

KEYWORD: Criminal Conduct; Personal Conduct

DIGEST: Applicant’s criminal history includes seven arrests and/or charges and convictions for drug related offenses. The Applicant’s arrest and subsequent conviction for Distribution of Cocaine in March 1994, resulted in him being incarcerated in jail for over one year. Therefore, he is disqualified under 10 U.S.C. Section 986 from having a security clearance granted or renewed. No waiver is recommended. Clearance is denied.

CASENO: 06-19264.h1

DATE: 07/30/2007

DATE: July 30, 2007

In Re:)	
)	
-----)	
SSN: -----)	ISCR Case No. 06-19264
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
DARLENE LOKEY ANDERSON**

APPEARANCES

FOR GOVERNMENT
James F. Duffy, Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant's criminal history includes seven arrests and/or charges and convictions for drug related offenses. The Applicant's arrest and subsequent conviction for distribution of cocaine in March 1994, resulted in him being incarcerated in jail for over one year. Therefore, he is disqualified under 10 U.S.C. Section 986 from having a security clearance granted or renewed. No waiver is recommended. Clearance is denied.

STATEMENT OF THE CASE

On January 5, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR in writing on January 16, 2007, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government's File of Relevant Material (FORM), consisting of seventeen Government Exhibits referred to in the record as Government Exhibits 1 through 17, to the Applicant on May 24, 2007. In the File of Relevant Material (FORM), Department Counsel made a Motion to Amend the SOR by adding the following paragraph to Guideline J, "1(h), Due to the facts alleged in subparagraph 1.(c), 10 U.S.C. Section 986, (as amended) disqualifies you from having a security clearance granted or renewed by the Department of Defense. However, 10 U.S.C. Section 986, provided that, in a meritorious case, an exception to this prohibition may be authorized. Should you choose to do so, your response may include information which would support consideration of such a waiver. A copy of 10 U.S.C. Section 986 is attached." This statute is commonly referred to as the Smith Amendment. The Applicant was sent a copy of the requested amendment and was given 30 days to respond by either filing an objection to the proposed amendment, or if filing no objection, to respond to the amendment by admitting or denying the allegation. The Applicant received the FORM on May 31, 2007, and was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. The Applicant submitted a response dated June 4, 2007. In his response, the Applicant failed to object or respond to the Government's motion to amend the SOR. Accordingly, the Government's Motion is granted and allegation 1(h) is added to the SOR.

The case was received by the undersigned for decision on June 11, 2007.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, and the contents of the FORM. The Applicant is 39 years old, and is currently working for a defense contractor. He is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J- Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engages in criminal conduct.

The Applicant admitted to the allegations set forth in the SOR under this guideline.

From 1988, through 1994, the Applicant has been arrested for, or charged with, seven separate drug offenses. Specifically, he was arrested for Possessing Cocaine on three separate occasions, and charged with Distributing Cocaine on four other occasions. Each of the arrests, charges and convictions are set forth below.

In February 1988, the Applicant was arrested and charged with Possession of Cocaine, a misdemeanor. He pleaded guilty and was sentenced to seven months confinement. (*See* Government Exhibit 6, p. 3).

In December 1994, the Applicant was convicted of Distributing Cocaine and was sentenced to 20 years in jail, with 15 years of that sentence suspended. Applicant served over one year in jail as a result of that conviction. (*See* Government Exhibits 7, 12 and 16).

He was arrested again on March 12, 1994, and charged with Distribution of Cocaine with Intent to Distribute, a felony. (*See* Government Exhibit 9).

On February 8, 1994, the Applicant was charged with Distribution of Cocaine, a felony, on July 23, 1993. This charge was nolle prosequi. (*See* Government Exhibit 15).

On February 8, 1994, the Applicant was charged with Distribution of Cocaine, a felony, on July 22, 1993. This charge was nolle prosequi. (*See* Government Exhibit 14).

_____ On February 8, 1994, the Applicant was charged with Distribution of Cocaine, a felony, on July 21, 1993. (*See* Government Exhibit 13).

On February 8, 1994, the Applicant was charged with Distribution of Cocaine, a felony, on July 16, 1993. (*See* Government Exhibit 16).

He was arrested on June 15, 1994, and charge with Possession of Cocaine with Intent to Distribute, a felony. This charge was dismissed with prejudice.

In his response to the FORM dated June 4, 2007, the Applicant stated that all of these things happened when he was very young. He has paid for his mistakes and he has no intentions of ever getting involved with illegal drugs again. He is married with children and has a respectful and happy life.

Paragraph 2 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in questionable judgment, lack of candor, dishonesty, or an unwillingness to comply with rules and regulations that raise questions about his ability to protect classified information.

On September 23, 2005, the Applicant completed an Electronic Questionnaire for Investigation, otherwise known as a security clearance application. Concerning Section 23 his Police Record, Question 23(a), asked if he has ever been charged with a felony. The Applicant answered "NO". (*See* Government Exhibit 5). This was a false response. Question 23(d), asked if he had you ever been charged with or convicted of any offenses related to alcohol or drugs. The Applicant answered, "YES" and listed only his conviction for Distribution of Cocaine. (*See* Government

Exhibit 5). He failed to list his conviction for possession of cocaine or the charges brought against him on five other occasions for cocaine related offenses.

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

30. *The Concern.* 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.

Conditions that could raise a security concern:

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 charged, formally prosecuted or convicted;

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.

Conditions that could mitigate security concerns:

None.

Guideline E (Personal Conduct)

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

Condition that could raise a security concern:

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.

Conditions that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "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. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal or personal conduct that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J) and dishonesty (Guideline E). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines J and E of the SOR.

The Applicant has offered no evidence to refute, mitigate or extenuate his criminal conduct. Although his criminal conduct occurred over ten years ago, the repeated nature of this conduct calls into question his judgment, reliability, trustworthiness, and willingness to comply with laws, rules and regulations.

The Applicant's extensive criminal history that includes arrests, charges, convictions and incarceration for drug related offenses disqualifies the Applicant from eligibility for a security clearance. Under 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 charged, formally prosecuted or 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. The Applicant's arrest and subsequent conviction for distribution of cocaine in March 1994, resulted in him being incarcerated in jail for over one year. This triggers his disqualification under 10 U.S.C. Section 986, from having a security clearance granted or renewed. No waiver is recommended. None of the mitigating conditions apply. Accordingly Guideline J is found against the Applicant.

Under Personal Conduct, Disqualifying Condition *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* applies. None of the mitigating conditions apply. The Applicant deliberately provided false information to the Government on his security clearance application by failing to reveal his extensive criminal history. It is just not believable that the Applicant could have

overlooked or failed to recall his 1988 conviction for Possession of Cocaine because he served 7 months confinement for the offense. He also failed to list five other cocaine related offenses. Accordingly, Guideline E is found against the Applicant.

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the SOR.

FORMAL FINDINGS

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

Paragraph 1: Against the Applicant.

Subpara. 1.a.: Against the Applicant.
Subpara. 1.b.: Against the Applicant.
Subpara. 1.c.: Against the Applicant.
Subpara. 1.d.: Against the Applicant.
Subpara. 1.e.: Against the Applicant.
Subpara. 1.f.: Against the Applicant.
Subpara. 1.g.: Against the Applicant.
Subpara. 1.h.: Against the Applicant.

Paragraph 2: Against the Applicant.

Subpara. 2.a.: Against the 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 the Applicant.

Darlene Lokey Anderson
Administrative Judge

