KEYWORD: Criminal Conduct

DIGEST: In 1982, Applicant pleaded guilty to the sale and possession of controlled substances. He served about 18 months of a five-year sentence to confinement. He was on parole until 1988 when he was released from all supervision. In 2007, Applicant is now a 47-year-old husband and father to two adopted sons. He is a vice-president and part-owner of a successful family business, and he is involved in community affairs. His demonstrated ability to lead a responsible and productive life for a significant period after conviction and release from confinement is strong evidence of reform and rehabilitation. But because he was incarcerated for not less than one year, he is statutorily disqualified from being granted a security clearance by the Defense Department unless a waiver is granted. Eligibility for a security clearance is denied solely as a result of 10 U.S.C. § 986(c)(1).

CASENO: 05-15576.h1

DATE: 07/11/2007

DATE: July 11, 2007

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| In re: | ) | |
| | ) | |
| ---------- | ) | ISCR Case No. 05-15576 |
| SSN: ---------- | ) | |
| | ) | |
| Applicant for Security Clearance | ) | |

**DECISION OF ADMINISTRATIVE JUDGE**
**MICHAEL H. LEONARD**

## APPEARANCES

**FOR GOVERNMENT**
James F. Duffy, Esq., Department Counsel

**FOR APPLICANT**
Brian J. Kaveney, Esq.

## SYNOPSIS

In 1982, Applicant pleaded guilty to the sale and possession of controlled substances. He served about 18 months of a five-year sentence to confinement. He was on parole until 1988 when

he was released from all supervision. In 2007, Applicant is now a 47-year-old husband and father to two adopted sons. He is a vice-president and part-owner of a successful family business, and he is involved in community affairs. His demonstrated ability to lead a responsible and productive life for a significant period after conviction and release from confinement is strong evidence of reform and rehabilitation. But because he was incarcerated for not less than one year, he is statutorily disqualified from being granted a security clearance by the Defense Department unless a waiver is granted. Eligibility for a security clearance is denied solely as a result of 10 U.S.C. § 986(c)(1).

## STATEMENT OF THE CASE

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant on March 8, 2007. The SOR—which is equivalent to an administrative complaint—details the factual basis for the action and alleges security concerns under Guideline J for criminal conduct due to Applicant's drug-related offenses. In addition, the Guideline J matters include an allegation that Applicant is disqualified, as a matter of law, from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986.

In addition to the Directive, this case is brought under the revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (Revised Guidelines) approved by the President on December 29, 2005. The Revised Guidelines were then modified by the Defense Department, effective September 1, 2006. They supersede or replace the guidelines published in Enclosure 2 to the Directive and Appendix 8 to DoD Regulation 5200.2-R. They apply to all adjudications and other determinations where an SOR has been issued on September 1, 2006, or thereafter.[2] Both the Directive and the Regulation are pending formal amendment. The Revised Guidelines apply to this case because the SOR is dated March 8, 2007, which is after the effective date.

Applicant timely replied to the SOR and requested a hearing. The case was assigned to me on April 5, 2007. A notice of hearing was issued scheduling the hearing for May 3, 2007. The hearing took place as scheduled. DOHA received the hearing transcript on May 14, 2007.

## FINDINGS OF FACT

Applicant admitted the factual allegations about his drug offenses as set forth in SOR subparagraphs 1.a, 1.b, and 1.c. His admissions are incorporated herein as findings of fact. Based on the record evidence as a whole, I find the following facts:

[1] Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

[2] *See* Memorandum from the Under Secretary of Defense for Intelligence, dated August 30, 2006, Subject: Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005).

1. Applicant is a 47-year-old man who is a vice-president and part-owner (approximately 15%) of a successful family business. He has worked for this company since 1983. The company specializes in manufacturing optical fire-control equipment and components, and it is also a distributor of surveying instruments and other optical equipment. He is a vice-president of the company's real estate division, but his day-to-day duties are in the surveying division where he works in sales, marketing, and management. Since he has worked in the surveying division, it has grown from 10 employees and $2 million in annual sales to almost 50 employees and $25 million in annual sales (Exhibit E). In the real estate division, he helps manage, acquire, and control some of the properties the company owns. This is his initial application to obtain a security clearance from the Defense Department.

2. Applicant has a history of criminal conduct, which he reported on his security-clearance application (Exhibit 1).[3] By way of background, Applicant started using marijuana while a high-school student. While in college, his marijuana usage increased and he started using cocaine. This led to Applicant becoming a low-level seller. His customers were, for the most part, other college students and fraternity members.

3. In about April 1981, Applicant sold both marijuana and cocaine to an undercover police officer. He was not immediately arrested. A few months later in August, his room at the fraternity house was searched by police. They found about 35 grams of marijuana, phenobarbital, and diazepam. Applicant did not have a prescription for phenobarbital and diazepam as he had accepted the drugs as payment-in-kind. He was charged with unlawful possession of those drugs and the marijuana.

4. In February 1982, Applicant pleaded guilty to the five drug offenses involving the sale and possession of controlled substances (two counts of selling and three counts of possession) (Exhibit 2). The state court sentenced him to serve five years of incarceration for each offense, to run concurrently. He served about 18 months of incarceration in a combination of the state penitentiary, an intermediate reformatory, and a halfway house. He served about 15 months at the reformatory. He was released on parole in 1983. He remained a parolee until released in 1988.

5. After his release from incarceration, Applicant started working for the family business where he has remained employed to date. Also, he transferred from his old college to a university in the city where the family business is located. He enrolled in the evening program in the college of business and administration (Exhibit D). He earned a bachelor's degree in business administration in 1987 and an MBA in 1990.

6. He expressed remorse for his crimes (R. 31–32). He's sorry for what happened, and he is not proud of his past actions. He has worked to atone by doing his best by focusing on what he calls his two great hobbies, work and home.

7. Applicant's wife testified on his behalf (R. 95–106). She met Applicant in 1986, and they married in October 1987. She learned about his drug offenses and incarceration on their second or

[3] In addition to the drug offenses, Applicant reported two other matters. The first was a 1981 trespass offense resulting in a dismissal. The second was a 1985 alcohol-related offense resulting in a dismissal. Because neither matters were alleged in the SOR and both incidents resulted in dismissals, I have given little weight to these matters.

third date. During their nearly 20-year marriage, she has never seen any indication that Applicant was involved with illegal drugs. For the last three years, she has been a stay-at-home mother. She also works part-time (about five hours weekly) as the executive director of a youth-sports program. Previously, she worked in marketing and public relations. She and Applicant have two sons, ages three and seven, adopted in 1999 and 2004 (*See* family photographs at Exhibit A). She describes Applicant as a wonderful father, the best father any woman could ever ask for her children. She believes Applicant is a devoted husband, very dedicated to their family. Some of her girlfriends are envious of her due to his focus on family. She and Applicant are active in their community, to include various charitable activities and teaching Sunday school twice a month. In addition, Applicant was an Eagle Scout (Exhibit B at 1), and he and his seven-year-old son participate in Cub Scouts (Exhibit E).

8. A longtime friend also testified on Applicant's behalf (R. 107–119). The friend is a former CPA who is now a stay-at-home parent. He has known Applicant since they attended the second grade together, about 40 years in total. After Applicant's conviction and release from incarceration, Applicant was a changed person who was focused on getting an education and settling down. The friend has seen no indication that Applicant has been involved with illegal drugs since his release from confinement. He considers Applicant a model citizen with a good moral compass. He and his wife chose Applicant as the godfather of their eldest son because of their high opinion of Applicant's character.

9. In addition to the two character witnesses, a clinical psychologist testified on Applicant's behalf (R. 63–94). His qualifications in clinical psychology are superb, to include a Ph.D. in clinical psychology, a postdoctoral fellowship in clinical child psychology, clinical experience in mental health since 1971, and serving as an adjunct faculty member (supervisor in clinical psychology) at a university since 1982 (Exhibit C). The witness was qualified as an expert in the field of clinical psychology and allowed to testify in the form of an opinion (R. 71).[4]

10. Applicant met the clinical psychologist in 1999 when Applicant was referred by his adoption attorney for an assessment of his current psychological status. The result of the psychological evaluation was a September 1999 report, which is incorporated herein as findings of fact (Exhibit B). In finding that Applicant was suitable to be an adoptive parent, the report concluded with the following summary:

> The data of this evaluation indicates that [Applicant] is a normal adult male who long ago recovered and rehabilitated himself from serious lapses in judgment as a young adult. There is no sign in the present or the recent past of any psychological problems, including any problems resulting from use of alcohol or other substances. There appears to be a present pattern of mild, responsible alcohol use which causes no problems. There appears to be no use at all of illegal substances. It appears that [Applicant] is exactly what he claims to be, a responsible and mature adult who acknowledges and regrets his past mistakes, but who is long past them. No sign was seen in these evaluation data of any problems that would suggest that [Applicant] is not highly qualified to be an adoptive parent (Exhibit B at 3).

[4] Under Fed.R.Evid. 702, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

The data included a full urine screen for drugs and alcohol that Applicant took with one day notice. The test results were negative (Exhibit B at 2–3).

11. In his testimony, the clinical psychologist reaffirmed his conclusions and opinions stated in his September 1999 report. He recalls the evaluation of Applicant because "it was refreshingly different" as Applicant was completely honest about what he had done in the past (R. 72). He opined that Applicant's behavior after his release from confinement was a complete turnaround compared with the previous five-year period, and he described it as a "reversion to type" (R. 77). Based on the full urine screen and the other data gathered during the evaluation, he opined that the data strongly supported Applicant's claim that he had been completely drug free for a long time (R. 82–83). Also, he opined that Applicant was completely recovered and rehabilitated and had been for quite some time (R. 83).[5]

## POLICIES

The Revised Guidelines sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. 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 those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[6] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

## BURDEN OF PROOF

The only 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.[7] There is no presumption in favor of granting or continuing access to classified information.[8] The government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[9] An applicant is responsible for presenting evidence to refute, explain, extenuate, or

[5] Although the clinical psychologist testified about his opinions, I formed my own independent evaluation of Applicant's credibility and rehabilitation. *See* ISCR Case No. 03-22167 (App. Bd. Dec. 6, 2006) (judge's deferral to the expert witness on the issue of Applicant's credibility about arrests was arbitrary, capricious, and contrary to law).

[6] Executive Order 10865, § 7.

[7] ISCR Case No. 96-0277 (App. Bd. Jul. 11, 1997).

[8] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[9] Directive, Enclosure 3, ¶ E3.1.14.

mitigate facts that have been admitted or proven.[10] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[11]

No one has a right to a security clearance.[12] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[13] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

## CONCLUSIONS

### *1. Applicability of 10 U.S.C. § 986*

In addition to the typical security concern under Guideline J, the SOR alleges in subparagraph 1.d that Applicant is statutorily ineligible for a security clearance based on a conviction and sentence that resulted in him serving not less than one year in prison. The federal statute at issue is 10 U.S.C. § 986, the so-called Smith Amendment.[14]

In 2000, a federal law was enacted that prohibited the Defense Department from granting or continuing a security clearance for any applicant if that "person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year."[15] The effect of the legislation was to disqualify a person with a conviction in state, federal, or military court with a sentence imposed of more than one year regardless of the amount of time actually served, if any.

Congress amended parts of the law in 2004. As amended, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited or narrowed. The law now disqualifies an applicant if "the person 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."[16] The effect of the legislation is that an applicant

[10] Directive, Enclosure 3, ¶ E3.1.15.

[11] Directive, Enclosure 3, ¶ E3.1.15.

[12] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.").

[13] *Egan*, 484 U.S. at 531.

[14] For background information on the origin of this statutory prohibition, *see* Attorney Sheldon I. Cohen's publication *Loss of a Security Clearance Because of a Felony Conviction: The Effect of 10 U.S.C. § 986, the "Smith Amendment,"* which can be found at www.sheldoncohen.com/publications.

[15] 10 U.S.C. § 986(c)(1) (2001).

[16] 10 U.S.C. § 986(c)(1) (2004).

who has been sentenced to more than one year, but instead served probation, or who served less than a year of incarceration, is now eligible to hold a security clearance.

The law also authorizes a waiver in a meritorious case if there are mitigating factors. A waiver of the prohibition is permitted for two of the four types of cases covered by the Smith Amendment: (1) where, as here, a person has been convicted and sentenced to imprisonment for more than one year; and (2) where a person has been discharged or dismissed from the Armed Forces under dishonorable conditions.[17]

In September 2006, the Director, DOHA, issued a revised operating instruction (OI) for cases subject to 10 U.S.C. § 986.[18] In summary, the OI implements the waiver authority granted to the Director by the Under Secretary of Defense (Intelligence) in August 2006. Also, the OI addresses an administrative judge's responsibilities in handling a case. First, the judge is responsible for deciding if the law applies to the facts of the case.[19] And second:

> If an Administrative Judge issues a decision denying or revoking a security clearance solely or in part as a result of 10 U.S.C. § 986, the Administrative Judge shall not opine whether a waiver of 10 U.S.C. § 986 is merited, nor recommend whether to consider the case for a waiver of 10 U.S.C. § 986. However, if an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. § 986, the decision shall state this fact and shall identify the specific subparagraph under 10 U.S.C. § 986(c) applicable to the case.[20]

Accordingly, an administrative judge's role or authority is limited to determining if the law applies to an applicant. If it does, no waiver recommendation of any kind will be made.

Here, the government seeks to disqualify Applicant asserting he served about 18 months of confinement. Applicant concedes the Smith Amendment applies to his case (R. 21). And the record evidence supports that concession. He pleaded guilty to five drug offenses, and the court sentenced him to serve five years of incarceration for each offense, to run concurrently. He served about 18 months of incarceration during 1982–1983 in a combination of the state penitentiary, an intermediate reformatory, and a halfway house. He served most of his sentence, about 15 months, at the reformatory. Therefore, I conclude that 10 U.S.C. § 986(c)(1) applies here because the available, reliable evidence establishes that Applicant was incarcerated for not less than one year. Accordingly, the Defense Department may not grant (or renew) a security clearance for Applicant without a waiver.

### *2. The Criminal Conduct Security Concern*

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[17] 10 U.S.C. § 986(d) (2004).

[18] DOHA Operating Instruction No. 64, dated September 12, 2006.

[19] OI 64, ¶ 2.e.

[20] OI 64, ¶ 3.f.

Under Guideline J, criminal conduct is a security concern because 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.

Here, based on the record evidence as a whole, a security concern is raised under Guideline J. The record evidence shows Applicant has a history of drug-related criminal conduct as a user of both marijuana and cocaine and a low-level seller of the same substances. His criminal conduct culminated with his guilty plea in 1982, which resulted in his incarceration for about 18 months. He was on parole until 1988. His history of drug-related criminal conduct is a security concern under the applicable DCs of the guideline.

I reviewed the MCs under the guideline and conclude that Applicant receives substantial credit in mitigation under two of the MCs. Both are summarized and discussed below.

MC 1—so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur—applies. His drug-related criminal conduct took place in the early 1980s when he was a young adult attending college. He accepted responsibility for his crimes by pleading guilty in 1982, he was released from incarceration in 1983, and he completed parole in 1988. Approximately 25 years have past since he was involved with illegal drugs. Given the passage of time, his drug-related criminal conduct is not recent and it no longer casts doubt on his current reliability, trustworthiness, or good judgment.

MC 4—there is evidence of successful rehabilitation—applies. There is clear evidence of successful reform and rehabilitation based on the following: (1) his expression of remorse and desire to atone; (2) the passage of time since his release from incarceration without recurrence of drug-related criminal activity; (3) his efforts to improve himself by earning a bachelor's degree and an MBA; (4) his favorable employment record; (5) his mature and stable family life as a husband of nearly 20 years and a father to two adopted sons; (6) his involvement in community activities, to include scouting and teaching Sunday school; and (7) the opinions of the clinical psychologist who opined that Applicant was completely recovered and rehabilitated and has been so for quite some time. Taken together, these circumstances are strong evidence of reform and rehabilitation.

### *3. The Whole-Person Concept*

I have also considered Applicant's case in light of the whole-person concept. In making this assessment, four matters are noteworthy.

First, illegal drugs, the source of Applicant's criminal conduct, are no longer a part of his life. He has had no involvement with illegal drugs since his arrest in 1981. His drug-free lifestyle was verified in 1999 when he was underwent a full urine screen for drugs and alcohol as part of the psychological evaluation.

Second, since his release from incarceration in 1983, Applicant has carved a new path and made a new life for himself. He did it the old-fashioned way: higher education and hard work. He is now a successful businessman who is involved in his community.

Third, Applicant is now a 47-year-old family man. Married nearly 20 years, he and his wife are raising two adopted sons. Unlike the early 1980s, Applicant now has substantial responsibilities at home, at work, and in the community.

Fourth, the totality of Applicant's life circumstances is proof of a well-established track record of responsible, reliable, and trustworthy behavior. His track record as husband and father, a successful businessman, and a law-abiding citizen for many years is persuasive evidence that the likelihood of additional drug-related criminal conduct is remote if not nil. What stands out here is that both his personal and professional lives are profoundly different from his life in the early 1980s when he was a college student involved with drugs. His demonstrated ability to lead a responsible and productive life for a significant period after conviction in 1982 and release from confinement in 1983 is strong evidence of reform and rehabilitation. This is a key factor, and it is deserving of substantial weight.

Viewing the record evidence as a whole, I conclude Applicant presented sufficient evidence to explain, extenuate, or mitigate the criminal conduct security concern under subparagraphs 1.a –1.c of the SOR. Based on this record, I have no doubts about Applicant's current suitability for access to classified information. But based on serving approximately 18 months of incarceration, he is disqualified from having a security clearance granted (or renewed) by the Defense Department under 10 U.S.C. § 986(c)(1). Therefore, this case is decided against Applicant based solely on the Smith Amendment.

## FORMAL FINDINGS

Here are my conclusions for each allegation in the SOR:

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|---|---|
| SOR ¶ 1–Guideline J: | Against Applicant |
| Subparagraphs a - c: | For Applicant |
| Subparagraph d: | Against 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. Eligibility for a security clearance is denied solely as a result of 10 U.S.C. § 986(c)(1).

Michael H. Leonard
Administrative Judge