

KEYWORD: Criminal Conduct

DIGEST: After pleading guilty to a conspiracy to distribute cocaine and being sentenced to 18 months confinement in a federal facility in 1982, Applicant was granted a secret security clearance by the Department of Defense in June 1992. Since being granted a clearance, he has not done anything to violate the trust and confidence placed in him; he has worker hard and achieved considerable success in his chosen vocation. However, because he was sentenced to imprisonment for more than 365 days--20 years ago, Applicant is ineligible for security clearance under 10 U.S.C. 986 unless granted a waiver by the Secretary of Defense. Clearance is denied with a recommendation this case be considered for a waiver of 10 U.S.C. 986.

CASENO: 02-04949.h1

DATE: 10/23/2002

DATE: October 23, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-04949

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

After pleading guilty to a conspiracy to distribute cocaine and being sentenced to 18 months confinement in a federal facility in 1982, Applicant was granted a secret security clearance by the Department of Defense in June 1992. Since being granted a clearance, he has not done anything to violate the trust and confidence placed in him; he has worked hard and achieved considerable success in his chosen vocation. However, because he was sentenced to imprisonment for more than 18 months, Applicant is ineligible for security clearance under 10 U.S.C. 986 unless granted a waiver by the Secretary of Defense. Clearance is denied with a recommendation this case be considered for a waiver of 10 U.S.C. 986.

STATEMENT OF THE CASE

On April 11, 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 finding under the Directive that it is clearly consistent with the national interest to grant a security clearance for Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied or continued.

Applicant answered the SOR in writing on April 26, 2002, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on July 1, 2002. On July 26, 2002, a NOTICE OF HEARING was issued scheduling Applicant's hearing for August 13, 2002. The hearing was conducted on the scheduled date. The Government's case consisted of four exhibits and no witnesses. Applicant relied on his own testimony. A transcript (Tr.) of the proceeding was received on August 21, 2002.

FINDINGS OF FACT

The Statement of Reasons (SOR) alleges Applicant is disqualified from having a security clearance under 10 U.S.C. 986 because he was sentenced to serve 18 months in a federal prison in August 1982 following his plea of guilty to a charge of conspiring to distribute cocaine. Applicant admitted his involvement in drug trafficking prior to his 1982 arrest, and he admitted being sentenced to 18 months in federal prison for his criminal conduct. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 49-years-old and currently the executive vice president of a DoD contractor with 150 employees. He was granted a secret clearance in June 1992 while employed by a different DoD contractor--an employer for whom he had worked from March 1985 until April 1999. Applicant recently applied for a top secret clearance.

In April 1982 when he was 28-years-old, Applicant was arrested by the United States Drug Enforcement Administration and charged with conspiracy to distributed a controlled substance (cocaine), possession with intent to distribute cocaine, and distribution of cocaine. In August 1982, he pled guilty to the charge of conspiracy to distribute cocaine and the other two charges were dismissed. Applicant was sentenced to 18 months in a federal prison camp where he served 4 months and 17 days before being released in early January 1983.

The occasion of his arrest was not the first, or the only time, Applicant was involved in drug possession or sales. By his own admission, he had purchased, used and sold various illegal drugs (marijuana, cocaine, and Quaaludes) for "approximately 8 years" before he was arrested (Tr. 29)

--having purchased cocaine from the same individual on 12 occasions in the year preceding his April 1982 arrest (Tr. 24). After his arrest, Applicant did not deny his involvement in drug purchases, sales and use. However, he refused to disclose the names of others from whom he had purchased or to whom he had sold drugs, or to help the police set these individual up for arrest (Tr. 27). He explained that he had made the mistake in getting involved with drugs, and he did not believe it was right to avoid the consequences of that decision by helping the police set someone else up for arrest in the same way that he had been set up (Tr. 27-28, 44).

After being released from prison in early January 1983, Applicant remained on probation for five years. He admitted using cocaine a "couple of times" while on probation, most recently in 1985. Applicant attributes his drug use after serving time in prison and while on probation to still being "a little rebellious" (Tr. 31).

Applicant's "rebelliousness" apparently ended sometime in 1985 when he began working for Company X in State A. He started working for this company as a dispatcher in 1985, and in 1998, he was promoted to executive vice president (Gov. Exh. 1). When he was questioned by the Defense Investigative Service (DIS) in February 1991 as part of his background investigation, he fully disclosed his past involvement with illegal drugs (Gov. Exh 2). He testified there were questions at the time about his suitability to be granted a security clearance because of the felony conviction. (Tr. 7). Applicant believes he was granted his secret security clearance in June 1991 because two retired general officers had submitted statements on his behalf (Tr. 7, 34).

In June 1995, Company X relocated from State A to State B, and in October 1998, Company X filed for bankruptcy partly because of cost overruns associated with the move (Tr. 40-41). Applicant testified that at the time of the bankruptcy, he was retained by the owner (of Company X) and the court to dissolve the company "because of (his) credibleness, truthfulness, honesty, and work ethic" (Tr. 37). In April 1999, Applicant was hired by two investors to manage a new company, Company Y, which was started "from scratch," partly from the assets of Company X to provide the same services as Company X had provided before its bankruptcy and dissolution. Before recently stepping down to the position of executive vice president because of concerns about his ability to retain his security clearance in view of 10 U.S.C. 986, Applicant had served as president of Company Y since its beginning. He continues to be the highest paid employee of Company Y [\(1\)](#) (Tr. 49).

Applicant testified about how he has changed in the 20 years since his arrest and incarceration:

...I think over the last 20 years though, I have led an exemplary life. I have three children, which are all doing great - going to college. I have been very successful in business. I have been very involved with the military and the DoD over the years.... (Tr. 13-14)

...I don't think anybody hates drugs more than I do simply because I was involved with them and it took me a lot longer to get on track in life that it would have had I not. I have a family. I have three kids. I want them to grow up and be responsible adults and not have the problems I had when I was a kid.

I will tell you that I had my problem with drugs, but dealing in business over the years, I have dealt with a lot of people and I think I am the most honest, moral ethical person around. I watch what people do and totally disagree with it and I lead a straight and narrow life. I just don't believe in lying, cheating, stealing, drugs. Maybe that's why I got caught -it set me on a straight path (Tr. 32-33)

In addition to the above testimonial about his personal character traits, Applicant's reputation for honesty, integrity, and trustworthiness is established by the facts: he has been entrusted by investors to run a company with 150 employees and with more than \$50,000,000.00 in assets, and his efforts have been rewarded with a very generous salary.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decisions with reasonable consistency which are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section E2.2 of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

CRIMINAL CONDUCT⁽²⁾

(Guideline J)

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:

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;

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.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the SOR. If the Government established its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant'

CONCLUSION

Having considered the record evidence in accordance with the appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guideline J. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E2.2., as well as those referred to in the section dealing with the Adjudicative Process.

A security concern is raised by Applicant's conviction of conspiracy to distribute cocaine, a felony, in August 1982. His commission of a single, serious offense creates doubt about his judgment, reliability and trustworthiness.

The criminal conduct represented by Applicant's drug trafficking at the time of, and prior to his April 1982 arrest for conspiring to distribute cocaine, possession with the intent to distribute cocaine, and distribution of cocaine, is unlikely to recur. While Applicant's drug use and his involvement in the sale and distribution of illegal drugs is reprehensible, he served the prison term to which he was sentenced--except for that portion of his sentence that was set aside by the court, and more than 20 years have passed since his arrest and incarceration. Except for using marijuana on two occasions while on probation--most recently in 1985, Applicant has led an exemplary life as a law abiding and productive member of society. He has not used any illegal drugs since 1985 and he has never been involved in any other illegal activity. And even after being fully informed about all the details of his drug involvement and arrest, the U.S. Department of Defense found him to be reliable and trustworthy, and it granted him a secret security clearance in June 1992. If commission of a crime creates doubt about an individual's judgment, reliability and trustworthiness, Applicant

has erased that doubt and his successful rehabilitation is evidenced through the trust and confidence placed in him by the investors who hired him to manage their startup company in April 1999.

The Government has directed attention to Applicant's refusal to provide the names--of the individuals from whom he had purchased and to whom he had sold drugs prior to his arrest--to law enforcement officials at the time of his arrest. Applicant explained he had made the mistake of becoming involved with drugs, and he did not believe it was right to avoid the consequences of that mistake by helping the police to do to someone else what he believed someone had done to him. While drug use and drug trafficking are serious problems, Applicant's position of accepting full responsibility for his misconduct is not necessarily unethical or immoral. **Not** doing to others what you would **not** have them do to you, is not inconsistent with the Golden Rule of "Doing unto others what you would have them do unto you." Moreover, the morality, ethical conduct, and personal responsibility Applicant has demonstrated in the years since his arrest have been consistent with the stance he assumed when he was asked to provide the names of his associates in the drug culture. This fact obviously influenced the Department of Defense in its decision to grant Applicant's security clearance in 1992. He has not participated in any activity since that date that would warrant the revocation of that decision.

Finally favorable consideration has been given to the court's setting aside more than three-fourths of Applicant's 18-month sentence of confinement; he served only 4 months and 17 days of an 18 month sentence. While the setting aside of a significant portion of Applicant's sentence of confinement does not render 10 U.S.C. 986 inoperative, it does suggest the court was influenced by mitigating considerations in his case. I recommend further consideration of this case for waiver of 10 U.S.C. 986.

FORMAL FINDINGS

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

Paragraph 1 (Guideline J) AGAINST THE APPLICANT

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. Against the Applicant

DECISION

In light of all the circumstances presented by this case, it is not clearly consistent with the national interest to grant Applicant's security clearance. I recommend this case for further consideration of a waiver of 10 U.S.C. 986.

John R. Erck

Administrative Judge

1. Applicant testified his salary is \$175,000.00 a year.

2. The disqualifying and mitigating conditions for Guideline J are taken from the OSD Memorandum (dated June 7, 2001) implementing the restrictions on the Granting or Renewal of Security Clearances under the provisions of 10 U.S.C. 986.