



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 05-06949
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco J. Mendez, Jr., Esquire, Department Counsel
Pro se

February 28, 2008

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 3 November 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J.¹ Applicant answered the SOR 19 November 2007, and requested a hearing. DOHA assigned the case to me 19 December 2007, and I convened a hearing 30 January 2008. DOHA received the transcript (Tr.) 7 February 2008.

¹DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (RAG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Findings of Fact

Applicant admitted the SOR allegations. Accordingly, I incorporate his admissions as findings of fact. He is a 46-year-old telecommunications installer employed by a defense contractor since September 2003. He has not previously held a clearance.

Between February 1981 and December 1996, Applicant was involved in six run-ins with law enforcement officials. The offenses run the gamut from simple marijuana possession, to theft, to assault, to more serious offenses involving cocaine possession and distribution. Three of the alleged offenses were dismissed (1.a.), not disposed of (1.b.) or nolle prossed (1.e.) under circumstances that suggest that the incidents lack security significance, particularly where the most recent of those incidents is over 16 years old. The remaining three offenses (1.c., 1.d., and 1.f.) involved more serious drug charges. In February 1988, Applicant was convicted of cocaine possession, and sentenced to one year confinement, suspended, probation, and drug treatment. In October 1988, he was charged with three counts of cocaine distribution, was convicted, and served 20 months in jail. In December 1996 he was charged with multiple cocaine offenses, and ultimately pleaded guilty to attempted cocaine distribution—for which he received two-years probation.

Although Applicant came from a middle-class background, he attributes these drug offenses to his desire to be part of the “in” crowd in his neighborhood. His 1996 arrest occurred when he obtained some cocaine from a friend so he could pay someone to wash his car. He was arrested by an undercover policeman.

Policies

The Revised Adjudicative Guidelines (RAG) list factors to be considered in evaluating an Applicant’s suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in RAG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guideline is Guideline J (Criminal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant’s security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the

government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.²

Analysis

The government established a case for disqualification under Guideline J, and Applicant did not completely mitigate the security concerns. His six arrests between 1981 and 1996 raise concerns about his criminal conduct.³ While the three minor offenses are mitigated by the passage of time and the unlikelihood of recurrence,⁴ the same cannot be said about the more serious drug charges. Although Applicant's most recent drug arrest was over 11 years ago, the circumstances of that arrest (busted for using cocaine to pay for a car wash) cast significant doubt on his judgment, coming as it did after his jail time following his 1988 arrest. Further, Applicant's 20-months imprisonment disqualifies him from holding a clearance,⁵ and cannot be mitigated absent a finding of meritorious circumstances by the Director, DOHA.⁶ I resolve Guideline J against Applicant.⁷

²See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

³¶31.(a) a single serious crime or multiple lesser offenses; (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

⁴¶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; (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence or criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement;

⁵¶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.

⁶¶32.(e) potentially disqualifying conditions . . . (f) above, may not be mitigated unless, where meritorious circumstances exist . . . [the Director], Defense Office of Hearings and Appeals (DOHA), has granted a waiver.

⁷The 2008 Defense Authorization Act (P.L. 110-181) repealed the "Smith Amendment," 10 U.S.C. § 986 [thus removing the statutory basis for ¶31.(f) and ¶32.(e)] effective 1 January 2008. However, the statute was not retroactive, nor does it void the provisions of the RAG. Barring action by the Secretary of Defense to revise implementation of the RAG, those guidelines remain the applicable law of this case.

Formal Findings

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph a:	For Applicant
Subparagraph b:	For Applicant
Subparagraph c:	Against Applicant
Subparagraph d:	Against Applicant
Subparagraph e:	For Applicant
Subparagraph f:	Against Applicant
Subparagraph g:	Against Applicant

Conclusion

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. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge