

DATE: May 16, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-03496

## **DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Catherine Engstrom, Esquire, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Fifty-one year old Applicant's 1974 arrest for Sale of Cocaine, Possession of Cocaine, Conspiracy to Sell Cocaine, and Possession of Marijuana, when he was 22-years old, and his subsequent conviction, following a plea agreement, of Sale of Cocaine, led to a sentence of imprisonment for three years. The clear evidence of successful rehabilitation, and the absence of any subsequent criminal conduct, would normally mitigate the government's security concerns. However, the application of 10 U.S.C. § 986 disqualifies him from such eligibility. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is recommended.

### **STATEMENT OF THE CASE**

On October 22, 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 modified, 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 of Reasons (SOR) to Applicant which 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 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 November 18, 2002, but notarized the following day, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record, in lieu of a hearing. Department Counsel submitted the government's written case on March 5, 2003. A complete copy of the file of relevant material (FORM) [\(U\)](#) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Any such submissions were due by April 18, 2003, and it appears he chose not to do so. The case was assigned to this Administrative Judge on May 8, 2003.

### **FINDINGS OF FACT**

Applicant has admitted the factual allegations pertaining to criminal conduct under Guideline J. Those admissions are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 51-year old employee of a defense contractor, and is seeking to retain a security clearance, a clearance held since 1985. <sup>(2)</sup>

Applicant has been involved in one criminal incident which occurred nearly 29 years ago. On March 11, 1974, when he was a 22 year old university student, Applicant was arrested and charged with Sale of Cocaine, Possession of Cocaine, Conspiracy to Sell Cocaine, and Possession of Marijuana. <sup>(3)</sup> Upon the advice of his attorney, Applicant entered into a plea agreement under which he would plead *nolo contendere* to Sale of Cocaine, and the other charges would be dismissed. <sup>(4)</sup> On March 31, 1975, he was convicted of the charge, a felony under the state law, <sup>(5)</sup> and the remaining charges were dismissed. <sup>(6)</sup> He was sentenced to three years in prison. <sup>(7)</sup> He was transported to the state correctional facility where he remained until February 2, 1977, when he was released on supervised parole. <sup>(8)</sup> He was released from parole in May 1977. <sup>(9)</sup>

Applicant had been an illegal substance abuser since about 1969-70, during his senior year in high school, when he commenced using marijuana on a weekly basis with friends. <sup>(10)</sup> He abstained during the following freshman year in college, but upon commencing his sophomore year, he resumed his former pattern of abuse. The frequency eventually increased to a twice weekly basis. <sup>(11)</sup> In the Spring of 1974, Applicant extended his illegal substance abuse by including Cocaine. <sup>(12)</sup> He used Cocaine on about a monthly basis using four or five lines each time. <sup>(13)</sup> His illegal substance abuse continued until his arrest. <sup>(14)</sup>

During the period of Applicant's illegal substance abuse, he routinely purchased marijuana and/or Cocaine from a part-time student and resold it "as an accommodation" to other students. <sup>(15)</sup> Unfortunately for Applicant, some of those "students" turned out to be undercover narcotics agents. <sup>(16)</sup> Several days after one of his Cocaine sales, he was "busted."

Applicant has vowed to never use any illegal substances in the future, and there is no evidence to rebut his contention that he had not engaged in illegal substance activities since his arrest. He has never undergone rehabilitation treatment or therapy for substance abuse. <sup>(17)</sup>

Applicant received his B.S. in Mathematics in March 1975, and has been employed by the same company (through mergers) since November 1979, where he now serves as a Senior Software Development Analyst. The quality of his performance has not been developed in the record. He has been married to the same woman since 1983, and has one son.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An Administrative Judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the Administrative Judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an Administrative Judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

**[Criminal Conduct - Guideline J]: 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;
- (3) conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.

**Conditions that could mitigate security concerns include:**

- (1) the criminal behavior was not recent;
- (4) the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;
- (6) there is clear evidence of successful rehabilitation.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *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*. The memorandum provides policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that precludes the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

- (1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;
- (2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));
- (3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or
- (4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may

authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicates that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of more than one year, regardless of the amount of time actually served."

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," <sup>(18)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this Decision, I have endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the Government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the Government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the Government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

### CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

With respect to Guideline J, the government has established its case. By his own admission, Applicant was a poly-substance abuser who, when he was a 22-year old university student, was arrested and charged with Sale of Cocaine, Possession of Cocaine, Conspiracy to Sell Cocaine, and Possession of Marijuana. Under the terms of a plea agreement, he pled *nolo contendere* to Sale of Cocaine, and the other charges were dismissed. He was sentenced to three years in prison. Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and DC E2.A10.1.2.3. (*conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year*).

It has been nearly 29 years since the criminal conduct of late 1974. Since that time, Applicant has not been involved in any additional criminal conduct. Those facts would seem to activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1. (*the criminal behavior was not recent*). Moreover, by virtue of his spotless record since the arrest, there is clear evidence of successful rehabilitation, thus activating MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). In addition, the appearance that his subsequent maturity and involvement in educational, family, and professional activities, seem to have eliminated the otherwise undeveloped motivating factors leading to his illegal substance abuse which are not likely to recur, activating MC E2.A10.1.3.4. (*the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*). A person should not be held forever accountable for misconduct from the past, especially the indiscretions of his early adulthood, when there is a clear indication of subsequent reform, remorse, or rehabilitation. Under other circumstances, I would conclude Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's case, and the allegation of the SOR would be concluded in favor of Applicant.

However, Applicant's criminal conduct in this regard also falls within 10 U.S.C. § 986. He was convicted in a state court of a felony crime and sentenced to imprisonment for a term of three years, a term which obviously exceeds the one year period envisioned in the law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of more than one year, regardless of the amount of time actually served. In this instance, Applicant was fortunate enough to have his prison term eventually reduced rather than actually served in its entirety, but that fact does not help him in this issue. Consequently, by virtue of 10 U.S.C. § 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegations 1.a. and 1.b. of the SOR, are concluded against Applicant.

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

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

#### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: 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. However, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

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Robert Robinson Gales

Chief Administrative Judge

1. The government submitted nine items in support of its contentions.
2. *See* Item 5, (Security Clearance Application (SF 86), dated March 14, 2001), at 8.
3. *See* Item 8 (Federal Bureau of Investigation (FBI) Record, dated June 7, 2001), at 4-5.
4. *See* Item 7 (Statement, dated June 6, 1985), at 2.
5. *See* Item 8, *supra* note 3, at 4.
6. *See* Item 7, *supra* note 4, at 2.
7. *See* Item 8, *supra* note 3, at 5. Despite the specific portion of the allegation in subparagraph 1.a. of the SOR that the sentence was "three years less one day," I can find no indication in the evidence, including the references made by Department Counsel in the FORM (at 2), that the sentence was for any period of time other than simply three years in prison.
8. *See* Item 7, *supra* note 4, at 2.
9. *Id.*
10. *Id.*, at 1.
11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*, at 2.

18. See Executive Order 12968, "*Access to Classified Information*;" as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (see Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (see Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (see Enclosure 2, Sec. E2.2.2.)