

DATE: June 21, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-13687

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 51-year-old engineer was arrested and convicted of the sale of drugs in 1973 and again in 1975, when he was 21 and 23 years old. He was sentenced to more than one year imprisonment on each conviction and a probation violation, and actually served six months. He has not had any criminal problems for almost 30 years, has led a productive life, and has a solid work history, including possession of a DoD Security Clearance since 1987, with no problems. Adequate mitigation has been established under Criminal Conduct Guideline J. However, under 10 U.S.C. 986, Applicant's two convictions, probation violation, and sentences preclude me from granting or renewing his security clearance. Clearance is denied.

STATEMENT OF THE CASE

On April 18, 2003, 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 May 14, 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 matter was assigned to another Administrative Judge, but was reassigned to me on August 19, 2003, because of caseload considerations. A Notice of Hearing was issued on September 14, 2003, setting the hearing for September 18, 2003. At the hearing, the Government did not call any witnesses, but offered six exhibits, which were marked for identification and admitted as Government Exhibits (GX) 1-6. The Applicant testified, called two other witnesses, and offered two exhibits, which were marked and admitted as Applicant's Exhibits (AX) A and B. The transcript (Tr) was received at DOHA on September 29, 2003.

FINDINGS OF FACT

Applicant is a 51-year-old production specialist. The SOR contains four allegations under Guideline J (Criminal Conduct). In his response to the SOR, Applicant admits the factual allegations in SOR 1.a. - 1.c., pertaining to criminal conduct, and admits SOR 1.d. , with the argument that consideration should be given to a waiver of the 10 U.S.C. 986. Applicant's admissions are incorporated herein and are considered as Findings of Fact.

After considering the totality of the evidence derived from the contents of the case file, I make the following additional FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

1.a. - Applicant was arrested on April 25, 1973, in State A, on drug related charges. He was convicted of one count of Possession of Hallucinogens and one count of Sale of Hallucinogens. The sale was of 3/4 of an ounce of marijuana, sold at the request of an old school friend who had himself been arrested on drug charges and was working for the police. (Tr at 22, 23). He was sentenced to one year incarceration for Possession of Hallucinogens and 20-40 years incarceration for Sale of Hallucinogens, to run concurrently. The sentence was suspended and he was paced on probation.

1.b. - Applicant was arrested on June 25, 1975, in State A, and charged with Possession of Narcotic Drug-Heroin and Possession of Heroin for Sale. He was found guilty and was sentenced to two to fifteen years incarceration. The sentence was suspended and Applicant's probation was continued for a longer period. Applicant was visiting in a home when a drug transaction took place between the homeowner and an agent of the Drug Enforcement Agency (DEA). His involvement was actually being in a place where a drug sale had taken place, which was both a violation of probation from his earlier arrest and the basis for the new conviction.

1.c. - The conviction in SOR 1.b. violated his probation in the conviction alleged in SOR 1.a., above. As a result, Applicant was resentenced to 22 to 55 years incarceration, to run concurrently with the sentence in SOR 1.b., above, for violating his probation. Applicant was first incarcerated on the violation matter and then at another institution on the 1975 conviction. He actually served five months incarceration and was then released on five years probation.

1.d. - The sentences and convictions cited in SOR 1.a., 1.b., and 1.c., above, accurately reflect the record evidence. Pursuant to 10 U.S.C. 986(1), Applicant is prohibited from holding a DoD security clearance, unless the Secretary of Defense finds this case to merit consideration of a waiver of the statute.

After his release, Applicant voluntarily attended drug counseling and urinalysis monitoring at a drug abuse clinic, where he was "scared to death" (Tr at 25) by seeing heroin addicts coming in for methadone. "These people were empty . . . like walking zombies." (*Id.*). He continued this counseling even after he returned to college to obtain his degree. (Tr at 26). He obtained a DoD security clearance 10 years later, in 1985, after first inquiring of DoD whether his 1973 and 1975 convictions would bar him. They did not and he has had a clearance ever since. He leads a quiet life and pretty much keeps to himself. (Tr at 37). He finds his work very rewarding and it makes him "feel good that he is doing something for his country." (Tr at 38).

Applicant's work supervisor testified that she has known Applicant for eight years; that he is highly respected among his peers and with the DoD program managers; and he has been a valuable asset to the DoD programs on which he has worked. She is familiar with other employees who have had drug problems and has never seen any indication of Applicant having a problem. She "can't imagine that [Applicant] would lose his clearance and jeopardize our project for something he did when he was 20 and 21 years old. (Tr at 48). Applicant's two exhibits, from co-workers, speak equally highly of Applicant. (AX A and AX B). Applicant's brother was a college instructor and helped him get his first job after graduating from college. He knows all about Applicant's past and speaks highly of how far he has come in his life. (Tr at 42-44).

Applicant is 51 years old. The offenses cited above occurred 28 and 30 years ago, when he was 21 and 23. He accepted responsibility for the crimes and pleaded guilty in each case. Applicant subsequently graduated from college with an engineering degree and began his career. He has possessed a DoD security clearance since 1987, and has consistently disclosed his youthful criminal history to DoD. He has never had any problems relating to his possession of such a

clearance, which he retained as he changed jobs over the years

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

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

1. Any criminal conduct . . . ;
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

1. the criminal behavior was not recent;
2. The crime was an isolated incident; [\(1\)](#)
5. There is clear evidence of rehabilitation.

Other Policy Considerations

10 U.S.C. 986 precludes the granting or continuation of a DoD security clearance for anyone convicted of a crime and sentenced to more than one year imprisonment.

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

The facts of Applicant's two arrests and convictions, as alleged in SOR 1.a. and 1.b., and the violation of probation (SOR 1.c.) are undisputed, and are otherwise established by the record evidence. They occurred when he was 21 and 23 years old. All drug activity is serious and the sale of any drugs is even more serious, even though the amounts involved in the present case are not large. Applicant's explanations to the court in 1975 and 1976 suggest a level of emotional immaturity and a denial of risks and consequences that is not uncommon in someone of his age at the time. Clearly he did not learn the right lessons from his first arrest and conviction, since he allowed himself to be in a place where he should not have been. The fact that the original charge was "Conspiracy - Narcotics" and that the court imposed a relatively lenient sentence (GX 5) suggests that Applicant was not directly involved in the drug sale.

I conclude that Applicant drew the right conclusions and learned a hard lesson from his second arrest, conviction, and incarceration. Almost 30 years have passed since his youthful misconduct. There appear to have been no problems of any kind since then. It is hard to discern the troubled youth he was then from the mature man and valued employee he has become. The positive comments submitted on his behalf make a strong case for the premise that Applicant became a man of considerable integrity and good judgment, has been so for many years, and is unlikely to repeat his old mistakes of judgment.

Considered under the Disqualifying Conditions (DC) and Mitigating Conditions (MC) relating to Criminal Conduct, I conclude that while DC 1 and 2 are applicable, their current security significance is minimal because of the passage of some 30 years, without any recurrence of similar or other misconduct (MC 1); the repeated misconduct is not a single act, but is isolated in the sense of it's not having otherwise occurred in a life spanning 51 years (MC 2) and; finally, clear evidence of successful rehabilitation over a long and current period, as shown not only by the time that has elapsed, but by what he had done with his life, particularly as shown by the credible and consistent statements of others (MC 5). Overall, I conclude that the risk of recurrence is minimal. In the absence of other policy considerations, and considering the record evidence under the Directive's specific Disqualifying and Mitigating Conditions *and* the general guidelines applicable in all cases, allegations 1.a , 1.b., and 1.c. would have been decided in favor of Applicant.

There remains the issue of the applicability of 10 U.S.C. 986(1). That statute clearly applies to convictions and sentences such as those imposed on Applicant. Consequently, I conclude that 10 U.S.C. 986(1) is controlling and mandates a finding that Applicant is ineligible to hold a security clearance. I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

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

SOR 1.a. Against the Applicant

SOR 1.b. Against the Applicant

SOR 1.c. Against the Applicant

SOR 1.d. 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.

BARRY M. SAX

Administrative Judge

1. An "isolated incident" is generally taken to mean one time only. In context, I conclude that there are two incidents of criminal conduct, a year apart (1975 and 1976) which, while not a single act, are entitled to some weight under this condition since they were related and have not recurred for over 25 years.