

DATE: November 22, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15508

ECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Thomas Albin, Esq.

SYNOPSIS

Applicant used heroin and cocaine when stationed in Vietnam from 1969 to 1971. After his discharge from the military, he continued to use illicit drugs, and was arrested in about July 1973 on controlled dangerous substance charges. Sentenced to five to six years incarceration (suspended) for possession of marijuana with intent to sell, Applicant is statutorily disqualified from being granted a security clearance under 10 U.S.C. §986, despite his abstinence from illegal drugs since 1973 and productive employment as a heavy equipment mechanic with a defense contractor since 1978. Clearance is denied with a recommendation this case be considered for a waiver of 10 U.S.C. §986.

STATEMENT OF THE CASE

On August 25, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant which 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. [\(1\)](#) DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on Criminal Conduct (Guideline J).

On September 16, 2003, Applicant executed an Answer to the SOR, and requested a hearing before a DOHA administrative judge. The case was assigned to me on March 22, 2004. Pursuant to formal notice of that same date, a hearing was held as scheduled on April 13, 2004. The Government submitted two exhibits that were entered in the record. Applicant and four witnesses testified on Applicant's behalf, as reflected in a transcript received on April 26, 2004. Applicant also presented 11 exhibits that were admitted without objection.

FINDINGS OF FACT

The SOR alleges Criminal Conduct (Guideline J) concerns due to Applicant's arrest in June 1973 for possession of hallucinogenic substance, for which he was sentenced to one year in jail, suspended and two years probation; possession

of marijuana, which was nolle prossed; and possession of marijuana with intent to sell, for which he was sentenced to a prison term of five to six years (suspended). Since he was sentenced to a term of incarceration of more than one year (albeit suspended), Applicant was alleged to be disqualified from having a clearance granted or renewed under 10 U.S.C. § 986 (commonly referred to as the "Smith Amendment").⁽²⁾

Applicant admits his arrest and disposition of charges as alleged. Those admissions are accepted and incorporated as findings of fact. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is a 53-year-old heavy equipment mechanic who was employed by the same defense contractor (company A) from 1978 to October 2003 when his clearance was revoked due to the issuance of the SOR. He is subject to recall should he be granted his security clearance.

While still a teenager, Applicant was drafted into the United States military in July 1969 and sent to Vietnam. As a young private, he witnessed "devastating things." As a means of coping with the stress of war, he began to use heroin and cocaine with other servicemen in Vietnam.

On return from Vietnam, he was given an honorable discharge in July 1971. Unemployed for about 12 to 18 months and struggling to get his life in order, Applicant continued to use illegal drugs, even after he began working as a chemical operator in 1972 for a local municipality. He purchased drugs from street dealers, and sold illegal drugs to his friends.

In about July 1973, the local police executed a search pursuant to warrant of Applicant's residence and discovered some marijuana and mescaline. Applicant was arrested for possession of marijuana with intent to sell, possession of controlled drugs with intent to sell, possession of marijuana, and possession of controlled drugs (hallucinogens). Pursuant to a plea bargain, he was convicted of possession of marijuana with intent to sell, for which he was sentenced to a term of incarceration of five to six years (suspended), and of possession of controlled drugs (hallucinogens) for which he was sentenced to one year in jail (suspended) and two years probation. The remaining charges were nolle prossed. Applicant served his probationary term without incident. His arrest served as a wake-up call, and Applicant stopped all involvement with illegal drugs.

After working for two years managing a farm from 1976 to 1978, Applicant applied for work at company A. On his job application executed on July 3, 1978, Applicant listed a conviction in approximately in 1972 for possession of marijuana for which he served two years probation. Hired, he was credited with a start date of January 1978 because he had worked as a painter for the company in 1968/69 before he was drafted. Applicant was given a company-granted confidential security clearance for his duties as a heavy equipment (crane) mechanic, which he held until October 2003. Subject to several random drug tests over the years in his job because of his commercial operator's license, Applicant has not tested positive for any illegal substance.

Applicant proved to be a dedicated worker for the defense contractor. After Applicant broke his shoulder and elbow on the job in 1996, he was out of the yard for three years as he rehabilitated and the company pursued various retraining options with him. Desirous of returning to his old shop, Applicant was placed in the power house as he finished his recuperation in 1999. While serving in the power house, Applicant applied for a security clearance upgrade. His felony conviction for sale and possession of marijuana was listed on his security clearance application completed in April 2000.

At Applicant's request, he was allowed back into his old job. Several individuals who worked with him, some more than 20 years, attest to his professionalism, positive attitude and work ethic, reliability, and ability to follow security guidelines. In the opinion of those persons who have had the opportunity to observe Applicant's job performance over many years, his knowledge and experience make him an asset to the company.

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.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case: ⁽³⁾

GUIDELINE J

Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- b. A single, serious crime or multiple lesser offenses;
- c. Conviction in a Federal or State court, including a court-marital of a crime and sentenced to imprisonment for a term exceeding one year. ⁽⁴⁾

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent;
- d. . . . the factors leading to the violation are not likely to recur;
- f. There is clear evidence of successful rehabilitation;
- g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

CONCLUSIONS

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to Guideline J:

Applicant was arrested in about July 1973 on serious illegal drug charges after the police found marijuana and mescaline in his residence. Pursuant to a plea bargain, Applicant was convicted of two drug charges: possession of marijuana with intent to sell, for which he was sentenced to a prison term of five to six years (suspended), and possession of a controlled dangerous substance (hallucinogens), for which he was sentenced to one year in jail (suspended), and two years probation. Notwithstanding the passage of more than 30 years since the crimes, disqualifying conditions a. (allegations or admissions of criminal conduct), b. (a single serious crime or multiple lesser offenses) and c. (conviction in a state court and sentenced to a term of imprisonment exceeding one year) must be considered in evaluating Applicant's current security suitability.

Several of the Directive's mitigating conditions (MC) apply to Applicant's criminal conduct: a. (the criminal behavior was not recent); d. (the factors leading to the violation are not likely to recur); and f. (there is clear evidence of successful rehabilitation). Applicant's involvement with illicit drugs started when he was a young private in Vietnam. With the "devastating things" he saw in Vietnam and his unemployment and lack of direction on his return, his illegal drug involvement continued. While there is little detail about his past drug use of record, he admits to having used drugs, purchased them from street dealers, and sold at least marijuana to his friends. As testified to by a state police sergeant who has known Applicant for 26 or 27 years, Applicant turned his life in a positive direction after his arrest in 1973. In addition to maintaining a drug-free lifestyle, Applicant held stable employment--since 1978 with the defense contractor--until October 2003 when he was terminated subject to recall following the issuance of the SOR. Individuals of long acquaintance who have either worked with Applicant or known him socially attest to his good character, dedication, reliability, and trustworthiness. There is no indication of recent or recurring questionable judgment or irresponsibility on Applicant's part which would give rise to a present security risk.

Yet, criminal conduct punished by imposition of a prison term in excess of one year is regarded as sufficiently serious to where it cannot be mitigated unless meritorious circumstances exist (See MC g.). Pursuant to 10 U.S.C. §986, the Department of Defense is prohibited from granting or renewing access to classified information to a defense contractor employee who has been convicted in a Federal or State court and sentenced to imprisonment for a term exceeding one year. Although Applicant served no jail time, he was sentenced to a term of incarceration (suspended) of five to six years. By virtue of this sentence, Applicant falls within the provisions of 10 U.S.C. §986. Hence, Applicant's request for continued access must be denied and an adverse finding returned as to subparagraph 1.a. of the SOR. This statutory prohibition may be waived in meritorious circumstances as determined by the Secretary of Defense. I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

FORMAL FINDINGS

Formal Findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

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

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).

2. Section 986 states in pertinent part:

§986. Security clearances: limitations

(a) Prohibition.--After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons Disqualified From Being Granted Security Clearances.--A person is described in this subsection if any of the following applies to that person;

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

(d) Waiver Authority--In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

3. The adjudicative factors considered most pertinent are identified as set forth in guideline J following the implementation of 10 U.S.C. § 986.

4. Under the provisions of 10 U.S.C. §986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts marital, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.