

DATE: January 8, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-17623

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

This 48-year-old systems programmer was arrested and convicted of possession of heroin for sale in 1975 and again in 1976, when he was 20 and 21 years old. He was sentenced to more than one year imprisonment on the second matter, *and* for violation of probation on the first matter. He has not had any criminal problems for the last 27 years, has led a productive personal and family life, and has a solid work history, including possession of a DoD Security Clearance since 1992, with no problems. Adequate mitigation has been established under Criminal Conduct Guideline J. However, as to SOR 1.c., which cites 10 U.S.C. 986, Applicant's two convictions and sentences (SOR 1.a. and 1.b.) preclude me from granting or renewing his security clearance. Clearance is denied.

STATEMENT OF THE CASE

On March 28, 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 April 22, 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 June 24, 2003, because of caseload considerations. A Notice of Hearing was issued on August 8, 2003, setting the hearing for August 26, 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, and offered three exhibits, which were marked and admitted as Applicant's Exhibits (AX) A-C. At Applicant's request, the record was kept open after the hearing to allow her to obtain and submit additional documentation. Applicant timely submitted a package of 19 additional documents, which have been marked and admitted as AX D1-D19. The transcript

(Tr) was received at DOHA on September 8, 2003.

FINDINGS OF FACT

Applicant is a 48-year-old systems engineer for a defense contractor and has been employed by this company since 1995. He has held a DoD security clearance since 1992. The SOR contains three allegations under Guideline J (Criminal Conduct). In his response to the SOR, Applicant admits the factual allegations 1.a. and 1.b., which refer to arrests and convictions in 1975 and 1976, respectively. These 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 in January 1975 and charged with Possession of Heroin and Possession of Heroin for Sale. He was sentenced to, and served, four month's incarceration in a county jail. He paid a fine of \$500.00, and a surcharge of \$50.00. No sentence of any additional incarceration was imposed at the time; it was suspended for a period of four years. During that time, Applicant would be on probation, during which he was to comply with the court's other conditions, including that he be a law-abiding citizen. (GX 1 at page 56, 111). In 1976, Applicant was again arrested and convicted for the same type of offense (alleged in 1.b.), as a result of which he was found to be in violation of probation from his 1975 conviction, and was sentenced to three to five years imprisonment, to run concurrent with the sentence for his 1976 conviction. (GX 2 at 126-130). He actually served about two years.

1.b. - Applicant was arrested in June 1976, and charged with Possession of Heroin and Possession of Heroin for Sale. He was found guilty and was sentenced to a period of incarceration of from three to five years. His release date was July 1978 (GX 2 at 129-132). He actually served about two years (Tr at 21).

1.c. - The convictions and sentences to more than one year, cited in SOR 1.a. and 1.b., above, disqualify the Applicant from holding a security clearance, except that the Secretary of Defense may grant an exemption in a meritorious case.

The Governor of his state issued a Proclamation of Pardon to Applicant on June 18, 1986. The Proclamation noted Applicant had "led an exemplary life in his community, and has fulfilled the responsibilities of a law-abiding citizen since 1978." (GX 3 and AX A). Applicant received a B.S. in Computer Engineering in 1991 (AX B). The security officer of Applicant's company has worked with Applicant for eight years and views him as a conscientious, dedicated and completely trustworthy individual, who has demonstrated exemplary conduct (AX C).

The 18 post hearing documents submitted by Applicant are either letters of recommendation or performance appraisals covering 1998-2003. All 18 documents contain highly positive information about Applicant and are given considerable weight. In his previous application for a DoD security clearance in 1992, Applicant did cite and discuss the 1975 and 1976 arrests and convictions. (Tr at 45).

Applicant has never sought to hide the mistakes of his youth. The official records show that Applicant took responsibility for his actions (GX 1 and 2 and TR at 17). He has been married for 22 years, has two children and three grandchildren. His wife has a serious medical problem, which requires a great deal of attention from Applicant. (Tr at 18). He began his work career as a laborer, discovered a talent for technical drawing, and worked his way up to his present position after going back to school for additional training and a degree in computer engineering at the age of 36. (Tr at 33).

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

Applicant is a 48-year-old man, naturalized as a six-year-old child in 1961, after being adopted abroad. His parent were/are native borne Americans, as are his wife and children. He was raised and educated here and graduated from college in 1991. He has been with his present employer since 1995 and has held a DoD security clearance since 1992.

He appears to have had no other security-significant problems, legal, alcohol, drug, financial, or otherwise.

The fact of Applicant's two arrests and convictions, as alleged in SOR 1.a. and 1.b., are undisputed, and are otherwise established by the record evidence. They occurred when he was 20 and 21 years old. All drug activity is serious and possessing drugs for sale to others 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, in 1975, since he went out and did it again, with the help of an equally immature friend. Just as clearly, however, he appears to have drawn the right conclusions from second arrest, conviction, and incarceration. (Tr at 20-23). Twenty seven years have passed since 1976, and it is hard to discern the troubled youth he was then from the husband, father, valued employee, and holder of a security clearance for 10 years that he has become. The number of positive statements and evaluations submitted on his behalf make a strong case for the premise that Applicant became a man of considerable integrity and good judgment and has been so for many years.

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 so long a period of 27/28 years, without any recurrence of similar or other misconduct (MC 1); the once repeated misconduct is not a single act, but is isolated in the sense of its not having recurred in a life of 48 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 both the specific Disqualifying and Mitigating Conditions and the general guidelines applicable in all cases, allegations 1.a and 1.b. would have been decided in favor of Applicant.

However, there remains the issue of the applicability of 10 U.S.C. 986(1), as alleged in SOR 1.c. That statute 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

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.