

DATE: December 18, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-17850

DECISION OF ADMINISTRATIVE JUDGE

JEROME H. SILBER

APPEARANCES

FOR GOVERNMENT

William S. Fields, Esq., Department Counsel

FOR APPLICANT

Arthur A. Bud Marshall, Esq., Abraham A. Dash, Esq.

SYNOPSIS

Conviction of PCP possession, with intent to distribute, and sentence to imprisonment for four years trigger the provision in 10 United States Code, subsection 986(a) that prohibits DoD from granting a security clearance to such an offender who is a DoD contractor employee. Consideration of a waiver is recommended.

STATEMENT OF THE CASE

On August 21, 2001, the Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), issued a Statement of Reasons (SOR) to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding 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 a clearance should be granted, continued, denied, or revoked. In a sworn written statement, dated September 10, 2001, the Applicant responded to the allegations set forth in the SOR and requested a hearing.

On September 24, 2001, the case was assigned to Administrative Judge Wesley, who issued a notice of hearing on October 12, 2001, scheduling the hearing for October 30, 2001. The case was reassigned on October 29, 2001, to the undersigned Administrative for reasons of caseload rebalancing. The Applicant did not appear at the hearing on October 30, 2001. The Applicant's request, dated October 22, 2001, for a continuance of the hearing in the case was received by the undersigned Administrative Judge on October 30, 2001, after the hearing. An amended notice of hearing was issued on November 16, 2001, scheduling a new hearing for November 29, 2001. The undersigned held a hearing on November 29, 2001. The Department Counsel presented five exhibits ("exhs"), but no witnesses. The Applicant's case consisted of the presentation of nine exhibits and the testimony of seven witnesses besides his own testimony. The record in this case closed on November 29, 2001. The undersigned Administrative Judge received the transcript ("tr") of the hearing on December 6, 2001.

RULINGS ON PROCEDURE

On October 30, 2001, the Administrative Judge issued an Order to the parties granting the Applicant leave to request a new hearing, which request of the Applicant was made on November 5, 2001. The Order also amended subparagraph 1.b of the SOR to read:

b. Due to the facts alleged in subparagraph 1.a., above, 10 U.S.C. 986 disqualifies you from having a security clearance granted or renewed by the Department of Defense. *10 U.S.C. 986 also provides that, in a meritorious case, the Secretary of Defense may authorize an exception to this prohibition. 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. 986 is attached. *(Amendment italicized.)*

The Order enclosed a copy of DOHA Operating Instruction (OI) No. 64, dated July 10, 2001, which prescribes the exact wording of the SOR in this case. Paragraph 3.g of the DOHA OI provides that the Director, DOHA, shall within his sole discretion determine whether or not to forward the case to the Deputy General Counsel (Legal Counsel) for further consideration of a possible waiver under 10 U.S.C. § 986.

SOR AMENDMENT

The Department Counsel moved pursuant to item 17 of the additional procedural guidance (encl. 3 to the Directive) to amend the SOR so that ¶ 1.a reflects the fact that the Applicant was found guilty of one charge and not two charges. Tr pages 14-16, 22; exhs. 4 and 5. The motion was granted.

FINDINGS OF FACT

The Statement of Reasons (SOR) consisted of allegations predicated on the following sole guideline: paragraph 1, Guideline J (criminal conduct). The undersigned Administrative Judge completely and thoroughly reviewed the evidence in the record, and upon due consideration of the same, makes the following Findings of Fact:

The Applicant is a 30-year-old senior systems engineer employed by a U.S. Government contractor since December 1998. The Applicant seeks to obtain a Secret personnel security clearance.

The Applicant used a wide variety of illegal drugs while a juvenile in high school and while attending night school. In May 1989 when he was 18¼ years old, he was arrested while intoxicated with a friend who was still a juvenile on a charge under state law of possession of a controlled dangerous substance (phencyclidine, commonly known as PCP) with intent to distribute. The Applicant was incarcerated in the county jail from October 1989--when his bond was revoked upon his guilty plea--until May 1990 when he was paroled and placed on five years' supervised probation. Exhs. 3 and 5; tr pages 39, 110. The Applicant was never arrested before 1989 or since 1989. Exh. 3, page 2; exh. 4; tr pages 50, 113.

Sentencing of the Applicant as a first-time offender occurred in November 1989. He was sentenced to four years confinement, all but 18 months suspended, and five years' probation after release from incarceration. Exh. 5. The state court directed that upon his release, he was required to attend drug counseling, undergo drug testing, and seek to earn a General Equivalency Diploma (G.E.D.). Upon release he started aftercare drug counseling sessions--one hour each session--and was tested twice weekly for drugs. In September 1990 he tested positive for PCP. ⁽¹⁾ He was given a choice of being cited for violation of parole/probation or being admitted to an inpatient drug treatment program for 40-60 days. He chose the latter option and received daily alcohol and drug individual and group counseling. After discharge from the inpatient program in about January 1991, he returned to his prior outpatient program for six months, during which time he received a G.E.D. Tr page 36. Thereafter he met with his probation officer once a month at first, then once every other month, and finally once every three months. His only violation of probation was in September 1990. He successfully completed probation in April 1995. Exhs. 3, 5; tr pages 41-46.

The Applicant is married and has two children, ages 10 and 4. Tr pages 34-35, 128-130, 136; exh. 1. He is a caring husband and father. Tr pages 103-104. He coaches his son as well as other neighborhood children in Little League baseball and is an active volunteer in other community affairs. Exh. I; tr page 78. He is very much involved in his

daughter's cheerleading activity. Tr page 98. He has led an exemplary life as a citizen of his community since he purchased a house there in 1995. SOR answer; exh. 1. He is a helpful neighbor who is considerate and solicitous of his neighbors' welfare. Tr pages 85-91. He was trusted with collecting money owed to a neighbor. Tr pages 81-82. He told his future parents-in-law about his guilt and conviction shortly after he met their daughter. Tr pages 94-96, 104-105.

The Applicant attributes his rehabilitated life in large part to the support provided by his wife. Tr pages 47, 118. He readily acknowledges the truth of his guilt and sentence in 1989 and volunteered at the hearing that he knows that PCP is a very dangerous drug. Tr page 120. He has discussed his teenage substance abuse problems with his son and counseled him. Tr pages 118-119. Since his inpatient treatment in 1990, he has been "a straight arrow." Tr pages 112, 115-116.

The Applicant learned to be a computer specialist during his probation and held a number of jobs prior to his present employment involved with repair of computers/computer software. Exh. 1; tr pages 35-36, 47-49, 124-125. His character witnesses were told by the Applicant of his problems before they testified or wrote supportive letters. Tr pages 119-120. The military customers that he supports praise his technical ability, responsiveness, and trustworthiness. Exhs. A, B, C, D, E, F, G, and H; tr pages 59-61. The Applicant's superiors find him reliable and extremely honest. Tr pages 54-56. When he was interviewed in 1998 for his present job, he told the interviewer about his drug conviction when he was 18 years old. Tr page 65-74.

ACT OF CONGRESS

On October 30, 2000, Public Law 106-398, 114 Stat. 1654 was enacted. Section 1071(a) of that statute added the following section to title 10 of the United States Code:

§ 986. Security clearances: limitations

(a) Prohibition.

After the date of the enactment of this section [October 30, 2000], 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)
- (2)
- (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.
- (2)
- (3)
- (4)
- (d) Waiver Authority.

In a meritorious case, the Secretary of Defense or the Secretary of the military 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.

(e) Annual Report.

Not later than February 1 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and House of Representatives a report identifying each waiver issued under subsection (d) during the preceding year with an explanation for each case of the disqualifying factor in subsection (c) that applied, and the reason for the waiver of the disqualification.

On June 7, 2001, the Deputy Secretary of Defense issued a general distribution memo-ramdum, subject: "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," which interpreted 10 U.S.C. § 986(c)(1) to cover sentences imposed by courts other than Federal courts as well as those imposed by "courts of the United States" in accordance with the definition in paragraph (1) of 18 U.S.C. § 101(a).

A copy of the Deputy Secretary of Defense memorandum dated June 7, 2001, was provided by DOHA to the Applicant under letter dated August 21, 2001 (exh. 2).

POLICIES

Enclosure 2 of the Directive (32 C.F.R. part 154 appendix H) sets forth adjudicative guidelines which must be considered in evaluating an individual's security eligibility. The guidelines are divided into those that may be considered in determining whether to deny or revoke a clearance (Disqualifying Conditions or DC) and those that may be considered in determining whether to grant or continue an individual's access to classified information (Mitigating Conditions or MC). In evaluating this case, relevant adjudicative guidelines as set forth below have been carefully considered as the most pertinent to the facts of this particular case.

The guidelines, disqualifying conditions, and mitigating conditions most pertinent to an evaluation of the facts of this case are:

GUIDELINE J - CRIMINAL CONDUCT

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:

- b. A single serious crime or multiple lesser offenses.
- 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 (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-martial, 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);

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.

The Adjudicative Guidelines contained in enclosure 2 of the Directive provide in part:

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.

(Emphasis added.) The Directive also requires the undersigned to consider, as appropriate, the factors enumerated in Section 6.3:

- a. Nature and seriousness of the conduct and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.
- e. Absence or presence of rehabilitation.
- f. Probability that the circumstances or conduct will continue or recur in the future.

Enclosure 2 to the Directive provides that the adjudicator should consider the following factors:

The nature, extent, and seriousness of the conduct

The circumstances surrounding the conduct, to include knowledge-able participation

The frequency and recency of the conduct

The individual's age and maturity at the time of the conduct

The voluntariness of participation

The presence or absence of rehabilitation and other pertinent behavioral changes

The motivation for the conduct

The potential for pressure, coercion, exploitation, or duress

The likelihood of continuation or recurrence

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security 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 may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record. Determinations under the Directive include consideration of the risk that an applicant may deliberately or inadvertently fail to safeguard properly classified information as that term is defined and established under Executive Order 12958, effective on October 14, 1995.

Initially, the Government has the burden of proving controverted facts alleged in the Statement of Reasons. The United States Supreme Court has said:

"It is difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent with the interests of the national security' test. The

clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials. Placing the burden on the Government to support the denial [of a security clearance] by a preponderance of the evidence would inevitably shift the emphasis and involve the Board in second-guessing the agency's national security determinations."

Dept. of the Navy v. Egan, 484 U.S. 518, 531 (1988). This Administrative Judge understands that Supreme Court guidance in its context to go to the minimum *quantum* of the admissible evidence that must be adduced by the Government in these proceedings to make its case, that is, substantial evidence but something less than a preponderance of the evidence--rather than as an indication of the Court's tolerance for error below. ⁽²⁾

The burden of going forward with the evidence then shifts to the applicant for the purpose of establishing his or her security eligibility through evidence of refutation, extenuation or mitigation of the Government's case or through evidence of affirmative defenses. Assuming the Government's case is not refuted, and further assuming it can reasonably be inferred from the facts proven that an applicant might deliberately or inadvertently fail to safeguard properly classified information, the applicant has a heavy burden of persuasion to demonstrate he or she is nonetheless eligible to hold a security clearance. ⁽³⁾

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility and demeanor of those who testified, the undersigned concludes that the Government established its case with regard to Guideline J.

The Applicant has admitted that he was convicted in the United States of a state crime and sentenced to imprisonment for a term exceeding one year. Predicated on that evidence, title 10 United States Code, § 986 prohibits the grant of a security clearance by the Department of Defense (DoD) to him as an employee of a contractor of the Department of Defense. *See* pages 4-5 *supra*. The statute is applicable even though the offense occurred 12 years ago when the Applicant was barely 18 years old. Therefore SOR ¶ 1.b is concluded adversely to the Applicant.

The hearing was nevertheless requested by the Applicant to present evidence that his is a "meritorious case" justifying a waiver of the statutory prohibition by the Secretary of Defense. It is noted that the Deputy Secretary of Defense incorporated his June 7, 2001 implementation of the statute into the existing framework of the Directive and its guidelines. Consequently, section 6.3 of the Directive is applicable to this case. That provision of the DoD regulation requires that the decision must be "a fair and impartial common sense determination" based on, *inter alia*, the guidelines at enclosure 2 of the Directive and the factors identified on page 7 *supra*.

The evidence shows that the Applicant committed a single serious crime. This falls within the scope of DC #b, which is identified on page 6 *supra*. In mitigation, the evidence shows that the criminal behavior was not recent, that it was an isolated incident, and that there is clear evidence of successful rehabilitation. This falls within the scope of MC #a, MC #b, and MC #f, which are also identified on page 6 *supra*. Furthermore, the SOR presents adverse evidence under only a single guideline (Guideline J). Therefore, the adjudicative guidelines contained in enclosure 2 of the Directive provide in part:

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.

(Emphasis added.) Clearly there is no available evidence of "a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior." Common sense dictates that the Applicant has been long rehabilitated, both with regards to substance abuse and with regard to criminal activity, and that he presents little identifiable *present* security risk. The Secretary of Defense should personally review this case with a view to determining whether to authorize a waiver of the prohibition in subsection (a) of 10 U.S.C. § 986.

Each clearance decision is required to take into consideration pertinent factors set forth in Section 6.3 of the Directive

and in the adjudicative process discussion at enclosure 2 to the Directive. These factors are identified on page 7 *supra*. The nature of the crime committed was very serious and weighs against the Applicant. The "frequency and recency" of the criminal conduct and the Applicant's age when he committed it weigh in his favor. The presence of rehabilitation and the probability that the conduct will not recur in the future weigh decisively in his favor. Therefore, SOR ¶1.a is concluded favorably to the Applicant.

FORMAL FINDINGS

Formal findings as required by Enclosure 1 of the Directive (see paragraph (7) of section 3 of Executive Order 10865, as amended) and the additional procedural guidance contained in item 25 of Enclosure 3 of the Directive are:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is the determination of the undersigned that it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

The undersigned Administrative Judge recommends further consideration of this case for a waiver of 10 U.S.C. § 986.

Jerome H. Silber

Administrative Judge

1. The last time the Applicant used or was otherwise involved with illegal drugs was in September 1990. He has no intention of ever again being involved with drug abuse. He was last intoxicated with alcohol in December 1996, subsequently has a beer very rarely, and last remembered tasting alcohol in the summer of 1999. Exh. 3; tr pages 125-126.

2. The rule has been restated as requiring "that security clearances should be revoked [*sic*] if doing so is consistent with the national interest;" *Doe v. Schachter*, 804 F. Supp. 53, 62 (N.D.Cal. 1992). *Cf.* with regard to the *quantum* of evidence the DOHA Appeal Board analysis in DISCR OSD Case No. 90-1054 (July 20, 1992) at pages 3-5, and DOHA Case No. 94-0966 (July 21, 1995) at pages 3-4. The Directive establishes the following standard of review:

[Whether the] Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the [DOHA] Appeal Board shall give deference to the credibility determinations of the Administrative Judge.

Item 32.a. of the Additional Procedural Guidance (Enclosure 3 to the Directive). See also 5 U.S.C. §556(d).

3. While the Government has the burden of proving controverted facts, the Applicant has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Items 14 and 15 of the Additional Procedural Guidance (Enclosure 3 to the Directive).