

DATE: November 5, 2003

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-22850

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Marc Curry, Esq., Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Between 1992 and 1996, Applicant was convicted of three criminal offenses. The last, in 1996 when he was approximately 40 years old, for concealment of merchandise, resulted in a sentence to prison for three years. While Applicant seems to have turned his life around and is now a respected worker, his use of marijuana after completing his security clearance application is troubling. Furthermore, the Department of Defense is prohibited from granting him a clearance absent a waiver from the Secretary of Defense. 10 U.S.C. § 986. Clearance is denied.

### **STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 9 July 2003, under the applicable Executive Order <sup>(1)</sup> and Department of Defense Directive, <sup>(2)</sup> DOHA issued a Statement of Reasons (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 1 August 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 2 September 2003. On 26 September 2003, 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 transcript (Tr.) of the proceeding on 6 October 2003.

### **FINDINGS OF FACT**

Applicant is 48 years old and works as a marine electrician for a defense contractor. He served almost five years in the U.S. Navy and received an honorable discharge in 1986.

In October 1992, Applicant was arrested for possessing marijuana. The charge was not prosecuted, but Applicant was convicted of trespassing and fined. Ex. 2 at 14. Applicant continued to use marijuana occasionally, the last time was after he completed his security clearance application. Tr. 23 In September 1995, Applicant was convicted of trespassing and paid a fine. *Id.*

In December 1995, Applicant was arrested for grand larceny from his employer, a department store. Answer. He was observed by a security officer before the store opened for business removing several boxes of cologne from showcases and placing them in a trash bag. Tr. 16-17; Ex. 2 at 6. The security officer recovered over \$1,500 in cologne and three watches from the bag. Ex. 2 at 6. In February 1996, the court accepted Applicant's guilty plea to concealment of merchandise and sentenced him to confinement in the penitentiary for three years, suspended for three years. Tr. 17; Ex. 2 at 3.

Applicant's supervisor attests to Applicant's excellent attendance and productivity at work. He believes Applicant is sincere and trustworthy.

### 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 personal 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 concealing merchandise and sentenced to three years in the state penitentiary (¶ 1.a.), convicted of trespass (¶ 1.b.), arrested for possession of marijuana in 1992 (¶ 1.c.), arrested for assault with a knife in 1989 (¶ 1.d.), and disqualified from holding a security clearance because of his sentence to three years' incarceration in the penitentiary (¶ 1.e.). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A.10.1.1.

An FBI rap sheet on Applicant notes Applicant was arrested for assault with a knife. Ex. 3; SOR ¶ 1.d.. However, Applicant denies being arrested for that offense, and the probation report for his conviction of concealing merchandise, in the same jurisdiction in which the knife assault allegedly occurred, does not list his arrest for the assault. Under the circumstances, I am not convinced Applicant was arrested for assault with a knife. Finding is for Applicant.

The Government's evidence established each of the other allegations. Applicant admits the criminal conduct in ¶¶ 1.a. -

1.c. DC E2.A10.1.2.1. The offense of concealing merchandise is a serious crime, as noted by the sentence imposed. DC E2.A10.1.2.2. However, the alleged criminal conduct was not recent. MC E2.A10.1.3.1. Although Applicant appears to have his life back on track, his admission to using marijuana after he completed a security clearance application is troubling. After carefully weighing all of the evidence in this case, I conclude that the disqualifying conditions outweigh the mitigating conditions. Therefore, I find against Applicant on ¶¶ 1.a. - 1.c.

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 U.S. court to confinement for more than one year. 10 U.S.C. § 986. Applicant is subject to the provisions of 10 U.S.C. § 986 by virtue of being sentenced to three years in confinement as a result of the conviction for concealing merchandise. The provisions of that statute apply even though Applicant did not serve any time in prison for that offense. ISCR Case No. 01-13566 at 5 (App. Bd. Apr. 15, 2003). Under the circumstances, I am required to find against Applicant on ¶ 1.e. As the denial of Applicant's security clearance is not solely as a result of 10 U.S.C. § 986, no recommendation on waiver is necessary. DOHA Operating Instruction 64 ¶ 3.e.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: Against 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.

**James A. Young**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.