

KEYWORD: Criminal Conduct; Drugs

DIGEST: Applicant was involved in multiple offenses involving use of drugs and alcohol between 1991 and 2001 that resulted in arrests and prosecutions and confinement for over five years. Applicant was sentenced to five years imprisonment in 1992 but the sentence was suspended and he was placed on probation. He violated his probation when he tested positive for cocaine in 1994 and the sentence was re-instated. After release in 2001 Applicant again used drugs in violation of probation. Applicant meets the current test under 10 U.S.C. § 986 since he served more than one year of confinement. No mitigating conditions are applicable. As I find against Applicant on other grounds, a recommendation as to waiver of § 986 is inappropriate. Clearance is denied.

CASENO: 03-18627.h1

DATE: 08/31/2005

DATE: August 31, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-18627

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was involved in multiple offenses involving use of drugs and alcohol between 1991 and 2001 that resulted in arrests and prosecutions and confinement for over five years. Applicant was sentenced to five years imprisonment in 1992 but the sentence was suspended and he was placed on probation. He violated his probation when he tested positive for cocaine in 1994 and the sentence was re-instated. After release in 2001 Applicant again used drugs in violation of probation. Applicant meets the current test under 10 U.S.C. § 986 since he served more than one year of confinement. No mitigating conditions are applicable. As I find against Applicant on other grounds, a recommendation as to waiver of § 986 is inappropriate. Clearance is denied.

STATEMENT OF CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) dated March 8, 2004, 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. It was received by Applicant on March 30, 2004. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

In a sworn written statement dated April 4, 2004, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on July 6, 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not do so and the case was assigned to me on September 16, 2004. Because amendments were enacted by Congress to the law affecting certain persons who had been sentenced to more than one year of confinement,

a moratorium was imposed by DOHA on decisions on those cases, including this one, on December 14, 2004, that was not lifted until August 3, 2005. This accounts for the delay in issuance of this decision.

FINDINGS OF FACT

Applicant admitted all of the allegations in the SOR but offered extenuating and mitigating circumstances in his Defense Security Service interview. After a complete and thorough review of the information in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 45-year-old employee of a defense contractor working with sheet metal since February, 2001. He filed an application for security clearance (SF 86) in April, 2001. He was involved in multiple offenses involving use of drugs and alcohol between 1991 and 2001 that resulted in arrests and prosecutions resulting in confinement for more than five years. The offenses include possession of marijuana with intent to distribute, possession of morphine and valium, possession of firearms, parole violations, and driving recklessly while intoxicated. Several charges were not prosecuted and others were suspended, Applicant was sentenced to five years imprisonment in 1992 on the morphine, marijuana, and firearms charges but the sentence was suspended on condition of good behavior, completing drug treatment, and paying court costs. However, he violated those conditions when he tested positive for cocaine in 1994. The sentence was re-instated and he served five years.

After serving his sentence and upon release in 1999, Applicant violated his probation in December, 2001, when he was arrested and charged with possession of marijuana. He pled guilty and was sentenced on June 3, 2002, to 30 days in jail suspended. He was placed on probation for two more years, fined \$225.00, and his driver's license was suspended for six months. Applicant has had no arrests or other incidents since 2001. He has attended various drug courses and does not intend to use drugs in the future.

At the time the SOR was issued 10 U.S.C. § 986 provided no one who had been sentenced to more than one year confinement could receive a security clearance without a waiver granted by the Secretary of Defense. The law was changed in 2004, to require that an individual must serve at least one year of confinement, and not merely be sentenced to that period of confinement, before the law applies.

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.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (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 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. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors and conditions above, I conclude the following with respect to all allegations set forth in the SOR:

Applicant's arrests for criminal conduct raises security concerns under Disqualifying Condition (DC) 2 of Guideline J involving a history or pattern of criminal activity creating doubt about a person's judgment, reliability and trustworthiness (E2.A10.1.1.), involving a single serious crime or multiple lesser offenses (E2.A10.1.2.2.). The

allegations that occurred between 1991 and 1994 might be mitigated by the passage of time since all occurred over seven years ago. (E2.A10.1.3.1.) However, the fact that, after his confinement, he again was arrested and pled guilty to marijuana possession in 2001 leads me to the conclusion that the mitigating factors are not applicable.

The government has cited DC 1 under Guideline H concerning drug involvement as relevant to the proposed denial of a security clearance for the Applicant. Drug involvement is always a security concern because it raises questions about a person's willingness or ability to protect classified information. Any drug abuse is a condition that may be disqualifying. The following definition is provided: "Drug abuse is the illegal use of a drug" (E2.A8.1.1.3) A mitigating condition might be applicable since the drug involvement was not recent. (E2.A8.1.3.1.)

However, Applicant used drugs from 1991 until 2001 and his last arrest occurred eight months after his SF 86 was filed. I find the security concern should not be mitigated by passage of time (E2.A8.1.3.1.) since the use was over such a long period of time and Applicant did test positive for drugs once since he was released from confinement. Such conduct indicates that a greater period of time than four years from the most recent offense and only two years since the latest period of probation is required to justify application of the mitigating condition or to recommend a waiver of § 986. No other mitigating conditions are applicable.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. No evidence was offered by Applicant to show justification of application of the whole person concept. After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude the Applicant's actions and conduct precludes a finding that it is clearly consistent with the national interest to grant a security clearance to him or to recommend a waiver to the Secretary of Defense.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are 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

Paragraph 2 Guideline H: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

DECISION

After full consideration of all the facts and documents 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.

Charles D. Ablard

Administrative Judge