

DATE: April 22, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-08339

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esquire, Department Counsel

FOR APPLICANT

Andrea K. Amy-Pressey, Esquire

STATEMENT OF THE CASE

On 20 November 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 10 December 2001, Applicant answered the SOR and requested a hearing. The case was originally assigned to a different Administrative Judge who issued a notice of hearing on 23 January 2002, but then realized he had a scheduling conflict for the original date. The case was then reassigned to me on 24 January 2002; however, I rescheduled the case on 11 February 2002 because of other scheduling conflicts and changed the hearing site to a more convenient location for Applicant. Unfortunately, I had to cancel the second hearing date because of a medical emergency in my family. I issued the third notice of hearing on 6 March 2002 for hearing on 25 March 2002.

At the hearing, the Government presented four exhibits--admitted without objection--and no witnesses; Applicant presented six exhibits and the testimony of one witness, himself. DOHA received the transcript on 2 April 2002.

FINDINGS OF FACT

Applicant admitted the factual allegations of the SOR; accordingly, Applicant's admissions are incorporated as findings of fact.

Applicant--a 32-year old employee of a defense contractor--seeks access to classified information. The Navy granted Applicant interim access on 8 September 1999.

On 7 September 1999, Applicant executed a Security Clearance Application (SF 86)(G.E. 1) on which he answered "yes" to two questions designed to elicit his felony and drug arrest record, and disclosed a January 1991 arrest and ultimate conviction for possession of a controlled substance (LSD).⁽²⁾ In a 20 September 2002 sworn statement to the Defense Security Service (DSS)(G.E. 4), Applicant described his involvement in the criminal case:

In Jan[uary] 91 in [city, state], I was originally charged with Delivery of a Controlled Substance (LSD). I pled guilty to Possession of a Controlled Substance (LSD). To explain how this all came about, I was caught in possession of LSD. For about six months or so, I had been contacted by telephone from a male known only to me as [name]. Each time [name] would call me he would ask me if I knew where he could get some drugs. At first he did not mention LSD in particular but he insinuated that he wanted something big. This [name] person called me about three different times. Each of the times he called there would be another male on another line on a three way conference call. After about the third time, I made a few calls and asked one of my friends, [named] if she knew where I could get some drugs. I think that at this point I was asking in particular for LSD but I am not certain. I do not know where [name] is at present. [name] located someone who had some LSD and I called this [name] male and told him I had located some LSD. I was not certain how much LSD this [name] male wanted or the other male who was always on the conference calls with him. I was not really certain of the amount of LSD I was going to get, either. I called this male (who was the supplier but I did not know his name) through [name] who had located the LSD. A meeting was arranged. I was to meet the supplier and the male who wanted the LSD at a restaurant. The male who wanted the LSD was the one who had been involved in the three way conversations with Britt. A friend of mine, [named] came with me. We planned to eat at this restaurant. The supplier and the male who wanted the LSD showed up. The supplier seemed nervous and asked me to hold the LSD. I was then in possession of a whole sheet of blotter LSD; I would say enough for about 100 people. The state of [state] claimed the amount of LSD in my possession had a street value of \$10,000.00 but I am doubtful of this. The male who wanted the LSD came over and started talking to me. Then I went to the bathroom and when I came out there were police everywhere. The male who wanted the LSD turned out to be an undercover police officer. [Named friend], the supplier and myself were taken to the police department. I do not think [named friend] was ever charged with anything because he had nothing to do with any of this. He only met me there to eat. I am not certain where [named friend] is now. I am not certain of the outcome of the supplier. As I indicated above, I was originally charged with Delivery of a Controlled Substance (LSD). I entered into a Plea Agreement and I pled guilty to Possession of a Controlled Substance (LSD). I was sentenced to four years in the State Penitentiary but I only served a little over three months. The three months was a type of confined rehab program known as New Directions. I was confined for those three months or so and I was required to attend Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings. The New Directions was not a hospital type setting but a period of confinement that involved drug counseling. The New Directions (ND) program was located in [city, state where I was arrested]. I do not recall the name of the counselor. After I was released from ND, I was on parole. I reported to a parole office in [name] County, TX. I was released from parole on 3 Jan[uary] 95. There was no probation. I have since applied and had my voting rights restored, even though I am a convicted felon. I have recently applied for clemency to the state of [state] for a full pardon but I have heard nothing about my request. My parole was completed without incident for the most part. . .

I have been questioned as to my motive for getting involved in this LSD matter. I had not been told that I would receive any type of monetary or drug profit and I did not expect this either. I can only say I was trying to please [name]. I admit that technically my intent was to deliver this LSD to the male who ended up being an undercover police officer but when I came out of the bathroom I was only in possession of this LSD and I had not made any delivery of this drug. I also admit that I used very poor judgment in getting involved in this incident since I had nothing to gain and everything to lose. At the time I did not really see the risk.

I have also been questioned as to how my name even surfaced that started the telephone calls in the first place. My name did not surface because I was known for delivering or supplying drugs but rather my name may have surfaced because in my community near [city, state], I was known for using drugs.

At the time of Applicant's arrest and conviction, he was nineteen years old.

At the hearing, Applicant testified about the changes in his life since his criminal misconduct. In August 1998, Applicant obtained a Bachelor of Science Degree in Marine Engineering, became a licensed merchant marine officer, and served as a third assistant engineer on commercial vessels (Tr. 21-22). He is pursuing a Masters degree in Ocean Engineering (Tr. 23, A.E. E). He married a couple of years ago, and has recently become a new parent. He has had his voting rights restored in the state where he engaged in the criminal conduct, and voted in the last election in the state where he now resides. He has requested a pardon from the state where he was convicted, but has encountered delays because state officials are unable to locate his conviction records (Tr. 24-25).

On his own initiative, he recently took, and passed, a drug urinalysis screening (A.E. F). Applicant's supervisors and coworkers consider him an excellent worker, with high personal integrity (A.E. A-D). None of the character references has indicated a specific knowledge of Applicant's criminal record.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*, under an assessment of the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year. ⁽³⁾

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent.

E2.A10.1.3.2. The crime was an isolated incident.

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying conditions 3. . ., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver. ⁽⁴⁾

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, § 986, precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001.

Burden of Proof

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such

factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

The Government has established its case under Guideline J. Applicant's criminal conduct in January 1991 was serious, a conclusion confirmed by the fact that Applicant was sentenced to four years in prison even with the full benefit of his plea arrangement. Nevertheless, I conclude that the criminal conduct is otherwise mitigated, but for the application of 10 U.S.C. § 986 to this case. First, the resolution of Applicant's criminal case is consistent with his explanations of his conduct. Without condoning Applicant's conduct in serving as middleman--even without compensation--for a drug transfer, the circumstances of his conduct are less serious than appear at first blush. In addition, Applicant was nineteen at the time of this offense, and there has been no repeat of the misconduct. Furthermore, the criminal conduct was not recent, having occurred over 11 years ago, and was isolated, being confined to a discrete period of time in January 1991. (5) Finally, there is clear evidence of successful rehabilitation, documented both by Applicant's educational and professional achievements since being released from prison, and by his character references which, while not indicating any knowledge of Applicant's criminal past, nevertheless attest to his work performance and family involvement.

Were this the end of the analysis under Guideline J., I would conclude Applicant's criminal conduct in 1990 mitigated. However, as alleged in Paragraph 2. of the SOR, Applicant's case falls within the purview of 10 U.S.C. § 986. Under the new regulations issued by the Deputy Secretary of Defense, because Applicant was convicted in Federal court and sentenced to imprisonment for more than one year, I may not mitigate his criminal conduct. Accordingly, I find Guideline J. against Applicant. However, because I do so solely because of the applicability of 10 U.S.C. § 986 to this case, I make the following statement as required by O.I. 64 in such a case: I recommend further consideration of this case for a waiver of 10 U.S.C. § 986 .

FORMAL FINDINGS

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph a: For the Applicant

Paragraph 2. 10 U.S.C. §986: 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).

2. Applicant was originally charged with three felony counts related to transfer and sale of LSD; the state quickly abandoned two counts related to constructive transfer and offering to sell LSD. Applicant negotiated a plea arrangement on the remaining felony charge of actual transfer in which the state agreed to reduce the charge to simple possession and

recommend a four-year prison sentence; the maximum sentence for simple possession was 2-20 years and a \$10,000.00 fine. Applicant was sentenced to four years imprisonment, served approximately 90 days, and completed a drug rehabilitation program while incarcerated.

3. As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.

4. Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.

5. I consider Applicant's 1979 misdemeanor possession of marijuana charge to have little effect on this conclusion, both because of its remoteness from the felony charge (11 years) and the substantial difference in criminal import between the two offenses.