

DATE: May 12, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00998

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 51-year-old engineer was convicted of the importation of 1.65 ounces of heroin more than 30 years ago, in 1972, and was sentenced to 5 years, suspended for 4 ½ years. He had no prior criminal problems of any kind and has had none since. He has provided substantial evidence of a productive and law-abiding life for three decades. However, the conviction and sentence do come within the scope of 10 U.S.C. 986, which prohibits the granting of a security clearance to anyone with such a conviction and sentence. I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

STATEMENT OF THE CASE

On September 23, 2002, 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 October 16, 2002, 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 November 25, 2002. A Notice of Hearing was issued on January 9, 2003 and the hearing was conducted on January 22, 2003. The transcript was received at DOHA on January 30, 2003.

FINDINGS OF FACT

Applicant is a 51-year-old engineer. The SOR contains two allegations under Guideline J, one alleging a specific criminal conviction, and the other alleging the applicability of a Federal statute. In his response, Applicant admits the first allegation, with an explanation, and adds a contention that the second allegation not be applied in his case.

After considering the totality of the evidence derived from Applicant's testimony and the hearing and post-hearing exhibits submitted by both parties, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

1.a. - Applicant was indicted on or about June 21, 1972, and charged with importation of heroin into the United States, in violation of 21 U.S.C. 952(a), 960(a), and 960(b)(1). He pleaded guilty, and was sentenced to imprisonment for five years, suspended for four years and six months, and placed on six years probation. On May 4, 1976, the court discharged him from probation, and set aside the conviction, pursuant to 18 U.S.C. 5021(b) (Government's Exhibits (GX) 1 - GX 8). Applicant admits the accuracy of this allegation (Tr at 23). The Trial Judge characterized the amount as "not a lot of heroin, 1.65 grams . . . [but] it was serious because there were 23 capsules" (Tr at 40). Applicant paid about \$200 for the capsules (Tr at 42).

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. 10 U.S.C. 986 also states that the Secretary of Defense or the Secretary of one of the Military Services can waive the prohibition in meritorious cases (GX 1 - GX 8, and GX 9).

Applicant received positive letters of support from seven individuals, including fellow employees and supervisors, the pastor and members of his church, and his parents (Applicant's Exhibits (AX) A - F).

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 may be disqualifying include:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses. [\(1\)](#)

Conditions that could mitigate security concerns:

1. The criminal behavior was not recent, having occurred some 30 years ago;
2. The criminal activity alleged was an isolated incident (GX 1, GX 3, GX 4, GX 5, GX 6, and GX 7);
6. There is clear evidence of rehabilitation (GX 1 - GX 8, and AX A - F).

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 Directive's "whole person" concept, I am 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 or work life, 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 Directive 5220.6, a federal statute, 10 U.S.C. 986, imposes restrictions that, among other things, prohibit granting a clearance to anyone who has been convicted and sentenced to more than one year. The only exception is that the Secretary of Defense or Secretary of a Military Service 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, and the proven misconduct in turn establishes a nexus or connection with Applicant's security clearance eligibility. Applicant admits the applicability of 10 U.S.C. 986 (Tr at 10, 11).

The totality of the evidence, including Applicant's admissions and explanations, establishes the validity of SOR 1.a., which shows criminal activity in 1972, when Applicant was 21 years old. He is now 51 years old. The circumstances leading up to Applicant's criminal conduct suggest the exercise of immature judgment on his part (Tr at 23, 24, and GX 6, a sworn statement he provided in 1984). In 1992, he stated that he had traveled across the border into Canada, visited several pubs, and accepted an offer from another party to buy some heroin. He accepted the offer in hopes that he could resell the heroin in the United States and make enough money to finance another trip he wanted to take (GX 4, a National Agency Questionnaire, dated May 18, 1992). Other than this one serious indiscretion, Applicant appears to

have lead an exemplary life. Besides his own testimony at the hearing (Tr at 24, 25, 27 - 37), he has independently established the positive nature of his life over the years that followed his conviction (GX 2, GX 4, GX 6, GX 7, and AX A - F).

Applicant entered college in 1975 and graduated in 1979. He was then hired in 1980 as a manufacturing engineer, and has been so employed up to the present (GX 2). A Personnel Security Questionnaire he completed on November 14, 1983 (GX 7) contains a citation of his 1972 felony conviction. He was nonetheless granted a Department of Defense security clearance on March 20, 1984, at the request of his present employer (GX 4). There is no evidence of any subsequent criminal or personal misconduct.

The writer of AX A is employed by the same defense contractor as a managing Engineer. He has known Applicant for 13 years, at work, at church, and in community activities, such as remodeling houses for homeless mothers. He views Applicant as a "hard working, highly motivated, ethical employee."

The writer of AX B was the pastor of Applicant's church and has known him for almost 20 years. He views Applicant as "reliable and regular in keeping his commitments to family, church, and community. I know he would be so in the work place also." The writer of AX C has known and worked with Applicant since 1998. He views Applicant as "always exhibit[ing] the highest character, . . . a hard worker, determined and persistent in his work habits," and a man who is "honest and upright, a 'model citizen' in all respects."

The writer of AX D views Applicant as "an honest, noble man [who] has been a great friend for over 20 years." His present church pastor has known him for 15 years and views him as an "honest, trustworthy, and faithful person" (AX E). Finally, his parents knew about his drug conviction when he was 20 and have seen him grow into a responsible husband and father of three, whose qualities have led his employer to "reward him with jobs of leadership and a great deal of responsibility" (AX F).

Mitigation

The totality of the record evidence indicates that Applicant's single serious act of criminal conduct comes within Disqualifying Conditions 1 and 2. I conclude, however, that this offense, 30 years ago, was an aberration at the time it occurred. His conduct and accomplishments over the past 30 years support the premise that this conclusion is still valid. In context, his criminal conduct is definitely not "recent" (Mitigating Condition (MC) 1); it was/is an isolated incident (MC 2); and there is "clear evidence of successful rehabilitation" (MC 6). *See, also* Tr at 49, 51.

However, his conviction for importation of heroin in 1972 and sentence to imprisonment for more than one year brings this matter within the scope of 10 U.S.C. 986. Consequently, and based solely on the applicability of 10 U.S.C. 986, I find that Applicant is ineligible to hold a security clearance.

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.

I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

BARRY M. SAX

ADMINISTRATIVE JUDGE

1. I find that the importation of heroin conviction qualifies as a serious crime.