DATE: April 28, 2003

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-06396

DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Robert J. Tuider, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Fifty-one year old Applicant's 1985 arrest (when he was 33 years old) for possession of a controlled substance (marijuana), to which manufacturing a controlled substance (marijuana) was added, and his subsequent conviction, upon his plea, of possession of a controlled substance (marijuana), with the additional charge being *nolle prossed*, led, in part, to a sentence of imprisonment for five years (four of which were suspended). The 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 not recommended.

STATEMENT OF THE CASE

On November 14, 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 December 4, 2002, Applicant responded to the allegations set forth in the SOR,[(1)] and requested a hearing. The case was initially assigned to Administrative Judge Roger Willmeth on January 30, 2003, but, due to caseload considerations, was reassigned to, and received by, this Administrative Judge on February 20, 2003. A notice of hearing was issued on February 20, 2003, and the hearing was held before me on March 19, 2003. During the course of the hearing, nine Government exhibits, five Applicant exhibits, and the testimony of one Applicant witness (the Applicant), were received. The transcript (Tr.) was received on March 26, 2003.

FINDINGS OF FACT

Applicant has admitted one factual allegation pertaining to criminal conduct under Guideline J (subparagraph 1.a.). That admission is incorporated herein as a finding of fact. He failed to address the remaining conclusory allegation (subparagraph 1.b.) And that failure is being treated as a denial of the allegation.

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 April 1990.(2)

Applicant was a marijuana abuser who commenced using the substance, out of curiosity-not peer pressure-in 1971, while he was a freshman in college.(3) For the first year of two he used marijuana approximately three times each week,(4) because "it felt good,"(5) but as he got older the marijuana did not appeal to him as much and his use tapered off before eventually increasing again.(6) Applicant has always known that use or possession of marijuana was illegal, but he believed it was a "bad law."(7)

Applicant has been convicted for one criminal incident, and it occurred nearly 18 years ago. In 1985, when he was 33 years old, Applicant received some marijuana seeds, at no cost, from a friend so he could plant them and grow enough marijuana for his personal use and the possible use of his friends.(8) He began cultivating about 20-25 marijuana plants on a farm near his residence.(9) The entire process, according to literature he had read, generally takes five or six months for the plants to mature.(10) Someone had apparently come across the plants (estimated as weighing approximately 60 pounds)(11) and notified the authorities who had the location staked out.(12) On September 7, 1985, during a police surveillance of the area, Applicant was arrested and charged with possession of a controlled substance (marijuana).(13) Upon a criminal information, the charge was modified, and he was also charged with manufacturing a controlled substance (marijuana).(14) In May 1986, upon his plea, Applicant was found guilty of the possession charge, and the manufacturing charge was *nolle prossed*.(15) He was subsequently sentenced to five years imprisonment in the county jail, with all but one year suspended, entered into a work release program, fined, and entered into supervised probation.(16)

In August 1986, nearly three months after his incarceration, upon a Motion for Reconsideration of Sentence,(17) the execution of the balance of the sentence was suspended and Applicant was released from jail and placed in supervised probation for a period of three years.(18) During his brief period of incarceration and work release, he returned from work when scheduled to do so and had no disciplinary reports submitted against him.(19)

After he had been arrested and charged, and while awaiting his trial, Appellant voluntarily attended drug counseling for six months.(20) While in counseling, he regularly underwent substance abuse testing.(21) Unfortunately, the record is silent as to the full description of the nature of the program, including the content and frequency of the program, whether it was in-patient or out-patient, or the qualifications of the staff.

Since his release from jail, Applicant has filled his life with work (he has been employed by the same government contractor since November 1989, and now holds the position of Engineering Tech III), community service, including service with the local volunteer fire department, and hunting and fishing.(22) The record is replete with accolades and letters of gratitude or appreciation, from a wide variety of sources. They characterize him as level-headed, dedicated, conscientious, very dependable, reliable, professional, and hard working. His performance evaluations generally rate his performance in the "excellent" category, the highest of five such categories.

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:

(E2.A10.1.2.1.) allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

(E2.A10.1.2.2.) a single serious crime or multiple lesser offenses;

(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.

Conditions that could mitigate security concerns include:

(E2.A10.1.3.1.) the criminal behavior was not recent;

(E2.A10.1.3.2.) the crime was an isolated incident;

(E2.A10.1.3.6.) 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 arine 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,"[(23)] 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 arrested and charged with criminal conduct in September 1985, when he was 33 years old. The original charge of possession of a controlled substance (marijuana) was modified, and he was also charged with manufacturing a controlled substance (marijuana). Upon his plea, Applicant was found guilty of the possession charge, and the manufacturing charge was *nolle prossed*. He was sentenced, in part, to five years imprisonment in the county jail, with all but one year suspended. 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*).

In addition to the DCs cited above, there is continuing substantial concern regarding Applicant's age and maturity (or lack thereof) at the time of the criminal conduct. An individual who was 33 years old when he was cultivating a relatively large quantity of marijuana for his own use as well as the possible use of his friends should have displayed significantly more maturity than he did. Furthermore, in disregarding the law pertaining to illegal drugs, including their use, possession, and manufacture, simply because he disagreed with the law, Applicant placed himself above the law.

It has been nearly 18 years since the criminal conduct of September 1985. Since that time, Applicant has not been involved an 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*), and arguably MC E2.A10.1.3.2. (*the crime was an isolated incident*), although the cultivation of the marijuana plants over a period of months would seemingly diminish the import of the MC. Also, by virtue of his spotless record since the incident, there is clear evidence of successful rehabilitation, thus activating MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). A person should not be held forever accountable for misconduct from the past when there is a clear indication of subsequent reform, remorse, or rehabilitation. Under other circumstances, I would conclude Applicant, through evidence of extenuation and explanation, successfully mitigated and overcame 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 crime and sentenced to imprisonment for a term of five 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 suspended and diminished rather than actually ordered and served for the full term, 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 do not 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. Moreover, I do not 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. Attached to Applicant's Response to SOR were a number of exhibits, including a Personnel Security Questionairre (SF 86), court records, financial records, statements, and employee performance evaluations. Such items are normally handled as separate exhibits rather than as part of the responsive pleadings, but they were accepted without objection being interposed by Department Counsel.

2. *See* Security Clearance Application (SF 86), dated August 18, 2000, at 6.

3. Tr., at 50-51.

4. Tr., at 50.

5. Tr., at 51.

6. Tr., at 52.

7. *Id.*

8. Tr., at 49.

9. Tr., at 35-36.

10. Tr., at 37.

11. Tr., at 36.

12. Tr., at 35.

13. *See* Government Exhibit 2 (Arrest Report, dated September 7, 1985).

14. *See* Government Exhibit 3 (Criminal Information, undated), at 1-2.

15. *See* Government Exhibit 4 (Commitment Record, dated May 20, 1986).

16. *Ibid.*

17. *See* Government Exhibit 5 (Motion for Reconsideration of Sentence, dated July 21, 1986). The Motion, prepared by Applicant's attorney, contained two erroneous statements in support of the Motion. For example, it stated Applicant had pled guilty to both counts, when, in fact, he had entered a plea of guilty to only one count; and it stated Applicant enjoys "the benefits of a Master's Degree," when, in fact, he had attended graduate school for only one semester and only had a Baccalaureate Degree. In this regard, *see* Tr., at 53-54.

18. *See* Government Exhibit 7 (Order for Probation, dated August 8, 1986).

19. *See* Government Exhibit 8 (Letter from County Sheriff, dated August 7, 1986).

20. *See* Government Exhibit 5, *supra* note 17, at 1-2.

21. Tr., at 39.

22. Tr., at 42.

23. *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.)