

DATE: March 15, 2007

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-19803

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Richard A. Stevens, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant and three others robbed a jewelry store 29 years ago. Applicant was incarcerated for six years. While incarcerated, he obtained two college degrees and is a few hours short of obtaining a third degree. Since his release, he has been gainfully employed. The crime is not recent, his changes in lifestyle makes it unlikely the factors leading to the violations are likely to recur and there is clear evidence of successful rehabilitation. Taken together, Applicant has presented sufficient evidence to mitigate his 1977 arrest and conviction. However, 10 U.S.C. § 986 directs Applicant cannot have a clearance without a waiver being granted. Because Applicant was incarcerated for six years, clearance is denied. Denial is solely based on 10 U.S.C. § 986.

STATEMENT OF THE CASE

On September 29, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR set forth reasons why a security clearance could not be granted or continued due to criminal conduct security concerns.

On October 16, 2006, Applicant answered the SOR and requested a hearing. On November 2, 2006, I was assigned the case. On November 11, 2006, a Notice of Hearing was issued for the hearing held on November 29, 2006. On December 8, 2006, DOHA received the transcript (Tr.).

The record was kept open to allow Applicant to submit additional documents, which were received from Department Counsel on December 7, 2006. Department Counsel having no objections, the documents were admitted into evidence.

FINDINGS OF FACT

The SOR alleges security concerns due to criminal conduct. Applicant admits to the following: In December 1977, he drove the car when three others executed a robbery. Although he did not possess a weapon, he was charged with

aggravated robbery with a deadly weapon --a felony. In February 1979, he pleaded guilty. During his incarceration he completed two junior college degrees. One is an associate of applied science and the other is an associate of arts in business. He was taking additional courses through a four-year university and was almost complete with that degree when released from incarceration. (App Ex B) He had a 3.9 grade point average. He also obtained certification training and education in electronics and became an electronics technician in inmate trustee status. In October 1985, he was released from incarceration and returned home to his wife and son.

In January 1986, he obtained a job writing test requirement documents and programs for testing electronics equipment on military aircraft. In September 1988, he obtained a new job as a logistics analyst, again working on DoD programs. Due to a company wide lay off in July 1990, Applicant took a job with a small firm as a lead analyst and project manager. (Tr. 40) In January 1996, he stated his own logistics and systems engineering business while continuing to work for an engineering company. Since January 1994, he has worked for a DoD contractor providing engineering technical services for a military aircraft. In February 1999, he completed his mandatory supervised probation. The admissions are incorporated herein as findings of fact. After a thorough review of the entire record, I make the following findings of fact.

Applicant, a 54-year-old lead analyst who has worked for a defense contractor since January 1994, is seeking a security clearance. Applicant is regarded by those who know him as organized, efficient, very competent, conscientious, eager to do what is right, honest, courteous, and a man of highest integrity. (App Ex A). He is considered a dependable, conscientious, motivated, level-headed, dependable, honest, courteous, self-motivated, and dedicated person. His quality of work is excellent. One of his foremost attributes is his attention to detail and his desire to accomplish an assigned task to the highest degree of accuracy and perfection. (App Ex B)

Until October 1977, Applicant had worked as a sheet metal mechanic. (Tr. 33) He was out of work in December 1977 when Applicant--then age 25--decided with three others to kidnap the owner of a jewelry store. They took the owner back to his store after hours and robbed the store of cash and jewelry. The robbery netted \$11,000 in cash plus jewelry. For his involvement Applicant was paid \$1,000. (Tr. 35) Four days after the robbery, Applicant was arrested. One of the individuals received probation and a dishonorable discharge from the Air Force. (Tr. 30) The other two, who were also wanted for murder, were sentenced to 25 to 50 years. (Tr. 31-32)

Applicant was sentenced to serve 20 years in the state department of corrections. He served from March 1979 until October 1985. He met his wife prior to the start of his incarceration. They married while he was incarcerated and their first son was born during Applicant's incarceration. As of October 2006, he has been married 28 years. While incarcerated, Applicant's wife, while working in a grocery store, was robbed at gun point. This event has helped him realize how the jewelry store owner felt during the robbery.

Applicant is a very hard-working husband, very faithful, and very committed. (Tr. 51) He spends his free time with his family. (Tr. 54) Applicant's sons are 27, 17, and 16 and his daughter is 13. He is active in community involvement. Applicant and his wife chose to live where they do because it is close to where Applicant's mother lives and is close to his brothers and sisters, nieces and nephews. It is also close to the home of his wife's father.

Applicant acknowledges he cannot change the past and can only change the future. He has been working for the last 29 years to change his future for the better. (Tr. 66)

POLICIES

The Directive sets forth adjudicative guidelines to be considered when evaluating a person's eligibility to hold a security clearance. Disqualifying Conditions (DC) and Mitigating Conditions (MC) are set forth for each applicable guideline. Additionally, each decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in Section 6.3 of the Directive. The adjudicative guidelines are to be applied by administrative judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. The presence or absence of a particular condition or factor for or against clearance is not determinative of a conclusion for or against an applicant. However, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, I conclude the relevant guideline to be applied here is Guideline J, criminal conduct.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, an applicant from being eligible for access to classified information. The burden of proof in a security clearance case is something less than a preponderance of evidence, although the government is required to present substantial evidence to meet its burden of proof. Substantial evidence is more than a scintilla, but less than a preponderance of the evidence. All that is required is proof of facts and circumstances which indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. Additionally, the government must prove controverted facts alleged in the SOR. Once the government has met its burden, the burden shifts to an applicant to present evidence to refute, extenuate or mitigate the government's case. Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. ⁽²⁾

As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security. Security clearance determinations should err, if they must, on the side of denials.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Criminal Conduct, Guideline J. Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. In 1977, Applicant and three others kidnaped a jeweler and robbed his jewelry store. Applicant was incarcerated for six years. Disqualifying Condition (DC) (a) (*A single serious crime or multiple lesser offenses*) apply, DC (c) (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*) and DC (f) (*Conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarceration as a result of that sentence for not less than a year*) apply.

The crime occurred in 1977, which is 29 years ago. Applicant was released from prison in 1985, and successfully completed his parole or probation. Given these circumstances, I conclude his criminal behavior was not recent. Mitigating Condition (MC) (a) (*So much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) applies. He was 25 at the time of the crime and is now 54 years old. Applicant has seen the error of his ways and has tried for the past 29 years to make a better life for himself and his family.

The evidence of reform and rehabilitation is clear. Applicant served his punishment and is no longer in the criminal-justice system. He has been gainfully employed for many years and performs his duties exceedingly well. He has become a law-abiding citizen who has not been involved in any further incidents of criminal conduct. While incarcerated, Applicant obtained two degrees and was but a few hours short of obtaining his third degree. Marriage and fatherhood have had a dramatic impact on Applicant. Since being released from prison, Applicant has been gainfully employed working for various DoD contractors on services related to military aircraft. His change in lifestyle makes it unlikely the factors leading to the violations are likely to recur.

While incarcerated, Applicant obtained two college degrees. He has been gainfully employed since 1986. He has an excellent employment record and is involved with the community. Applicant's changes of lifestyle show clear evidence of successful rehabilitation. MC (d) (*There is clear evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good*

employment record, or constructive community involvement) applies. Taken together, Applicant has presented sufficient evidence to mitigate the security concern. Accordingly, subparagraph 1.a is decided for Applicant.

Applicant has met his ultimate burden of persuasion to obtain a favorable clearance decision under SOR 1.a. By all appearances, Applicant is a textbook case of reform and rehabilitation, and the record evidence shows his criminal conduct is a thing of the past unlikely to recur. In reaching my decision, I considered the whole-person concept considering: the nature, extent, and seriousness of the conduct; Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

However, subparagraph 1.b alleges that Applicant is disqualified, as a matter of law, from having a security clearance based on his conviction and incarceration for several years which makes 10 U.S.C. § 986 applicable. MC (e) (*Potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exists, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver*) applies. Applicant has asked for a waiver.

Except for the effect of 10 U.S.C. § 986, Guideline J would have lead to a favorable result. Denial is solely based on 10 U.S.C. § 986. DOHA Operating Instruction # 64 directs that no one will make a formal waiver recommendation to the Director of DOHA.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of the Directive are hereby rendered as follows:

Paragraph 1 criminal conduct: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

DECISION

Because of 10 U.S.C. § 986, Applicant cannot have a clearance without a waiver being granted. Because Applicant was incarcerated for six years, clearance is denied. Denial is solely based on 10 U.S.C. § 986.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended. This action is brought under Revised Adjudicative Guidlentine J dated August 2006.

2. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15