

DATE: July 25, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-26050

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Jonathan A. Beyer, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a 48-year-old crane rigger employed by a defense contractor, was convicted of possession of marijuana in 1983 and of possession of marijuana with intent to distribute in 1990. For the 1990 offense, he was sentenced to 10 years imprisonment, although it was suspended and he was placed on probation for 10 years. The last conviction occurred over 13 years ago and Applicant has not used illegal drugs or had any further criminal history since that conviction. However, he has not been completely candid concerning the facts surrounding his 1990 conviction. Because of Applicant's sentence for the 1990 offense, moreover, 10 U.S.C. § 986 prohibits the granting or continuing of a clearance, absent an appropriate Secretarial waiver. Clearance is denied. Further consideration of this case for a waiver is not recommended.

STATEMENT OF THE CASE

On October 8, 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 October 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 7, 2003, and the hearing was held on January 31, 2003. During the hearing, six Government (Govt) exhibits, two Applicant (AP) exhibits, and the testimony of the Applicant were received. The transcript (Tr.) was received on February 7, 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 48-year-old crane rigger, who is employed by a defense contractor, and is seeking a security clearance.

He served with the U.S. Army from 1972-1974.⁽¹⁾ From 1974 to the present, he has worked various jobs at a shipyard.⁽²⁾

Applicant began using marijuana in 1973 and, for the most part, continued to use it weekly until his arrest in 1990.⁽³⁾

On August 9, 1978, Applicant was charged with possession of marijuana. The charge was dismissed. At the time, Applicant was at a lake with some friends, all of whom were charged, following the discovery of some marijuana by an undercover police officer.⁽⁴⁾

As a result of growing marijuana in his backyard, Applicant was arrested on October 1, 1982. He was subsequently convicted of simple possession of marijuana on July 5, 1983.⁽⁵⁾ On September 12, 1983, he was sentenced to 30 days in jail, which was suspended subject to Applicant's good behavior for 12 months, and he received a \$250.00 fine.⁽⁶⁾

While in the possession of more than five pounds of marijuana, which Applicant claimed he was holding for a friend, he was again arrested on January 5, 1990.⁽⁷⁾ Following his indictment, Applicant was convicted of possession with intent to distribute marijuana, a felony. On December 18, 1990, he was sentenced to 10 years imprisonment and was fined \$1,000.00. The imprisonment was suspended and Applicant was placed on supervised probation for 10 years.⁽⁸⁾

During Applicant's supervised probation, none of his monthly urinalysis tests were positive.

Following his conviction in 1990, Applicant ended his association with people with whom he had used marijuana.⁽⁹⁾ In 1994, he moved from the town he had lived in since 1978 to the area where he now lives, which is 60 miles from his former location.⁽¹⁰⁾

Prior to his arrest in 1990, Applicant occasionally smoked marijuana with his first wife, whom he married in 1978 and from whom he has been divorced for two years.⁽¹¹⁾ She left him in 1997 and he gained custody of their two sons, who are now adults and have moved away from home.⁽¹²⁾ Applicant has remarried and lives with his new wife, a government employee, in a new house on a five acre lot.⁽¹³⁾

Applicant has been a very dependable employee for his current employer and his duty performance has been outstanding, both as a crane rigger and as a "make-up supervisor," substituting for his supervisor when he is out.⁽¹⁴⁾ His employment requires him to successfully undergo urinalysis testing on an annual basis.⁽¹⁵⁾

Applicant provided a sworn statement to a special agent of the Defense Security Service (DSS) on October 20, 2000.⁽¹⁶⁾ He was unwilling to identify the friend for whom he claims to have held the marijuana, which resulted in his 1990 conviction.

POLICIES

Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted. Directive E3.1.14. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision. Directive E3.1.15.

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 b);

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

Conditions that could mitigate security concerns include:

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

There is clear evidence of successful rehabilitation (Mitigating Condition f);

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 (Mitigating Condition g).

Disqualifying Condition c implements a requirement of 10 U.S.C. § 986, which 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." As implemented by Mitigating Condition g, the statute further permits the Secretary of Defense or the Secretary of the military department 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*, provides further guidance.⁽¹⁷⁾

CONCLUSIONS

Applicant's felony conviction in 1990 for possession of marijuana with intent to distribute is sufficient to establish the applicability of Disqualifying Condition b and c under Guideline J of the Directive. However, the facts in this case also establish mitigating conditions under Guideline J.

Applicant committed his last and most serious offense over 13 years ago (Mitigating Condition a). Moreover, the record presents evidence of his successful rehabilitation with regard to the drug related criminal conduct (Mitigating Condition f).

The record establishes that Applicant has been drug-free since his arrest on January 5, 1990. It appears his rehabilitation began immediately after his arrest. Applicant testified that his incarceration convinced him that nothing was worth going through that experience of feeling like "a caged animal."⁽¹⁸⁾

Following his arrest, Applicant also stopped associating with the people he "used to hang around with" and with whom he used marijuana.⁽¹⁹⁾ Within a few years, he moved away from the area, further removing himself from his former

associates. Applicant attributed his continued use of marijuana following his earlier arrest to his continued contact with these associates. [\(20\)](#)

Although sentenced to 10 years imprisonment, all of the imprisonment was suspended and Applicant was placed on 10 years of supervised probation. Evidence of his rehabilitation began to emerge during Applicant's supervised probation. Based on his ability to successfully undergo monthly urinalysis testing, maintain steady employment, and remain free of any further violations of the law, Applicant's supervised probation was reduced to three years. [\(21\)](#)

Applicant's supervised probation ended seven years early, nearly 10 years ago. His life since has been without incident and reflects his rehabilitation from his earlier drug involvement. He has successfully undergone annual urinalysis testing by his employer. Moreover, his supervisor, and the official to whom his supervisor reports, rate Applicant's duty performance as outstanding, both in his regular job as a crane rigger and as the back-up supervisor. It also appears that Applicant is often called upon to work 60-70 hours per week. [\(22\)](#)

Applicant has put an unsuccessful marriage to a woman with whom he smoked marijuana behind him. He is now married to a woman who is a government employee. They are financially stable and share a new home on five acre lot. Although alcohol consumption is not in issue in this case, Applicant also asserts that he stopped using alcohol over four and a half years ago. [\(23\)](#)

Despite the mitigation supported by the record, Applicant has not been completely candid with regard to the facts surrounding his 1990 conviction. He continues to maintain that he was holding the marijuana in a cooler for a friend. [\(24\)](#) Although he admits to giving half an ounce of the marijuana to the police informant, Applicant denies any prior knowledge of the man leaving \$100.00 for it under a clock radio in his house. [\(25\)](#) When interviewed by the DSS special agent, Applicant was unwilling to identify the friend for whom he claims to have held the marijuana. [\(26\)](#) Moreover, 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 in 1990.

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: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

Subparagraph 1.d: 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. I do not 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 5; Tr 33.

2. Govt Ex 1 at 2-3; Tr 33.
3. Govt Ex 2 at 3.
4. Govt Ex 2 at 2.
5. Govt Ex 4.
6. *Id.*
7. Govt Ex 5; Govt Ex 2 at 1-2.
8. Govt Ex 6.
9. Govt Ex 2 at 3; Tr 18.
10. Govt Ex 1 at 1; Tr 9, 27-28.
11. Govt Ex 2 at 3; Govt Ex 1 at 3; Tr 19.
12. Govt Ex 2 at 3; Govt Ex 1 at 3-4; Tr 30.
13. Tr 29-30.
14. Ap Ex A; Ap Ex B.
15. Tr 17.
16. Govt Ex 2.
17. Neither 10 U.S.C. § 986 nor DOHA OI No. 64 defines "a meritorious case."
18. Tr 24-25. Although Applicant's prison sentenced was suspended, he was jailed at the time of his arrest on a Friday night and remained in jail until the following Tuesday.
19. Tr 18.
20. Tr 21-22.
21. Tr 23-24.
22. Tr 34.
23. Tr 25-26.
24. Tr 22.
25. Govt Ex 2 at 1-2; Tr 22-23.
26. Govt Ex 2 at 1.