

DATE: October 1, 2003

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-12933

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was sentenced to two years in jail as a result of a conviction for assault in 1982. He was arrested in 1988 for possession of a controlled and dangerous substance and possession of a controlled and dangerous substance with intent to distribute, but the charges were dismissed. Applicant mitigated the criminal conduct security concerns, but is ineligible for access to classified information under 10 U.S.C. § 986. Clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 12 May 2003, DOHA issued a Statement of Reasons (SOR) under the applicable Executive Order⁽¹⁾ and Department of Defense Directive⁽²⁾ detailing the basis for its decision-failure to meet the criminal conduct (Guideline J) personnel security guideline of the Directive. Applicant answered the SOR in writing on 13 June 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 14 July 2003. On 3 September 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. DOHA received the transcript (Tr.) of the proceeding on 15 September 2003.

FINDINGS OF FACT

Applicant is now 47 years old. In 1982, Applicant was arrested and charged with assault on a man he found in bed with his wife. Tr. 15; Ex. 3 at 2. His sentence included a jail term of two years, suspended. Tr. 15. He subsequently divorced this woman. Tr. 16.

In 1988, Applicant was arrested and charged with possession of a controlled and dangerous substance and possession of a controlled and dangerous substance (cocaine) with the intent to distribute. Tr. 16. He was a passenger in a vehicle that had been stopped because the driver was weaving out of his lane. The police found 58.7 grams of cocaine under

Applicant's seat in the vehicle and paraphernalia associated with the manufacture of crack cocaine in the trunk. The charge was ultimately dismissed. Ex. 2. Applicant did not list this 1988 arrest on his security clearance application. He did list his 1982 arrest and conviction for assault. Ex. 1 at 8-9.

Applicant smoked marijuana on a regular basis from 1978 to 1992. Ex. 3 at 4. He smoked it approximately 20 times a year to relax. He also smoked marijuana at some time after completing his security clearance application in December 2000. Tr. 25.

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 (DC) and mitigating conditions (MC) 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.

CONCLUSIONS

In the SOR, DOHA alleged under Guideline J that Applicant was convicted of assault and received a sentence to imprisonment for two years, suspended (¶ 1.a.), arrested for possession of a controlled dangerous substance with intent to distribute (¶ 1.b.), and because of the sentence to imprisonment for two years is ineligible for a security clearance (¶ 1.c.). Under Guideline J, a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established by substantial evidence that Applicant was arrested for, and convicted of, assault, a serious criminal offense. DC 1, 2. However, the criminal behavior was not recent (MC 1) and the factors leading to the violation are not likely to recur (MC 4) because of his subsequent divorce. Finding is for Applicant on ¶ 1.a.

In ¶ 1.b., the SOR alleged Applicant was arrested for possession of a controlled dangerous substance and possession of a controlled dangerous substance with intent to distribute in State 1 "on or about August 21, 1998." Applicant denied the allegation and testified that he "didn't come here to get no clearance." Tr. 27. He wanted a hearing to contest the allegation that he had been arrested in 1998 in State 1. With Applicant's consent, the SOR was amended to reflect

Applicant's arrest in *1988 in State 2*. Tr. 6-8.

The Government established by substantial evidence that Applicant was arrested for, and charged with, possession of a controlled dangerous substance (cocaine), and possession of a controlled dangerous substance with intent to distribute. Allegations of criminal conduct may lead to disqualification from eligibility to possess a security clearance, even if the individual has not been charged or convicted. DC 1. Even if one were to conclude Applicant committed the offense, it is not recent. MC 1. In light of Applicant's admissions to other misconduct, and after observing his demeanor and listening to his denials to knowing the cocaine and paraphernalia were in the car, I am convinced he did not know of its presence in the car. Finding is for Applicant on ¶ 1.b.

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. 18 U.S.C. § 986. Applicant is subject to the provisions of 10 U.S.C. § 986 by virtue of being sentenced to two years in jail as a result of the assault conviction. The provisions of that statute apply even if the sentence to imprisonment was suspended and the applicant did not serve time in prison. ISCR Case No. 01-13566 at 5 (App. Bd. Apr. 15, 2003). Under the circumstances, I am required to find against Applicant on ¶ 1.c.

Having denied Applicant a security clearance solely as a result of the application of 10 U.S.C. § 986, I am required to include, without explanation, a recommendation as to whether the case should be favorably considered for waiver. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

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.: 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.

James A. Young

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.