KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant is a 57-year-old employee of a defense contractor who has an excellent work record, and has held a security clearance since 1979 without incident. In 1970, he was arrested on felony charges of marijuana possession and distribution. He pled guilty, and served three years and eight months of the resulting eight year sentence to imprisonment. Renewal of his security clearance is not clearly in the national interest only because of the provisions of 10 U.S.C. § 986. Clearance is denied.

CASENO: 07-01137.h1

DATE: 09/19/2007

DATE: September 19, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 07-01137
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
DAVID M. WHITE

APPEARANCES

FOR GOVERNMENT
Candace Le'i, Esq., Department Counsel

FOR APPLICANT
David I. West, Esq.

SYNOPSIS

Applicant is a 57-year-old employee of a defense contractor who has an excellent work record, and has held a security clearance since 1979 without incident. In 1970, he was arrested on felony charges of marijuana possession and distribution. He pled guilty, and served three years and eight months of the resulting eight year sentence to imprisonment. Renewal of his security clearance is not clearly in the national interest only because of the provisions of 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF THE CASE

Applicant reapplied for a security clearance on July 26, 2005, in conjunction with his employment by a defense contractor as a high-voltage electrician. On April 5, 2007, 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 Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended. The SOR detailed reasons, under Guideline J (Criminal Conduct), and Guideline E (Personal Conduct), of the revised Adjudicative Guidelines (AG),[1] why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations in a letter and notarized statement dated April 20, 2007, and elected to have a hearing before an administrative judge. The case was then assigned to me on June 15, 2007. A notice of hearing was issued on June 19, 2007. By letter dated June 22, 2007, Applicant's attorney requested a continuance. Department counsel agreed to the request, and an amended notice of hearing was issued on July 5, 2007. The hearing was held as scheduled on August 9, 2007. The Government offered six exhibits that were marked as Government Exhibits (GE) 1 through 6, and admitted without objection. Applicant testified, and offered nine exhibits that were marked Applicant Exhibits (AE) A through I, and admitted without objection. DOHA received the hearing transcript (Tr) on August 22, 2007.

FINDINGS OF FACT

Applicant admitted the truth of some factual allegations set forth in the SOR pertaining to criminal activity under Guideline J (¶¶ 1.a, 1.c (in part), and 1.d (but requested a Smith Amendment waiver)), and personal conduct under Guideline E (¶ 2.a). Those admissions are incorporated herein as findings of fact. Applicant denied the factual allegations in SOR ¶¶ 1.b, 1.c (in part), 1.e, and 2.b. After complete and thorough review of the evidence in the record, and upon due consideration of

[1] *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (December 29, 2005) as modified and implemented by Under Secretary of Defense Memorandum of Aug. 30, 2006 for use in adjudication of all cases in which an SOR had not been issued by Sept 1, 2006. These revised AG replaced those found in enclosure 2 of the Directive, which is pending revision to incorporate them. Copies of the applicable AG were provided to Applicant with the SOR.

same, I make the following findings of fact:

Applicant is a 57-year-old employee of a defense contractor seeking to renew a security clearance he has held since 1979.[2] He has proudly and successfully held his present position, which does not involve access to classified information but does require access to sensitive areas, since 1991.[3] He is married with a 21-year-old daughter who lives independently, and a 15-year-old son who is autistic. Applicant and his wife spend virtually all their time away from work caring for their son. His condition caused some stress in their marriage, but after counseling they have resolved those problems and rededicated themselves to each other and their family's needs.

As Applicant admitted, in response to SOR ¶ 1.a, that he was arrested on December 4, 1970, and charged with four felony drug distribution counts. He pled guilty to, and was convicted of, two counts of Felony Possession and Distribution of Drugs. On February 24, 1971, he was sentenced to serve four years confinement on each, to be served consecutively for a total of eight years. He was released on parole after actually serving approximately three years and eight months in the state penitentiary. This conviction and sentence meet the criteria of 10 U.S.C. § 986 (the Smith Amendment), precluding the grant or renewal of a security clearance without obtaining a meritorious waiver.

Applicant credibly testified that he has no recollection of the March 1975 misdemeanor marijuana possession charge alleged in SOR ¶ 1.b.[4] However, GE 4 (where his parole officer recorded detailed descriptions of the arrest and subsequent nol-prosse determination in return for Applicant's cooperation in an ongoing investigation of burglary charges against his roommate), and GE 5 (where an independent Department of State Police Central Criminal Record reflects an arrest on the identical date and charge), provide more than sufficient evidence, and I find that this arrest did occur and Applicant admitted the offense shortly thereafter. Applicant, through counsel, asserted that the absence of information concerning this incident in AE F (Applicant's FBI Criminal History, dated June 8, 2007) corroborates his belief that this incident did not happen. However, that same report also does not reflect the 1976 marijuana possession arrest or resulting misdemeanor conviction, which Applicant remembers and admits. Accordingly, with GE 5 reporting the arrest, its absence from AE F is not persuasive.[5]

Applicant admitted that he was arrested for marijuana possession in 1976, in a different state, shortly after his release from parole. This arose from a traffic stop during which the passenger in the car he was driving was found in possession of the drugs. Applicant consented to a search because he did not know the drugs were there. As the driver, he was also charged with marijuana possession, but believed that it was reduced to a traffic violation with a $50 fine in return for his agreement to

[2]Tr at 112, 122.

[3]GE1 (Electronic Questionnaire for Investigations Processing (e-QIP), dated July 26, 2005) at 4-5; Tr at 101-102. *Note*: GE 1 has several different pagination numbers noted on each page. Citations herein will be to the hand-written page numbers 1 through 22, on the bottom of each page following the unnumbered cover page.

[4]Tr at 86-88, 103-111.

[5]*See* Tr at 19, 130-131, 135, 137-139.

plead guilty.[6] GE 3 (the state Computerized Criminal History) reflects that Applicant's belief was incorrect. In fact, he was initially charged with felony marijuana possession, found guilty (based on his plea) of misdemeanor marijuana possession, and fined $25, plus costs. Applicant credibly testified that he did not list this incident as a drug charge or felony charge in response to question 23 on GE 1 (his e-QIP) because he thought the court's action reduced it to a traffic offense. He has never reported this incident on previous security clearance applications for the same reason. He now understands it should be so listed, and will do so in the future. He has not tried to hide this arrest from his employer or family, all of whom know about it from his having told them. He simply did not realize it should have been listed on the e-QIP. He did answer "yes" to questions 23a and 23d, and listed his 1970 drug felony.

Applicant admitted that he tested positive for marijuana use on a random urinalysis test in 1995 because he had shared a marijuana cigarette the preceding weekend while helping a neighbor who was moving. He did this due to peer pressure from the others present, all of whom were sharing the marijuana. He admitted the incident to his wife and employer, felt terribly stupid for having done it, and has not used marijuana or any illegal substance since then. He successfully completed a year-long bi-weekly drug testing program but suffered no other job sanctions.[7] Applicant underwent an Alcohol/Drug Evaluation by a Licensed Clinical Social Worker/Chemical Dependency Professional, on April 26, 2007. The Evaluation/Diagnosis and Treatment Recommendation stated that he:

> is diagnosed as demonstrating insufficient evidence of substance abuse/dependence. The test results and interview information were not indicative of chemical dependency or abuse symptomatology. He does not evidence consistent loss of control, denial or any of the other attendant life problems that would suggest a problem with alcohol. It would appear that their [sic] was a time in his early to mid twenties when he abused marijuana which led to his legal problems associated with this drug. He has shown no propensity to resume this maladaptive pattern of use and his problems in this regard are in full remission. He does not appear to be a heavy drinker and has no history of prescription drug abuse. He was given a [surprise] urinalysis and the results were negative to all substances including cannabis. . . Given that he does not currently meet clinical criteria for substance abuse or dependence there is no need for [Applicant] to receive any alcohol or drug related treatment services.[8]

AE A through E contain five declarations of co-workers and supervisors attesting to Applicant's excellent character, reliability and work performance. Another person with whom he has worked closely testified credibly to the same effect.[9] AE G contains 22 pages of awards, certificates, and letters of appreciation further documenting his sustained quality professional performance since

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[6]Tr at 77-78, 88-90, 111-115.

[7]Tr at 35-39, 42, 72, 78-79, 99-101, 115-120, 123-125.

[8]AE I (Evaluation report, dated May 14, 2007) at 2. *See* Tr at 46-65.

[9]Tr at 66-79.

1991.

POLICIES

The revised AG that replaced Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into disqualifying conditions (DC) that may raise security concerns, and mitigating conditions (MC) that may reduce or negate security concerns. Applicable DCs and MCs must be considered in deciding whether to grant, continue, deny or revoke an individual's eligibility for access to classified information. Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, under Guidelines J and E, are set forth and discussed in the conclusions section below.

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are intended to be applied in conjunction with the factors set forth in the Adjudicative Process provision of the Directive,[10] to assist the administrative judge in reaching fair and impartial, common sense decisions.

The entire decision-making process is a conscientious scrutiny of a number of variables known as the "whole person concept." All available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider, in addition to the applicable guidelines, are: (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 individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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.

Protection of the national security is the paramount consideration, so the final decision in each case must be arrived at by applying the standard that issuance of a clearance must be clearly consistent with the interests of national security. Any doubt as to whether access to classified information is clearly consistent with national security must be resolved in favor of the national security.[11] In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. I have avoided drawing inferences grounded on mere speculation or conjecture.

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[10] AG ¶ 2.

[11] *Id*., at ¶¶ 2(b), 2(c).

In the decision-making process, facts must be established by "substantial evidence."[12] The burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. "Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted."[13] "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and [Applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision."[14] Once it has met its initial burden of production, the burden of persuasion (including any burden to disprove a mitigating condition) never shifts to the government.[15]

A person applying for access to classified information seeks to enter a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Section 7 of Executive Order 10865 specifically provides that any adverse industrial security clearance decision shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned," so the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. 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.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

Guideline J: Criminal Conduct

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[12]"Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "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).

[13]Directive ¶ E3.1.14.

[14]Directive ¶ E3.1.15.

[15]ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005); "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

"Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."[16]

Criminal conduct disqualifying condition (CC DC) 31(a) ("a single serious crime or multiple lesser offenses") applies to raise possible security concerns due to Applicant's 1970 felony arrest and conviction, 1975 misdemeanor arrest and 1976 misdemeanor conviction for marijuana possession and distribution. CC DC 31 (c) ("allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted") also applies to raise security concerns from his admitted criminal conduct, regardless of ultimate judicial disposition. As discussed below concerning the personal conduct guideline, I conclude that Applicant did not violate 10 U.S.C. § 1001, as alleged in SOR ¶ 1.e. Finally, CC DC 31(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 incarcerated as a result of that sentence for not less than a year") is a mandatory disqualifying condition that applies due to Applicant's 1971 conviction and sentence to serve eight years imprisonment, under which he was incarcerated for approximately three years and eight months.[17]

As conceded by Department Counsel,[18] Criminal conduct mitigating condition (CC MC) 32(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") does apply to mitigate security concerns under CC DCs 31(a) and 31(c). His most recent arrest was more than 30 years ago. Although not alleged under Guideline J in the SOR, Applicant's last, minimal use of marijuana in 1995 was more than 12 years ago, and any possible criminal conduct concern from it would also be mitigated under this CC MC. I specifically find Applicant met his burden of proving that such behavior is unlikely to recur and does not cast doubt on his current reliability, trustworthiness or good judgment.

Applicant also established CC MC 32(d) ("there is 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") in mitigation of any remaining security concerns from his criminal conduct under CC DCs 31(a) or 31(c). However, as noted in CC MC 31(e), CC DC 31(f) may not be mitigated unless, where meritorious circumstances exist, an authorized authority (in this case, the Director of DOHA) grants a waiver.

Guideline E: Personal Conduct

"Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability,

[16]AG ¶ 30.

[17]10 U.S.C. § 986 (the Smith Amendment) prohibits granting or renewing access to classified information to persons meeting the criteria of CC DC 31(f). In a meritorious case, the Secretaries of the Military Departments or designee, or the Directors of WHS, DIA, NSA, DOHA or designee may authorize a waiver of this prohibition.

[18]Tr at 127.

trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."[19]

After considering all of the personal conduct disqualifying conditions (PC DC), it is unclear which of them the Government found applicable to the 1995 positive urinalysis alleged in SOR ¶ 2.a. This was not alleged under Guideline H (Drug Involvement), or Guideline J (Criminal Conduct), although it clearly could have been if either or both of those aspects formed the basis of the security concern. While Applicant admitted that this did happen, there is neither an admission nor record evidence that would support finding the violation of some written condition of employment, or vulnerability to exploitation, manipulation or duress. Thus, I find that no PC DC applies to this alleged conduct, and Department Counsel conceded that any security concerns arising from it were mitigated under Guideline E because it occurred 12 years ago.[20] I concur that PC MC 17(c) ("the offense was so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment") mitigates any security concerns arising from the 1995 positive urinalysis, for reasons identical to those discussed above concerning CC MC 32(a).

PC DC 16(a) ("deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities") requires deliberate omission of relevant facts, which Applicant established did not occur when he listed only the one felony conviction in responding to question 23 on his e-QIP. He had no recollection of the 1975 arrest that resulted criminal charges being dismissed, and honestly did not think the 1976 arrest qualified as either a felony charge or drug charge due to his understanding of the court's action in the case.

Whole Person Analysis

Applicant is a mature, responsible family man and employee who is widely trusted and highly regarded. He was heavily and criminally involved with marijuana more than 30 years ago, for which he went to prison. He has not been arrested or charged since 1976. He has held a security clearance while working in shipyards and other government facilities since 1979, without any security incidents. The criminal conviction that led to a sentence disqualifying him from clearance without a waiver resulted from conduct in 1970. Applicant was formally evaluated by a Chemical Dependency Professional and found to have no current dependency or abuse problems. However, his security clearance cannot be renewed without a meritorious waiver under the provisions of 10 U.S.C. § 986 (the Smith Amendment). He requested such a waiver in his response to the SOR, and again at the hearing. For the reasons stated, I conclude Applicant has not demonstrated that it is clearly consistent with the interests of national security to grant him access to classified information only because of the provisions of 10 U.S.C. § 986.

[19] AG ¶ 15.

[20] Tr at 127.

FORMAL FINDINGS

Formal Findings For or Against Applicant on the allegations set forth in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant, only because of the provisions of 10 U.S.C. § 986. Clearance is denied.

David M. White
Administrative Judge