

KEYWORD: Criminal Conduct

DIGEST: Applicant has a long history of criminal conduct between 1971 and 1991. He had numerous convictions for offenses related to or arising from serious and continuing drug and alcohol abuse. On two occasions he was sentenced to (and actually served) more than one year in jail. Since February 1996, Applicant has not consumed alcohol or illegal drugs; he actively participates in a substance abuse recovery program. Applicant mitigated the security concerns arising from his history of criminal conduct. However, he is subject to 10 U.S.C. § 986 by virtue of his convictions, sentences and confinement for more than one year; thus, I am required to find him ineligible for a security clearance. Clearance is denied.

CASE NO: 05-00976.h1

DATE: 04/25/2006

DATE: April 25, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-00976

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has a long history of criminal conduct between 1971 and 1991. He had numerous convictions for offenses related to or arising from serious and continuing drug and alcohol abuse. On two occasions he was sentenced to (and actually served) more than one year in jail. Since February 1996, Applicant has not consumed alcohol or illegal drugs; he actively participates in a substance abuse recovery program. Applicant mitigated the security concerns arising from his history of criminal conduct. However, he is subject to 10 U.S.C. § 986 by virtue of his convictions, sentences and confinement for more than one year; thus, I am required to find him ineligible for a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On June 9, 2003, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance for Applicant under 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), as amended (the "Directive"). On October 27, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline J, Criminal Conduct, of the Directive.

Applicant answered the SOR in writing on November 22, 2005. He elected to have a hearing before an administrative judge.

I received the case assignment on January 30, 2006. With the concurrence of Applicant and Department Counsel, I convened the hearing on March 10, 2006. The government introduced Exhibits 1 and 2. Applicant presented no exhibits but testified on his own behalf. After the presentation of the evidence, Department Counsel moved to amend ¶ 1.f of the SOR by changing the location of the incident in accordance with the evidence. Applicant did not object, and I granted the motion to amend. DOHA received the transcript of the hearing (Tr.) on March 17, 2006.

FINDINGS OF FACT

Applicant admitted the factual allegations in the SOR. (Applicant's Answer to SOR, dated November 22, 2005.) Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in March 1953. (Ex. 1 at 1.) When he was five years old, his brother died; his mother held herself responsible for his death. (Tr. at 15-16.) She later left the family and Applicant's father raised him. (*Id.*) In 1965, Applicant's father was severely injured in an industrial accident and was totally disabled. (Tr. at 17.) Applicant attended high school through the ninth grade, then dropped out. (Tr. at 16.)

In 1971, when he was about 18 years old, he began using and selling illegal drugs. (Tr. at 18.) He carried a knife for his personal protection. (Tr. at 18.) In April 1971, the police stopped Applicant on suspicion of drug activity and discovered the knife in his possession. (*Id.*) A court found Applicant guilty of possessing a concealed weapon and sentenced him to ten days confinement and a \$50.00 fine. (Tr. at 18; Answer to SOR, *supra*, at 1.)

On September 6, 1971, the police arrested Applicant for distributing marijuana to children, and charged him with contributing to the delinquency of a minor. The state authorities later decided not to prosecute the charge. (Tr. at 18-19.)

On about September 14, 1971, Applicant sold heroin to an undercover police officer. (Tr. at 19-20.) Authorities later arrested him at his father's home and charged him with selling heroin. Applicant pled guilty to the lesser offense of Possession of Dangerous Drugs. (Answer to SOR, ¶ 1.c, at 1.) The court sentenced him to six months in jail (suspended), a \$100.00 fine, and 12 months probation. (Answer to SOR, *supra*, at 1.)

On December 15, 1971, local police arrested Applicant for shoplifting. (Tr. at 20.) A court found him guilty of Petit Larceny and sentenced him to 30 days in jail and a \$30.00 fine. (Answer to SOR, *supra*, at 2.) Applicant served 30 days in jail. (Tr. at 20.)

In January 1972, the police arrested Applicant and charged him with the robbery of some sailors incident to a drug sale. (Tr. at 21.) The authorities later dismissed the charge based upon insufficient evidence. (*Id.*)

In March 1972, Applicant visited friends in a southern state. (Tr. at 22.) They decided to rob people to get money to buy drugs. The police arrested Applicant in possession of a .32 caliber revolver and stolen credit cards. (Tr. at 22-23.) Applicant asserted he was arrested before he actually robbed anyone. Authorities charged him with (1) Being a Fugitive; (2) Possession of a Dangerous Weapon; and (3) Possession of Stolen Property. The court found Applicant guilty of possession of stolen property and sentenced him to ten days confinement. (Answer to SOR, *supra*, at 2.)

After his release from confinement, Applicant returned to his home state. In May 1972, the police arrested him and charged him with possession of a concealed weapon-a knife. (Tr. at 23-24.) The court found him guilty and fined him about \$25.00. (Answer to SOR, *supra*, at 2.)

In June 1972, when Applicant was 19 years old, the police arrested him for contributing to the delinquency of a minor, because Applicant provided marijuana to his girlfriend who was then 16 years old. (Tr. at 24.) In August 1972, while the charge was pending, the police arrested Applicant for Forgery and Illegal Possession of a Credit Card. The court found Applicant guilty of the charges, including contributing to the delinquency of a minor, and sentenced him to confinement for three years. Applicant served time in the county jail and in a prison work camp. (Tr. at 24.) He received credit for good behavior and for working during confinement, and was released after serving two years in jail.

By 1975, Applicant was addicted to heroin and stole to support his drug habit. (Tr. at 25.) In February 1975, the police arrested Applicant and charged him with breaking and entering. He pled guilty to the lesser charge of trespassing and was sentenced to 90 days in jail. (Tr. at 25.)

In February 1977, Applicant robbed a convenience store by pushing the clerk aside and grabbing cash from the register. (Tr. at 26.) He fled the scene and went to a bar; later the police investigators arrived and bar patrons identified Applicant as matching the description of the robber. (*Id.*) A court found Applicant guilty of the offense and sentenced him to seven years confinement (two years suspended), and supervised probation for three years. (Answer to SOR, *supra*, at 2.) Applicant actually served 30 months confinement. (Tr. at 26.) During that time, he participated in a drug abuse prevention program consisting of group counseling sessions. (Tr. at 27.) After his release from confinement in 1980, the program provided methadone treatment. (*Id.* at 27, 29.)

Applicant began working for a valve company in 1980. (Tr. at 29.) He was married in 1987. (Ex. 1 at 3.) Applicant's wife gave birth to twin boys. ((Tr. at 33.)

By 1988, Applicant's father was dying and required periodic hospitalization. (Tr. at 29.) Applicant felt unable to handle the circumstances and began drinking alcohol heavily. In September 1988, he broke into the home of a friend and neighbor looking for something to steal. The neighbor discovered Applicant and confronted him. As it turned out, the

neighbor was the director of a drug-treatment program, and told him that if he completed a 30-day treatment program she would drop the charges. (Tr. at 29.) The state charged Applicant with burglary and assault. (Tr. at 28.) Applicant completed the 30-day, inpatient, alcohol-treatment program and the state dropped the charges. (Tr. at 31.) The valve company continued to employ him after the program.

In June 1989, authorities charged Applicant with Forgery and Uttering. (Answer to SOR, *supra*, at 2.) The state later dropped the charges.

In September 1989, authorities arrested Applicant stealing property from a store and charged him with Petit Theft. (Tr. at 35; Answer to SOR, *supra*, at 3.) The court found him guilty of the offense and sentenced him to ten days in jail.

In October 1989, authorities pulled Applicant over for a traffic stop and found him in possession of credit cards in other people's names and some common tools. (Tr. at 35.) Authorities charged Applicant with Possession of Burglary Tools and Dealing in Fraudulent Credit Cards. (Tr. at 35.) Applicant asserted he worked at a gas station and picked up the credit cards when the owners left them behind. (Tr. at 36.) The state later dropped the charges.

In August 1991, a court cited Applicant for contempt of court. (Answer to SOR, *supra*, at 3.) He pled guilty. (*Id.*)

Applicant's father died in August 1991. (Tr. at 36.) In about 1993, Applicant spent a year in treatment program provided by the Salvation Army. (Tr. at 37-38.)

In 1995, Applicant's wife left him. (Tr. at 34.) He relapsed and used cocaine illegally three or four times. (Tr. at 33-34.) He soon found himself homeless, living in his car.

On February 21, 1996, Applicant "got clean." (Tr. at 34.) Since that time he has not used illegal drugs or alcohol, and he does not smoke. (Tr. at 38-39.) He attends meetings of Alcoholics Anonymous every day, and helps set up and run the meetings. (Tr. at 39-40.)

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guideline at issue in this case is:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. (Directive, ¶ E2.A10.1.1.)

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.

Title 10, United States Code § 986, prohibits the Department of Defense from granting or renewing a security clearance to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, was sentenced to imprisonment for a term exceeding one year, and was incarcerated for more than one year. The statute also provides that, in meritorious cases, the Secretary of Defense or his designee may authorize a waiver of the prohibition.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify an applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, ¶ E3.1.15.) An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Paragraph E2.A10.1.2.1 of the Directive provides that "allegations or admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant's record includes multiple convictions for serious crimes and lesser offenses. I find both these potentially disqualifying conditions raised in this case.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." The Directive does not define the term "recent"; the recency of an incident is determined by considering all the circumstances, including the applicant's age, his pattern of behavior over a period of time, and the number of years since the last incident relative to the entire course of conduct. Applicant's history of criminal offenses began in 1971 when he was a relatively young man, and continued for about 20 years. His last offense occurred in 1991, about 15 years ago. Considering all the circumstances, I conclude Applicant's criminal conduct is not recent, and this potentially mitigating condition applies.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." As noted above, Applicant has a long history of crimes related to drug abuse. His crimes are not isolated incidents; therefore, this potentially mitigating condition does not apply.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, under ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." Applicant's 10-year record of sobriety, and 15-year record of good citizenship and responsibility, demonstrate that he is fully rehabilitated. He met his burden of presenting clear evidence of successful

rehabilitation. I conclude these potentially mitigating conditions apply.

I carefully considered Applicant's eligibility for a security clearance in light of the "whole person" concept, and the disqualifying and mitigating conditions raised in this case. There can be no doubt that Applicant has a long record of serious, deliberate, drug-related offenses. He showed no regard for the law, and little amenability to correction even after two lengthy periods of confinement. On the other hand, his crimes occurred over 15 years ago. Since 1996, he has been "clean and sober." He has been fully rehabilitated for many years; therefore, there is little likelihood of continuation or recurrence of criminal conduct. I conclude Applicant mitigated the security concerns arising from his history of criminal conduct, and find in his favor for ¶¶ 1.a through 1.p of the SOR.

Applicant is subject to 10 U.S.C. § 986 by virtue of being sentenced to (and actually serving) more than one year in jail on two occasions. Under the statute, I am required to find against Applicant for ¶ 1.q of the SOR.

As my adverse security decision against Applicant is based solely on the applicability of 10 U.S.C. § 986, it is appropriate for me to make a recommendation as to whether Applicant's case should be considered for waiver. (ISCR Case No. 02-00500 at 6 (App. Bd. Jan. 16, 2004) (citing DOHA Operating Instruction 64 ¶ 3.e).) I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a-p: For Applicant

Subparagraph 1.q: Against Applicant

DECISION

In light of all of 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.

Michael J. Breslin

Administrative Judge