

DATE: July 29, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-23753

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Juan R. Rivera, Esq., Department Counsel

FOR APPLICANT

Robert J. Dautrich, Esq.

SYNOPSIS

In 1996, Applicant was found guilty of two felony counts of possession of marijuana with intent to distribute. He was sentenced to 10 years in prison on each count, for a total of 20 years. Applicant's prison term was suspended on the condition of good behavior for a period of 10 years on each charge, and he served nine months in prison on each charge, for a total of 18 months. Applicant was released from prison in November 1998. He is currently serving 10 years of unsupervised probation. Applicant has married, acquired an education, and is employed by a defense contractor. By operation of law, the provisions of 10 U.S.C. § 986 preclude a grant of clearance, absent meritorious waiver by the Secretary of Defense. Applicant is unable to show sufficient evidence of mitigation to warrant a waiver recommendation. Clearance is denied.

STATEMENT OF THE CASE

On November 19, 2002, 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, with modifications, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and it recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

In the SOR the Government alleged that Applicant was disqualified from obtaining a security clearance because of criminal activity (Guideline J) and the provisions of 10 U.S.C. § 986. In a sworn statement dated December 18, 2002, Applicant responded to the SOR and requested a hearing. The case was initially assigned to Judge Roger Willmeth, but due to caseload considerations, was subsequently assigned to me on March 17, 2003. A Notice of Hearing was issued on March 26, 2003, and I held a hearing in this matter on April 24, 2003. During the course of the hearing the Government presented 4 exhibits, and Applicant presented 17 exhibits and one witness. The transcript (Tr.) was received May 1, 2003.

FINDINGS OF FACT

In his answer, Applicant admitted the factual allegations as set forth in subparagraphs 1.a. and 1.b. of the SOR, involving Criminal Conduct under Guideline J. Applicant's admissions are incorporated as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

The Applicant, who is 29 years old, began dealing in and selling marijuana in 1989, at the age of 16. (Tr. 46.) He continued his drug involvement for six years, until he was arrested in 1995 for possession of marijuana with intent to distribute. At his arrest, Applicant had 10 pounds of marijuana in his possession. Later, on the day of his arrest, Applicant's house was searched and authorities found an additional 4 ounces of marijuana. In September 1996, Applicant was found guilty on both felony charges, and, in September 1997, he was sentenced to serve 10 years in prison on each charge. Applicant's 20-year sentence was suspended on the condition of good behavior, and he is currently serving 10 years of unsupervised probation. Applicant was ordered to serve 9 months of jail time on each count, for a total of 18 months. Applicant also paid court costs and his driver's license was revoked for a period of one year. (Government Exhibit 4)

While he was serving his prison sentence, Applicant studied computer operations and programming. (Tr. 42-43.) After his release from prison in November 1998, Applicant continued his computer studies, and he used his computer knowledge to acquire responsible positions with government contractors. Applicant has been successful in his work and his managers and supervisors hold him in high regard. (Applicant Exhibits A-D) Applicant is now married and the father of two children. His family and friends attest to his maturity and reliability (Applicant Exhibits E-G) Applicant and his wife recently purchased and moved into a new home. (Applicant Exhibit Q) Applicant attributes his difficulties with drugs to youth and irresponsibility. He states that he has matured and no longer has contact with individuals in the drug culture with whom he associated in the past. (Tr. 49, 59.)

POLICIES

General Policy Considerations and Whole Person Concept

"[No] 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 the 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.

Paragraph E2.2.1 of Enclosure 2 to the Directive, as amended, provides adjudicative guidelines for determining eligibility for access to classified information and defines the adjudicative process as "the careful weighing of a number of variables known as the whole person concept." In following this policy precept, adjudicators must examine a sufficient period of a person's life to determine whether the individual is eligible for a security clearance and they should consider available and reliable past and present information about the applicant that is both favorable and unfavorable. In evaluating the relevance of an individual's conduct, the adjudicator should consider (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable 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. *See* Directive, Enclosure E2, Part E2.2.

Criminal Conduct and 10 U.S.C. § 986

In addition to the policy guidelines discussed above, adjudicators must follow additional guidance on the granting or renewal of security clearances mandated by more recent legislative action. By Memorandum dated June 7, 2001, the Deputy Secretary of Defense promulgated policy guidance for implementing Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Chapter 49 of Title 10 of the United States Code by adding a new section, enumerated 10 U.S.C. § 986. 10 U.S.C. § 986(1) provides, in pertinent part, that a person is disqualified from being granted a security clearance if "[t]he person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The Deputy Secretary's memorandum specifies that the provisions of 10 U.S.C. § 986(1) apply "to any DoD [Department of Defense] officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in inactive status, who is under consideration for the issuance or continuation of eligibility for access to classified information."

Attachment 1 to the Deputy Secretary's Memorandum of June 7, 2001, provides general guidance for DoD adjudicators charged with making determinations of an individual's suitability for a security clearance under the provisions of 10 U.S.C. § 986. That guidance states that the disqualification from eligibility for security clearance under 10 U.S.C. § 986 applies to "persons with convictions in State courts, "with sentences imposed of more than one year, regardless of the amount of time actually served."

Also attached to the Deputy Secretary's Memorandum of June 7, 2001, are revised adjudication guidelines, originally promulgated by the Special Assistant to the President for National Security Affairs in March 1997, pursuant to Executive Order 12968, which pertain to criminal conduct. The Deputy Secretary's memorandum states that these adjudication guidelines have been revised to reflect the provisions of 10 U.S.C. § 986.

The relevant revised adjudication guideline pertaining to the instant case is Guideline J: Criminal Conduct, which reads, in pertinent part, as follows:

The Concern: A history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness.

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

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;
- c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year [footnote omitted];

...

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;

...

- f. There is clear evidence of successful rehabilitation.

g. Potentially disqualifying condition... c. ... above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

Footnote 1 in revised adjudication Guideline J reads: "Under the provisions of 10 U.S.C. § 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term

exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition." An Administrative Judge may recommend that an applicant's case be considered or not considered for a grant of Secretarial waiver only if the Judge's decision to deny or revoke a clearance is based solely on the provisions of 10 U.S.C. § 986.

Burden of Proof

A security risk may exist under Guideline J when an individual has a history or pattern of criminal activity because it "creates doubt about a person's judgment, reliability and trustworthiness." Directive, E2.A10.1.1.

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern 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 criterion conduct, it is clearly consistent with the national interest to grant or continue applicant's security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government, predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nevertheless security worthy. The U.S. Supreme Court has held that the "clearly consistent with the interests of national security" test indicates that "security clearance determinations should err, if they must, on the side of denials." *Department of the Navy v. Egan, supra*, at 531.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, and having assessed the credibility of the Applicant, I conclude the following with respect to each allegation set forth in the SOR:

Subparagraphs 1.a. and 1.b of the SOR under Guideline J, Criminal Conduct, allege that Applicant was arrested, charged, and convicted of two felony charges of possession of marijuana with intent to distribute and that subsequently Applicant was sentenced to two 10-year terms. Applicant's sentence was suspended and he served 18 months in jail. Subparagraph 1.c. of the SOR alleges that Applicant's criminal conduct disqualifies him from a security clearance pursuant to the provisions of 10 U.S.C. § 986. Subparagraph 1.c. also informs Applicant that only the Secretary of Defense can grant a waiver of the applicability of 10 U.S.C. § 986, based upon a finding of merit and satisfactory mitigation.

Applicant's conviction on the two charges of possession of marijuana with intent to distribute brought his conduct within disqualifying conditions **a**, **b**, and **c** under Guideline J, when he was sentenced to imprisonment for a term exceeding one year.

Applicant's subsequent conduct meets mitigating condition **a** under revised Criminal Conduct Guideline J because his criminal behavior was not recent, having occurred over 8 years ago, when Applicant was 22 years of age. While Applicant's criminal behavior has not been repeated, his crime was not an isolated incident, but a pattern of behavior which he admitted he carried out for 6 years during his adolescence and young adulthood. Thus mitigating factor **b** does not apply. While Applicant's case in mitigation is strengthened because there has been no criminal conduct by Applicant since his arrest in 1995 and the record since his release from incarceration in 1998 demonstrates a consistent pattern of law-abiding family and professional life, the fact remains that Applicant continues to serve a 10-year sentence of unsupervised probation, thus making a positive finding under mitigating factor **f** premature at this time.

Applicant failed to sufficiently mitigate disqualifying condition **b** under revised Guideline J. The unmitigated conduct demonstrates that it is not in the national interest to grant Applicant a security clearance. By operation of law, disqualifying condition **c** acts as a bar to granting Applicant a security clearance. As the finding is against Applicant for failing to mitigate the security concerns in paragraphs 1.a. and 1.b. of the SOR, I am unable to recommend a waiver under the provisions of 10 U.S.C. § 986.

FORMAL FINDINGS

Formal Findings For or Against Applicant on the allegations set forth in the SOR as required by Enclosure 3, subsection E3.1.25 of Directive 5220.6 are as follows:

Paragraph 1. Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: Against the Applicant

Subparagraph 1.c.: Against the 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 the Applicant. Clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Joan Caton Anthony

Administrative Judge