

DATE: May 5, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11609

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 58-year-old manager for a defense contractor was arrested, charged and/or convicted of drug -related offenses on four occasions between 1964 and 1975. He was sentenced to more than one year imprisonment on two occasions in 1975, and actually served 15 months. He has since then led a law abiding life, and has made significant contributions to his employer and community. He has demonstrated mature judgment, reliability, and trustworthiness for at least 27 years. However, the convictions and sentences 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. Clearance is denied.

STATEMENT OF THE CASE

On December 13, 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 January 15, 2003, 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 February 11, 2003. A Notice of Hearing was issued on February 26, 2003, and the matter was heard on arch 12, 2003. The transcript was received at DOHA on March 27, 2003.

FINDINGS OF FACT

Applicant is a 58-year-old manager employed by a defense contractor. He was first granted a DoD Security clearance in 1990 (GX 1).

Applicant admitted SOR allegations 1.a., 1.b., and 1.d. He denied SOR 1.c. and did not respond to SOR 1.e., which I will treat as a denial. After considering the totality of the evidence derived from Applicant's testimony and the exhibits submitted by both parties, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

1.a. - In December 1975, Applicant was arrested and charged with possession of a contraband substance with the intent to distribute. In March 1976, he pled guilty to possession of contraband substance, and was sentenced to three years imprisonment;

1.b. - On January 7, 1975, Applicant was arrested and charged with possession of marijuana, possession of marijuana for sale, and transportation of marijuana. He was found guilty and sentenced to 90 days incarceration, and 36 months probation. On June 7, 1976, his probation was revoked and he was sentenced to serve 2 to 10 years incarceration, to be served concurrently with his sentence as set forth in SOR 1.a., above. He actually served 15 months in a Federal Prison Camp (GX 3);

1.c. - On July 6, 1968, Applicant was arrested and charged with possession of marijuana, a felony. Although he denies this arrest, it is cited in the FBI Criminal Identification record (GX 5) and contains his full name, the city where the 1975 and 1976 arrests/conviction occurred, the offense being marijuana-related, and the notation that the subject was "released." Based on all of these common factors, I conclude that Applicant was arrested and charged as cited in this allegation;

1.d. - On July 7, 1964, Applicant was arrested and charged with forgery of a U.S. Treasury check. He was sentenced to 18 months probation and to pay restitution;

1.e. - The Findings of Fact as to SOR 1.a. and 1.b., above, bring this matter within the specific prohibition of 10 U.S.C. § 986, 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 provides that the Secretary of Defense or the Secretary of one of the Military Services may authorize an exception to this prohibition in meritorious cases.

Applicant began working for his present employer in April 1978, after graduating from college (GX 1 and AX A). Applicant has received consistently above average evaluations and ratings, including "outstanding" ratings during recent evaluations (AX B). He has been commended by his employer for his work with "inner city youth" (AX D at page 1). He was the subject of an impressive 1992 article in a major local newspaper, in which he discussed his difficult youth, what he learned from his experiences with drugs and the law, and what he tells the young people he speaks to (AX D at pages 2 - 4). Applicant's constructive efforts at work and in the community are documented as far back as 1988 (AX D at pages 5 - 13). In January 2003, he was the guest speaker at the graduation ceremony at a local technical college (AX D at page 14 and 15). He has received eight Certificates of Appreciation and similar awards at work and in the general community from 1993 to 2002 (AX D).

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.

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 doubts about a person's judgment, reliability, and trustworthiness.

Conditions that could raise security concerns and may be disqualifying include:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- 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;
- f. There is clear evidence of successful behavior.
- 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.

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. 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.

If the Government meets its initial burden of proof 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."

CONCLUSIONS

I have carefully considered all the evidence of record. The record clearly establishes the factual allegations in SOR 1.a - 1.d. Applicant was arrested for, charged with, and convicted of, the drug-related offenses alleged in SOR 1.a., 1.b., and 1.d, and was arrested and charged as alleged in SOR 1.c.

Applicant is a 58-year-old male (born 1944) who had problems with the law on four occasions between 1964 and 1975, when he was 20 to 31 years old. In each case, marijuana was involved and Applicant wound up spending about 15 months in Federal prison in 1975 - 1977. The record goes beyond establishing an absence of problems with the law over the past 27 years. Applicant has clearly turned his life around and has accomplished a great deal of good for his

employer and his community, including opening up his own life to public scrutiny by using himself as an example of how a troubled youth can become a productive and valued member of society.

While there is no question that Applicant committed the misconduct alleged in SOR 1.a - 1.d., there is also no question that the person he has become is not the person he was 27 years ago. Nothing in the record suggests that a risk exists that Applicant will relapse into the negative habits of his youth. Rather, I conclude that he will continue being a law abiding and productive member of society. Today, at 58, he enjoys the fruits of his long years of productive labor. His contributions to his company and his community are particularly noteworthy in that they began long before the present matter arose and have continued unabated for many years.

Under the Criminal Conduct guidelines, I conclude that while Disqualifying Conditions (DC) 1 and 2 are shown by the record, Mitigating Conditions (MC) 1 (criminal conduct not recent), and MC 6 (clear evidence of rehabilitation) are also established and outweigh the negative impact of Applicant's 27-year-old period of criminal conduct. Based on the totality of the record, I conclude that Applicant's criminal misconduct from 1964 to 1975 would not be of current security significance except for the fact that 10 U.S.C. § 986 is applicable.

Under that statute, however, Applicant is barred from holding a DoD security clearance because he was convicted and sentenced to imprisonment for a term exceeding one year, and in fact, served some 15 months. 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. - 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Factual support and reasons for the foregoing are set forth in **Findings of Fact** and **Conclusions**, *supra*.

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