

DATE: October 17, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-04002

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Marion Townsend, Personal Representative

SYNOPSIS

Applicant was convicted of three specifications of distribution of methamphetamine and one specification of attempt to distribute methamphetamine while on active duty in the U.S. Army in 1983. He was sentenced to serve one year confinement, reduced to paygrade E-1, forfeited all pay and allowances, and was separated from the Army with a dishonorable discharge. Although he would otherwise be able to mitigate the security concern created by his criminal conduct, he is prohibited from doing so because of the statutory disqualification imposed by 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF THE CASE

On June 15, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. [\(1\)](#) The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed.

Applicant submitted a sworn answer to the SOR that was received by DOHA on July 12, 2004, and requested a hearing. Applicant admitted the SOR allegation concerning his criminal conduct and the applicability of 10 U.S.C. § 986 to his case.

This case was assigned to me on September 15, 2004. A notice of hearing was issued on October 21, 2004, scheduling the hearing for November 10, 2004. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without objection. Applicant testified at the hearing, called two witnesses to testify on his behalf, and submitted 28 documentary exhibits that were marked as Applicant's Exhibits (AE) 1-28, and admitted into the record without objection. The transcript was received on November 17, 2004.

PROCEDURAL MATTERS

Following the hearing in this case, a moratorium was imposed by DOHA on the issuance of all decisions in cases involving 10 U.S.C. § 986(c)(1)

and (4) that necessitated the extended delay in the issuance of this decision. The moratorium has now been lifted.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 54 years old, has been married since April 1973, and has two sons, ages 30 and 26. He has been employed as an engineering technician for a defense contractor since May 2001. He was previously employed as a calibration technician from February 1998 to October 1998, by a different employer as a calibration technician from October 1998 to October 2000, and by a third employer as a maintenance technician from October 2000 to April 2001. The testimony of his witnesses, performance appraisals, photograph, newspaper article, and award certificates he submitted attest to his reputation as an excellent employee and involved community member.

Applicant served on active duty in the Army from March 1971 to July 1978, attained the rank of specialist five, earned three good conduct medals, and was discharged with an honorable discharge. Applicant reenlisted in the Army in June 1981 as a specialist four, performed his assigned duties admirably, and attained the rank of specialist six before he was dishonorably discharged in December 1983. He was awarded an Army Achievement Medal in recognition of his meritorious service in October 1982.

In 1983, while stationed in a foreign country, Applicant thrice purchased methamphetamine from a foreign national and resold it to a fellow soldier. The total weight of the controlled substance he purchased and resold was 1.315 grams, and the cost to him was \$260.00. The soldier to whom the drugs were sold was working as a confidential source for Army criminal investigators and persuaded Applicant to buy the drugs for him, apparently based upon Applicant's fluency in the language of the country in which he was stationed. Although Applicant experimented with marijuana on one occasion while in high school and a second time while in the Army, he did not use any of the methamphetamine he purchased for resale.

Applicant was arrested on June 3, 1983, and charged with three specifications of distribution of methamphetamine, three specifications of possession of methamphetamine, one specification of attempt to distribute methamphetamine, one specification of attempt to possess methamphetamine, one specification of failure to obey a lawful general regulation by possessing a straw containing methamphetamine, and one specification of larceny. In December 1983, Applicant pled to and was found guilty of three specifications of distribution of methamphetamine (the distributions occurring on May 3, 1983, May 25, 1983, and June 3, 1983), and one specification of attempt to distribute methamphetamine (the attempt occurring on June 3, 1983). He was found not guilty of the remaining charges. He was sentenced to be confined for one year, to be reduced to paygrade E-1, to forfeit all pay and allowances, and to be separated from the army with a dishonorable discharge. He was released from confinement on September 14, 1984, having served just over nine months.

Applicant's only other reported offense was a speeding ticket he received in 1969. He failed to appear in court on the scheduled trial date and a warrant was issued for his arrest. He was arrested on that warrant sometime around 1969, held in jail for a week, and the charge was ultimately dismissed. He has no criminal history subsequent to his release from military confinement in 1984.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, with its disqualifying and mitigating conditions is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

CONCLUSIONS

In all adjudications the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. In 1983 he was convicted of distributing methamphetamine three times and attempting to distribute it one time. He was sentenced to serve one year confinement and was discharged from the Army with a dishonorable discharge. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 4: *Discharge or dismissal from the Armed Forces under dishonorable conditions* apply in this case.

Applicant has not been arrested or charged with any offense since his 1983 conviction. Additionally, the testimony of his character witnesses, his employment records, community involvement, and steady work and family history attest to Applicant's rehabilitation and the unlikelihood that any similar conduct will ever again occur. I find Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 4: *. . . the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* applicable. Applicant would be able to mitigate the security concern that arises from his 1983 criminal conviction but for the statutory disqualification imposed by 10 U.S.C. § 986.⁽¹²⁾ Guideline J is decided against Applicant.

In 2000, a federal statute was enacted that prohibited the Department of Defense from granting or continuing a security clearance for any applicant who had been discharged or dismissed from the Armed Forces under dishonorable conditions. 10 U.S.C. § 986 (c)(4) (2001). "In a meritorious case," the Secretary of Defense could authorize an exception to the prohibition. The Secretary was not authorized to delegate that authority. 10 U.S.C. § 986(d) (2001). In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, directed that, in cases in which the decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not recommending further consideration of the case for a waiver of the prohibition. DOHA Operating Instruction No. 64 ¶ 3.e (Jul. 10, 2001).

The waiver provision was amended in 2004. It now provides that an exception to the prohibition on granting a clearance may be authorized "[i]n a meritorious case, . . . if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." 10 U.S.C. § 986(d) (2004). No such executive order or other guidance has been issued by, or under the authority of, the President.

Notwithstanding the Director's direction in DOHA Operating Instruction 64 that the administrative judge make a recommendation whether the statute's prohibitions should be waived, the Appeal Board has concluded that, under the 2004 amendments to 10 U.S.C. § 986, the administrative judge has

no authority to make a waiver recommendation. According to [the amendments], any waiver decision 'may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.' Without such standards and procedures, the Judge had no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. § 986.

ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).

The Appeal Board has conflated making a recommendation to waive with making a decision to waive. The amendment limits the authority to grant a waiver, not to recommend whether a waiver should or should not be granted. Nevertheless, I am not at liberty to disregard the Appeal Board's decision even though I disagree with it. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004). However, to avoid the possibility of a remand when/if guidance is later issued by or under the authority of the President, I believe it is appropriate to note what my recommendation would have been

had I the authority to make one. Recognizing my recommendation is not binding on the waiver authority, I would recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against 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 Applicant. Clearance is denied.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*, Executive Order 10865, and the Directive.
12. 10 U.S.C. § 986 was amended following issuance of the SOR but before the date of the hearing in this case. The amendment has no effect on the applicability of 10 U.S.C. § 986 to this case.