

DATE: November 17, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 06-02669

**DECISION OF ADMINISTRATIVE JUDGE**

**JACQUELINE T. WILLIAMS**

**APPEARANCES**

**FOR GOVERNMENT**

Emilio Jaksetic, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is 44 years old and employed as a senior wireless Lan installer by a defense contractor since May 2005. In November 1977, at the age of 15, Applicant was arrested and charged with murder of his father and possession or use of a firearm during the commission of a crime. He then served time in a juvenile facility. On June 5, 1980, at the age of 18, Applicant pled guilty to and was convicted of the charges, sentenced, and incarcerated in a state correctional facility until July 12, 1984. He was on parole for approximately three years after his release from prison. The Smith Amendment (10 U.S.C. § 986) applies to his incarceration from 1980 to 1984. Clearance is denied.

**STATEMENT OF THE CASE**

On May 12, 2005, Applicant applied for a security clearance and completed a Security Clearance Applicant (SF 86).<sup>(1)</sup> On April 7, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, 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. The SOR detailed reasons under Guideline J (Criminal Conduct) 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 or revoked.

In a sworn, written statement, dated July 18, 2006, Applicant responded to the SOR allegations and elected to have his case decided on the written record in lieu of a hearing.<sup>(2)</sup> Department Counsel submitted the Government's written case on August 31, 2006. A complete copy of the file of relevant material (FORM)<sup>(3)</sup> was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He had 30 days to respond to the FORM, and he timely responded.<sup>(4)</sup> Department Counsel did not object to his submissions, which are admitted. The case was assigned to me on October 12, 2006.

## FINDINGS OF FACT

Applicant admitted the factual allegations pertaining to criminal conduct under Guideline J cited in the SOR, subparagraphs 1.a and 1.b. 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 findings of fact:

Applicant is 44 years old and is employed as a senior wireless Lan installer by a defense contractor since May 2005. He divorced his first wife in February 1994. He married his current wife in arch 1994, and the record is devoid of the number of children in their family.

Applicant contends that while growing up, he lived in a household of emotional and physical abuse. His parents divorced when he was 12, and he and his brother, two years his senior, lived with their father. His father was a large man, at least 6'2", and approximately 320 pounds, drank heavily, and had a violent temper. On numerous occasions, Applicant and his brother were physically beaten, whipped, kicked, beaten with firewood, and had their lives threatened by their father. Applicant attempted to run away from home five times; however, he was always returned home, where he suffered extreme reprisals. <sup>(5)</sup>

In approximately November 1977, <sup>(6)</sup> Applicant was arrested and charged with murder of his father and possession or use of a firearm or dangerous weapon during the commission of a crime. Based on these charges, he served time in a juvenile facility. When he reached the age of 18, he pled guilty and was convicted and sentenced for the murder and unlawful possession of a firearm. He was incarcerated in the state facility from June 5, 1980 until July 18, 1984. Upon his release from jail, he was paroled for approximately three years.

Since Applicant was incarcerated from June 1980 to July 1894, The Smith Amendment (10 U.S.C. § 986) applies. 10 U.S.C. § 986 disqualifies an applicant from having a security clearance based on a period of incarceration for a year or more.

The record is devoid of any evidence that since the commission of the aforementioned crime, Applicant has committed any other crimes or was involved in unsavory activities.

## 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. 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. <sup>(7)</sup> The government has the burden of proving controverted facts. <sup>(8)</sup> The burden of proof is something less than a preponderance of evidence. <sup>(9)</sup> 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. <sup>(10)</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. <sup>(11)</sup>

No one has a right to a security clearance <sup>(12)</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." <sup>(13)</sup> Any reasonable doubt about whether an applicant

should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. <sup>(14)</sup> The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. <sup>(15)</sup> 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):** *The Concern:* 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 would mitigate security concerns, pertaining to the adjudicative guideline are set forth and discussed in the conclusions below.

### **Smith Amendment**

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. § 986 (The Smith Amendment), which was subsequently amended, mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, Memorandum, and within DOHA by Operating Instruction (OI) 64, issued initially on July 10, 2001, and revised on September 12, 2006. Under the provision, a person convicted in any court of the United States of a crime, who 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, is disqualified from being granted a security clearance. In meritorious cases, an exception to the disqualification may be granted if there are mitigating factors.

### **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, Criminal Conduct. In June 1980, Applicant pled guilty to the charges of murder and possession of a dangerous or deadly weapon during the commission of a crime. He was convicted and sentenced to imprisonment. Applicant was incarcerated from June 5, 1980 until July 18, 1984, and was paroled once he was released from incarceration. Consequently, Criminal Conduct Disqualifying Condition (CC DC) E2A10.1.2.1 (*allegations or admission of a criminal conduct, regardless of whether the person was formally charged*) and E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*) apply.

Title 10 U.S.C. § 986 applies with respect to Applicant's conviction for homicide and unlawful possession of a gun to commit a crime, since he was convicted in a United State court, was sentenced for more than one year, and served four years in a state prison.

Various factors can mitigate the criminal conduct security concern. Here, the crime was committed more than 29 years ago. The record is devoid of Applicant committing any other crime since his imprisonment in 1980, and that his crime was an isolated incident. Moreover, since his release from both incarceration and parole, Applicant has not been involved in any known criminal activity. Thus, Criminal Conduct Mitigating Conditions (CC MC) E2.A10.1.3.1 (*the criminal behavior was not recent*), E2.A10.1.3.2 (*the crime was an isolated incited incident*), and E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*) apply. However, the favorable application of the Guideline J mitigating conditions do not overcome the prohibitions 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. Guideline J (Criminal Conduct): AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

**DECISION**

In light of all of the circumstances in this case, it is clearly not consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Jacqueline T. Williams

Administrative Judge

1. Item 4 (Security Clearance Application, dated May 12, 2005). This copy does not have responses to Questions 17 through 42. Item 5 (Security Clearance Application, dated May 12, 2005). This is an unsigned copy of Applicant's SF 86 with responses to Questions 17 through 42 included.
2. Item 3 (Applicant's Answer, dated July 18, 2006).
3. The Government submitted seven items in support of the allegations listed in the SOR.
4. Applicant submitted two items in response to the FORM. Item A (Sworn letter to the Court, October 5, 2006); Item B (Joint Character letter from friends, dated September 20, 2006).
5. Item 3, *supra*, note 2.
6. In the FORM, Department Counsel accepted Applicant's statement that he was arrested in November 1977, not December 1979, at 4.
7. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
9. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
12. *Egan*, 484 U.S. at 531.
13. *Id.*
14. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
15. Executive Order 10865 § 7.