

DATE: March 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-14722

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 43-year-old truck driver has been arrested and/or convicted of criminal violations on eight occasions between 1979 and 1995. Five occasions involved drugs and two resulted in sentences of more than one year's incarceration. Two other arrests involved acts of violence. Applicant has not established an increase in personal maturity to the extent that it can be considered adequate mitigation of his long criminal record, despite the passage of nine years since the last offense. In addition, the Smith Act, 10 U.S.C. 986, is applicable and precludes Applicant from holding a DoD security clearance. Clearance is denied.

STATEMENT OF THE CASE

On July 2, 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 July 26, 2003, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made by a DOHA Administrative Judge on the written record, i.e., without a hearing. Department Counsel issued a File of Relevant Material (FORM) on December 12, 2003. The Form instructed Applicant that any response to the FORM had to be submitted within 30 days of its receipt by Applicant. Any response was due by January 28, 2004, but no submission to the FORM was received. The matter was assigned to me for resolution on March 5, 2004.

FINDINGS OF FACT

Applicant is a 44-year-old facility security officer for a defense contractor. The July 28, 2003 SOR contains nine

allegations under Guideline J (Criminal Conduct) 1.a. - 1.h., all pertaining to criminal arrests and/or convictions, and 1.i., which alleges the applicability of 10 U.S.C. 986. In his July 26, 2003 response to the SOR, Applicant *admits* SOR allegations 1.a. - 1.h. Applicant neither admitted nor denied allegation 1.i., which I consider to be a denial. In an additional page in his response, Applicant discusses his criminal history but does not deny any of the allegations. The admitted allegations are incorporated herein as Findings of Fact.

After considering the totality of the evidence derived from the FORM and its attachments, including Applicant's responses to the SOR, I make the following specific FINDINGS OF FACT as to the status, past and present, of each SOR allegation:

Guideline J (Criminal Conduct)

Applicant was arrested and/or convicted on the following dates for the cited violations:

1.a. - April 12, 1995 - Arrest for Possession of Amphetamine with Intent to Distribute. On September 22, 1995, he was acquitted because of "insufficient evidence" (Item 7).

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1.b. - May 23, 1992 - Arrest for misdemeanor Domestic Violence/Battery;

1.c. - March 2, 1988 - Arrested and charged with Distribution of a Controlled Substance and Possession of a Schedule I-V Narcotic. On June 15, 1998, he was found guilty and sentenced to 60 days confinement for Distributing a Controlled Substance; one to three years confinement for Distribution or Possession of ethamphetamine, and 18 months confinement to be followed by 46 months probation for Distribution of a Controlled Substance.

1.d. - March 28, 1988 - Arrested and charged with Distribution of a Controlled Substance and Possession of a Schedule I-V Narcotic. Both charges were dismissed prior to trial because Applicant had been convicted in the 1987 case (1.e.).

1.e. - November 13, 1987 - Arrested for (1) Possession of Marijuana, (2) Possession of Amphetamine with Intent, (3) Possession of Paraphernalia, (4) Possession of Stolen Property over \$250, (5) Possession of Stolen Firearm, and (6) five counts of Possession of Controlled Substance. These charges were combined with Applicant's March 2, 1988 arrest (SOR 1.c.) and he was sentenced to six years incarceration.

1.f. - October 13, 1986 - Arrested for Possession of Controlled Substance. On November 15, 1986, the charge was dismissed. The reason is not given in the FBI Criminal History (Item 7).

1.g. - April 8, 1986 - Arrested and charged with Aggravated Assault.

1.h. - March 10, 1979 - Arrested and charged with Selling or Giving Liquor to Minors. He was convicted and fined \$25 (Item 7)

1.i. - The facts established by the evidence supporting allegations 1.c. and 1.e. disqualify Applicant from receiving or maintaining a DoD security clearance, pursuant to 10 U.S.C. 986, subject only to a finding by the Secretary of Defense that this is a meritorious case for a waiver.

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.

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. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable financial judgment and conduct. Because Applicant chose to have this matter decided without a hearing and without submitting any additional information in response to the FORM, all credibility determinations and findings of fact are necessarily based entirely on the contents of the FORM and applicant's response.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE F (Criminal Conduct)

Conditions that could raise a security concern and may be disqualifying include:

1. Any criminal conduct, regardless of whether the person was formally charged;
2. A single serious crime or multiple lesser offenses.

Condition that could mitigate security concerns include:

1. The criminal behavior was not current

Pursuant to 10 U.S.C. 986, the initial granting or continuation of a DoD security clearance is prohibited if the individual: "(1) has been convicted in any court of the United States [to include state courts] of a crime and sentenced to imprisonment for a term exceeding one year. . . The Secretary of Defense may authorize a waiver of the prohibition . . . in meritorious cases."

The 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 "whole person" concept required by the Directive, the Administrative Judge is 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, here based solely on the written record. In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves 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

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file, the latest of which is Applicant's response to the SOR.

Applicant is a man of 43, born in 1961. He claims no recollection of the 1979 arrest (1.h.) and believes someone else was involved. Likewise, as to the April 1986 arrest (1.g.), Applicant has no recollection of the offense, which occurred during a period when Applicant was breaking up with his wife (Item 6, a sworn statement of February 2002). As to the October 1986 arrest (1.f.), Applicant says that the matter was dismissed because the police had no probable cause to stop the vehicle Applicant was driving, but he does not deny his possession of drugs. In addition, he admits becoming a substantial drug user, and remembers the other arrests and convictions (Item 6).

The record shows eight arrests between March 1979 and April 1995. Of the eight, two resulted in convictions and sentences of more than one year incarceration (SOR 1.c. and 1.e.), bringing this case squarely within the prohibition found in 10 U.S.C. 986 (1). Although not separately alleged as such, five of the eight arrests involved illegal drugs and two involved acts of violence.

Applicant understands the Government's concerns with his past criminal conduct, but argues it really ended in 1988. He contends that the 1995 matter occurred when Applicant happened to be in a car with his wife and brother when his brother committed a crime without Applicant knowledge or involvement. The record indicates that Applicant was acquitted of this charge because of insufficient evidence, presumably that Applicant did not know what his brother was doing. In fact, Applicant stated that his brother told the police Applicant was not involved, resulting in his acquittal and that of his wife.

In DOHA cases, the standard is whether it is clearly consistent with the national interest to allow Applicant access to the nation's secrets and the ultimate burden is always on the Applicant to establish his eligibility, and not on the Government to prove he is not eligible. Evaluating the totality of the evidence, I construe Applicant's "I admit" to SOR 1.a., which alleges a 1995 arrest, to admit the fact of the arrest and not to the knowing possession of the cited drugs. The acquittal occurred as a result of the granting of a Rule 29 motion, which means, in essence, that the Judge found as a matter of law that the evidence did not suggest guilt to the level that a jury could reasonable have found him guilty. On this basis, I conclude that the Government has not proven its case as to SOR 1.a., even under the lower standard of proof applicable in security clearance cases. SOR 1.a. is therefore found for Applicant. As to the other allegations, however, the Government has proven its case and each allegation is found against Applicant.

In summary, I conclude that Applicant was knowingly involved in criminal activity in the seven criminal incidents that occurred from 1979 to 1992. Consequently, Disqualifying Conditions (DC) 1 (any criminal activity) and DC 3 (a single serious crime or multiple lesser offenses) are all applicable. While the last proven criminal activity was in 1992, some 13/14 years ago, the nature and scale of the criminal conduct minimizes the positive effect of the passage of time. In any case, it is not yet clearly established that Applicant can be relied upon to avoid repeating his past mistakes.

In this context, I conclude that Disqualifying Conditions 1 and 2 are applicable. I also conclude, however, that while Mitigating Condition 1 (behavior is not recent) is applicable, it does not outweigh the negative impact of the totality of the evidence against Applicant. Consequently, without reference to 10 U.S.C. 986, the evidence compels a finding against Applicant.

I also find that 10 U.S.C. 986 (1) is applicable and is an independent basis for a finding that Applicant is not eligible 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 F (Criminal Conduct) Against the Applicant

Subparagraph 1.a. For the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. Against the Applicant

Subparagraph 1.f. Against the Applicant

Subparagraph 1.g. Against the Applicant

Subparagraph 1.h. Against the Applicant

Subparagraph 1.i. Against the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent
nnnnnnwith the national interest to grant or continue a security clearance for Applicant.

BARRY M. SAX

ADMINISTRATIVE JUDGE