

DATE: March 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-13965

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was convicted in July 1979 of unlawful possession with intent to distribute a controlled substance, for which he was sentenced to five years in prison (execution of all but three months suspended), three years probation, and a special parole term of three years. In the twenty-three years since his conviction, Applicant has done nothing to violate the trust and confidence placed in him by the Government or his employers. Despite his considerable success in his career as a field engineer for defense contracting firms, Applicant is ineligible for a security clearance pursuant to 10 U.S.C. §986 because he was sentenced in 1979 to imprisonment for a term of more than one year. Clearance is denied with a recommendation this case be considered for a waiver of 10 U.S.C. §986.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4 and the implementation of Title 10, Section 986 of the United States Code), issued a Statement of Reasons (SOR), dated July 30, 2002, to the Applicant. The SOR 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on criminal conduct (guideline J) due to Applicant's conviction of unlawful possession with intent to distribute a controlled dangerous substance, a felony offense committed in December 1978. That offense, for which Applicant was sentenced to five years imprisonment (all but three months suspended) with three years probation and special parole conditions, was alleged to disqualify him from having a security clearance granted or renewed pursuant to Title 10, Section 986 of the United States Code (hereafter 10 U.S.C. §986).⁽¹⁾

Applicant filed a response dated August 26, 2002, to the SOR in which he requested a hearing before a DOHA Administrative Judge. The case was assigned to me on December 6, 2002, and pursuant to formal notice dated

December 19, 2002, a hearing was scheduled for January 10, 2003. At the hearing held as scheduled, the Government submitted six documentary exhibits, which were entered without any objection from Applicant, and called Applicant as an adverse witness. Applicant submitted four documentary exhibits and his testimony. A transcript of the proceedings was received by this office on January 22, 2003.

The record was held open until January 27, 2003, to allow Applicant to submit additional documentation with respect to his character. On January 21, 2003, Applicant submitted reference letters from three coworkers at his current place of employment (Ex. E, Ex. F and Ex. G), and a reference from a Federal civilian employee familiar with Applicant's work (Ex. H). Applicant's youngest brother forwarded through Department Counsel his recommendation (Ex. I) on the same date. The Government having had an adequate opportunity to review these character reference letters and having filed no objections thereto, the documents were marked and admitted into the record.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 54-year-old field engineer, who has been employed continuously in the defense industry since his hire by a United States defense contractor in arch 1980. Applicant stayed on with that defense firm through several acquisitions/mergers, progressing from a machinist to a field engineer. In April 1998, Applicant commenced employment as a field engineer with another defense firm, which was subsequently acquired by a British aerospace company. Applicant seeks to retain a secret security clearance, which he has held since late March 1983 for his defense-related duties.

In at least the late 1970s, Applicant owned and operated a moving and storage business in partnership with Mr. X, an individual whom he knew was involved in the "mid-range" sales and distribution of controlled dangerous substances. On at least one occasion in late December 1978, Applicant knowingly permitted an illegal drug transaction to take place in the warehouse which he leased for his business.⁽²⁾ A Drug Enforcement Agency (DEA) agent, acting undercover, had arranged to buy a pound of cocaine from a person known (or at least suspected) by the DEA to be involved in drug sales. After the seller/middleman was unable to procure the cocaine, he brought the DEA agent to Applicant's warehouse, where the drug was "stashed."⁽³⁾ At the facility, the undercover DEA agent was brought to the mezzanine level where he was presented with two bags containing 539 gross grams of cocaine. At that point, all the parties present in the warehouse were arrested, including the Applicant, who was arrested in the office area.⁽⁴⁾

In court, Applicant pleaded not guilty to one count of unlawful possession with intent to distribute a controlled substance, a felony, and one count of unlawful possession of a narcotic drug. He was found guilty in late July 1979, and sentenced for the unlawful possession with intent to distribute charge to five years confinement (execution of all but three months suspended), and to three years probation, to commence on release from confinement, with a special parole term of three years. The unlawful possession of a narcotic drug charge was dismissed.

Applicant was incarcerated until October 1979. Following his release from prison, Applicant terminated all association with known drug dealers. While he was on probation, he secured a job as a machinist in March 1980. Subsequently transferred into the company's field engineering division, Applicant gained expertise in the development and installation of sonar systems for United States submarines. In March 1983, he was granted a secret security clearance for his duties, the Government being aware of his 1979 drug conviction.⁽⁵⁾

Applicant stayed on with his defense contractor employer through several acquisitions/mergers, progressing from installation and grooming of sonar systems to onsite repairs to training and instructing others to repair and maintain the sonar systems. At the specific request of their Government customer, Applicant was hired in April 1998 by a defense contractor in his present locale to provide engineering test support (operation, maintenance, repair, and upgrade) for a towed array handling system. His security clearance was transferred to his new employer. Circa June 1998, the company was acquired by a British firm, who "fire walled" its United States operations. In late November 1999, the United States assets were acquired by a British aerospace firm. Applicant stayed on with his employer following the acquisition.

In conjunction with his need for classified access to perform his duties as a field engineer for his employer, Applicant

executed a security clearance application (SF 86) on July 21, 2000. In response to questions 21 (any felony offenses) and 24 (any drug or alcohol related offenses), Applicant disclosed his 1978 controlled dangerous substance offense, for which he served ninety days in jail and a probationary term.

On March 25, 2002, Applicant was interviewed by a special agent of the Defense Security Service (DSS) about his 1978 drug offense. Applicant indicated a person acquainted with him through his moving business came to the warehouse location with the drugs and prospective buyers. Applicant admitted he was aware of that person's illegal drug activities and did nothing to stop them. In return, he was to receive a cut of the proceeds from the drug sale. Applicant denied any other criminal arrests or convictions, and denied any illegal drug use, at least since he held a security clearance, which he indicated was in about 1980.

In his capacity as field engineer IV for his present employer, Applicant has demonstrated a thorough understanding of the sonar systems' operations and proven to be extremely adept at managing multiple assignments. Consistently rated as highly proficient in all areas critical to his position, Applicant is considered the resident expert in the towed systems community. He is held in high regard by his supervisors, coworkers and Government customer for his technical expertise and professionalism. Applicant's employer has recognized his significant contributions by raising his salary \$30,000.00 since his hire in 1998.

Applicant regrets his past involvement in the drug crime, which included knowing his partner was involved in drug sales and doing nothing to stop the illegal drug activities. He presents in reform his more than twenty plus years of unblemished contributions to the national defense effort.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case: [\(6\)](#)

GUIDELINE J

Criminal Conduct

The Concern: 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. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
- b. A single, serious crime. . .

c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.⁽⁷⁾

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent

b. The crime was an isolated incident

f. There is clear evidence of successful rehabilitation

g. Potentially disqualifying conditions c. and d., 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.

* * *

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 is nonetheless security worthy. As noted by the United States Supreme Court in *Department of 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." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guideline J:

Applicant was arrested in December 1978 along with six others following the attempted sale in his warehouse of a large quantity of cocaine to a DEA agent working undercover. Following a jury trial, he was convicted of unlawful possession with intent to distribute a controlled substance, for which he was sentenced to five years in prison, all but three months suspended, and three years probation. Notwithstanding the passage of more than 22 years since the crime, disqualifying conditions a. (allegations or admissions of criminal conduct), b. (a single serious crime) and c. (conviction in a state court and sentenced to a term of imprisonment exceeding one year) must be considered in evaluating Applicant's current security suitability.

His criminal conduct was remote and isolated in nature. There is no evidence Applicant has engaged in any illegal drug sales or aided anyone in the distribution of controlled dangerous substances since his arrest in late 1978. While

Applicant contests the accuracy of the DEA report in several respects, he admits culpability in knowing of the illicit drug delivery arranged by his partner in the warehouse and in failing to take any action to stop it. His sincere expression of remorse for this conduct and his termination of known association with those involved with illegal drugs, reflect substantial rehabilitation. Since his release from incarceration in about October 1979, Applicant has committed himself to realizing his personal and professional goals. Through hard work and dedication, he became a field engineer after starting out as a machinist with a defense contractor in 1980. Aware of his criminal record, the Department of Defense granted Applicant a secret security clearance in 1983, and he has done nothing since to violate the trust placed in him. A recognized expert in the towed array sonar handling systems, Applicant is held in high regard by his employer and Government customer for his technical competence and professionalism.

Yet, criminal conduct punished by imposition of a prison term in excess of one year is regarded as sufficiently serious to where it cannot be mitigated unless meritorious circumstances exist (See MC g.). Pursuant to 10 U.S.C. §986, the Department of Defense is prohibited from granting or renewing access to classified information to a defense contractor employee who has been convicted in a Federal or State court and sentenced to imprisonment for a term exceeding one year. Although Applicant served only three months, he was sentenced in July 1979 to a term of five years in prison (all but three months suspended). By virtue of this sentence, Applicant falls within the provisions of 10 U.S.C. §986, as amended, which has been implemented within the Department of Defense by a June 7, 2001 memorandum from the Deputy Secretary of Defense titled *Implementation of Restrictions on the Granting or Renewal of Security Clearances as andated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. Hence, Applicant's request for continued access must be denied and an adverse finding returned as to subparagraph 1.b. of the SOR. This statutory prohibition may be waived in meritorious circumstances as determined by the Secretary of Defense. I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: For 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. I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

Elizabeth M. Matchinski

Administrative Judge

1. Section 986 states in pertinent part:

§986. Security clearances: limitations

(a) Prohibition.--After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons Disqualified From Being Granted Security Clearances.--A person is described in this subsection if any of the following applies to that person;

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

(d) Waiver Authority--In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

2. Applicant testified he was aware his partner had a drug transaction planned for that day, but it was not the site planned for the transaction. (Transcript p. 72). The report of the Drug Enforcement Agency (DEA) undercover agent (Ex. 4) indicates the agent had arranged to meet with an individual who was to deliver him up to two pounds of cocaine for \$28,000.00 per pound. The transfer of the drug was to take place in this seller/middleman's apartment. When the sale did not proceed timely, the DEA agent left the apartment for about fifty minutes, during which time the middleman indicated his source had been there and left a sample. After the undercover agent balked at paying \$26,500.00 for a pound, the middleman had the agent follow him to where the cocaine was stashed, which turned out to be Applicant's warehouse.

3. The middleman's supplier ("source") is not identified in the record.

4. At his hearing, Applicant identified by name the person who was his partner in the business. This person is not named or even mentioned in the DEA agent's report-a report which Applicant contests as inaccurate in some respects. In the DEA report of investigation, dated January 4, 1979, the agent, the middleman and the middleman's companion, were met at the entrance of the warehouse by a person who was subsequently identified as Applicant. Applicant accompanied the DEA agent, the middleman and the middleman's companion to the rear of the office area where the DEA agent was introduced to Applicant and two others, including the person (Mr. Y) who later gave the DEA agent two bags of cocaine. Following the introductions, Mr. Y was overheard to tell the middleman's companion that he had been told not to bring "a whole bunch of people" there. The DEA agent then remained behind and spoke with Applicant momentarily before following the others into an area adjacent to the office. The DEA agent related Applicant directed him to a stairway which led to a mezzanine directly above the main floor. According to the DEA agent, he and Applicant then proceeded to the top of the stairway at the mezzanine level where the agent was introduced to yet another person. It was there Mr. Y provided him with the cocaine. At the direction of the DEA agent, Applicant then left the mezzanine to acquire some clorox from the agent's companion, who was waiting outside. The DEA agent overheard Applicant shouting from the office area that "the police were coming and to get rid of the stuff." The DEA agent then placed those on the mezzanine level (including the middleman, the middleman's companion, and r. Y) under arrest, while Applicant was arrested in the office area of the warehouse by a detective. (See Ex. 4). Applicant maintains the DEA agent lost track of an eighth person-Applicant's business partner (Mr. X)-who met the middleman and his companions outside the entrance and entered the warehouse with them. (Transcript pp. 81-82). According to Applicant, he stayed in the office while Mr. X accompanied the DEA agent and the others to the mezzanine. When the police arrived, Mr. X ran to the back of the building and hid among the storage items there. Even assuming the DEA agent erred when he drafted his report several days after the incident, it is uncontroverted Applicant was present, knew of the planned drug transaction and did nothing to stop Mr. Y's delivery of cocaine to the undercover agent.

5. Applicant testified he informed the Government of his conviction on his security clearance application and during a subsequent interview. (Transcript p. 39).

6. The adjudicative factors considered most pertinent are identified as set forth in guideline J following the implementation of 10 U.S.C. §986.

7. Under the provisions of 10 U.S.C. §986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts marital, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military

Department concerned, may authorize a waiver of this prohibition.