KEYWORD: Criminal Conduct

DIGEST: Applicant is a 52-year-old employee of a defense contractor. He was arrested in 1990, and pled guilty to manufacturing over 100 marijuana plants. He was sentenced to five years incarceration. Applicant was incarcerated for about four years in a federal prison and a minimum security work-release facility. He is rehabilitated and has mitigated any security concern arising from his prior criminal conduct. Under 10 U.S.C. § 986(c)(1), the Department of Defense may not grant or continue a security clearance to one who was convicted of a crime, sentenced to more than one year in jail, and actually served more than one year in confinement. Clearance is denied based solely on 10 U.S.C. § 986(c)(1).

CASENO: 06-15425.h1

DATE: 05/14/2007

DATE: May 14, 2007

In re:	)	
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----------	)	ISCR Case No. 06-15425
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
EDWARD W. LOUGHRAN

APPEARANCES

FOR GOVERNMENT
Caroline H. Jeffreys, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant is a 52-year-old employee of a defense contractor. He was arrested in 1990, and pled guilty to manufacturing over 100 marijuana plants. He was sentenced to five years incarceration. Applicant was incarcerated for about four years in a federal prison and a minimum security work-release facility. He is rehabilitated and has mitigated any security concern arising from his prior criminal conduct. Under 10 U.S.C. § 986(c)(1), the Department of Defense may not grant or continue a security clearance to one who was convicted of a crime, sentenced to more than one year in jail, and actually served more than one year in confinement. Clearance is denied based solely on 10 U.S.C. § 986(c)(1).

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On December 22, 2006, DOHA issued a Statement of Reasons[1] (SOR) detailing the basis for its decision–security concerns raised under Guideline J (Criminal Conduct) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense for SORs issued after September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR in writing on January 11, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on February 23, 2007. A notice of hearing was issued on March 6, 2007, scheduling the hearing for March 22, 2007. Applicant waived the 15-day notice requirement. With the consent of the parties, the hearing was conducted as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The Government offered three exhibits that were marked as Government Exhibits (GE) 1 through 3, and admitted without objection. Applicant testified, but did not submit any exhibits. DOHA received the hearing transcript (Tr.) on March 30, 2007.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 52-year-old employee of a defense contractor. He married in 1998, and has two young children.[2]

Applicant was a heavy marijuana user as a teenager and into adulthood. He also used other drugs, but his drug of choice was marijuana. In 1973, when Applicant was 18 years old, he was arrested for the felony offense of possession of marijuana, after marijuana was found in his possession while boarding an airplane.[3]

Applicant was arrested in 1980, and charged with obstructing a public place. Applicant was part of a labor union that had called a strike. Applicant and a number of other union members were arrested while picketing. Charges were dismissed without a finding of guilt.[4]

Applicant grew up on a farm, and had experience in that area. In about 1990, Applicant and several friends decided to grow marijuana. They grew it for personal use, thinking they would have

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[1]Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive).

[2]Tr. at 29; GE 1.

[3]Tr. at 30; 53-55; Applicant's response to SOR; GE 2 at 2.

[4]Tr. at 31-32; Applicant's response to SOR; GE 2 at 2.

all the marijuana they could want. They also planned on selling some of the marijuana. They grew the marijuana in a house under controlled lighting. When Applicant was arrested in February 1990, they had approximately 400 marijuana plants that were about eight inches tall.[5]

As a condition of his release pending trial, Applicant attended a drug rehabilitation program. He successfully completed this program, as well as a number of other drug counseling programs while incarcerated.[6]

Applicant was charged with the federal offenses of conspiracy to manufacture and possess with intent to distribute marijuana; manufacturing over 100 marijuana plants; and possession with intent to distribute over 100 marijuana plants. Applicant pled guilty to manufacturing over 100 marijuana plants. He was sentenced to five years incarceration, plus four years of supervised release following his incarceration.[7]

Applicant was incarcerated in a federal prison from November 1, 1990, until September 19, 1991. From the federal prison, he was transferred to a minimum security facility. Applicant continued to be considered a federal detainee at this facility. The facility at one time was a military barracks. There were four persons per room. A head count was done several times per day. The individual rooms were never locked. Applicant believes the building was also unlocked, but there were guards at the door. The guards were unarmed. Specific times were designated for the dining hall, exercise at the gym, and the yard. Detainees could not wander around the yard, they had to wait until permitted. Violations of the rules could warrant a return to the federal prison.[8]

The facility was co-ed, with male and female detainees. Interaction such as sitting together at meals and playing cards was permitted, but physical contact was strictly forbidden, and would result in return to a higher security facility. Applicant was regularly drug tested, and tested for HIV.[9]

Applicant and other detainees were transported by bus during the work week to a military installation where they performed manual labor. Applicant's job for about his first year in the facility was as a janitor for the military police. Applicant was paid minimal wages for this work, between $.17 and $.53 per hour, similar to what was paid to the detainees at the prison.[10]

The detainees were periodically permitted off the facility, but always with a guard. Applicant saw a play, and played softball away from the facility. Furloughs were sometimes authorized for medical or family emergencies, usually toward the end of the sentence. Applicant was in the facility almost two years before he was granted a furlough. He had several furloughs including when his

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[5]Tr. at 32-35; Applicant's response to SOR; GE 2 at 2; GE 3.

[6]Tr. at 18-19, 35-38.

[7]Tr. at 31-32; Applicant's response to SOR; GE 2 at 2; GE 3.

[8]Tr. at 38-50.

[9]*Id*.

[10]*Id*.

father passed away. Furloughs were the only occasions that an detainee would be outside the facility unsupervised.[11]

Applicant was released from this facility on November 3, 1994. When he was released, he moved to his current state of residence. Applicant continued on the supervised release program until the probation office petitioned the Court to release him from the program because of his good record. The Court granted Applicant's release two years early.[12]

Since his incarceration, Applicant attended community college on a President's Scholarship, and received honors. He graduated from a four-year college with a bachelor's degree in 1999. Applicant has had steady employment since 1994. He is a landowner and a landlord, renting out several properties.[13]

Applicant actively serves on his Neighborhood Watch. He was asked to be captain, but he declined, thinking that it would not be appropriate because of his criminal record.[14]

Applicant has not been arrested, and has only two traffic citations, since 1990. He has not used any illegal drugs since 1990.[15]

Applicant did not request friends, neighbors or co-workers to submit character evidence because he prefers that they do not know about his criminal record. Applicant would not permit his record to be used as a means to coerce him to reveal classified information, and would willingly reveal his record if necessary. His record is not a total secret, he simply does not volunteer the information. Applicant has been an advocate of repealing mandatory minimum sentencing laws. He has appeared on network television and in the newspapers discussing his case. He also informed his supervisor about his record.[16]

POLICIES

[11] *Id.*; GE 3.

[12] Tr. at 23, 44-49; GE 3.

[13] Tr. at 23-26; Applicant's response to SOR; GE 1 at 2.

[14] Tr. at 26; Applicant's response to SOR.

[15] Tr. at 60.

[16] Tr. at 22, 26-27, 51-53.

"[N]o one has a 'right' to a security clearance."[17] As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information."[18] The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[19] An applicant has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance. The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.[20] Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.[21] The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. 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.[22]

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each 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 adjudicative process factors listed in listed in the Directive and AG ¶ 2(a).

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, are set forth and discussed in the conclusions section below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Guideline J, Criminal Conduct

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[17]*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

[18]*Id.* at 527.

[19]Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960).

[20]ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

[21]*Id.*; Directive, ¶ E2.2.2.

[22]Exec. Or. 10865 § 7.

Criminal activity creates doubt about an applicant'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.

Applicant's drug-related criminal activity in 1973 and 1990, establish Criminal Conduct Disqualifying Condition (CC DC) 31(a) (*a single serious crime or multiple lesser offenses*), and CC DC 31(c) (*allegation or admissions of criminal conduct, regardless of whether the person was formally charged*, *formally prosecuted or convicted*). There is insufficient evidence that Applicant committed a criminal offense when he was arrested for picketing in 1980. I conclude SOR ¶ 1.b in Applicant's favor.

I have considered all the mitigating conditions as they relate to CC DC 31(a) and CC DC 31(c), and especially considered 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*), and 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*).

Applicant's last criminal activity, other than minor traffic offenses, was more than 16 years ago. Applicant's criminal conduct was drug-related. He successfully completed drug rehabilitation before his incarceration, and has not used illegal drugs since 1990. Applicant is a model of a successful rehabilitation. His testimony was sincere and he displayed the appropriate remorse for his crimes. He had earned honors and received a President's Scholarship while attending community college, and earned a bachelor's degree from a four-year university. He has a good employment record. Applicant is a landowner and landlord for several properties. He demonstrated his community involvement by his active participation in his Neighborhood Watch program. CC MC 32(a) and 32(d) both apply.

This case also falls under 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 incarceration as a result of that sentence for not less than a year*), which implements 10 U.S.C. § 986. Under 10 U.S.C. § 986(c)(1), the Department of Defense is prohibited from granting a security clearance to any applicant who was convicted of an offense in a U.S. court, was sentenced to more than one year in jail, and was incarcerated as a result of that conviction for at least one year.

Applicant was convicted in Federal court, and sentenced to five years incarceration, plus four years of supervised release following his incarceration. He was incarcerated in a federal prison from November 1, 1990, until September 19, 1991. From the federal prison, Applicant was transferred to a minimum security facility, in what would be described as a "work-release" program, where he continued to serve his sentence until he was released on November 3, 1994.

The key issue in this case is whether Applicant's time in the work-release program in the minimum security facility constituted incarceration. The Appeal Board has stated that the specifics of each case must be scrutinized in order to determine if an applicant's work-release constitutes incarceration for the purposes of 10 U.S.C. § 986:

> The question of whether work-release should be considered incarceration for purposes of the Smith Act is a mixed question of fact and law. The Board cannot assume that the many such programs functioning concurrently in the United States necessarily impose the same restrictions on convicts.[23]

Department Counsel cites several federal cases that held that work-release constituted imprisonment in matters unrelated to security clearances.[24] I also considered *United States v. Timbrook*, 290 F. 3d 957 (7th Cir. 2002).[25] In *Timbrook*, the issue was whether a sentence of work release in a county jail is a sentence of imprisonment, as that term was used in the U.S. Sentencing Guidelines. In that case, Timbrook was sentenced to four years of probation, including six months of work release. Timbrook was locked up in the county jail when he was not at work. The court concluded the sentence to a work-release program as part of probation was a sentence of imprisonment. Although *Timbrook* was not a security clearance case, and involved application of the Sentencing Guidelines, rather than 10 U.S.C. § 986, the reasoning of the court is persuasive. Under the specifics of this case, as discussed above, I find that Applicant's time in the minimum security facility on work-release constituted incarceration for the purposes of 10 U.S.C. § 986.[26] Applicant was therefore incarcerated for much more than one year. CC DC 31(f) and 10 U.S.C. § 986 are both applicable.

The statute also provides that an exception to the prohibition may be authorized in a meritorious case if there are mitigating factors. The waiver provision of the statute is implemented in CC MC 32(e) (*potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee, or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), and Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver*). Applicant cannot be granted a clearance under the provisions of 10 U.S.C. § 986(c)(1), unless he is granted a waiver.

Whole Person Analysis

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating Applicant's case, I have considered the adjudicative process

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[23]ISCR Case No. 04-00354 at 2 (App. Bd. Mar. 26, 2007).

[24]Tr. at 57-59. *United States v. Ruffin*, 40 F. 3d 1296 (D.C. Cir. 1994); *Carter v. McCaleb*, 29 F. Supp. 2d 423 (W.D. Mich. 1998); *Asquith v. Volunteers of America*, 1 F. Supp. 2d 405 (D. N.J. 1998).

[25]For excellent analyzes of work-release programs as applicable to 10 U.S.C. § 986, see ISCR Case No. 03-08336 (A.J. Jan. 17, 2006), and ISCR Case No. 02-21013 (A.J. Nov. 28, 2005).

[26]Applicant never disputed that he was incarcerated. He argued for a waiver of 10 U.S.C. § 986.

factors listed in the Directive. I have also considered every finding of fact and conclusion discussed above.

Applicant committed a serious offense in 1990, resulting in his incarceration for several years. As noted above, I find that he is rehabilitated. He presented sufficient information under CC MC 32(a) and 32(d) to mitigate his criminal conduct. However, absent a waiver, he still cannot be granted access to classified information under CC DC 31(f) and 10 U.S.C. § 986(c)(1).

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his criminal conduct. However, based solely on 10 U.S.C. § 986(c)(1), Applicant's clearance must be denied. In accordance with DOHA Operating Instruction No. 64, dated September 12, 2006, a copy of this decision will be forwarded to the Director, DOHA, for a determination whether to exercise his discretion to grant a waiver in accordance with 10 U.S.C. § 986(d).

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

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

DECISION

In light of all of 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 is denied based solely on 10 U.S.C. § 986(c)(1).

Edward W. Loughran
Administrative Judge