

DATE: October 26, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-15750

ECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

James B. Norman, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Fined \$50 after being found in possession of marijuana in 1987, Applicant was again arrested on illegal drug charges in April 1988. Sentenced to 18 months in prison (suspended) for possession of a controlled dangerous substance and to one year (suspended) and probation for second controlled substance offense, he is statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986. Applicant also falsified his April 2001 security clearance application by failing to list his illegal drug offenses. Clearance is denied.

STATEMENT OF THE CASE

On October 2, 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) and Personal Conduct (Guideline E).

On October 20, 2003, Applicant executed an Answer to the SOR, and requested a hearing before a DOHA administrative judge if it would be in his best interests. The case was assigned to me on March 10, 2004, to conduct a hearing. Pursuant to formal notice of March 22, 2004, a hearing was held as scheduled on April 14, 2004. The Government submitted four exhibits that were entered in the record. Applicant testified, as reflected in a transcript received April 26, 2004, and submitted nine exhibits. Originals of three additional documents were identified for the record with admission dependent on Applicant providing copies for the record after the hearing. On receipt of these documents on April 30, 2004, they were marked and entered into the record as Applicant exhibits J, K, and L.

FINDINGS OF FACT

The SOR alleges Criminal Conduct (Guideline J) concerns due to Applicant being fined in April 1987 for possession of marijuana and being convicted of an April 1988 possession of controlled substance, for which he was sentenced to 18 months incarceration (suspended) and fines, and of second controlled substance offense, for which he was sentenced to one year (suspended), fined, and placed on probation. Since he was sentenced to a term of incarceration of more than one year (albeit suspended) for the April 1988 illegal possession, 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⁾

Personal Conduct (Guideline E) concerns were alleged as well because Applicant had not listed his drug offenses on his April 2001 security clearance application. Applicant admits his arrests and dispositions of charges as alleged. Those admissions are accepted and incorporated as findings of fact. He denies intentional falsification of his clearance application. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following findings of fact:

Applicant is a 46-year-old shipfitter who has been employed by the same defense contractor since January 1980. He seeks a secret clearance for his defense-related duties.

During the 1980s, Applicant abused alcohol and marijuana on weekends. While his use of alcohol impaired his judgment, and put him in circumstances where he should not have been, his involvement with marijuana was not limited to occasions when he was drinking with others.

In April 1986, Applicant's spouse complained to the police that she wanted Applicant out of the house. Responding officers noted Applicant appeared to be intoxicated, and he was taken into custody on an active warrant for malicious damage. Applicant "snapped" while being jailed and struck his jailer in the head with an open handcuff, causing lacerations that required medical treatment for the jailer. Applicant was charged with assault with a dangerous weapon, a felony. Fear of losing his family led him to pursue alcohol rehabilitation, but he continued to drink alcohol and to use marijuana on occasion.

In March 1987, trial of the felony assault charge led to a deadlocked jury. In late April 1987, Applicant pleaded nolo contendere to an amended charge of misdemeanor simple assault and his case was filed for one year.

In mid-April 1987, Applicant smoked marijuana while hanging out with two others in the parking lot of a local drinking establishment after hours. Local police saw him put the drug in his pocket, and he was arrested for illegal possession. Applicant pleaded nolo contendere and was assessed \$50 costs.

In mid-April 1988, Applicant was snorting cocaine inside a local elementary school at 2:00 in the morning with a friend who was the night custodian at the school. Noting Applicant's car parked at the school, local police investigated and found Applicant and his friend with lines of cocaine before them on a table. Applicant was arrested for felony possession of a controlled dangerous substance (cocaine). A search of his vehicle incident to his arrest led to the discovery of a large quantity of marijuana and drug paraphernalia (scale, plastic bags), and a charge of second controlled substance offense (marijuana) was added. Rolling papers and a short straw were found on Applicant's person when he was searched in a police cell block. In November 1988, Applicant pleaded nolo contendere to both charges, was adjudged guilty as charged, and sentenced for cocaine possession to 18 months in prison, suspended, 18 months probation and costs, and for his second marijuana offense, to one year, suspended, one year probation and costs, sentences to run concurrently.⁽³⁾

Needing a security clearance for his duties, Applicant completed a handwritten security clearance application from which an electronic version was prepared on arch 23, 2001. Applicant signed this SF 86 on April 10, 2001, certifying that the statements on the form were true, complete, correct to the best of his knowledge, and made in good faith. Applicant did not disclose his criminal drug convictions or the 1986 felony assault charge on his SF 86, responding "NO" to question 21 concerning any felony offenses ["Have you ever been charged with or convicted of any felony offense?"] and to question 24 concerning any alcohol/drug offenses ["Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?"].

In response to the Government's allegation that he deliberately falsified his SF 86 by not disclosing his drug offenses,

Applicant indicated he answered "No" to both questions because he "thought [his] record was clean when the judge told [him] to get help, which [he] did get the help." At his hearing, Applicant testified with respect to the omission of his drug offenses that he wasn't sure he got convicted of any of the felony charges. (Tr. 41) He subsequently explained:

The reasons I didn't write that down is I thought it meant being convicted, and I didn't think I had no convictions. I thought they were all suspended, or pulled from my file. I thought [the judge], the last time I had my problems, said, you know, if I clean up my act my record would be good. You know, I really understand that I screwed up, and I wish I at least mentioned it. (Tr. 72)

Applicant's denial of intentional omission is rejected as not credible. The express language in questions 21 and 24 is clear that information is to be reported regardless of whether the record has been sealed or otherwise stricken from the record. Applicant also seriously undermined his claim of good faith by his less than forthright testimony at the hearing about his drug involvement. When asked by Department Counsel whether he continued to use drugs after his first arrest for possession of marijuana, Applicant responded, "I wasn't really, I didn't really do drugs, you know." Applicant attributed his drug use to his alcohol problem; he claimed to use drugs only when he was intoxicated. As to whether his use of drugs in the elementary school at 2:00 a.m. was a "crime of opportunity," Applicant responded, "I would say that, yes." (Tr. 36-37) When questioned later by the undersigned about his marijuana use, Applicant testified, "I just think my drinking really got me into places where I shouldn't have been." Asked then why he happened to have a quantity of marijuana in his vehicle on the occasion of his 1988 arrest, Applicant answered, "I really don't know. I really don't even know what they found in the vehicle myself." (Tr. 66) It stretches credulity that Applicant was unaware he had marijuana in his vehicle. The police found not only a quantity of marijuana in a brown bag, but also a scale and a box of plastic bags--paraphernalia consistent with drug sales. Applicant eventually admitted to the undersigned he had been a user of marijuana, but he provided no explanation for the drug paraphernalia in his vehicle.

Applicant is a highly skilled and motivated shipfitter who gives beyond what is expected to get the job done. Consistently rated as performing at fully satisfactory (the highest rating), Applicant received awards for outstanding achievement in December 2001, December 2002, July 2003, and November 2003.

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: ⁽⁴⁾

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 . . .
- 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 ⁽⁵⁾

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent
- g. Potentially disqualifying conditions c. . . , 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.

Guideline E

Personal Conduct

E2.A5.1.1. The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying also include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

E2.A5.1.3. Conditions that could mitigate security concerns include:

None applicable.

CONCLUSIONS

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

Having already pled nolo contendere to an April 1987 misdemeanor marijuana possession charge, Applicant was caught with cocaine inside an elementary school and with a quantity of marijuana and drug paraphernalia in his vehicle in mid-

April 1988. Adjudged guilty of felony possession of cocaine and possession of marijuana (second offense), Applicant was sentenced to a prison term of 18 months, suspended, on the cocaine count, and to one year, suspended, on the marijuana count. Criminal conduct disqualifying conditions a. *Allegations or admission of criminal conduct*, b. *A single serious crime*, and c. *Any conviction in a Federal or State court, including a court-marital of a crime where the person has been sentenced to imprisonment for a term exceeding one year*, apply in this case, even though Applicant served no jail time. Had he violated the terms of his probation, he could have spent up to 18 months in prison.

The dated nature of the offenses and the absence of any recurrence are factors in his favor (*see* mitigating condition a. *The criminal behavior was not recent*), but Applicant is statutorily disqualified from having a security clearance granted or renewed under 10 U.S.C. § 986. Criminal conduct punished by a term of incarceration in excess of one year is regarded as so serious to where it cannot be mitigated unless meritorious circumstances exist as determined by the Secretary of Defense (*see* MC g.).

Furthermore, security significant Personal Conduct, Guideline E, concerns are raised where an applicant has not been completely candid with the Government about matter relevant and material to his or her personnel security application and investigation. (*See* DC E2.A5.1.2.2. *The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*). The SF 86 signed by Applicant on April 10, 2001, bears negative responses to the inquiries concerning any felony charges or convictions and any alcohol or drug charges or convictions. His responses were found to be knowingly false; likely attributable to his desire for specific job opportunities that would be open to him if he had a clearance.

Despite the passage of three years since the falsification of his SF 86, I am unable to conclude he possesses the requisite judgment, reliability, and trustworthiness that must be demanded of those granted access. He admitted to active involvement with marijuana (as opposed to being a few time user when his judgment was clouded by alcohol) late in the hearing after being confronted with the fact that the police found a quantity of marijuana in his vehicle. He has yet to explain his possession of drug paraphernalia (plastic bags and scale) associated with illegal drug sales. Although it has been 16 years since his arrest, it is simply not believable that he would not know that a bag of marijuana was found in his car and rolling papers were found on his person. Applicant having failed to meet his burden of showing he is successfully rehabilitated, adverse findings are warranted with respect to each allegation of the SOR. Pursuant to DOHA OI 64 ¶ 3.e., ⁽⁶⁾ it is not appropriate to make a recommendation as to whether his case should be considered further for a waiver of 10 U.S.C. § 986, given the unmitigated Personal Conduct and Criminal Conduct concerns.

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

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: Against the Applicant

Paragraph 2. Guideline E: AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.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.

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. It is not clear when Applicant last used illegal drugs. At his hearing Applicant claimed March 13, 1988, as his date of sobriety, denying any illegal drug use or alcohol consumption after that date. (Tr. 67) His arrest of mid-April 1988 on the illegal drug charges calls that date and Applicant's credibility into question.

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

5. 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.

6. To implement the June 7, 2001 memorandum, the Director, DOHA issued Operating Instruction No. 64 (dated July 10, 2001) which indicates with respect to waiver recommendations:

e. If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement "I recommend further consideration of this case for a waiver of 10 U.S.C. 986" or "I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986."

In this case, the decision to deny or revoke clearance was not solely because of the statutory disqualification set forth in 10 U.S.C. § 986.

