

DATE: January 31, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-16810

DECISION OF ADMINISTRATIVE JUDGE

JACQUELINE T. WILLIAMS

APPEARANCES

FOR GOVERNMENT

J. Theodore Hammer, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 49 years old and employed by a defense contractor as an electrician. He was arrested and charged with fraud in 1993. In January 1994, he was found guilty of conspiracy to launder money and sentenced to 33 months in prison. He was incarcerated from January 1994 to March 1995, at which time he was placed on supervised release. Applicant is disqualified from holding a security clearance based on his incarceration for more than a year. Clearance is denied.

STATEMENT OF THE CASE

On April 12, 2004, Applicant submitted a Security Clearance Application (SF 86).⁽¹⁾ On August 31, 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 September 7, 2006, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on October 2, 2006. A Notice of Hearing was issued on October 6, 2006, scheduling the hearing for October 27, 2006. The hearing was conducted as scheduled. At the hearing, the Government submitted six exhibits (Gov. Exs. 1-6) and Applicant submitted three exhibits (Exs. A, B,⁽²⁾ and C), all of which were admitted into the record without objection. 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.b and 1.c of the SOR. Those admissions are incorporated herein as findings of fact. He denied the other factual allegations. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is 49 years old and has been employed by a defense contractor as the general foreman of an electric shop since July 1995.⁽³⁾ He currently supervises approximately 80 employees.⁽⁴⁾ He served in the Navy from 1975 to 1978.⁽⁵⁾ Although married in 1977, he was divorced in 1985, and then remarried the same woman in 1992.⁽⁶⁾ They have three adult children. Applicant recently became a master electrician, certified by the state.⁽⁷⁾

From 1985 to 1990, Applicant was self-employed and owned three car lots and a car repair shop.⁽⁸⁾ An individual that he did not know left a car on his lot for about four months. At the end of the four months, Applicant obtained a mechanic's lien for the car. When the owner later attempted to collect the car, the owner went to court and charged that the property was stolen from him. Applicant was arrested on or about October 27, 1990, for possession of stolen property. The charge was subsequently dismissed after the court ordered Applicant to return the car to the rightful owner.

In 1988, Applicant eventually turned over his car repair business to a silent partner. The silent partner was using Applicant's car repair business to launder money. Applicant was unaware of what was going on. Applicant was approached by the Drug Enforcement Agency (DEA) in about 1989 and was informed about his silent partner's activities.⁽⁹⁾ Applicant was informed that he was responsible for the illegal activities of his partner because the activities occurred in his shop and because Applicant's name was used in executing the activities. Applicant agreed to be an informant for the DEA by watching and divulging his silent partner's activities.

On October 13, 1993, Applicant was arrested and charged with fraud. On January 4, 1994, he was found guilty of conspiracy to launder money and sentenced to 33 months in prison, with 24 months of supervised release. He was incarcerated from January 1994 to at least March 8, 1995, at which time he was placed on supervised release. The DEA received a conviction against his silent partner, which is when the government moved to reduce Applicant's sentence from 33 months to 14 months for providing information that assisted in the arrest of his silent partner.⁽¹⁰⁾

Applicant submitted a number of character reference letters attesting to his responsibility, professionalism, and excellent work ethic.⁽¹¹⁾

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.⁽¹²⁾ The Government has the burden of proving controverted facts.⁽¹³⁾ The burden of proof is something less than a preponderance of evidence.⁽¹⁴⁾ 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.⁽¹⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance

decision. (16)

No one has a right to a security clearance (17) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (18) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (19) The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. (20) 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 is 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. Under the amended 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 was convicted of possession of stolen property, a car, even though the charge was subsequently dismissed after the court ordered him to return the property to the rightful owner. Additionally, he was found guilty of conspiracy to launder money. Consequently, Criminal Conduct Disqualifying Conditions (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. When he was released from prison in 1995, Applicant was placed on supervised parole. The record is silent as to Applicant committing any other criminal activity since his release from prison more than 12 years ago. Thus, Criminal Conduct Mitigating Conditions (CC MC) E2.A10.1.3.1 (*the criminal behavior was not recent*), and E2.A10.3.6 (*there is clear evidence of successful rehabilitation*) apply. Based on the facts of these mitigating factors, I would recommend a security clearance for Applicant. However, the favorable application of the Guideline J mitigating conditions does not overcome the disqualifications of Title 10 U.S.C. § 986(c)(1). Applicant has not mitigated the Government's case. Accordingly, allegations 1.a through 1.c are concluded against Applicant.

I have considered all the evidence in the case. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. Based on the evidence of record and Applicant's 14 months of incarceration, however, it is not clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, I conclude Applicant is not suitable for access to classified information.

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

DECISION

In light of all of the circumstances in this case, it is not clearly 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, electronically submitted on April 12, 2004).
2. Ex. B consists of a number of character reference letters, in which the pages are unnumbered.
3. Gov. Ex. 1, *supra*, note 1; Tr. 33.
4. *Id.* at 22; Ex. C (Applicant's Statement, which he read at the hearing).
5. *Id.* at 26.
6. *Id.* 31.
7. Tr. 24.
8. *Id.* 28.
9. *Id.* 28.
10. *Id.* at 9.
11. Ex. A (Letter, dated October 20, 2006); Ex. B (Miscellaneous documents).
12. ISCR Case No. 96-0277 (July 11, 1997) at 2.
13. ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, ¶ E3.1.14.
14. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
15. ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, ¶ E3.1.15.
16. ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, ¶ E3.1.15.
17. *Egan*, 484 U.S. at 531.
18. *Id.*
19. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.

20. Executive Order 10865 § 7.