DATE: November 28, 2005

In re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 02-21013

REMAND DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

Eric H. Borgstrom, 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. Clearance is granted.

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 (SOR) detailing the basis for its decision[(1)]-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.

Before 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. The amendment added four additional allegations to the SOR. See Conclusions, *infra.*

On 26 October 2004, I issued on opinion in this case. I concluded Applicant had mitigated the allegations of criminal conduct in ¶¶ 1.a, and 1.c-1.f. But I also concluded that, as a result of his 1973 convictions for the sale of marijuana and LSD, the Department of Defense was prohibited from granting him a clearance absent a waiver from the Secretary of Defense. 10 U.S.C. § 986. I did not recommend waiver. Two days after I issued the opinion, the President signed into law amendments to 10 U.S.C. § 986. Applicant timely appealed. On 9 September 2005, the Appeal Board remanded the case because the record was not sufficient to determine whether "Applicant's convictions fall under the amended version of 10 U.S.C. § 986." ISCR Case No. 02-21013 at 4 (App. Bd. Sep. 9, 2005). The Board ordered reopening of the record "to allow the parties to present evidence on whether any of Applicant's convictions resulted in him being 'incarcerated as

a result of that sentence for not less than one year.'" Id.

Pursuant to my order, the parties submitted evidence and briefs on the matter. The Government presented a facsimile from the state historical society of Applicant's Division of Corrections record. Applicant did not object, so I admitted the document as Ex. 9. Applicant submitted an affidavit. The Government did not object, so I admitted the document as Ex. C.

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 before 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 offenses 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. Pursuant to the state probation statute, the judge ordered, as a condition on his probation, Applicant to serve the first year in the county jail. Ex. 9. Applicant does not remember whether he served all 365 days or was released early.

In October 1973, while on the work-release program, Applicant was arrested and charged with battery. At a hearing held at the prison, the charge was dismissed when the victim failed to show in court. He was terminated from three different jobs while on the work-release program: one for too much unaccountable time; another for not being able to perform his duties; and the third for using company property for personal use.

In August 1975, Applicant was charged with violating his probation. As a result, he served 35 days in jail.

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 on his SCA his arrests, convictions, and illegal drug use. Applicant admitted several arrests. Despite his criminal record and the fact he falsified his SCA concerning that criminal record, Applicant 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

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 1973 conviction for selling marijuana (¶ 1.b). Applicant admitted the allegations in ¶¶ 1.d and 1.f, admitted in part the allegations in ¶¶ 1.c and 1.e, and neither admitted or denied the allegation in ¶ 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 the allegations in ¶¶ 1.a, 1.c, 1.d, 1.e, and 1.f. 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.

In 2000, a federal statute was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who was convicted of an offense in a U.S. court and was sentenced to more than one year in jail, absent a waiver from the Secretary of Defense. 10 U.S.C. § 986 (c)(1) (2001). As amended in 2004, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited to those who are sentenced to more than one year in jail and were "incarcerated as a result of that sentence for not less than one year." 10 U.S.C. § 986(c)(1) (2004).

Applicant admits he was ordered to serve the first year of his probation in a work-release program, and he was locked up in the county jail when he was not at work. He asserts it was not imprisonment because, except for the first month, he was not in a cell, wore street clothes and was able to move about the facility, and the work-release facility was separate

from the county jail. He contends that, as his five-year sentence was never ordered executed, Applicant "was not incarcerated as a result of the sentence." Applicant's Brief at 3.

The Government argues that federal courts have concluded that a sentence to work release is a "sentence of imprisonment." Government's Brief at 2 (citing *United States v. Timbrook*, 290 F.3d 957 (7th Cir. 2002). In *Timbrook*, the sole issue raised was "whether a sentence of work release in a county jail is a 'sentence of imprisonment'" as the term was used in the U.S. Sentencing Guidelines for sentence enhancement.[(3)] In that case, Timbrook had been "sentenced to four years of probation, including six months of work release." *Timbrook*, 290 F.3d at 958. Timbrook had been locked up in the county jail when he was not at work. *Id.* at 959. The court concluded the sentence to a work-release program as part of probation was a sentence of imprisonment.

Although *Timbrook* was not a security clearance case, and involved application of the Sentencing Guidelines rather than 10 U.S.C. § 986, I adopt the reasoning of the court. The court order that Applicant serve the first year of his probation in a work-release program was a sentence to incarceration under the terms of 10 U.S.C. § 986.

Applicant admits the court ordered him to serve his first year of probation in the county jail pursuant to that part of the state probation statute authorizing a work-release program, but is unsure that he served 365 days or less. The Government has the burden of establishing any contested facts. The government established Applicant was sentenced to more than a year in jail, but failed to establish the actual term of his incarceration as being at least one year, as required by 10 U.S.C. § 986. Therefore, I must find for Applicant on ¶ 1.b.

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: 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 clearly consistent with the national interest to grant or continue a security clearance for Applicant.

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.

3. Under the Sentencing Guidelines, U.S.S.G. § 4A1.1(b), a defendant receives a two-point enhancement for a "prior sentence of imprisonment of at least sixty days." The commentary explains that a sentence of probation falls within the scope of § 4A1.1(b) if a condition of probation requires imprisonment for at least 60 days.