

DATE: August 22, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-28066

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Chief Deputy Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1988, Applicant was charged with violating a state controlled substances act by selling a relatively small amount marijuana. He was sentenced to four years incarceration that was then converted to four years probation. There is no evidence he has committed any criminal offense since that time. Clearance is granted.

STATEMENT OF THE CASE

On October 20, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. ⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed. Applicant submitted a sworn answer to the SOR that was received by DOHA on November 17, 2003, admitted he was convicted of violating a state controlled substance act, and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on February 9, 2004, that was mailed to Applicant on February 13, 2004. For unexplained reasons, no acknowledgment of receipt of the FORM was received by DOHA, so the FORM was again mailed to Applicant on July 7, 2004. Applicant acknowledged receipt of the FORM on July 14, 2004, and thereafter did not object to anything contained in the FORM or submit additional information for consideration within the 30-day time period provided to him. The case was assigned to me November 8, 2004. ⁽²⁾

PROCEDURAL MATTERS

SOR subparagraph 1.b. alleges Applicant is disqualified from having a security clearance granted or renewed by operation of 10 U.S.C. § 986 because he had been sentenced to more than one year in jail. Subsequent to issuance of the SOR, 10 U.S.C. § 986 was amended to impose the automatic disqualification only in those cases where the person was

actually incarcerated as a result of the sentence for not less than one year. Because Applicant was not actually incarcerated for more than one year, the automatic disqualification imposed by 10 U.S.C. § 986 no longer applies in this case.

FINDINGS OF FACT

Applicant's admission to the allegation in the SOR is incorporated herein. In addition, after a thorough review of the record evidence, I make the following findings of fact:

Applicant is a 43-year-old man who has been employed by a defense contractor as a structures mechanic since November 2001. He was previously employed by this same defense contractor in similar positions from August 1998 to March 1999, and May 1994 to May 1995. The employment interruptions appear from Applicant's answer to have been caused by layoffs. Between the periods of employment with the defense contractor, Applicant worked at a variety of jobs, including two periods of self-employment, with the exception of one stretch of unemployment between April and September 1999. Applicant previously worked as an instrument man for a surveying company from November 1988 to April 1994.

Applicant has been married since November 1998. He has a daughter who was born in April 1999, and a son who was born in September 2001.

Applicant was charged with feloniously violating a state controlled substance act in October 1988 by possessing and selling quantities of marijuana. Item 5 of the FORM indicates he sold 29.4 grams of marijuana on September 15, 1988, 123 grams of marijuana on September 22, 1988, and on October 24, 1988, he agreed to sell two ounces of marijuana that resulted in a search of his residence and the discovery of an undisclosed quantity of marijuana. The two sales appear to have been combined in a single warrant (No 88 W 12513), while the possession was charged in a different warrant (No 88 W 12808). Both warrant numbers appear on the final disposition report under accusation number 8990483, and while that document is unclear as to which incident Applicant pled guilty, the totality of the FORM strongly indicates he pled guilty to one or both of the sale of marijuana charges.

Applicant was sentenced to four years confinement on March 8, 1989. Although the general practice of the prosecuting attorney's office was to oppose defendants in drug sales cases being referred to a diversion program, the assistant district attorney responsible for Applicant's case stated in open court and on the record that he had no such objection in Applicant's case. Accordingly, rather than being confined for four years, Applicant was placed on probation for four years and directed to reside in a restitution and diversion center "until such time as has met the terms of his contract with the center." (Item 7) The FORM does not contain any information as to how much time Applicant actually spent residing in the center.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than

a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹¹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹²⁾

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. The evidence establishes he committed several drug offenses in 1988, and was convicted of at least one felony sale of marijuana. He was initially sentenced to four years incarceration, but, without objection from the prosecuting attorney, that sentence was converted to a term of probation. Disqualifying Condition (DC) 2: *A single serious crime or multiple lesser offenses* applies.

There is no evidence Applicant has committed any criminal offense since he was sentenced for the marijuana offense(s) in March 1989. To the contrary, the FORM discloses he has been gainfully employed since November 1988, with the exception of a single six-month period of unemployment after he was laid off by his present employer in March 1999. Further, Applicant is now married with two young children to raise. (MC) 1: *The criminal behavior was not recent*; and C 6: *There is clear evidence of successful rehabilitation* apply in this case.

Applicant has successfully mitigated the criminal case alleged against him. Guideline J is decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Due to the October 28, 2004 amendment of 10 U.S.C. § 986, DOHA imposed a moratorium on the issuance of any decision in which that section was alleged in the SOR. The moratorium was not lifted until August 3, 2005.
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id* at 531.
12. *Egan*, Executive Order 10865, and the Directive.