

DATE: December 27, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 06-06246

**DECISION OF ADMINISTRATIVE JUDGE**

**LEROY F. FOREMAN**

**APPEARANCES**

**FOR GOVERNMENT**

Nichole L. Noel, Esq., Department Counsel

**FOR APPLICANT**

*Pro se*

**SYNOPSIS**

Applicant is a 50-year-old systems engineer. When he was 19 years old, he was convicted of aggravated robbery, and he served approximately 20 months in prison. After his release from prison, he was married, completed his vocational school education, raised two daughters, and gained a reputation as a dependable, hard-working employee and responsible member of the community. He has mitigated the security concern based on criminal conduct, but granting him a clearance is prohibited by 10 U.S.C. § 986(c)(1). Solely because of the statutory prohibition, clearance is denied.

**STATEMENT OF THE CASE**

On July 10, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleged security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on July 28, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on October 26, 2006, and heard on November 15, 2006, as scheduled. DOHA received the hearing transcript (Tr.) on November 29, 2006.

**FINDINGS OF FACT**

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 50-year-old systems engineer for a federal contractor engaged in simulation training. He has worked for his current employer since June 2004. He believes he had a clearance while working on simulators between 1984 and 1990 (Tr. 33-34). He does not currently hold a clearance.

In April 1976, Applicant was charged with aggravated robbery with a knife, a felony. At the time, he was 19 years old and on the dean's list at his vocational school (Applicant's Exhibit (AX) D). According to Applicant, he and a classmate decided to avoid paying a taxi fare by threatening the taxi driver with a knife. Applicant's friend initiated the idea and wielded the knife. No physical contact was made with the driver. The taxi driver alleged that they tried to rob him. The incident was observed by police, who promptly arrested Applicant and his friend.

Applicant was represented by a lawyer at his trial. He pleaded not guilty, but he was convicted and sentenced to confinement for 4 to 25 years. He was in confinement from April 6, 1976, until he was paroled on December 22, 1977. He was discharged from parolee status on January 24, 1979 (Government Exhibit (GX) 2). He completed vocational school in November 1981 (AX E). He has had no further contact with the friend who was involved with him in the incident (Tr. 40).

Applicant's wife was his girl friend at the time he was arrested and convicted. They were married on December 31, 1980, after his release from prison (AX F). They have two adult daughters, one of whom is a college student and one is in graduate school (Tr. 37). Applicant's wife was present at the hearing, and their interaction indicated strong bonds of affection.

Applicant has worked continuously since his release from jail (AX J). His former supervisor found him dependable, reliable, hard-working, conscientious and honest, and he rated him his most dependable and hard-working subordinate (AX A). Another former supervisor regards him as a man of integrity who is dependable, hard-working, conscientious, honest, peace-loving, and courteous (AX B).

Applicant has had no further criminal violations, not even a traffic offense (AX C). He is involved with his church (AX G and H). His credit rating is excellent (AX I).

Applicant was articulate, sincere, and credible at the hearing. He testified that he decided after his arrest and conviction that he would not allow that single incident to define his life (Tr. 22, 33).

## POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

In evaluating an applicant's conduct, an administrative judge should consider: (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 applicant'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. Directive ¶¶ E2.2.1.1 through E2.2.1.9.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information.

However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

## CONCLUSIONS

### **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. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2. Applicant's conviction of a felony raises DC 2.

Since the government produced substantial evidence to establish DC 1, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Criminal conduct can be mitigated by showing it was not recent (MC 1), it was an isolated incident (MC 2), or there is clear evidence of successful rehabilitation (MC 6). Directive ¶¶ E2.A10.1.3.1, E2.A10.1.3.2, E2.A10.1.3.6. MC 2 is established because the incident is the only criminal offense in Applicant's personal history.

The issues under both MC 1 and MC 6 are whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the record. If the evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

I conclude MC 1 is established because the incident happened more than 31 years ago. MC 6 is established because Applicant has demonstrated, by a long track record of law-abiding, responsible behavior, that his criminal behavior is not indicative of his current attitude or life style and is not likely to recur. He has established "a track record that shows [he] . . . , through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that [he] has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at \*7 (App. Bd. Aug. 3, 1998).

### **Whole Person Analysis**

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant'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. See Directive ¶¶ E2.2.1.1 through E2.2.1.9.

Applicant committed a serious offense, apparently because he acquiesced in the criminal suggestion of a friend and classmate. The crime occurred when he was only 19 years old, and it is the only criminal offense in his personal history. He is now 50 years old, and he is now a responsible spouse, father, and employee. His conviction is a matter of public record and was disclosed on his security clearance application, eliminating the potential for pressure, coercion, exploitation, or duress. The likelihood of recurrence is nil.

### **10 U.S.C. § 986 ("Smith Amendment")**

Under the provisions of 10 U.S.C. § 986(c)(1), the Department of Defense is prohibited from granting or renewing a security clearance for any person who "has been convicted in any court of the United States of a crime, 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," unless the prohibition is waived by certain designated officials. On its face, it is not entirely clear whether the statute imposes a prohibition or creates a disqualifying condition that cannot be mitigated. Subsection (a) is captioned "*prohibition*," but subsection (c) is captioned, "persons *disqualified* from being granted a security clearance." The waiver authority set out in subsection (d) allows waiver "as an exception to the *prohibition* in subsection (a) . . . "if there are mitigating factors." The reporting requirement in subsection (e) refers to "the *disqualifying* factor in subsection (c) that applied, and the reason for waiver of the *disqualification*." Federal courts have treated the statute as imposing a prohibition. See *Wright v. U.S. Army*, 307 F.Supp.2d 1065 (D. Ariz. 2004); *Nickelson v. United States*, 284 F.Supp.2d 387 (E.D. Va., 2003).<sup>(1)</sup>

Based on the evidence, I conclude 10 U.S.C. § 986 (c)(1) applies to this case. I also conclude that Applicant has established several enumerated mitigating conditions under Guideline J as well as the general adjudicative guidelines. However, I do not have authority to waive the statutory prohibition against granting a clearance. Authority to grant a waiver has been granted to the Director, DOHA. My decision to deny a clearance is based solely on 10 U.S.C. § 986(c) (1).

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

### **DECISION**

In light of all the circumstances of this case, it is clearly consistent with the national interest to grant Applicant a security clearance. However, under the provisions of 18 U.S.C. § 986(c)(1), as amended, Applicant may not be granted a security clearance unless a waiver is granted by the Director, DOHA. Based solely on this statutory prohibition, clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. The new adjudicative guidelines approved by the President on December 29, 2005, as implemented by the Under Secretary of Defense for Intelligence on August 30, 2006, treat 10 U.S.C. 986(c)(1) and (4) as disqualifying conditions that cannot be mitigated. Adjudicative Guideline J, paragraph 32(e). The new adjudicative guidelines do not apply to

this case, because the SOR was issued before the new guidelines were implemented.