

KEYWORD: Criminal Conduct

DIGEST: This 37-year-old Applicant was convicted of a crime in 1984 and sentenced to more than a year. He was discharged from probation in 1988. Under 10 USC 986(c)(1), Applicant is ineligible to hold a security clearance. No reason was found to recommend further review of the case to determine whether it is meritorious to be considered for a waiver of 10 USC 986. Clearance is denied.

CASENO: 01-21146.h1

DATE: 03/27/2002

DATE: March 27, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-21146

**DECISION OF ADMINISTRATIVE JUDGE**

**BARRY M. SAX**

## APPEARANCES

### **FOR GOVERNMENT**

Martin H. Mogul, Department Counsel

### **FOR APPLICANT**

*Pro Se*

## STATEMENT OF THE CASE

On October 18, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On November 9, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The case was assigned to me on January 29, 2002. A Notice of Hearing was issued on February 27, 2002 and the matter was heard on arch 14, 2002. At the hearing, the Government offered three exhibits, to which the Applicant made no objection. The exhibits were marked and admitted as Government Exhibits (GX) 1 - 3. Applicant testified on his own behalf and did not offer any exhibits. The transcript (Tr) was received on March 22, 2002.

## FINDINGS OF FACT

Applicant is a 37-year-old research engineer for a defense contractor that is seeking a security clearance for Applicant. In his response to the SOR, Applicant admits both SOR allegations, 1.a. and 1.b. Without using the term "waiver," he

contends, however, that he should be granted a security clearance.

Based on Applicant's testimony and all documentary evidence, I find the following as to both allegations:

#### Guideline J (Criminal Conduct)

1.a. - Applicant was charged on July 24, 1984 with Possession with Intent to Deliver Marijuana, a felony. On May 16, 1984, he was found guilty as charged was sentenced to 30 months probation and 65 hours of community service. On July 25, 1986, his probation was revoked because of a probation violation, and he was sentenced to two years in prison.

1.b. - The Finding of Fact as to SOR 1.a., above, brings this matter within the specific prohibition of 10 USC 986(c)(1), which states that anyone convicted of a crime and sentenced to more than one year imprisonment is disqualified from obtaining or retaining a security clearance. I note that Applicant was sentenced to more than a year, to wit, three years, some two years after his original sentence to probation. 10 USC 986 does not mention when the sentence of more than one year had to be imposed, and I find it makes no difference as to whether 10 USC 986 applies.

### POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above 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.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

#### 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 maybe disqualifying include:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
2. *A SINGLE SERIOUS CRIME*<sup>(1)</sup> or multiple lesser offenses. (Emphasis added)

Conditions that could mitigate security concerns:

1. The criminal behavior was not recent.
2. The crime was an isolated incident.

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that 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.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an

applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns 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 conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

In addition to the general and specific guidelines found in the Directive, a federal statute, 10 USC 986, imposes restrictions that, among other things, prohibit granting a clearance to anyone is convicted and sentenced to more than one year. The only exception is that the Secretary of Defense or Secretaries of the Military Services may grant a waiver in cases they find to be meritorious.

## CONCLUSIONS

I have considered the evidence in light of the appropriate legal standards and factors, and have assessed Applicant's credibility based on the entire record. I conclude the totality of the evidence establishes a case as to both SOR allegations, which in turn establishes a nexus or connection with Applicant's security clearance eligibility. The crime for

which Applicant was convicted in 1985 (GX 1 at p. 7, GX 2, and GX 3), is clearly serious, by any reasonable definition.

Although the fact of the conviction and sentencing is enough, by itself, to trigger application of 10 USC 986, an evaluation of the circumstances surrounding the crime is relevant to an understanding of Applicant's implicit contention that he merits a waiver of the statute. Applicant began using marijuana when he was four or five years old (GX 2). He used increasing amounts of marijuana until he was 15, when he stopped, only to begin again when he was 17. In the early 1980s, he also used cocaine and "magic mushrooms" (*Id.*). His arrest and conviction resulted from a police raid on a friend's apartment. Applicant continued to use marijuana while on probation. He violated his probation when he was arrested and convicted for shoplifting and possession of stolen property.

He served six months on that violation. After he was released, he again violated his probation, although he does not remember what he did, and was sent back to jail for another 15 months.

After his release from this imprisonment, he was placed on parole for another nine to twelve months, during which time he again used marijuana and cocaine," and was again violated and returned to jail for 21 - 28 days. Upon release from this last imprisonment, he entered an in-patient treatment program and has not used drugs since (*Id.*). The FBI Criminal History (GX 3) shows Applicant's last contact with law enforcement to be his "Final Discharge" in November 1988.

Disqualifying Condition (DC) 1 clearly applies. DC 2 also applies because Applicant's criminal conduct qualifies as a "single serious crime." I also find that mitigating Condition (MC) 1 applies, since the crime occurred in 1984, and his final discharge occurred in 1989. MC 2 is of questionable application, since Applicant's long history of drug use logically prevents the one arrest and conviction as being an isolated incident of drug-related misconduct. However, I conclude there is clear evidence of rehabilitation (MC 6) in Applicant's "successful completion of drug program" in 1987 (GX 2), no evidence of subsequent drug use, and improved family and work conditions. On balance, I conclude that the facts show sufficient mitigation to allow a reasonable conclusion that Applicant can be relied upon to protect the nation's secrets in the future.

However, **10 USC 986** is controlling.

This statutory provision is applicable under the facts of this case. There is a conviction and sentence of more than one year (GX 1, 2, and 3). The statute does not contain any statute of limitations, so it applies regardless of how long ago the conviction and sentence occurred. Under these circumstances, the fact of the conviction and sentence makes Applicant ineligible to hold a security clearance. Because of the age of the 1984 conviction can be considered mitigating, I conclude that this is a case where my decision to deny or revoke is "solely a result of 10 USC 986."

Accordingly, pursuant to DOHA Operating Instruction No. 64, dated July 10, 2001, I am required to make a recommendation as to whether a waiver should be granted. After careful evaluation of all the evidence, I do not recommend further consideration of this case for a waiver of 10 USC 986.

## FORMAL FINDINGS

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

Guideline J (Criminal Conduct) 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.

**BARRY M. SAX**

**ADMINISTRATIVE JUDGE**

1. Although no official lists or objective standards are given as to what constitutes a "serious crime," I conclude that Possession with Intent to Control marijuana is such a crime.