

DATE: November 16, 2004

---

In re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-05804

**ECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Esq., Department Counsel

**FOR APPLICANT**

Louis R. Moffa Jr., Esq.

Richard D. Gallucci, Esq

**SYNOPSIS**

While assigned to Thailand with the U.S. Air Force, Applicant received nonjudicial punishment, under 10 U.S.C. § 815, for possession of marijuana--he attempted to mail it to a friend. After being reassigned to the U.S., Applicant took leave to Thailand where he mailed heroin to his address in the U.S. He was convicted in 1974 in U.S. District Court of illegally importing heroin and using the U.S. mail to facilitate the illegal importation of heroin. He was sentenced to seven and one-half years in jail and served 32 months. Applicant mitigated his criminal conduct, but absent a waiver from the Secretary of Defense is barred from holding a clearance. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 18 September 2003, DOHA issued a Statement of Reasons<sup>(1)</sup> (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 12 October 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 30 July 2004. On 2 September 2004, 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 hearing transcript (Tr.) on 15 September 2004.

**FINDINGS OF FACT**

Applicant is a 53-year-old lead member on the engineering staff of a defense contractor. Exs. 1, P. He has held a security clearance since approximately 1981 and worked for the same organization since 1985. He is well-respected member of the organization and has been promoted with some regularity. He has been married since 1983.

Applicant received his associate's degree in 1971. As he had a low draft lottery number, rather than be drafted, Applicant enlisted in the U.S. Air Force. While assigned to Thailand, he attempted to mail marijuana to a friend in the U.S. He was caught and punished under Article 15, UCMJ, 10 U.S.C. § 815 for possession of marijuana. While he was in Thailand, he smoked marijuana and cigarettes laced with heroin. When he was reassigned to the U.S., he was required to attend a military drug rehabilitation course program from March-September 1974. He returned to Thailand on leave a few months later and mailed seven envelopes containing small quantities of heroin from Thailand to his address in the U.S.. He was indicted in federal district court on 10 charges--five counts of knowingly and intentionally importing heroin into the U.S. from Thailand on 6 December 1974 and five counts of knowingly and intentionally using the U.S. mail in facilitating the knowing and intentional importation of the heroin. Applicant pled not guilty, but was convicted. He was sentenced to seven and one-half years in prison, but served 32 months. He was placed on probation for three years after his release. As a result of the conviction and sentence, he was discharged from the Air Force in 1976 with a general discharge under honorable conditions. Applicant has not illegally used controlled substances since his arrest. Applicant was convicted in 1978 of shoplifting and fined \$250. He has not engaged in any other criminal conduct.

### 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 personnel 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 importation of heroin and sentenced to seven and on-half years in confinement (¶ 1.a) and, absent a waiver from the Secretary of Defense, is disqualified from holding a clearance, pursuant to 10 U.S.C. § 986 (¶ 1.b). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR.

Applicant admitted committing serious criminal conduct. DC E2.A10.1.2.1; DC E2.A10.1.2.2. At the same time, the criminal behavior was not recent. MC E2.A10.1.3.1. The factors leading to his criminal conduct are not likely to recur (MC E2.A10.1.3.4) and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6). Applicant has matured over the past 30 years, has not been involved with drugs for 30 years, has not been involved in any criminal activity since 1978, and has turned his life around. Considering all of the circumstances of this case, I find for Applicant on ¶ 1.a.

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 court in the U.S. to confinement for more than one year and who actually serves at least one year. 10 U.S.C. § 986. Applicant is subject to 10 U.S.C. § 986 as a result of serving more than a year for his conviction of using the mails to import heroin into the U.S. Under the circumstances, I am required to find against Applicant on ¶ 1.b. Having found for Applicant on the only other allegation, I am required to include, *without explanation*, a recommendation for or against further consideration of the case for waiver. DOHA OI 64, ¶ 3.e (Jul. 10, 2001).

### **FORMAL FINDINGS**

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: 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. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

**James A. Young**

**Administrative Judge**

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