

DATE: October 26, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21013

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Claiborne S. Newlin, Esq.

SYNOPSIS

Between 1971 and 1997, Applicant had numerous run-ins with the law. However, he was last convicted in 1993. Applicant mitigated the criminal conduct security concerns, but is prohibited from holding a clearance absent a waiver from the Secretary of Defense. 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 28 July 2003, DOHA issued a Statement of Reasons⁽¹⁾ (SOR) detailing the basis for its decision—security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 26 August 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 30 July 2004. On 24 August 2004, 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 hearing transcript (Tr.) on 2 September 2004.

RULINGS ON PROCEDURE

Prior to the hearing, over the objection of Applicant's counsel, I granted Department Counsel's motion to amend the SOR. The notice of the motion to amend was served on counsel by mail on 20 February 2004. Applicant's attorney answered on 1 March 2004.

FINDINGS OF FACT

Applicant is a 53-year-old engineering technician for a defense contractor.

Applicant served in the U.S. Navy from September 1969 to January 1971, during which time he held a security clearance. During his naval service, he used marijuana. About January 1971, Applicant was apprehended by military

authorities for selling hashish to another military member and spent between 30 and 40 days in pretrial confinement. Ex. 8 at 3; Ex. 2 at 1-2. In January 1971, Applicant was discharged prior to the expiration of his term of service. He received an undesirable discharge that was upgraded in 1980 to a general discharge under honorable conditions.

In May 1973, Applicant was charged with selling marijuana and LSD. Applicant pled guilty to selling the marijuana and not guilty to selling the LSD. He was convicted of both and given a five year prison term for each offense, to run concurrently. The order to serve the confinement was stayed and Applicant was placed in a work release program for one year and put on probation for three years.

In October 1973, Applicant was arrested and charged with battery. The charge was dismissed.

In 1979, he was arrested for possession of marijuana. Applicant pled not guilty and was acquitted.

Applicant was hired by his current employer in August 1983. On 26 August 1983, Applicant submitted a security clearance application (SCA) in which he certified that all entries were "true, complete, and accurate to the best of [his] knowledge and belief," and acknowledged that a "knowing and wilful false statement" could be punished as a violation of 18 U.S.C. § 1001. Question 14a asked if he had ever been arrested, charged, cited, or held by Federal, state, or local law enforcement regardless of the disposition of the case. Question 14b asked if he had ever been convicted of any offense. Question 14c asked if he had ever been detained in or served time in any jail, prison, or institution under the jurisdiction of an city, county, or state. Question 15a asked if Applicant had ever used marijuana or hashish, except as prescribed by a licensed physician. Applicant answered "no" to each question. *Id.*

Applicant was interviewed by a Defense Investigative Service agent concerning his failure to note his arrests, convictions, and his illegal drug use on his SCA. Despite his failure to provide this information, he was granted a security clearance in 1984. Ex. 7 at 2.

In March 1993, Applicant was arrested for improper behavior and resisting arrest. Applicant was convicted of improper behavior/disorderly person. Tr. 71. The court placed him on probation for one year, ordered him to pay a fine of \$500 plus court costs, to submit to urine tests, and to attend Narcotics Anonymous.

In October 1997, Applicant was arrested by police and charged with shoplifting. In January 1998, he was acquitted of the charge. [\(2\)](#)

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 personnel 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

Guideline J--Criminal Conduct

In the SOR, DOHA alleged Applicant was convicted of selling marijuana and LSD in 1973 (¶ 1.a); was arrested for selling illegal drugs in 1971 (¶ 1.c), for possession of marijuana in 1979 (¶ 1.d), for improper behavior and resisting arrest in 1993 (¶ 1.e), and for shoplifting in 1997 (¶ 1.f); and is ineligible for a security clearance under 10 U.S.C. § 986 because he was sentenced to confinement in excess of one year as a result of his conviction in ¶ 1.a. ¶ 1.b. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations contained in the SOR. There are allegations and admissions of criminal conduct involving both minor and serious offenses. DC E2.A10.1.2.1; DC E2.A10.1.2.2. Nevertheless, the criminal activity was not recent--the last offense for which he was convicted occurred in 1993. MC E2.A10.1.3.1. And Applicant was acquitted of the allegations in SOR ¶¶ 1.d. and 1.e. Despite Applicant's numerous run-ins with the law, after considering all of the evidence, I find for Applicant on all allegations except 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 court in the U.S. to confinement for more than one year. 10 U.S.C. § 986. Applicant is subject to 10 U.S.C. § 986 as a result of being sentenced to prison for five years for selling marijuana and LSD. The statute applies whether or not Applicant actually served more than a year in jail. ISCR Case No. 01-13566 at 5 (App. Bd. Apr. 15, 2003). Under the circumstances, I am required to find against Applicant on ¶ 1.b. Having found for Applicant on all but ¶ 1.b, I am required to include, *without explanation*, a recommendation for or against further consideration of the case for waiver of 10 U.S.C. § 986. DOHA OI 64, ¶ 3.e (Jul. 10, 2001).

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: Against Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For 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. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).
2. Although I admitted the statement of the store employee who was responsible for Applicant's arrest, I did not consider it in my resolution of this case.