

DATE: August 4, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-17200

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant committed criminal conduct on at least seven separate occasions, including drug possession and sales, battery of a cohabitant, and rape by a foreign object, for which he was sentenced to a term of eight years imprisonment. The provisions of Title 10 U.S.C. 986 apply. Applicant voluntarily exited the hearing shortly after it began, thereby failing to mitigate any of the Government's allegations. Mitigation has not been shown. Clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

STATEMENT OF THE CASE

On March 8, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or granted .

Applicant filed a notarized response dated March 27, 2004, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On May 12, 2004, the case was assigned to this to Administrative Judge to conduct a hearing, and pursuant to formal notice dated June 7, 2004, a hearing was held on July 2, 2004.

At the hearing, Department Counsel offered seventeen documentary exhibits (Government Exhibits 1- 17) and no witnesses were called. Applicant offered no documentary exhibits and briefly offered his own testimony. Shortly after Department Counsel began questioning Applicant, he indicated that he did not want to proceed further with the hearing. The transcript (TR) was received on July 29, 2004.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct) of the Directive. The SOR contains eight allegations 1.a., through 1.h. under Guideline J. In his response to the SOR, Applicant admits all allegations except 1.b, and 1.c. During his brief testimony he admits to all of the allegations in the SOR (TR at 21).The admitted allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 36 years old and not currently married. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Guideline J (Criminal Conduct)

On March 14, 2002, Applicant sold three tablets of an illegal substance, MDMA, to an individual.

On March 20, 2002, Applicant again sold three tablets of MDMA, to an individual.

On March 27, 2002, Applicant was arrested for selling controlled substances, which is a felony, and conspiracy to sell controlled substances, another felony. On June 17, 2002, he pled guilty to selling controlled substances, a felony. He was sentenced to 180 days in jail, placed on a short term work furlough, fined \$350, ordered to pay restitution of \$1,200, and ordered to register as a drug registrant.

On April 30, 2002, Applicant possessed 172 tablets of MDMA, three grams of ketamine, a controlled substance, and two grams of psilocybin mushrooms, another controlled substance, which were all seized by the San Diego Police.

On September 23, 1999, Applicant was arrested for battery of a spouse or cohabitant and tampering with electric, telephone and cable television. On October 13, 1999, Applicant pled guilty to battery of a cohabitant . He was placed on summary probation for three years, ordered to pay fines fees and restitution totaling approximately \$4,000, ordered to report to a substance abuse assessment unit, ordered to complete a domestic violence program, and ordered to abstain from consuming alcohol.

On May 25, 1993, Applicant pled guilty to committing rape by a foreign object. He was sentenced to state prison for eight years. The execution of the sentence was suspended for five years under the following conditions of probation: Applicant was to serve 365 days in jail, pay fines and restitution t of approximately \$400, not depart the count of his residence without the permission of his parole officer, not possess a firearm or other deadly weapon, participate in counseling or therapy as directed by his parole officer, and register as a sex offender.

On January 9, 1989, Applicant was arrested for inflicting corporal injury on a spouse or cohabitant. The charge was subsequently dropped.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent

the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (*See* Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with

the U.S. Government that is predicated upon trust and confidence. Where facts proven by the Government raise doubts about an applicant's judgment, reliability, or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

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:

The Government has established its case under Guideline J. Applicant's conduct that is the basis for allegation of 1.f. of the SOR is criminal and did result in his receiving a term of eight years imprisonment. Under the provisions of Title 10 U.S.C. §986, a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment to a term exceeding one year, may not be granted or have renewed access to classified information. I resolve Guideline J against the Applicant.

Under Guideline J, I conclude that Disqualifying Conditions a, Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; b, A single serious crime or multiple lesser offenses, and c, Convictions in a Federal or State court . . . of a crime and sentence to imprisonment for a term exceeding one year, all apply because Applicant's conduct did involve seven serious criminal offenses over several years, including the one that resulted in the sentence of eight years. Applicant failed to remain at the hearing to its conclusion, and he has not offered any evidence to rebut the Government's case regarding his criminal conduct. No Mitigating Conditions apply.

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 APPLICANT

Subparagraph 1. a.: Against Applicant

Subparagraph 1. b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against 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 do not recommend further consideration of this case for a waiver of 10 U.S.C.986.

Martin H. Mogul

Administrative Judge