

DATE: July 28, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-10224

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Kathryn MacKinnon, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 55-year-old truck driver employed by a defense contractor, received a felony conviction for possession of marijuana more than 34 years ago. He was sentenced to imprisonment for a term of four years and served 32 months in prison, in addition to the time he spent in jail awaiting trial. The episode is an isolated experience in his life and he has not used illegal drugs or had any further criminal history since that conviction. Moreover, he has safely and reliably hauled munitions and other hazardous materials for the Department of Defense for more than two decades. Despite the clear evidence of successful rehabilitation, 10 U.S.C. § 986 prohibits the granting or continuing of a clearance, absent an appropriate Secretarial waiver. Clearance is denied. A waiver is recommended.

STATEMENT OF THE CASE

On July 30, 2002, 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 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 Reasons (SOR) to Applicant. The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to any classified information and recommends that his case be submitted to an Administrative Judge. On September 19, 2002, Applicant executed a response to the SOR and requested a hearing. This case was assigned to me on December 16, 2002. A notice of hearing was issued on January 6, 2003, and the hearing was held on February 4, 2003. During the hearing, two Government (Govt) exhibits, five Applicant (AP) exhibits, and the testimony of the Applicant were received. The transcript (Tr.) was received on February 13, 2003.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, including Applicant's admissions to the allegations in the SOR, I make the following findings of fact:

Applicant is a 55-year-old truck driver, who is employed by a defense contractor to haul munitions and other hazardous materials, and is seeking a security clearance.

He served with the U.S. Army from 1964-1967.⁽¹⁾ During his tour of duty in Vietnam, from 1966-1967, he began using marijuana.⁽²⁾

On January 26, 1969, Applicant was arrested for possession of narcotics, after four pounds of marijuana were discovered in his luggage at an airport.⁽³⁾ He subsequently plead guilty and was convicted of possession of cannabis, a felony, and was sentenced to a term of four years imprisonment.⁽⁴⁾ Applicant was credited for the 143 days that he spent in jail awaiting trial and was released from prison in 1971, after serving 32 months.⁽⁵⁾

Applicant has not used marijuana or any illegal drug since he went to prison.⁽⁶⁾ Upon his release from prison and with the assistance of a veterans' group, he obtained employment with a company that was hiring ex-convicts.⁽⁷⁾

In 1973, Applicant took a course to become a truck driver.⁽⁸⁾ He scored first in his class with a 99.4% average.⁽⁹⁾

After obtaining the necessary certification, Applicant began hauling munitions in 1977.⁽¹⁰⁾ He obtained a security clearance in 1980.⁽¹¹⁾ He went to work for a different company and continued to have a security clearance until 1994, when he took a job that did not require security clearance.⁽¹²⁾ In 1997, Applicant returned to work for his prior employer. His security clearance was renewed and he has held it ever since.⁽¹³⁾

Applicant's service with his current employer, which expands a combined total of over 12 years, has been exemplary and without incident or violation.⁽¹⁴⁾ He received a One Million Mile Safe Driving Award in 2003.⁽¹⁵⁾

Applicant has been married since 1978 and has four stepchildren.⁽¹⁶⁾ His wife worked as his truck driving teammate for several years before her retirement in 2002.⁽¹⁷⁾

POLICIES

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration 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 decision. This assessment should include the following factors: (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.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guidelines are applicable to this case.

Guideline J: Criminal Conduct

The concern under Guideline J is 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:

A single serious crime or multiple lesser offenses (Disqualifying Condition 2).

Conditions that could mitigate security concerns include:

The criminal behavior was not recent (Mitigating Condition 1);

The crime was an isolated incident (Mitigating Condition 2);

There is clear evidence of successful rehabilitation (Mitigating Condition 6).

In pertinent part, 10 U.S.C. § 986 prohibits the Department of Defense from granting or renewing a security clearance for a person who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The statute further permits the Secretary of Defense or the Secretary of the military service concerned to authorize an exception to a person covered by the prohibition "in a meritorious case." DOHA Operating Instruction No. 64, *Processing Procedures for Cases Subject to 10 U.S.C. § 986*, implements the statute.⁽¹⁸⁾

CONCLUSIONS

Applicant's conviction for a felony establishes the applicability of Disqualifying Condition 2 under Guideline J of the Directive. However, the facts in this case also establish several mitigating conditions under Guideline J.

The offense resulting in the Applicant's conviction occurred over 34 years ago (Mitigating Condition 1). It also the only criminal offense that he has ever committed and is an isolated incident in his life (Mitigating Condition 2).⁽¹⁹⁾

Moreover, the record presents clear evidence of Applicant's successful rehabilitation (Mitigating Condition 6). He testified how he was "scared straight" as a result of his experience in a penitentiary.⁽²⁰⁾ Since Applicant's release from prison over 30 years ago, he has been gainfully employed. In fact, for most of that period he has held a security clearance and hauled munitions and other hazardous materials for the Department of Defense. Not only has Applicant's life been drug-free, as evidenced by random drug tests, but his driving record has been commendable, as evidenced by his One Million Mile Safe Driving Award. Based on his employer's submission, it is clear Applicant is not only highly rated but highly regarded.

Applicant has also had a successful marriage for over 24 years and has established a good relationship with his four stepchildren. In fact, his wife became his driving teammate for a number of years before her retirement. Given the evidence of how Applicant has conducted his life since his release from prison, it is not surprising that he professes a personal relationship with God.⁽²¹⁾

As explained above, the record here establishes several mitigating conditions, including clear evidence of Applicant's successful rehabilitation, and would support a finding in his favor. However, 10 U.S.C. § 986 prohibits a favorable finding or the granting or continuing of a clearance in this case, due to the sentence that Applicant received for his conviction.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

DECISION

In light of the evidence of record in this case, it is clearly not 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.

Signed

Roger E. Willmeth

Administrative Judge

1. Govt Ex 1 at 4.
2. Tr 54.
3. Govt Ex 2; Ap Ex D. The Government did not submit evidence of the quantity of marijuana that Applicant was found to have possessed. Applicant admitted to possessing four pounds of marijuana but maintained it was for his personal use. Ap Ex E at 21; Tr 54-55.
4. SOR ¶ 1.a appears to be in error with regard to the sentence Applicant received. Applicant submitted a copy the judge's sentencing order. Ap Ex D.
5. Ap Ex D; Ap Ex E at 21.
6. Tr 58.
7. TR 59.
8. Tr 61.
9. Tr 62.
10. Tr 62.
11. Tr 65.
12. Tr 66-67.
13. Govt Ex 1 at 8; Tr
14. Ap Ex B.
15. Tr 36.
16. Govt Ex 1 at 3-4; Tr 86.
17. Tr 71.
18. Neither 10 U.S.C. § 986 nor DOHA OI No. 64 defines "a meritorious case."
19. Govt Ex 2; Tr 83.
20. Tr 21.
21. Tr 88.