

KEYWORD: Criminal Conduct

DIGEST: Fifty-three year old Applicant's December 1973 arrest, when he was 24 years old, for possession of a controlled substance (marijuana) for resale led to a sentence to imprisonment for a term of two to five years (after serving about 30 days in the penitentiary, he was released into a work-release program for 17 months). In 1994 a court restored his "citizenship" because he had proven that he "has sustained the character of a person of honesty, respectability and veracity and that he is generally esteemed as such by his neighbors." This clear evidence of successful rehabilitation and the absence of any subsequent criminal conduct over the past 28 years, would normally mitigate the Government's security concerns. However, the application of 10 U.S.C. 986 disqualifies him from such eligibility. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. 986 is recommended.

CASENO: 01-02183.h1

DATE: 12/26/2001

DATE: December 26, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-02183

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Fifty-three year old Applicant's December 1973 arrest, when he was 24 years old, for possession of a controlled substance (marijuana) for resale led to a sentence to imprisonment for a term of two to five years (after serving about 30 days in the penitentiary, he was released into a work-release program for 17 months). In 1994 a court restored his "citizenship" because he had proven that he "has sustained the character of a person of honesty, respectability and veracity and that he is generally esteemed as such by his neighbors." This clear evidence of successful rehabilitation and the absence of any subsequent criminal conduct over the past 28 years, would normally mitigate the Government's security concerns. However, the application of 10 U.S.C. 986 disqualifies him from such eligibility. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. 986 is recommended.

STATEMENT OF THE CASE

On August 30, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, "*Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, "*Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to 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 Applicant, and recommended referral to an Administrative Judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated September 18, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the Government's written case on October 25, 2001. A complete copy of the file of relevant material (FORM) [\(1\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. He chose not to do so. The case was assigned to this Administrative Judge on December 17, 2001.

FINDINGS OF FACT

Applicant has admitted the factual allegations (subparagraph 1.a. of the SOR) pertaining to criminal conduct under Guideline J. 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 additional findings of fact:

Applicant, a 53 year old male employed by a defense contractor, is seeking to retain a security clearance.

Applicant was involved in one major criminal incident when he was 24 years of age. Commencing in November 1970, while serving with the U.S. Army in Vietnam, and continuing until December 1973, long after his June 1973 discharge, Applicant was a regular marijuana user, smoking about two marijuana cigarettes (joints) on a daily basis. In December 1973, Applicant, on behalf of three others with whom he was to share marijuana, made arrangements to purchase a pound of the substance for about \$160.00.⁽²⁾ At the time of the major purchase, another individual approached him and asked if he could have some bags of marijuana and Applicant and he agreed to meet back at Applicant's residence. Shortly thereafter, the individual returned on two occasions that same day. It is unclear if an exchange of cash for marijuana took place or if any of the substance was furnished the individual as the record is silent in that regard. Soon after the last departure by the individual, the police appeared and raided Applicant's residence.⁽³⁾ Applicant was arrested and charged with possession of a controlled substance (marijuana) for resale.⁽⁴⁾ After posting \$2,500.00 bail, he remained out of jail until his trial in June 1994. He was subsequently convicted of the offence and sentenced to incarceration for a term of two to five years. After serving about 30 days in the penitentiary, Applicant was released into a work-release program for 17 months.⁽⁵⁾

Applicant has abstained from any illegal substance abuse since his December 1973 arrest, and has no future plans to resume its use.⁽⁶⁾

On March 31, 1989, after having conducted a hearing, pursuant to Executive Order 10865 and the earlier version of this Directive, on allegations, including one pertaining to the arrest in issue, the Directorate for Industrial Security Clearance Review (DISCR), the name by which DOHA was previously known, issued a Determination of Hearing Examiner in which it was determined "[i]n light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant."⁽⁷⁾ The Hearing Examiner therein concluded:⁽⁸⁾

The evidence falls short of establishing that Applicant has ever trafficked in drugs for profit. His criminal conviction for possession of one pound with intent to distribute and use of the substance prior to 1975 are too remote in time to preclude a finding that it is now clearly consistent with national security to grant Applicant a security clearance.

On May 2, 1994, upon his petition, and because he had proven to the court that he "has sustained the character of a person of honesty, respectability and veracity and that he is generally esteemed as such by his neighbors,"⁽⁹⁾ and "it appearing conclusively that sufficient time has expired subsequent to [Applicant's] conviction,"⁽¹⁰⁾ his full rights of citizenship were restored.

Since his release from prison, Applicant has held a number of positions with a variety of companies, including his most recent one as a storekeeper which he commenced in February 1982. The quality of Applicant's performance has been described as "highly professional," and his current supervisor claims he is highly respected by both his co-workers and management. Applicant received an honorable discharge following his active military service, and eventually returned to college to receive his degree. He has been married for 31 years, and he and his wife have raised three children, two of whom have made them grand-parents. Applicant's son has been a member of the U.S. Marine Corps for the past three years.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision found in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all

available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

[Criminal Conduct - Guideline J]: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- (1) allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses;
- (3) conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.

Conditions that could mitigate security concerns include:

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident;

(6) there is clear evidence of successful rehabilitation.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. 986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

(1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;

(2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));

(3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or

(4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The memorandum also notes that the statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," [\(11\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Guideline J, the Government has established its case. By his own admission, Applicant purchased one pound of marijuana with the intent of sharing it with three others. He was subsequently arrested, charged, and convicted of possession of a controlled substance (marijuana) for resale, and was sentenced to incarceration for a term of two to five years, but released into a work-release program for 17 months after serving about 30 days in the penitentiary. Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1., DC E2.A10.1.2.2., and DC E2.A10.1.2.3.

It has been 28 years since the then 24 year old Applicant became involved in the drug purchase, and Applicant has not been involved in any subsequent criminal conduct. To the contrary, Applicant has turned his life around since that unfortunate incident. He has abstained over that same period, and no longer associates himself with marijuana or any other illegal substances. Applicant has become more fully educated, and obtained his degree. And he and his wife of 31 years have raised three children, including a son now serving with the U.S. Marine Corps. Additionally, in 1994, the court restored his "citizenship" because he had proven to the court that he "has sustained the character of a person of honesty, respectability and veracity and that he is generally esteemed as such by his neighbors." Furthermore, the court found "conclusively that sufficient time has expired subsequent to [Applicant's] conviction" to take that action. Those facts would normally activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1., MC E2.A10.1.3.2., and MC E2.A10.1.3.6.

Another favorable factor is that a Hearing Examiner in this office previously concluded Applicant's "criminal conviction for possession of one pound with intent to distribute and use of the substance prior to 1975 are too remote in time to preclude a finding that it is now clearly consistent with national security to grant Applicant a security clearance." Additionally, there is an issue which should, likewise, be addressed, and that is the potential impact of the National Industrial Security Program Operating Manual (NISPOM), upon these proceedings. Of particular significance to this case is Section 2-203 of the NISPOM which reads as follows: [\(12\)](#)

Federal agencies that grant security clearances (TOP SECRET, SECRET, CONFIDENTIAL, Q or L) to their employees or their contractor employees are responsible for determining whether such employees have been previously cleared or investigated by the Federal Government. Any previously granted [employee's personnel clearance] that is based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required, shall provide the basis for issuance of a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency.

Under this provision of the NISPOM, prior to enactment of 10 U.S.C. 986, DOHA was required to grant reciprocity to prior favorable security clearance decisions. [\(13\)](#) Applicant was previously granted a security clearance as a result of the March 1989 DISCR proceeding, and to revoke that security clearance now, in the absence of subsequent misconduct,

and solely because of legislation which was enacted over 28 years after the criminal conduct itself, in my estimation, is contrary to the fundamental fairness required by the Directive which requires "[e]ach clearance decision must be a fair and impartial common sense determination. . . ." (14) Under other circumstances, I would conclude Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case, and the allegation of the SOR would be concluded in favor of Applicant.

However, Applicant's criminal conduct in this regard also falls within the application of 10 U.S.C. 986. He was convicted in a state court of a crime and sentenced to imprisonment for a term of two to five years, a term which obviously exceeds the one year period envisioned in the new law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of more than one year, regardless of the amount of time actually served. In this instance, Applicant was fortunate enough to be released from prison long before the full term of his sentence was actually served, but that fact does not help him in this issue. Despite the lengthy period of abstinence and rehabilitation, as well as continuing good conduct, and despite the earlier security clearance determination which was favorable to him, solely by virtue of 10 U.S.C. 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegations 1.a. and 1.b. of the SOR, are concluded against Applicant.

In this instance, I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

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: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: 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 Applicant. However, I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

Robert Robinson Gales
Chief Administrative Judge

1. The Government submitted 10 items in support of its contentions.
2. *See* Item 9 (Statement of Subject, dated January 25, 1983), at 1.
3. *Ibid.*
4. *See* Item 10 (Federal Bureau of Investigation Criminal Information History, undated), at 3.
5. *See* Item 9, *supra* note 2, at 2. It should be noted Applicant's wife was also arrested and charged, and she received two years probation, with a suspended sentence.
6. *Ibid.*
7. *See* Item 7 (Determination of Hearing Examiner Leon J. Schachter, DISCR OSD Case No. 88-1908, dated March 31, 1989), at 4.
8. *Id.*, at 3.
9. *See* Order of Restoration of Citizenship, dated May 2, 1994, attached to Item 3 (Response to SOR, dated September 18, 2001).

10. *Ibid.*
11. See Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (see Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (see Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (see Enclosure 2, Sec. E2.2.2.)
12. See, Department of Defense Manual 5220.22-M, "*National Industrial Security Program Operating Manual*," dated January 1995, at 2-2-1.
13. See ISCR Case No. 98-0320 (Appeal Board Decision and Remand Order, April 8, 1999), at 4.
14. See the Directive, Sec. 6.3.