1981 charge and 1986 conviction but for the statutory disqualification imposed by 10 U.S.C. § 986. Guideline J is decided against Applicant.

Under Guideline E, personal conduct is always a security concern because it asks the ultimate question - whether a person's past conduct instills confidence the person can be trusted to properly safeguard classified information. An applicant's conduct is a security concern if it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such behavior could indicate that the person may not properly safeguard classified information.⁽¹²⁾

The government established its case under Guideline E by showing that Applicant failed to disclose that in 1981 he was charged with a firearm offense when he submitted his SF 86. Although it is questionable whether Applicant could have forgotten the search of his car, his arrest, and receiving Article 15 punishment, I do not believe his omission was deliberate or with the intent to falsify or mislead the government. Usually, the incentive behind a deliberate falsification is an applicant's desire to cover his past criminal behavior because of his concern for the adverse impact this information would have on his qualifications to obtain a security clearance. In this case, the adverse impact that he could have avoided by deliberately concealing the 1981 incident is negligible and insignificant when compared with Applicant's 1986 felony conviction for physically abusing his own daughter. Further, the offense likely was not considered serious by the command because it was adjudicated at a company level Article 15 instead that at court-martial.

In light of the totality of the facts and circumstances, including his age at the time he submitted the SF 86, his change of a lifestyle and spotless record since 1986, his 18 years of steady work, his statement, and his state certificate of rehabilitation, I find Applicant's omission was not deliberate or committed with the intent to mislead the government. Guideline E is decided for the Applicant.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. Considering all relevant and material facts and circumstances present in this case, including Applicant's statements, his misconduct, the whole person concept, and the adjudicative factors listed in the Directive, I find Applicant has mitigated the security concerns. Notwithstanding, 10 U.S.C. § 986 disqualifies him from eligibility for a security clearance. Applicants' clearance is denied.

FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraph 1.a For Applicant

Subparagraph 1.b - 1.c Against Applicant

Paragraph 2, Personal Conduct (Guideline E) FOR APPLICANT

Subparagraph 2.a For 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.

Juan J. Rivera

Administrative Judge

1. Required by Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended.
2. Directive, E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ."
3. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
4. ISCR Case No. 98-0761 (December 27, 1999) at p. 2 (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199 (April 3, 2006) p. 3 (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.
5. *Id.* at 528, 531.
6. *See Egan*; Directive E2.2.2.
7. Directive, E2.A10.1.1.
8. Directive, E2.A10.1.2.1.

9. Directive, E2.A10.1.2.2.

10. In 2001, Congress enacted 10 U.S.C. § 986 to prohibit DOD from granting or continuing a security clearance for any applicant who was convicted of an offense in a U.S. court and was sentenced to more than one year in jail. In 2004, 10 U.S.C. § 986 was amended to limit its prohibition to those who are sentenced to more than one year in jail and were incarcerated as a result of that conviction for at least one year.

11. Directive, E2.A10.1.3.1.

12. Directive, E2.A5.1.1.