DATE: December 7, 2004

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-01090

EMAND DECISION OF ADMINISTRATIVE JUDGE

ROBERT ROBINSON GALES

APPEARANCES

FOR GOVERNMENT

Peregrine D. Russell-Hunter, Esquire, Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Forty-one-year old Applicant was arrested in 1980, when he was 18 years old, and charged with (1) possession of marijuana, (2) possession of cocaine, (3) possession of paraphernalia, (4) 13 counts of theft, and (5) four counts of breaking and entering. Upon his pleas of guilty, he was convicted and sentenced for each charge individually. The various sentences included periods of confinement of six months, 12 months, 18 months, and four years, much of which was subsequently suspended. Applicant's total period of incarceration was clearly less than one year. While the application of 10 U.S.C. § 986 previously would have disqualified him from eligibility for a security clearance, the recently amended 10 U.S.C. § 986 no longer serves as an automatic disqualification in this case. Clearance is granted.

STATEMENT OF THE CASE

On October 16, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry,* dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons why DOHA could not make the 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 recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn, written statement, dated October 28, 2003, Applicant responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to, and received by, me on November 20, 2003. A notice of hearing was initially issued on November 20, 2003, scheduling the hearing for December 17, 2003, but it was subsequently cancelled. Another notice of hearing was issued on February 23, 2004, and the hearing was held before me on March 17, 2004. During the course of the hearing, five Government Exhibits and the testimony of one Applicant witness (the Applicant) were received. The transcript (Tr.) was received on March 29, 2004.

On April 16, 2004, I indicated that a person should not be held forever accountable for misconduct from the past when there is a substantial indication of subsequent reform, remorse, or rehabilitation, and that under other circumstances, I could have concluded Applicant had, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case, and the allegations of the SOR would be concluded in favor of Applicant. But, Applicant's criminal conduct also fell within 10 U.S.C. § 986. He was convicted in a state court of several crimes and sentenced to 18 months and four years for two of those charges--terms which obviously exceed the one year period envisioned in the law as it stood at that time. Furthermore, I noted that implementing guidance indicated such a sentence would disqualify persons with "sentences imposed of *more than* one year, regardless of the amount of time actually served. Applicant was fortunate enough to have his prison terms reduced rather than actually served, but, by virtue of 10 U.S.C. § 986, as it then existed, I concluded Applicant was not eligible for a security clearance. Accordingly, on April 16, 2004, I issued a Decision in which I found that it was not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

Applicant subsequently filed a notice of appeal and submitted an appeal brief. Department Counsel submitted a reply brief. However, while the case was pending appeal, Congress amended 10 U.S.C. § 986. The Appeal Board considered the issue as to whether the amendments should be applied retroactively and ruled, in part, as follows:

As a matter of fairness to the parties in this case and in recognition of the limits of the Board's authority under the Directive, the Board hereby remands the case to the Administrative Judge to allow the parties an opportunity--consistent with basic principles of due process--to present their views on the effect of Section 1062 on Applicant's case. On remand, the Administrative Judge must allow Department Counsel the opportunity to obtain guidance and direction from appropriate Department of Defense officials as to the legal effect of Section 1062 on pending cases and how the Department of Defense proposes to implement that statute.

On November 22, 2004, I issued an Order to both parties affording them an opportunity to present their respective written views regarding possible retroactive application of the revised statute with such views to be received by me no later than the close of business on December 6, 2004. Neither party responded directly to the Order.

FINDINGS OF FACT

The Findings of Fact set forth in my initial Decision, dated April 16, 2004, are hereby incorporated herein as though they were expressly re-written below.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (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.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Personal Conduct - Guideline E: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, pertaining to each of the adjudicative guidelines are set forth and discussed in the conclusions below**.**

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provided policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that precluded the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or arine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

(1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;

(2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));

(3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or

(4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases."

Implementing guidance attached to the memorandum indicated that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of *more than* one year, regardless of the amount of time actually served."

On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 was approved and adopted, amending portions of Subsection (c)(1) of section 986 of Title 10, United States Code, thereby altering it to read as follows:

(1) has been convicted in any court of the United States of a crime, 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.* (Emphasis of change supplied)

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security,"[(1)] or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those

conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

The government has established its case under Guideline J. By his own admission, Applicant was involved in criminal activity in 1980, as described above, that resulted in his arrest. Upon his plea of guilty, for one of the charges of possession of a controlled dangerous substance, he was sentenced to 18 months confinement and 36 months probation, with all but five months of confinement suspended; and for the other charge of possession of a controlled dangerous substance, he was sentenced to four years confinement, with all but five months of confinement suspended. Applicant's criminal conduct clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and CC DC E2.A10.1.2.3. (*conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year*). I acknowledge CC DC E2.A10.1.2.3. has not yet been formally amended to conform with the recent change in the law, and no implementing guidance has yet been provided. Nevertheless, in complying with the mandate that these security clearance review decisions be fundamentally fair commonsense decisions, I have concluded that the new law was intended to be applied retroactively.

The criminal activity of 1981, 1983, and 1984, is uncharged criminal conduct as it was not alleged in the SOR, and is discussed only for the purposes of describing the whole-person in the context of this security clearance review proceeding.

It has been approximately 24 years since the series of criminal conduct incidents began and slightly less time since Applicant was released from prison. Since then, except for the activities of 1981, 1983, and 1984, Applicant has not been involved in any additional criminal conduct and has apparently turned his life around. Those facts would seem to activate Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*).

By virtue of his spotless record since 1984, as well as his successful completion of substance abuse treatment, and his abstinence from further marijuana abuse since November 1980, there is substantial evidence of successful rehabilitation, thus activating CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). However, as the conduct in question occurred over a period of days in different cities, I cannot find that the criminal conduct was isolated as set forth in CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

A person should not be held forever accountable for misconduct from the past when there is a substantial indication of subsequent reform, remorse, or rehabilitation. Moreover, Applicant's criminal conduct no longer falls within 10 U.S.C. § 986. While he was convicted in a state court of several crimes and sentenced to 18 months and four years for two of those charges--terms which obviously exceeded the one year period envisioned in the law at that time, those sentences were suspended and reduced, in part, to confinement for five months. Applicant's actual period of incarceration was clearly less than one year. Consequently, under the newly amended 10 U.S.C. § 986, Applicant is no longer automatically disqualified from eligibility for a security clearance. Considering all of the above, I conclude Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case. Accordingly, allegations 1.a. and 1.b. of the SOR, are concluded in favor of Applicant.

The government has not established its case under Guideline E. Examination of Applicant's actions when he was 18 years old reveals a pattern of conduct involving questionable judgment and criminal conduct. He was arrested and convicted of a number of crimes in 1980, but there is no evidence to support the government's contention that any of the crimes for which he was charged or convicted, stemming out of his criminal activity of 1980, were felonies. In the absence of evidence, I refuse to speculate whether a crime for which a sentence of over one year was imposed by a state court was a felony. Furthermore, neither the state court nor the FBI record identify the particular charges as felonies. In this instance, it is understandable that the teenage defendant might not have known the crimes for which he was charged and convicted were felonies, and I accept his explanations regarding the same.

Likewise, while the 1983 charge of possession of dangerous drugs (psilocybin) was a felony, Applicant again denied knowing that fact. Furthermore, the government was satisfied with his explanation and withdrew so much of the allegation that referred to the 1983 incident. No Personal Conduct Disqualifying Conditions apply in this case. Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the government's case with respect to the issue of personal conduct. Accordingly, allegation 2.a., as modified, is concluded in favor of Applicant. Allegation 2.b. was withdrawn by the government.

For the reasons stated, I conclude Applicant is eligible for access to classified information.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Paragraph 1. Guideline E: FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Withdrawn

DECISION

In light of all 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. Clearance is granted.

Robert Robinson Gales

Chief Administrative Judge

1. Exec. Or. 12968, *"Access to Classified Information;"* as implemented by Department of Defense Regulation 5200.2-R, *"Personnel Security Program,"* dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)