

DATE: November 30, 2006

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 06-03230

## **DECISION OF ADMINISTRATIVE JUDGE**

**JACQUELINE T. WILLIAMS**

### **APPEARANCES**

#### **FOR GOVERNMENT**

J. Theodore Hammer, Esq., Department Counsel

#### **FOR APPLICANT**

M. Jefferson Euchler, Esq.

### **SYNOPSIS**

Applicant is 63 years of age and works as an electrician. He was arrested in July 1962 and charged with larceny of mail matter with intent to defraud on a government reservation. Applicant was convicted and served one year and one day in jail. In November 1963, he was arrested for grand larceny and forgery. He was convicted of both offenses and served three years of a five-year sentence. In October 1982, he was arrested for felonious assault and murder. In February 1984, he pled guilty to voluntary manslaughter and served less than one year in jail. I recommend a security clearance for Applicant. However, he is disqualified from holding a security clearance based on his incarceration for more than a year in 1962 and 1963. Clearance is denied.

### **STATEMENT OF THE CASE**

On November 9, 2004, Applicant applied for a security clearance and completed a Security Clearance Application (SF 86).<sup>(1)</sup> On June 22, 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, certified on July 31, 2006, Applicant responded to the SOR allegations and requested an in-person hearing. The case was assigned to me on August 29, 2006. On September 14, 2006, Applicant's attorney filed a Notice of Appearance. A Notice of Hearing was issued on October 6, 2006, scheduling the hearing for October 26, 2006. The hearing was conducted as scheduled. At the hearing, the Government submitted six exhibits, which were not objected to and admitted as Gov. Exs. 1-6. Applicant submitted one exhibit which was not objected to and admitted as Ex. A. The transcript (Tr.) was received on November 13, 2006.

## FINDINGS OF FACT

Applicant admitted the factual allegations pertaining to criminal conduct under Guideline J, subparagraphs 1.a through 1.d. 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 63 years old and employed by a defense contractor as an electrician since February 2004.<sup>(2)</sup> He has held a security clearance in the past. He has been married for more than 36 years, and he and his spouse have resided in their current residence for more than 18 years. They have one independent adult child.

Applicant served in the U.S. Army from December 1959 through December 1962. He received an "undesirable" discharge from the Army in 1962. While in the Army, he was stationed in the post office as the mail clerk. He indicated that procedures established by his superior officer in disbursing mail were in direct conflict with official procedures. He put himself in a position of signing for mail that "hopefully"<sup>(3)</sup> was received by people in the unit. However, he went against protocol and a piece of mail that was found opened in the mail room, for which he had signed, led to his conviction. On July 13, 1962, Applicant was arrested and charged with larceny of mail matter with intent to defraud on a government reservation. On September 17, 1962, he was convicted, sentenced, and served one year and one day of incarceration.

Upon release from prison, Applicant lived with his mother. While she was out of town, he called her and testified he received permission to write checks on her bank account.<sup>(4)</sup> He wrote about six checks, which totaled about \$120.<sup>(5)</sup> When she returned home, she did not remember giving him permission to use her funds, and filed criminal charges against him.<sup>(6)</sup> Applicant indicated that she eventually changed her mind and did not want him prosecuted, but the prosecutors proceeded with the court case against him.<sup>(7)</sup> On November 15, 1963, he was arrested for grand larceny and forgery. He was convicted of both offenses and sentenced to five years' incarceration, serving three years in jail.

Applicant stated that in October 1982, he was in a bar drinking beer and shooting pool.<sup>(8)</sup> Eventually, another individual initiated a fight with Applicant over who was going to use the pool table. The individual lunged at him, and Applicant grabbed a broken pool stick to ward him off. As the individual approached, he tripped and fell, and the pool stick went into his eye. That person eventually died of his injuries at the hospital.<sup>(9)</sup> On October 24, 1982, Applicant was arrested for felonious assault and murder. Initially, he pled not guilty, since he filed a self-defense plea. On February 15, 1984, during the trial proceedings, he pled guilty to voluntary manslaughter. He was sentenced to eight years' incarceration, with five years' suspended. He served less than one year in jail before being paroled.

The Smith Amendment (10 U.S.C. § 986(c)(1)) disqualifies an applicant from having a security clearance based on a period of incarceration for a year or more. Applicant has been incarcerated twice and each time he served more than a year in prison.

At the hearing, Applicant called three character witnesses to testify. The first witness was a retired federal government employee.<sup>(10)</sup> He knew Applicant for more than 30 years, as his wife and Applicant's wife are cousins. The families socialize together and their wives talk on the telephone just about every day.<sup>(11)</sup> He's noticed a change in Applicant's behavior over the last several years. He testified that "[Applicant] doesn't drink anymore."<sup>(12)</sup>

The second witness to testify has known Applicant for the past three years and is his first line manager at their place of employment.<sup>(13)</sup> He characterized Applicant's job performance as "exemplary,"<sup>(14)</sup> based on his quality of work, timeliness, professional demeanor, and attitude. This manager is so pleased with Applicant's work that he testified that he has "personally requested him on every installation that I have had."<sup>(15)</sup>

Applicant's wife testified about the impact her husband's drinking had on their marriage.<sup>(16)</sup> She testified that since Applicant stopped drinking, he goes to work, comes home immediately, and does yard work on the weekends.<sup>(17)</sup>

Applicant also testified. (18) He credibly testified that he has not used alcohol for the past seven years. (19) He submitted a letter dated October 9, 2006 signed by his counselor in a substance abuse program. (20) The counselor commends Applicant's attendance at the substance abuse program beginning August 5, 1999 and successfully graduating from the program on January 23, 2001. The counselor acknowledged Applicant admitted to a long-standing problem with alcohol and was determined to make major changes in his life, regain control, and preserve his marriage. Applicant attended the requisite individual sessions with his counselor and completed a 20-session group program that met three hours each meeting. His counselor stated that "[Applicant] passed all urine drug screens and breath analysis tests."

## 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. (21) The Government has the burden of proving controverted facts. (22) The burden of proof is something less than a preponderance of evidence. (23) 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. (24) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (25)

No one has a right to a security clearance (26) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (27) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (28) The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. (29) 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 guideline 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(c)(1) (Smith Amendment), which was subsequently amended and revised, mandates restrictions on the granting or renewal of security clearances. This statutory limitation revision was implemented within the Department of Defense 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, the disqualification may be waived.

### CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards, and I reach the following conclusions.

The Government has established a *prima facie* case for disqualification under Guideline J, Criminal Conduct. Applicant has been convicted of two crimes - larceny and forgery - that involved dishonesty, offenses which go straight to the heart of a trustworthiness determination. Moreover, he pled guilty to voluntary manslaughter. He has been incarcerated three times. Two of his incarcerations involved confinement for more than a year. Consequently, Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*allegations or admission 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 offenses*) apply.

Various factors can mitigate the criminal conduct security concern. Here, two of the crimes were committed more than 43 years ago. The 1982 crime was committed more than 24 years ago. The record is devoid of Applicant being involved in any recent criminal activity. Moreover, he has been alcohol-free for the last seven years. Thus, Criminal Conduct Mitigating Conditions (CC MC) E2.A10.1.3.1 (*the criminal behavior was not recent*) and CC MC E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*) apply. Because there were three criminal acts, I cannot find that CC MC E2.A10.1.3.2 (*the crime was an isolated incited incident*) applies. Title 10 U.S.C. § 986(c)(1) applies with respect to two of Applicant's convictions. He was convicted of larceny and served one year and one day of incarceration. His conviction for grand larceny and forgery included three years' of incarceration. I recommend a security clearance for Applicant. However, since he was convicted in a United State court for both crimes, and each sentence included incarceration for more than one year, 10 U.S.C. § 986(c)(1) applies.

### 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

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: 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. Gov. Ex. 1 (Security Clearance Application, executed November 9, 2004).
2. *Id.*; Tr. 25.
3. Applicant's Answer, certified on July 31, 2006.
4. Tr. 71-72.

5. *Id.* at 73.
6. *Id.*
7. Applicant's Answer, *supra*, note 3.
8. Tr. 79-80.
9. Applicant's Answer, *supra*, note 3.
10. *Id.* 12-22.
11. *Id.* 15.
12. *Id.* 16.
13. *Id.* 24-33.
14. *Id.* 26.
15. *Id.* 28.
16. *Id.* 33-42.
17. *Id.* 36.
18. *Id.* 44-98.
19. Applicant's Answer, *supra*, note 3.
20. Ex. A (Letter from Counselor at Substance Abuse Program, dated October 9, 2006).
21. ISCR Case No. 96-0277 (July 11, 1997) at 2.
22. ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
23. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
24. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
25. ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
26. *Egan*, 484 U.S. at 531.
27. *Id.*
28. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
29. Executive Order 10865 § 7.