

DATE: March 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-11661

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Richard Murray, Esq.

SYNOPSIS

Applicant engaged in serious criminal conduct, including drug use and distribution, for 16

years. He was twice sentenced to incarcerations of more than one year by state courts. Applicant, now 53 years old, has mitigated in part his criminal conduct and established himself as a law-abiding citizen and employee. By operation of law, the provisions of 10 U.S.C. § 986 preclude a grant of clearance, absent meritorious waiver by the Secretary of Defense. Clearance is denied. Waiver is not recommended.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. Under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued an undated Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive and 10 U.S.C. § 986. Applicant answered the SOR in writing on June 26, 2003, and elected to have a hearing before an administrative judge. The case was assigned to me on October 1, 2003. On October 9, 2003, DOHA issued a Notice of Hearing, setting Applicant's hearing for November 7, 2003. For good cause, an Amended Notice of Hearing was issued on October 29, 2003. On November 3, 2003, Department Counsel filed a motion to amend the SOR. On November 13, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the hearing, Department Counsel moved, pursuant to ¶ E.3.1.17 of DoD Directive 5220.6, to amend the SOR ⁽³⁾ to render it in conformity with the evidence admitted. Applicant did not object to Department Counsel's motion, and I granted the motion. Applicant acknowledged that even though his employer had filed with DOHA a Clearance Change Notification (Form 562), he and his employer wished to proceed with a hearing to determine his security worthiness because Applicant continues to need access to classified information. Applicant acknowledged DOHA'S jurisdiction to decide the matter of his security clearance and he waived his right to appeal DOHA's decision on the issue of jurisdiction. (Transcript at 18-20.) DOHA received the transcript (Tr.) of the proceeding on November 21, 2003.

FINDINGS OF FACT

The amended SOR contains ten allegations of disqualifying conduct under Guideline J, Criminal Conduct. The amended SOR also recites that Applicant's felonious conduct under Guideline J disqualifies him from a security clearance under 10 U.S.C. § 986. Applicant admitted the criminal conduct alleged in the SOR at subparagraphs 1.a., 1.b., 1.c., 1.e., and 1.i. (Answer 1-2.) He also admitted allegations 1.d., 1.f., 1.g., 1.h., and 1.j. in the amended SOR. (Tr. 63-65.) He offered evidence to mitigate his criminal conduct and requested that his case be considered for a waiver of 10 U.S.C. § 986. Applicant's admissions are incorporated as findings of fact.

Applicant is 53 years old. He has completed nearly two years of a college education and training courses in electronic communications. At present he is employed by a government contractor as a senior software engineer. He is divorced and has been in a spouse-like relationship with a woman for over 11 years. She, her brother, and Applicant's present supervisor attest to his sincerity, honesty, and reliability.

Applicant has a history of criminal activity. In 1971, at the age of 21, he was arrested and charged with felony abduction. The charge was later dismissed. In 1977, at the age of 27, he was arrested and charged with unauthorized use of an automobile. That charge was later dismissed. In 1979, Applicant was arrested and charged with writing a fraudulent check. He was found guilty and sentenced to \$100 in court costs.

Applicant began experimenting with drugs at age 19 or 20. He used marijuana in the early 70s and phencyclidine (PCP) frequently between 1975 and 1983. He also used cocaine, crack cocaine, hashish, LSD, and angel dust. He last used PCP in 1987, at the age of 37.

From 1975 to 1983 Applicant sold PCP and cocaine to others. In 1981 he was arrested and charged with distribution of PCP and conspiracy to possess PCP. He pled guilty to a lesser charge of possession of PCP and was sentenced to three years of probation. In 1982 he was arrested and charged with contributing to the delinquency of a minor. In 1982, while on probation for the possession of PCP, he was arrested and found guilty of breaking and entering and petit larceny. Two months later, he was arrested for distribution of PCP. He pled not guilty to the charge of distribution of PCP, but was found guilty. He was sentenced to five years incarceration on the distribution of PCP charge, five years incarceration on the breaking and entering charge, and 12 months in jail on the petit larceny charge. The court ordered the sentences to run consecutively for a period of 11 years. The sentence was stayed to confinement and Applicant was committed to a residential drug treatment facility.

Applicant was found guilty twice of violating his probation. In 1983, he was found guilty of violating the probation imposed for conviction of PCP possession and sentenced to confinement in the state penitentiary for five years. The court suspended the confinement sentence and placed Applicant on probation for a period of five years following his release from confinement for his conviction and sentence for distribution of PCP, breaking and entering, and petit larceny. In 1984 Applicant was found guilty of violating probation by leaving the residential treatment center to which he had been committed by the court, and it issued a warrant for his arrest. Applicant was apprehended and arrested in 1985 and sentenced to work-release for 12 months for violating his probation. He was released after one year and placed on supervised probation for a period of ten years. After five years of supervised probation, ⁽⁴⁾ he was placed on unsupervised probation for the remainder of his sentence.

Applicant admitted to flashbacks, memory loss, and hallucinations in the 1980s as a result of his long-term use of PCP. He admitted to overdosing on PCP and continuing to use the drug after recovering from treatment for overdosing.

The National Institute for Drug Abuse (NIDA) fact sheet on PCP states:

People who use PCP for long periods report memory loss, difficulties with speech and thinking, depression, and weight loss. These symptoms can persist up to a year after stopping PCP use. Mood disorders also have been reported. ⁽⁵⁾

In 1998 Applicant was diagnosed with third stage Hepatitis C. In 2002 he was counseled for depression relating to domestic problems. His present work assignment with his employer does not require a security clearance.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

A person who seeks access to classified information enters into a fiduciary relationship with the Government, predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nevertheless security worthy. The U.S. Supreme Court has held that the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan*, *supra*, at 531.

Criminal Conduct and 10 U.S.C. § 986

In addition to the policy guidelines discussed above, adjudicators must follow additional guidance on the granting or renewal of security clearances mandated by more recent legislative action. By Memorandum dated June 7, 2001, the Deputy Secretary of Defense promulgated policy guidance for implementing Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Chapter 49 of Title 10 of the United States Code by adding a new section, enumerated 10 U.S.C. § 986. In pertinent part, 10 U.S.C. § 986(1) provides that a person is disqualified from being granted a security clearance if "[t]he person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The Deputy Secretary's memorandum specifies that the provisions of 10 U.S.C. § 986(1) apply "to any DoD [Department of Defense] 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 inactive status, who is under consideration for the issuance or continuation of eligibility for access to classified information."

Attachment 1 to the Deputy Secretary's Memorandum of June 7, 2001, provides general guidance for DoD adjudicators charged with making determinations of an individual's suitability for a security clearance under 10 U.S.C. § 986. That guidance states that the disqualification from eligibility for security clearance under 10 U.S.C. § 986 applies to persons

with convictions in state courts, "with sentences imposed of more than one year, regardless of the amount of time actually served."

Also attached to the Deputy Secretary's Memorandum of June 7, 2001, are revised adjudication guidelines, originally promulgated by the Special Assistant to the President for National Security Affairs in March 1997, pursuant to Executive Order 12968, which pertain to criminal conduct. The Deputy Secretary's memorandum states that these adjudication guidelines have been revised to reflect 10 U.S.C. § 986.⁽⁶⁾

The adjudication guideline pertaining to the instant case is revised Guideline J, Criminal Conduct, which contains the following relevant disqualifying conditions:

- 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 sentence to imprisonment for a term exceeding one year [footnote omitted];

Conditions that could mitigate Guideline J 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 condition... c. ... 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.

CONCLUSIONS

Guideline J - Criminal Conduct; 10 U.S.C. § 986

In the amended SOR, DOHA alleged in subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.g., 1.h., 1.i., and 1.j. that Applicant had a history of criminal activity that raised security concerns under revised Guideline J, Criminal Conduct. Additionally, the amended SOR alleged that Applicant had been sentenced by state courts for prison terms of more than one year for criminal acts specified in subparagraphs 1.g and 1.j. Further, DOHA alleged in the amended SOR that, by operation of law, Applicant's criminal conduct, and the sentences imposed by State courts for that conduct, disqualified him from a grant of a security clearance absent a meritorious waiver by the Secretary of Defense.

The security concern under Guideline J is that an individual's history or pattern of criminal activity raises doubts about his judgment, reliability and trustworthiness. Directive, ¶ E2.A10.1.1.

Footnote 1 in revised adjudication Guideline J reads: "Under the provisions of 10 U.S.C. § 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition." An Administrative Judge may recommend that an applicant's case be considered or not considered for a grant of Secretarial waiver only if the Judge's decision to deny or revoke a clearance is based solely on the provisions of 10 U.S.C. § 986.

Allegations set forth in subparagraphs 1.a. through 1.j. of the amended SOR, and admitted by the Applicant, raise a concern under revised Guideline J that he lacks sufficient judgment, reliability, and trustworthiness to be entrusted with classified material. I am also obliged to review and evaluate Applicant's conduct under the adjudicative process

identified as the whole person concept. See ¶¶ E2.2.1.1-E2.2.1.9. Applicant's conduct was of a serious criminal nature, and it affected not only his life but the lives of those he influenced and those to whom he sold drugs that were potentially lethal in their effects. His conduct was carried out for a long period of time while he was an adult and fully aware of the consequences of his behavior. To his credit, Applicant has abandoned his criminal behavior and has built himself a positive life. Applicant's admissions of a history or pattern of criminal activity bring his conduct under disqualifying conditions **a.** and **b.** of revised adjudication Guideline J. His admission of allegations 1.g. and 1.j. of the amended SOR that he was arrested, convicted, and sentenced twice to more than one year of incarceration places his conduct under disqualifying condition **c.**

Applicant's criminal conduct, as alleged in amended SOR subparagraphs 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.h., and 1.i. occurred between 1971 and 1987, when he was between the ages of 21 and 37, and thus meets mitigating condition **a.** of revised Guideline J because it was not recent. However, mitigating condition **b.** of revised Guideline J does not apply, since the conduct was not an isolated incident but a pattern of many crimes perpetrated over a long period of time during Applicant's early and middle adulthood. The record indicates that Applicant has found a network of supportive family and friends and has established himself as a reliable employee. He has demonstrated persuasively that he is not likely to repeat his previous pattern of criminal conduct and he has successfully rehabilitated himself. Thus, mitigating condition **f.** applies to his Guideline J conduct as specified in allegations 1.a., 1.b., 1.c., 1.d., 1.e., 1.f., 1.h., and 1.i. The finding is for Applicant as to those allegations in the amended SOR.

Applicant's admitted criminal behavior under allegations 1.g. and 1.j. of the amended SOR falls within disqualifying condition **c.** of the revised Criminal Conduct Guideline J. Mitigating condition **g.** of revised Guideline J advises that disqualifying condition **c.** applies to allegations 1.g. and 1.j. of the amended SOR and thus precludes Applicant, by operation of law, from receiving a security clearance under these facts absent a waiver from the Secretary of Defense. The Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than one year. (10 U.S.C. § 986; revised Guideline J, disqualifying condition ¶ **c.** and mitigating condition ¶ **g.**) Applicant is subject to 10 U.S. C. § 986 by virtue of being sentenced by a state court to 11 years of confinement as a result of his convictions of distribution of PCP, breaking and entering, and petit larceny and five years of confinement for violating the terms of his probation in relation to his conviction and sentence for possession of PCP. The statute applies even though Applicant's sentences were suspended or not served in full. ISCR Case No. 01-13566 at 5 (App. Bd. Apr. 15, 2003). Under 10 U.S.C. § 986, I am required to find against Applicant on allegations 1.g. and 1.j. of the amended SOR.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J.: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: Against Applicant

DECISION

In light of all of 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. Clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. The motion, as proposed and as granted, provided for the amendment of allegations 1.d., 1.f., 1.g., 1.h., and 1.j. of the SOR.
4. During this time, Applicant went to live with a friend who was a drug user and used drugs again in early 1987. Applicant then acquired his own place to live, stopped using drugs, and has not used them since..
5. NIDA InfoFacts, PCP, at 1-2. ([Http://www.nida.nih.gov/Infofax/pcp.html](http://www.nida.nih.gov/Infofax/pcp.html)) Ex. 16, for official notice.
6. The revised adjudication guidelines modify Guideline H (Drug Involvement), Guideline I (Emotional, Mental, and Personality Disorders), and Guideline J (Criminal Conduct). The modified Guidelines reflect Department of Defense policy relating to 10 U.S.C. §986. The modified Guidelines identify disqualifying and mitigating conduct by alphabetical letters and not by the Enclosure 2 code of alphabetical letters and numbers found in DoD Directive 5220.6. (See, e.g., Guideline E disqualifying and mitigating conditions.) The policy promulgated in the revised adjudication guidelines changes DoD 5200.2-R, and, according to the July 7, 2001, memorandum of the Deputy Secretary of Defense, will be codified in the next revision of the regulation.