

KEYWORD: Criminal Conduct

DIGEST: Applicant has a history of criminal conduct from 1979 to 1986, when he was between 16 and 23 years old. He had several felony convictions for drug-related offenses, received lengthy sentences to confinement, and served 20 months in jail. Since his release, he has been an excellent father, a helpful neighbor, a dependable employee, and a good citizen. He has been fully rehabilitated for many years. He successfully held a security clearance from about 2000 until the initiation of this action. Applicant mitigated the security concerns arising from his history of criminal conduct. However, he is subject to 10 U.S.C. § 986 by virtue of his confinement; thus, I am required to find him ineligible for a security clearance. Clearance is denied.

CASENO: 04-01835.h1

DATE: 04/17/2006

DATE: April 17, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-01835

**DECISION OF ADMINISTRATIVE JUDGE**

**MICHAEL J. BRESLIN**

**APPEARANCES**

## **FOR GOVERNMENT**

Richard Stevens, Esq., Department Counsel

## **FOR APPLICANT**

David P. Price, Esq.

## **SYNOPSIS**

Applicant has a history of criminal conduct from 1979 to 1986, when he was between 16 and 23 years old. He had several felony convictions for drug-related offenses, received lengthy sentences to confinement, and served 20 months in jail. Since his release, he has been an excellent father, a helpful neighbor, a dependable employee, and a good citizen. He has been fully rehabilitated for many years. He successfully held a security clearance from about 2000 until the initiation of this action. Applicant mitigated the security concerns arising from his history of criminal conduct. However, he is subject to 10 U.S.C. § 986 by virtue of his confinement; thus, I am required to find him ineligible for a security clearance. Clearance is denied.

## **STATEMENT OF THE CASE**

On August 27, 2003, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant a security clearance for Applicant under Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On September 8, 2005, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns raised under Guideline J, Criminal Conduct, of the Directive.

Applicant answered the SOR in writing on September 28, 2005. He elected to have a hearing before an administrative judge.

I received the case assignment on November 29, 2005. With the concurrence of Applicant and Department Counsel, I convened the hearing on February 8, 2006. The government introduced Exhibits 1 through 3. Applicant's counsel

presented Exhibits A through C, and the testimony of four witnesses. Applicant also testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on February 16, 2006.

### **FINDINGS OF FACT**

Applicant admitted the factual allegations in ¶¶ 1.a through 1.f of the SOR, with explanations. (Applicant's Answer to SOR, dated September 28, 2005.) Those admissions are incorporated herein as findings of fact. He denied the allegation in ¶ 1.g of the SOR. (*Id.*) After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in June 1963. (Ex. 1 at 1.) In 1979, when he was about 16 years old, he began smoking marijuana occasionally at social events. (Ex. 2 at 1.) By 1980, he was using marijuana daily, if available. (*Id.*) He started purchasing the drug in small quantities for his personal consumption; gradually he began buying larger quantities and selling a portion to his friends. (*Id.* at 2.) While in high school, Applicant used lysergic acid diethylamide (LSD) once, in a form known as "blotter acid." (Ex. 2 at 4.)

After graduating from high school, he began selling larger quantities of marijuana. By about 1983, he was making about \$500.00 a week selling marijuana. (Ex. 2 at 3.)

In September 1981, when he was 18 years old, he was pulled over for speeding. (Ex. 2 at 5.) When he opened his wallet for his driver's license, a marijuana cigarette fell out. (*Id.*) The local police arrested him for possession of marijuana, a misdemeanor. (Answer to SOR, *supra*, at 1; Ex. 3 at 1.) The authorities deferred prosecution of the charge. (Ex. 3 at 1.)

In January 1982, Applicant was arrested while trying to steal a fuel filter from a store. (Answer to SOR, *supra*, at 1.) According to Applicant, he was under the influence of illegal drugs at the time. (*Id.*) At trial, authorities dismissed the charge. (*Id.*)

In 1983, Applicant started using cocaine. (Ex. 2 at 2.) He began purchasing and using cocaine about once or twice a month. (*Id.* at 2-3.) He sold cocaine about five times, in quantities ranging from one gram to one-eighth of an ounce. (Ex. 2 at 3.)

By 1985, Applicant was buying larger quantities of marijuana and selling it to support his addiction to cocaine. (Answer to SOR, *supra*, at 1.) On one occasion, he purchased a quarter-pound of marijuana and sold it in bulk to his friend. (Ex. 2 at 6.) Unbeknownst to Applicant, his friend was working with an undercover city police officer. (*Id.*) A few nights later, the police broke in his door, searched his home, and seized a quarter-pound bag of marijuana. (*Id.*) City authorities charged Applicant with possession of marijuana with intent to distribute, a felony. (*Id.* at 7; Answer to SOR, *supra*, at 1; Ex. 3.)

After being released on bond, he went home. Police officers from another city arrived, arrested Applicant, and charged him with possession of marijuana with intent to distribute, a felony, based upon the same conduct. (Ex. 2 at 7.) Applicant was released on his personal recognizance. These charges came to trial first; the court found Applicant guilty and sentenced him to 5 years confinement, suspended, and five years probation. (Answer to SOR, *supra*, at 1; Ex. 2 at 7.)

While the second prosecution was pending, Applicant continued to use and sell illegal drugs. (Ex. 2 at 7-8.) In about October 1985, Applicant was arrested while possessing cocaine. (*Id.*) Authorities charged him with possession of cocaine, a felony.

Applicant went to trial on the original charge of possession of marijuana with intent to distribute. (Ex. 2 at 8.) The court found him guilty and sentenced him to five years confinement, running concurrent with the sentence on the related charge, but suspended the sentence. (Answer to SOR; *supra*, at 1.)

In about January 1986, Applicant was arrested for possession of cocaine. (Answer to SOR, *supra*, at 1.) The court found him guilty of the offense and sentenced him to five years in jail, suspended, and three years probation. (Answer to SOR, *supra*, at 2.) The court found that Applicant violated his probation and ordered him to serve the remainder of his five-year sentence. Applicant actually served one year and eight months in confinement, and was placed on probation for the remainder of his sentence. (Tr. at 69.)

While incarcerated, he attended Alcoholics Anonymous (AA) meetings twice a week. (Ex. 2 at 10.) He cooperated with the police to help arrest others. (Tr. at 67.) He was released from confinement in about 1987. (Tr. at 70.) Later, the court released him from probation early. (Ex. B (a).)

Upon his release from confinement, Applicant worked hard to make a better life for himself. (Tr. at 62.) He worked as a mechanic at a car rental agency, and obtained a degree in applied science from a community college. (*Id.*) The car rental agency promoted him to service manager.

Applicant was married in June 1989. (Ex. 1 at 3.) He and his wife have been married for 17 years and have two daughters. (Tr. at 63.)

In 1996, he went back to college to study computers. He graduated with honors. (Tr. at 63.) After several jobs in the computer field, he began working for a federal contractor in 1998.

Applicant applied for a security clearance, and was interviewed by a security investigator about his criminal background. In a statement dated June 1, 1999, Applicant detailed his history of criminal involvement. (Ex. 2.) In May 2000, Applicant received a Secret security clearance. (Ex. 1 at 9.)

In October 2000, Congress enacted a statute codified at Title 10, United States Code § 986, commonly called the "Smith Amendment." That a statute provided, *inter alia*, that absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than one year. In October 2004, that provision was amended to limit its application to persons who actually served at least one year in confinement.

Since his release from jail, Applicant has not been arrested or charged with any offense. (Tr. at 65.) He has not used any illegal drug (Tr. at 65), and does not associate with persons associated with his criminal past. His former parole officer praises his trustworthiness and acceptance of responsibility. (Exs. C (c) and (n); Tr. at 44-46.) Applicant is attempting to have his voting privileges restored and his criminal record expunged. (Tr. at 68.)

Presently, Applicant works as a field engineer/supervisor for a defense contractor. (Ex. 1 at 1.) His supervisor, managers, and security officer describe him as dedicated, hard-working and responsible. (Exs. C (j), (k), (l), (m), (o), (p), (q), and (r); Tr. at 30-32, 38, .) A co-worker praises his dependability and honesty. (Ex. C (g).) He is a volunteer coach for youth soccer teams. (Tr. at 63; Ex. C (h).) His parents, his accountant, and his neighbors attest to his stable family life and good citizenship. (Exs. C (a), (b), (d), (e) and (i).) Applicant and his wife are in a reasonably sound financial condition; they are current on their financial obligations, (Ex. A (c)), have equity in their home (Ex. A (a)), and have funds in an investment/savings account (Ex. A (b)).

## POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch.

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. The adjudicative guideline at issue in this case is:

Guideline J, Criminal Conduct: A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. (Directive, ¶ E2.A10.1.1.)

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to this adjudicative guideline, are set forth and discussed in the conclusions below.

As noted above, Title 10, United States Code § 986, prohibits the Department of Defense from granting or renewing a security clearance to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, was sentenced to imprisonment for a term exceeding one year, and was incarcerated for more than one year. The statute also provides that, in meritorious cases, the Secretary of Defense or his designee may authorize a waiver of the prohibition.

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. *Id.* An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (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 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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (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 (App. Bd. Dec. 19, 2002)). "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.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

Paragraph E2.A10.1.2.1 of the Directive provides that "allegations or admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant's record includes multiple felony convictions. I find both these potentially disqualifying conditions raised in this case.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated. Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." The Directive does not define the term "recent"; the recency of an incident is determined by considering all the circumstances, including the applicant's age, his pattern of behavior over a period of time, and the number of years since the last incident relative to the entire course of conduct. Applicant's criminal offenses arose when he was a relatively young man, between the ages of 16 and 23. His last offense occurred about 20 years ago. Considering all the circumstances, I conclude Applicant's criminal conduct is not recent, and this potentially mitigating condition applies.

The Directive, ¶ E2.A10.1.3.2, also provides that it may be mitigating where "the crime was an isolated incident." As noted above, Applicant has a long history of crimes related to drug use and possession. His crimes are not isolated incidents; therefore, this potentially mitigating condition does not apply. Although his counsel ably argued that one should consider that portion of his life as an isolated episode, I am not persuaded that was the intent of the Directive. Nonetheless, I will consider how these offenses relate to the entire span of Applicant's life as part of the "whole person" analysis, below.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, under ¶ E2.A10.1.3.6 of the Directive, it may be mitigating where "there is clear evidence of successful rehabilitation." Applicant's 20-year record of good citizenship and responsibility demonstrate that he is fully rehabilitated. Through the impressive testimony and affidavits of co-workers, neighbors and acquaintances, he met his burden of presenting clear evidence of successful rehabilitation. I conclude these potentially mitigating conditions apply.

I carefully considered Applicant's eligibility for a security clearance in light of the "whole person" concept, and the disqualifying and mitigating conditions raised in this case. There can be no doubt that Applicant has a long record of serious, deliberate, drug-related offenses. He showed no regard for the law, and no amenability to correction until his lengthy period of confinement. On the other hand, his crimes occurred about 20 years ago, when he was a relatively young man. Since then, he has been an excellent father, a helpful neighbor, a dependable employee, and a good citizen. He has been fully rehabilitated for many years; therefore, there is no likelihood of continuation or recurrence of criminal conduct. He successfully held a security clearance from about 2000 until the initiation of this action. I conclude Applicant mitigated the security concerns arising from his history of criminal conduct, and find in his favor for ¶¶ 1.a through 1.f of the SOR.

Applicant is subject to 10 U.S.C. § 986 by virtue of being sentenced to five years in confinement as a result of the convictions for possession of marijuana with intent to distribute, and actually serving 20 months in jail. Under the statute, I am required to find against Applicant for ¶ 1.g of the SOR.

As my adverse security decision against Applicant is based solely on the applicability of 10 U.S.C. § 986, it is appropriate for me to make a recommendation as to whether Applicant's case should be considered for waiver. (ISCR Case No. 02-00500 at 6 (App. Bd. Jan. 16, 2004) (citing DOHA Operating Instruction 64 ¶ 3.e).) I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

### **FORMAL FINDINGS**

My conclusions as to each allegation in the SOR are:

Paragraph 1, Guideline J: AGAINST APPLICANT



Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: 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.

Michael J. Breslin

Administrative Judge