

DATE: July 16, 2004

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-13002

ECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1976, when he was 18 years old, Applicant was convicted of possession of marijuana and, later that year, of drinking in public. In 1978, he was convicted of felony possession of marijuana and sentenced to confinement for five years, suspended. Applicant mitigated the security concerns raised by his criminal conduct, but absent a waiver from the Secretary of Defense, is barred from receiving a security clearance under 10 U.S.C. § 986. 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 28 January 2004, DOHA issued a Statement of Reasons⁽¹⁾ (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 13 February 2004 and elected to have a hearing before an administrative judge. The case was assigned to me on 29 March 2004. On 11 April 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 20 May 2004.

FINDINGS OF FACT

Applicant is a 47-year-old president of a defense contractor. On 9 January 1976, Applicant, who was then 18 years old, was arrested for distributing marijuana and possession of marijuana. He gave two marijuana cigarettes to an acquaintance who was working undercover for the police. The charges were reduced from felonies to misdemeanor possession. Applicant was convicted and given a 35-day suspended sentence and was ordered to pay a small fine.

Later that year, Applicant was arrested for drinking in public. He ended up paying a \$100 fine for this offense.

In March 1978, Applicant was charged with possession of marijuana with the intent to distribute, a felony. He was

found guilty of felony possession of marijuana and sentenced to five years in jail, suspended. Applicant was arrested after police found a little more than one ounce of marijuana in his room in a house he shared. After this arrest, Applicant stopped smoking marijuana and associating with those who did. He moved to a different college, applied himself to his studies, and consistently made the Dean's List.

Applicant does not use illegal substances and has not had any run-ins with the law since 1978. Applicant has been steadily employed, working for a city and then some technology companies. Dissatisfied with the quality of work produced and the ethics of the companies for which he worked, Applicant formed his own company. It now has about 20 hand-picked employees. Applicant's employees, friends, and the chief executive officer of the company testified to his good character, integrity, and ethics.

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 arrested in January 1976 and subsequently convicted of possession of marijuana (¶ 1.a.), was arrested in 1976 and charged with drinking in public (¶ 1.b.), was arrested in March 1978, subsequently convicted of felony possession of marijuana, and sentenced to confinement for five years (¶ 1.c.) and is disqualified from holding a security clearance because of his sentence in excess of a year (¶ 1.d.).

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant has admitted a history of criminal conduct (DC E2.A10.1.2.1), including a single serious offense (felony possession of marijuana) and two lesser offenses (possession of marijuana and drinking in public) (E2.A10.1.2.2.). But several mitigating conditions apply. The criminal behavior was not recent (MC E2.A10.1.3.1.)-the latest incident being over 26 years old. There is also clear evidence of successful rehabilitation (MC E2.A10.1.3.6.)-he has not been in trouble with the law in over 26 years, he no longer uses illegal drugs or associates with those who do, he completed

college, and has become a productive, law abiding citizen.

I have also considered the adjudicative process factors in evaluating Applicant's case. Directive ¶ 6.3. Based on Applicant's age at the time of his criminal conduct, the length of time since he committed the criminal acts, the presence of rehabilitation, and the unlikely probability of a recurrence of such conduct, I find for Applicant on ¶¶ 1.a.-1.c.

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. 10 U.S.C. § 986. Applicant is subject to 10 U.S.C. § 986 as a result of his sentence to confinement for five years for felony possession of marijuana. The statute applies even though Applicant did not serve any time in prison for that offense. ISCR Case No. 01-13566 at 5 (App. Bd. Apr. 15, 2003).

Under the circumstances, I am required to find against Applicant on ¶ 1.d. As my adverse security decision against Applicant is based solely on the requirement of 10 U.S.C. § 986, it is appropriate for me to make a recommendation as to whether Applicant's case should be considered for waiver. DOHA Operating Instruction 64 ¶ 3.e. I recommend Applicant be considered for a waiver of 10 U.S.C. § 986.

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.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: 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).