

KEYWORD: Criminal Conduct

DIGEST: Applicant is a program manager and has worked for the same defense contractor since 1989. While on active duty in the Air Force, he was convicted of using cocaine and distributing cocaine and marijuana by both the state and a general court-martial. He served approximately seven months for the state conviction and 18 months in prison as a result of the military conviction. The provisions of 10 U.S.C. § 986 apply for his military imprisonment. Applicant mitigated the criminal conduct security concerns. However, in accordance with 10 U.S.C. § 986, Applicant cannot be granted a security clearance. Based solely on that provision, clearance is denied. He argues that a waiver of 10 U.S.C. § 986 is merited and requests the matter be forwarded to the Director for consideration.

CASENO: 06-19072.h1

DATE: 07/31/2007

DATE: July 31, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 06-19072
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JACQUELINE T. WILLIAMS**

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Ira E. Hoffman, Esq.

SYNOPSIS

Applicant is a program manager and has worked for the same defense contractor since 1989. While on active duty in the Air Force, he was convicted of using cocaine and distributing cocaine and marijuana by both the state and a general court-martial. He served approximately seven months for the state conviction and 18 months in prison as a result of the military conviction. The provisions of 10 U.S.C. § 986 apply for his military imprisonment. Applicant mitigated the criminal conduct security concerns. However, in accordance with 10 U.S.C. § 986, Applicant cannot be granted a security clearance. Based solely on that provision, clearance is denied. Applicant argues that a waiver of 10 U.S.C. § 986 is merited.

STATEMENT OF THE CASE

On April 7, 2006, Applicant executed a Security Clearance Application (SF 86), EPSQ version.¹ On February 22, 2007, the Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance, and issued a Statement of Reasons (SOR)² 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.

On March 12, 2007, Applicant responded to the SOR allegations and requested a hearing. The case was assigned to me on April 13, 2007. A Notice of Hearing was issued on April 20, 2007, scheduling the hearing for May 10, 2007. Applicant's attorney filed a Notice of Appearance on April 24, 2007. The hearing was conducted as scheduled. At the hearing, the Government submitted 11 exhibits, Exs. 1-11 and Applicant submitted 2 exhibits, Exs. A and B. All of the exhibits were admitted into the record without objection. The transcript (Tr.) was received on May 22, 2007.

MOTION TO AMEND THE STATEMENT OF REASONS

At the hearing, the Government moved to amend subparagraph 1.b of the SOR to conform to the evidence as follows:

1.b On or about November 4, 1986 you were arrested for possession and sale of narcotics by the Arizona police. You were found guilty and sentenced (4) years in prison. You were incarcerated for this conviction from approximately September 1988 to approximately April 27, 1989.³

At the hearing, Applicant did not object to the amendment of subparagraph 1.b. Accordingly, the SOR is amended as stated above.

FINDINGS OF FACT

Applicant admitted all the factual allegations under Guideline J, subparagraphs 1.a through 1.c. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

¹Ex. 1 (Security Clearance Application, EPSQ version, signed April 7, 2006).

²Pursuant 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).

³Tr. 143-145.

Applicant is 47 years old and is a program manager for a defense contractor since 1989. From October 15, 1979 to November 1, 1987, Applicant served in the U.S. Air Force. He was a staff sergeant (E-5).⁴ He was married in 1984 and divorced in 1989.⁵

Applicant has two arrests stemming from using cocaine and distributing cocaine and marijuana. Between May 1, 1986 and October 3, 1986, Applicant used cocaine on approximately 10 to 15 different occasions.⁶ Between September 1, 1986 and October 3, 1986, he distributed cocaine approximately 10 times. On October 21, 1986 and October 25, 1986, he purchased and distributed marijuana.⁷

On November 4, 1986, Applicant was arrested for possession and sale of narcotics. The arrest was a coordinated effort by the U.S. Air Force and the state and two separate sentences were imposed. The November 1986 arrest was on Applicant's 27th birthday.⁸ He was in a failed marriage. He was also addicted to cocaine.⁹

On March 19, 1987, at a general court-martial, Applicant pled guilty to three specifications in violation of Article 112a, Uniform Code of Military Justice: specification 1, wrongful use of cocaine; specification 2, wrongful distribution of cocaine; and specification 3, wrongful distribution of marijuana. His sentence included the reduction of his rank to the lowest enlisted grade (airman basic), forfeiture of all pay and allowances, confinement for 33 months, and a bad conduct discharge from the military.¹⁰ After serving more than 18 months in prison for his military conviction, he was granted parole on September 21, 1988. His military parole was terminated on or about September 18, 1989.¹¹

Pursuant to his arrest by the state, he was found guilty and sentenced to four years in prison. He served this sentence after release from his military confinement. He was incarcerated for this conviction from approximately September 1988 to approximately April 27, 1989. His state parole was terminated on April 15, 1991.¹²

⁴*Id.*

⁵*Id.* at 67.

⁶Ex. 3 (Stipulation of Fact).

⁷*Id.*

⁸Tr. 68.

⁹Applicant's Answer (dated, March 12, 2007).

¹⁰Tr. 67.

¹¹Ex. 4 (General Court-Martial Order No. 45, dated May 11, 1987); Ex. A (Certificate of Release from Parole).

¹²Ex. B (Release from State Parole).

While incarcerated in a military prison, Applicant successfully completed an intensive drug rehabilitation program for three months, which included daily individual counseling, attendance at Narcotics Anonymous meetings three times a week, and group counseling.¹³ He has been drug free since November 4, 1986.¹⁴

Applicant's employment since May 1989 with a defense contractor was part of his parole package with the state parole board. He started out at an entry-level position in the shipping department and has progressively been given more responsibility through the years.¹⁵ He currently is a program manager.

Five character witnesses testified on behalf of Applicant.¹⁶ They favorably and highly endorsed Applicant's security clearance application. They have worked with him during his course of employment. They testified that Applicant is an exemplary, trustworthy, and highly regarded in his professional environment.

In the 20 years since his arrest, Applicant's criminal record is clean, except for an improper driving ticket in February 1997 and a speeding ticket in November 2006.¹⁷

POLICIES

“[N]o one has a ‘right’ to a security clearance.”¹⁸ 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.”¹⁹ 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.”²⁰ 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.²¹ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such

¹³*Id.* at 69.

¹⁴Applicant's Answer, note 9, *supra*.

¹⁵Tr. 1

¹⁶*Id.* at 21-64, 111-139.

¹⁷Applicant's Answer, note 9, *supra*.

¹⁸*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁹*Id.* at 527.

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

²¹ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

sensitive information.²² 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.²³

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).

Smith Amendment

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. § 986 (The Smith Amendment), which was subsequently amended, mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, Memorandum, and within DOHA by Operating Instruction (OI) 64, issued initially on July 10, 2001, and revised on September 12, 2006. Under the provision, a person convicted in any court of the United States of a crime, who 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, is disqualified from being granted a security clearance. In meritorious cases, an exception to the disqualification may be granted if there are mitigating factors.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards, and I reach the following conclusions.

Criminal conduct under Guideline J is always 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.

I have carefully considered all the facts in evidence and the legal standards. The Government has established a *prima facie* case for disqualification under Guideline J, Criminal Conduct. Applicant was arrested and convicted for possession and distribution of narcotics in a coordinated effort by the state police and the U.S. Air Force. His sentences were separate. In 1987, at a general court-martial, he was convicted of using cocaine and distributing cocaine and marijuana. He served more than 18 months in a federal prison for this conviction. Moreover, he received a bad conduct discharge from the Air Force because of his drug-related behavior. He served approximately seven months in prison based on the state conviction. Consequently, Criminal Conduct Disqualifying Conditions ¶ 31(a) (*a single serious crime or multiple lesser offenses*), ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally prosecuted or*

²²*Id.*; Directive, ¶ E2.2.2.

²³Exec. Or. 10865 § 7.

convicted), and ¶ 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) apply.

Various factors can mitigate the criminal conduct security concern. Here, the crime was committed more than 20 years ago. The record is devoid of Applicant committing any other crime since his arrest in 1986 for drug use and distribution, and that crime was an isolated incident. Moreover, since his release from both incarcerations and completion of paroles, Applicant has not been involved in any known criminal activity. He has been on the same job since 1989 and has been promoted several times. He has successfully integrated back into society and is successfully rehabilitated. Thus, Criminal Conduct Mitigating Conditions ¶ 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*), (*the crime was an isolated incited incident*) and ¶ 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*) apply.

After weighting the disqualifying and mitigating conditions, all facts and circumstances, in the context of the whole person, I conclude Applicant presented evidence to mitigate the security concerns pertaining to criminal conduct. However, in accordance with 10 U.S.C. § 986, Applicant cannot be granted a security clearance because he served more than 18 months in prison based on his court-martial. Accordingly, Guideline J is decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1 Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

DECISION

In light of all of the circumstances in the 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.

Jacqueline T. Williams
Administrative Judge