

DATE: February 2, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-15580

**DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Marc Curry, Esq. Department Counsel

**FOR APPLICANT**

Robert J. Dautrich, Esq.

**SYNOPSIS**

In September of 1996, when he was 19 years old, Applicant was arrested for using marijuana in his university dormitory room. In January 1997, Applicant was arrested and charged with possession of marijuana near a school with intent to distribute. Subsequently, Applicant was convicted and sentenced to confinement for five years. Applicant sufficiently mitigated the drug abuse and criminal conduct security concerns, but, as a result of his sentence to confinement for five years, the Department of Defense is prohibited from granting or continuing a security clearance for him absent a waiver of 10 U.S.C. § 986 by the Secretary of Defense. 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 4 September 2003, under the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision—security concerns raised under Guideline H (Drug Involvement) and Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in a writing notarized on 10 October 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on 4 November 2003. On 6 January 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 transcript (Tr.) of the proceeding on 13 January 2004.

**FINDINGS OF FACT**

Applicant was born in August 1977. Ex. 1 at 1. He is a technical team lead overseeing small teams developing software products to support qualification training for an air traffic control system that is being deployed at a military installation. Tr. 14. He is a top performer. *Id.*

In September 1996, when he was a 19-year-old university freshman, Applicant was arrested by university police for smoking marijuana in a dormitory. He was charged with possession of marijuana and possession of drug paraphernalia. Tr. 28. He subsequently paid a \$353 fine. In January 1997, campus police arrested Applicant in a university dormitory with several others. He was charged with possession of five baggies of marijuana with intent to distribute near a school. Exs. 4, 5. Three of the baggies were found in Applicant's coat pocket. Ex. 4 at 1. As a result, Applicant was suspended from the university and indicted. Ex. 4 at 3.

While awaiting resolution of the drug charge, Applicant was arrested and charged with assault and battery in March 1997. Applicant was convicted of the assault and battery. He appealed and was given a deferred finding of guilty. Tr. 30; Ex. 3. In April 1997, Applicant was arrested by the university police for trespassing and being a minor in possession of alcohol. Tr. 29; Ex. 3. He was convicted of trespassing and fined \$189. The alcohol charge was dismissed.

In June 1997, Applicant was convicted of the January possession of marijuana with the intent to distribute near a school. He was sentenced to confinement for five years, but the sentence was suspended and Applicant was given probation for two years. Ex. 4 at 4. He successfully completed his sentence to probation that included drug urine screens and educational counseling on drugs. Tr. 23. Applicant has not used drugs since his January 1997 arrest. Answer at 1.

Applicant enrolled in a community college and received his associate's degree. He then enrolled in a university and received his bachelor's degree in 2000 in computer science with minors in mathematics and business management. Tr. 20-21.

Applicant and his girlfriend had a daughter in 1999. When they split up, Applicant's girlfriend was not letting him see the child. Applicant went to court and won custody. Applicant's daughter is now four years old. Tr. 24-25; Ex. 1 at 5.

### 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 personal 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

### **Guideline H-Drug Involvement**

In the SOR, DOHA alleged Applicant was arrested and convicted in 1997 of possession of a controlled substance near a school (¶¶ 1.a.), and was arrested in 1996 for possession of marijuana and drug paraphernalia, but convicted of only possession of drug paraphernalia (¶¶ 1.b.). An applicant's improper or illegal involvement with drugs raises questions about his willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1.1.

The Government established by substantial evidence and Applicant's admissions that he used and possessed marijuana. Any drug abuse (DC E2.A8.1.2.1.) and illegal drug possession (DC E2.A8.1.2.2.) are disqualifying conditions. However, Applicant's involvement with illegal drugs was not recent (MC E2.A8.1.3.1.)-he has not used any illegal drugs in seven years. He has demonstrated an intent not to abuse any drugs in the future (MC E2.A8.1.3.3.). After considering these mitigating conditions, along with the adjudicative process factors found in ¶ 6.3 of the Directive, including his age at the time of his involvement with drugs, I conclude Applicant has sufficiently mitigated any security concerns about his use of drugs. I find for Applicant.

### **Guideline J-Criminal Conduct**

In the SOR, DOHA alleged Applicant had been convicted of criminal acts discussed under Guideline H and, because he received a sentence of more than one year in confinement, the Department of Defense is prohibited from granting him a clearance absent a waiver from the Secretary of Defense. 10 U.S.C. § 986. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1

The Government established by substantial evidence and Applicant's admissions that he engaged in criminal conduct (DC E2.A10.1.2.1.) of a serious nature (DC E2.A10.1.2.2.)-possession of marijuana with intent to distribute near a school. Applicant's criminal behavior was not recent. MC E2.A10.1.3.1. His criminal conduct occurred during a six-month period while he was 19 years old, over seven years ago. He has not been in trouble since. He has earned an education, is the custodial parent of his daughter, and has turned his life around. He is now a productive member of society. This is clear evidence of Applicant's successful rehabilitation. MC E2.A10.1.3.6. I would find for Applicant if I were not prohibited from doing so by 10 U.S.C. § 986.

By virtue of being sentenced to five years in confinement as a result of the conviction for possession near a school with intent to distribute marijuana, Applicant is subject to the provisions of 10 U.S.C. § 986. The provisions of that statute apply 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.a. However, I recommend further consideration of this case 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 H: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Paragraph 2. Guideline J: AGAINST APPLICANT

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