

DATE: September 29, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-06807

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Gary Rigney, Esq.

SYNOPSIS

Applicant is a 40-year-old employee of a federal contractor. When Applicant was 23 years old he was arrested and convicted of trafficking cocaine. He was sentenced to and served three years in prison. Since Applicant's arrest he has dedicated himself to turning life around and he has been successful. Applicant has led an exemplary life. He is a valued family man, employee, and member of the community. Applicant is successfully rehabilitated. However, mitigation of the disqualifying condition is not sufficient to grant Applicant a security clearance. Under the provisions of 10 U.S.C. § 986, absent a waiver, the Defense Department cannot grant a security clearance TO any person convicted and sentenced in any court in the United States for a crime and incarcerated as a result of that sentence for at least one year. The provisions of 10 U.S.C. § 986 apply. Clearance is denied.

STATEMENT OF CASE

On November 23, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance. ⁽¹⁾ The SOR, which are in essence the administrative complaint, alleged security concerns under Guideline J, criminal conduct.

In a sworn statement, dated December 16, 2004, Applicant responded to the SOR allegations, and requested a hearing. In his SOR response, Applicant admitted both allegations under Guideline J, criminal conduct.

The case was assigned to me on August 10, 2005. A notice of hearing was issued on August 29, 2005, scheduling the hearing for September 13, 2005. The hearing was conducted as scheduled. The government submitted six exhibits that were marked as Government Exhibits (GE) 1-6. The exhibits were admitted into the record without objection. Applicant testified on his own behalf, had eleven witnesses testify on his behalf, and submitted seven exhibits that were marked as Applicant's Exhibits (AE) A-G. They were admitted into the record without objection. The decision in this case involves Title 10 U.S.C. § 986 (the Smith Amendment). The transcript was received on September 21, 2005.

FINDINGS OF FACT

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

Applicant is 40 years old, married and has a daughter and a stepdaughter. Applicant and his wife have been married 9 years and she works for the police department in the city where they live.

Applicant was previously married and divorced. His biological daughter lives with her mother. Applicant pays child support and has never been delinquent in payments. Applicant is an engineering technician and has worked for a federal contractor since 2003. Prior to then he worked for the same employer from 1996 to 2003 and was steadily employed since 1993.

While in high school Applicant became involved with people who had a negative influence on him. Applicant admitted to hanging around with the wrong crowd and he refused to accept the advice of his family and friends. Applicant used illegal drugs from 1979 to 1988. He illegally purchased drugs and sold drugs. Applicant's last involvement with drugs was in 1988 when he was arrested for selling drugs to an undercover agent. He was 23 years old at that time.

Applicant was arrested on September 9, 1988, and charged with three counts of violation of State A's Uniform Controlled Substance Act (felonies). The charges involved a single transaction. On May 21, 1990, Applicant pled guilty to and was adjudged guilty of one count of Trafficking in Cocaine, a felony. The other offenses were nolle prosequi. On July 19, 1990, Applicant was sentenced to three years in the State Penitentiary, fined \$50,000.00, and ordered to pay approximately \$50.00 to the Victim Compensation Assessment, and \$756.00 in court costs. Applicant was incarcerated from July 19, 1990 to May 30, 1993. Applicant was awarded two months credit for incarceration time he previously served.

After being arrested Applicant intentionally did not accept his family's offer to have him released on bond because he wanted time to think about his life, where it was going, and to clean himself up. He was released two months later on bond pending the disposition of his case. From the time he was released until he was incarcerated Applicant maintained a job and did not get into any trouble.

While in prison, Applicant went through intensive rehabilitation, including a 12-step program for drug abuse. Applicant was moved from different penal facilities and assisted the coordinators of various rehabilitation programs while in prison. He eventually was permitted to serve his time in a minimum security facility, on a work release program where he would complete community service during the day and be incarcerated at night. Applicant was a model prisoner and took advantage of all the rehabilitative and educational programs that were offered.

Upon Applicant's release from prison in May 1993, he reapplied to work with his previous employer. Although the employer was not hiring, he was offered a job by the supervisor because he was known to be a hard worker, very fair, and got along with co-workers. Applicant was promoted and became a supervisor over approximately 20-25 people. Applicant moved jobs in 2003 for better opportunities. Applicant's employers know of his conviction and prison time.

Applicant readily admits that the best thing that ever happened to him was being arrested. It turned his life around. Applicant is a welder by trade and assists the local high school's teachers. Specifically he provides expert advice to the welding technology classes. He also serves on numerous advisory committees with the high school and is generous with his free time to help the students. Applicant is not shy about sharing his experiences with the students so they hopefully will not make the same mistakes he did. Applicant also devoted his time to completing the required college courses in emergency medical technology, standard first aid, and adult cardiopulmonary resuscitation.

The attorney who prosecuted Applicant testified on his behalf. He believes Applicant is a good person who became involved with the wrong crowd. He believes Applicant turned himself around by applying for every educational opportunity available while in prison. The prosecutor kept track of Applicant's progress while in prison. He specifically remembers Applicant because he was very forthright in admitting he had committed the offense he was charged with. Applicant wanted to plead guilty and get on with his life.

Applicant leads a healthy lifestyle. He rarely drinks alcohol and surrounds himself with only his family and a few close trusted friends. He no longer associates with people from his past that were involved in drugs. He is devoted to his wife, daughter, and stepdaughter. He has not used any illegal drugs since his arrest in 1988. Applicant is dedicated to his job and the community. Applicant's family, friends and employers know of his past. Many had serious reservations regarding Applicant when he was released from prison. However, Applicant has proved to be sincere and genuine in his rehabilitation. Applicant has also proven himself to be a good father figure and provides an exemplary example to his children. Applicant is considered honest, trustworthy, reliable and well-liked by a myriad of people from different segments of the community, including, work, school, and social services, to name a few.

Applicant takes his work seriously and although he does not presently hold a security clearance, he is required at times to be escorted into a restricted secure area to conduct work. He is required to follow certain guidelines while in those areas and not wander. Applicant resolutely complies with all the access rules. In addition, he is equally resolute in complying with all safety standards and regulations, as well as all time card and other administrative requirements. Applicant's work ethic is outstanding and he is seen not only as an expert at his craft, but a visionary in seeking and developing solutions for difficult problems. He is the "go to" guy when these problems arise and is sought after to be on the "A" Team to get the job done.

Applicant provided numerous character letters and numerous character witnesses testified. All were fully aware of Applicant's past and praised his current lifestyle and commitment to his family, community and work. He maintains an outstanding reputation in the community and is considered trustworthy, reliable, responsible and rehabilitated. Applicant's successful rehabilitation and reformation was recognized by State A when Applicant was granted a pardon with restoration of civil rights and political rights on April 23, 2003. ⁽²⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline J, criminal conduct, with its respective DC and MC, applies in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. ⁽³⁾ The government has the burden of proving controverted facts. ⁽⁴⁾ The burden of proof is something less than a preponderance of evidence. ⁽⁵⁾ 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. ⁽⁶⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽⁷⁾

No one has a right to a security clearance ⁽⁸⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." ⁽⁹⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. ⁽¹⁰⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. ⁽¹¹⁾ It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case:

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.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under Guideline J.

Based on all the evidence 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*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser charges*) apply. Applicant was arrested, charged with, and convicted of trafficking cocaine, a felony. He admitted his guilt, was sentenced, and served three years in prison.

I considered all the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.10.1.2.1 (*The conduct was not recent*); CC MC E2.10.1.2.2 (*The crime was an isolated incident*); CC MC E2.10.1.2.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*); and CC MC E2.10.1.3.6 (*There is clear evidence of successful rehabilitation*). I conclude all of the above mitigating conditions apply.

Applicant admitted he associated with the wrong people when he was arrested and charged with trafficking cocaine. This conduct happened when he was 23 years old, over 17 years ago, and is not recent. Applicant has not been in any trouble since that time. To the contrary, he has led an exemplary life. Applicant's mistake, although serious, was an isolated incident. Applicant no longer associates with the people from his life before he went to prison and none of the factors that influenced him are likely to recur. Applicant made a conscious and deliberate decision when he was arrested to change his ways. In Applicant's case it was not a fleeting thought, but rather he took notable action to rehabilitate himself and he has been completely successful. Applicant took responsibility for his wrongdoing, served his sentence and became a responsible, valuable member of the community. He epitomizes what the penal system strives for in a rehabilitated person, so much so he was granted a pardon by the state that convicted him. There is overwhelming evidence of Applicant's successful rehabilitation. Applicant has mitigated the security concerns regarding his criminal conduct.

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 life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

In 2000, a federal statute was enacted that prohibited the Department of Defense 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. 10 U.S.C. § 986 (c)(1) (2001). "In a meritorious case," the Secretary of Defense could authorize an exception to the prohibition. The Secretary was not authorized to delegate that authority. 10 U.S.C. § 986(d) (2001). In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, directed that, in cases in which the decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not

recommending further consideration of the case for a waiver of the prohibition. DOHA Operating Instruction No. 64 ¶ 3.e (Jul. 10, 2001).

As amended in 2004, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited 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. 10 U.S.C. § 986(c)(1) (2004). The waiver provision was also amended. It now provides that an exception to the prohibition on granting a clearance may be authorized "[i]n a meritorious case, . . . 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." 10 U.S.C. § 986(d) (2004). No such executive order or other guidance has been issued by, or under the authority of, the President.

Notwithstanding the Director's direction in DOHA Operating Instruction 64 that the administrative judge make a recommendation whether the statute's prohibitions should be waived, the Appeal Board has concluded that, under the 2004 amendments to 10 U.S.C. § 986, the administrative judge has

no authority to make a waiver recommendation. According to [the amendments], any waiver decision '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.' Without such standards and procedures, the Judge had no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. § 986.

ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).

I disagree with the Appeal Board's conclusion. The Appeal Board conflated making a recommendation to waive with making a decision to waive. The amendment limits the authority to grant a waiver, not to recommend whether a waiver should or should not be granted. Nevertheless, I am not at liberty to disregard the Appeal Board's decision even though I disagree with it. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004). However, to avoid the possibility of a remand if guidance is later issued by or under the authority of the President, I believe it is appropriate to note what my recommendation would have been had I the authority to make one. Recognizing my recommendation is not binding on the waiver authority, I would have recommended further consideration of this case for a waiver of 10 U.S.C. § 986.

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: Criminal Conduct (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. Against 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.

Carol. G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. AE G; A state pardon does not negate the applicability of 10 U.S.C. § 986. ISCR Case no. 01-00407 at 4-5 (App. Bd. Sep 18, 2002).

3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
5. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
6. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
7. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
8. *Egan*, 484 U.S. at 531.
9. *Id.*
10. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
11. Executive Order 10865 § 7.