

KEYWORD: Criminal Conduct; Illegal Drugs; Personal Conduct

DIGEST: Title 10 U.S.C. § 986 bars Applicant from holding a clearance because she served more than one year in jail for violating terms of her probation in 1994. Applicant has otherwise mitigated the security concerns about her drug use, criminal conduct, and personal conduct. Clearance is denied. I recommend further consideration of this case for meritorious waiver.

CASENO: 03-19537.h1

DATE: 04/13/2006

DATE: April 13, 2006

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-19537

DECISION OF ADMINISTRATIVE JUDGE

MATTHEW E. MALONE

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Title 10 U.S.C. § 986 bars Applicant from holding a clearance because she served more than one year in jail for violating terms of her probation in 1994. Applicant has otherwise mitigated the security concerns about her drug use, criminal conduct, and personal conduct. Clearance is denied. I recommend further consideration of this case for meritorious waiver.

STATEMENT OF THE CASE

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to give Applicant a security clearance. On March 29, 2005, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline J (criminal conduct), Guideline H (drugs), and Guideline E (personal conduct). Applicant timely submitted a responsive pleading, and requested a hearing.

The case was assigned to me on October 3, 2005, and I convened a hearing on November 16, 2005. The parties appeared as scheduled and the government presented five exhibits (GE 1 through 5). Applicant presented one exhibit (AE A) and the testimony of six witnesses, and testified in her own behalf. DOHA received the transcript (Tr) on December 1, 2005.

PROCEDURAL ISSUE

SOR ¶ 1.f alleged Applicant was precluded from holding a security clearance through application of 10 U.S.C. § 986. At

the time the SOR was issued, this statute barred award or renewal of a clearance for anyone who had been convicted of a crime and sentenced to more than one year in jail. As alleged in SOR ¶ 1.d, available information indicated Applicant had been sentenced to four years in jail on conviction of a felony in 1989, but that the sentence was suspended conditioned on Applicant's adherence to the terms of her probation. The statute has since been amended and is now applicable only in cases where the applicant has actually served more than one year in jail. As alleged, the statute would not apply to SOR 1.d; however, information introduced at hearing showed Applicant violated her probation when she tested positive for cocaine. Based on the foregoing, and pursuant to Directive paragraph E3.1.17, Department Counsel moved to amend SOR ¶ 1.d by adding the following language:

"You subsequently violated your probation. As a result, you were ordered to be incarcerated and were incarcerated for 13 months."

I concluded the information admitted into the record at that point supported such an allegation, and without objection by the Applicant, I granted Department Counsel's motion. [\(2\)](#)

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is 42 years old and employed by a defense contractor as a materials handler on a contract at a U.S. Navy shipyard. She has held this job, albeit with different companies holding the same contract, since 1996. After graduating from high school, Applicant studied cosmetology and obtained a license to do business as a beautician and hair stylist. She was working as a beautician when she was introduced by a friend to cocaine in 1986. She quickly became addicted. Applicant used the drug daily, eventually smoking crack cocaine as well as snorting the drug in powdered form. Applicant was first treated for substance abuse that same year, when her mother took her to a rehabilitation center for a 30-day treatment program. Applicant did not finish this course of treatment. She used cocaine from 1986 until she went to jail in 1994. She suffered a brief relapse in 1995 or 1996, using about three or four times, but has been clean ever since.

Applicant was arrested on October 4, 1988, and charged with possession of cocaine with intent to distribute, a felony. She had been in an apartment with a drug dealer when police entered and searched the premises. A large quantity of drugs was found and she was charged along with the dealer. She eventually testified against the dealer as part of a plea bargain, through which she pleaded guilty to simple possession. In November 1989, after she had been in jail for 11 months, Applicant received a four year suspended jail sentence, was fined, placed on probation for four years, and ordered to undergo drug counseling.

When Applicant was arrested as discussed, above, she hid a small amount of cocaine in her underwear. After going to jail, the drugs were discovered on her person and she was charged with an additional count of drug possession. This charge was disposed of through the aforementioned plea deal.

Applicant was also arrested in December 1990, after being caught stealing a pair of gloves from a retail store. Because of her drug habit, she did not have money to buy Christmas gifts. Applicant was convicted of petit larceny, sentenced to 30 days in jail, of which all but two were suspended, and assessed a fine.

In October 1992, Applicant was arrested after a traffic stop when an empty vial with cocaine residue was found in her car. She was charged and convicted of possession of cocaine, a felony, and sentenced to three years in jail. Her jail sentence was suspended, her driver's license was suspended, and she was placed on probation for five years. Applicant was also ordered to participate in drug treatment and to undergo random drug testing as part of her probation. In October 1994, Applicant tested positive for cocaine. A court found she had violated her probation from the October 1988 arrest and her original jail sentence was reinstated. Applicant served 16 months in jail before being paroled in 1995. She successfully completed her parole and drug treatment in November 1997.

Applicant submitted a security clearance application (SF 86) on November 29, 2001. In response to question 21, which asked if she had ever been charged with or convicted of any felony offense, Applicant answered "no." In response to question 24, which asked if she had ever been charged with or convicted of any offense related to drugs or alcohol, she again answered "no." Applicant has asserted during her background investigation and in response to the SOR she misread the questions, understanding them to only require disclosure of events from the previous seven years.

In November 2002, Applicant's company hired a new facility security officer (FSO), whose predecessor had been remiss in timely processing security clearance applications and related paperwork. As she investigated the status of various clearance applications, the FSO determined Applicant's SF 86 had not been submitted. She called Applicant into her office and went over a new form with her. In so doing, she explained to Applicant the correct interpretation of various questions therein, including questions 21 and 24. The FSO has experienced similar circumstances with other employees who have also misinterpreted the required scope of these questions. The FSO had Applicant fill out a new questionnaire, but was subsequently told DOHA had received her investigative file and the new questionnaire was not submitted. [\(3\)](#)

Applicant's last known involvement with illegal drugs was not as a user, but occurred after her release from jail in 1995. After she witnessed the drug-related murder of a friend, Applicant assisted the state's attorney in securing a conviction primarily on the strength of her testimony. She did so despite knowing she would be subject to vigorous cross-examination because of her arrest record and history of drug use.

Applicant's testimony at the hearing was credible and sincere. Her mother testified she was a good student in high school and never got into trouble before she became addicted to drugs. Her sister testified Applicant was her role model when they were growing up. Applicant was an athlete and, by all accounts, a responsible girl growing up. She has five children and, by all accounts is a responsible, caring mother who works hard to provide her children with a good life and to set a good example. Applicant's employer and co-workers speak highly of her job performance and regard her as trustworthy. Applicant's former probation officer testified she has no knowledge of any trouble Applicant has been in since 1995. She also testified that Applicant was cooperative during her parole and, based on her experience with Applicant, not likely to repeat her earlier transgressions.

POLICIES AND BURDEN OF PROOF

The Directive sets forth adjudicative guidelines⁽⁴⁾ for consideration in evaluating an applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive.⁽⁵⁾ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline E (personal conduct), Guideline H (drugs), and Guideline J (criminal conduct).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁽⁶⁾ for an applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a "right" to a security clearance, the applicant bears a heavy burden of persuasion.⁽⁷⁾ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.⁽⁸⁾

CONCLUSIONS

Under Guideline E, a security concern may arise if it is shown an applicant has exhibited questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. Such conduct may indicate the person may not properly safeguard classified information.⁽⁹⁾ Here, the government questioned Applicant's trustworthiness by alleging she deliberately omitted from her SF 86 the fact she had been charged four times with drug-related felonies as required by SF 86 question 21 (SOR ¶ 3.a), and that she deliberately failed to list those same drug-related charges as required by SF 24 (SOR ¶ 3.b).

Department Counsel submitted sufficient information to show that these omissions and inaccuracies exist. Based on available information, Guideline E DC 2⁽¹⁰⁾ must be considered. To be disqualifying, the omissions and inaccuracies must have been made with intent to mislead or deceive the government in its investigation of Applicant's background. Applicant asserts in her defense that she misunderstood the scope of the questions in the SF 86 to be limited to the preceding seven years and that she miscalculated what events would have been included in that period. However, the questions at issue are not, by their plain language, limited in scope. Rather, they seek information about any such charge at any time.

Generally, Applicant's response would be untenable. There is nothing complicated about the questions at issue here and Applicant is an intelligent individual fully capable of reading and understanding the questions. However, the record here also contains credible testimony by Applicant's FSO, who went over the questions with Applicant as part of the FSO's efforts to update the security applications from Applicant's company. It was apparent to the FSO a mistake had been made because of Applicant's misunderstanding of the questions. Combined with Applicant's credible presentation of what happened, I conclude she lacked the intent required for disqualification. In light of all of the information probative of this issue, DC 2 does not apply, and I conclude Guideline E for Applicant.

The government also cross-alleged as a separate security concern under Guideline H (illegal drugs) Applicant's arrests for drug-related offenses (SOR ¶ 2.a). Illegal drug use or involvement with illegal drugs through purchase, sale, or possession is a security concern because it raises questions about an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.⁽¹¹⁾ The government presented sufficient evidence to support these allegations. Accordingly, Guideline H DC 1⁽¹²⁾ and DC 2⁽¹³⁾ apply. By her own admission, Applicant used and / or possessed cocaine on a daily basis for nearly ten years.

Available information also supports application of Guideline H mitigating condition (MC) 1⁽¹⁴⁾ and MC 3.⁽¹⁵⁾ Applicant has not used or been involved with illegal drugs for more than ten years. She has a stable, productive life, and has the support of her family, friends and co-workers. In light of all the information available about Applicant's involvement with illegal drugs, I conclude Guideline H for the Applicant.

Finally, the government has declined to award Applicant a clearance because of the criminal offenses that were the product of her drug addiction. Specifically, the government alleged Applicant was charged with and convicted of felony drug possession, twice in October 1988 (SOR ¶¶ 1.d and 1.e), and in October 1992 (SOR ¶ 1.b). The government also alleged she was jailed in October 1994 for violating her state's drug control act (SOR ¶ 1.a), and that she was convicted of petit larceny for shoplifting in December 1990 (SOR ¶ 1.c). The allegation in SOR ¶ 1.d was amended to also allege Applicant spent 13 months in jail for violating her probation from her October 1988 conviction. Criminal conduct is a security concern because a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information.⁽¹⁶⁾ The government submitted sufficient information to support these allegations, and Applicant has admitted these facts throughout her investigation and at her hearing. Based on the available information about Applicant's criminal conduct, Guideline J DC 1⁽¹⁷⁾ and DC 2⁽¹⁸⁾ apply.

By contrast, Applicant's last criminal offense occurred over 11 years ago. Since then, she has successfully overcome her drug addiction, which was the root cause of her criminal conduct between 1988 and 1994. Available information, including substantial testimony about Applicant's reliability, good character, and integrity, supports Application of Guideline J MC 1,⁽¹⁹⁾ MC 4,⁽²⁰⁾ and MC 6.⁽²¹⁾ Applicant is a devoted mother and, since 1996, a reliable employee of several companies doing business with the Department of Defense. On balance, Applicant has mitigated the security concerns about her criminal conduct.

Absent application of the Smith Amendment, I would conclude Guideline J for Applicant. However, because Applicant served more than one year in jail for violating her probation in 1994, 10 U.S.C. § 986 (also known as the Smith Amendment) applies to bar Applicant from receiving a clearance. The Defense Department and the military departments may not grant or renew a clearance for any DoD officer or employee, any employee, officer, or director of a DoD contractor, or a member of the armed forces, both active and inactive, whose circumstances fall within one of four statutory categories.⁽²²⁾ The specific category at issue here is 10 U.S.C. § 986(c)(1), which, when first enacted, barred grant or renewal of a clearance where a person has been convicted of a crime and sentenced to "imprisonment for a term exceeding one year." In October 2004, Congress amended the statute in relevant part to impose this prohibition in cases where the person was sentenced "to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year." Therefore, under either the original or amended versions of the Smith Amendment, Applicant's criminal record bars her from holding a security clearance.

The Smith Amendment also provides that the appropriate authority may authorize a waiver, in meritorious cases, of the statutory prohibitions in 10 U.S.C. § 986(c)(1) and (4). DOHA Operating Instruction (OI) 64, dated July 10, 2001, further requires administrative judges to state whether or not they recommend further consideration of Smith Amendment cases for possible waiver of the statutory bar, but only in cases where the Smith Amendment is the sole basis for denial or revocation. As noted above, I have concluded Applicant has mitigated the Guideline E, Guideline H, and Guideline J security concerns expressed in the SOR. Accordingly, absent application of the Smith Amendment, I would find it is clearly consistent with the national interest to grant Applicant's request for a clearance.

I have carefully weighed all of the evidence, and I have applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. A fair and commonsense assessment⁽²³⁾ of the available information about

Applicant's criminal record, drug use, and answers to the questions in her SF 86, taken in the context of all of the information before me, shows she has overcome any reasonable doubts about her judgment and reliability. Her criminal conduct is dated and not likely to recur, due in large part to the fact she has not used illegal drugs in more than ten years. Further, her omission of information about her criminal conduct from her SF 86 was not a deliberate attempt to deceive the government. Accordingly, but for the requirements of the Smith Amendment, Applicant has overcome the government's case for disqualification.

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

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

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: Against the Applicant

Subparagraph 1.e: For the Applicant

Subparagraph 1.f: Against the Applicant

Paragraph 2, Guideline H (Illegal Drugs): FOR THE APPLICANT

Subparagraph 2.a: For the Applicant

Paragraph 3, Guideline E (Personal Conduct): FOR THE APPLICANT

Subparagraph 3.a: For the Applicant

Subparagraph 3.b: For 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 the Applicant. Clearance is granted. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

2. Tr., 31 - 37.

3. Testimony of the FSO, at Tr., 80 - 98.

4. Directive, Enclosure 2.

5. Commonly referred to as the "whole person" concept, these factor are as follows:

1. Nature and seriousness of the conduct and surrounding circumstances.
2. Frequency and recency of the conduct.
3. Age of the applicant.
4. Motivation of the applicant, and the extent to which the conduct was negligent,

willful, voluntary, or undertaken with knowledge of the consequences involved.

5. Absence or presence of rehabilitation.
6. Probability that the circumstances or conduct will continue or recur in the future;

6. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).

7. *See Egan*, 484 U.S. at 528, 531.

8. *See Egan*; Directive E2.2.2.

9. Directive, E2.A5.1.1.

10. Directive, E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from

any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

11. Directive, E2.A8.1.1.1.

12. Directive, E2.A8.1.2.1. Any drug abuse (see above definition);

13. Directive, E2.A8.1.2.2. Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

14. Directive, E2.A8.1.3.1. The drug involvement was not recent.

15. Directive, E2.A8.1.3.3. A demonstrated intent not to abuse any drugs in the future.

16. Directive, E2.A10.1.1.

17. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

18. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

19. Directive, E2.A10.1.3.1. The criminal behavior was not recent.

20. Directive, E2.A10.1.3.4. The person did not voluntarily commit the act *and/or the factors leading to the violation are not likely to recur*. (emphasis added)

21. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

22. 10 U.S.C. §986(c)(1) through (c)(4).

23. Directive, E2.2.3.