DATE: July 12, 2006

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 04-05809

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has held a secret-level security clearance since November 1992. His evidence of reform and rehabilitation is sufficient to mitigate the criminal conduct security concern raised by his two marijuana-related convictions in 1986 and 1988. In addition, Applicant's 1988 conviction and sentence to confinement for five years does not fall within the meaning of the 10 U.S.C. § 986, because he was incarcerated for less than one year. Clearance is granted.

STATEMENT OF THE CASE

Applicant is challenging the Defense Department's initial decision to deny or revoke his security clearance. Acting under the relevant Executive Order and DoD Directive,[(1)] on October 27, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct. Also, it alleges that Applicant is disqualified from holding a security clearance under 10 U.S.C. § 986, the so-called Smith Amendment. Applicant replied to the SOR on November 2, 2005, and requested a hearing. The case was assigned to me January 12, 2006. A notice of hearing was issued scheduling the hearing for March 2, 2006. Applicant appeared without counsel and the hearing took place as scheduled.

The record was kept open to allow Applicant to present additional documentary evidence (a college transcript). That information was timely received and it is admitted, without objections, as Exhibit D. DOHA received the transcript March 14, 2006.

FINDINGS OF FACT

In his reply to the SOR, Applicant admitted the allegations in subparagraphs 1.a and 1.b, and he did not respond to the Smith Amendment allegation in subparagraph 1.c. His admissions are incorporated herein as findings of fact. In addition, based on the record evidence as a whole, I make the following findings of fact.

Applicant is a 56-year-old man who is seeking to retain a security clearance for his employment with a contractor of the Defense Department. He has been employed as an electronics technician since about May 1992. His day-to-day work involves testing various components of missile and aviation systems and subsystems.

Applicant and his wife have been married for 31 years. They have three adult children, ages 30, 25, and 20. The two oldest children are both college graduates, and the 25-year-old son is now a seminary student. The 20-year-old daughter is a college sophomore. Applicant's spouse has worked for the same city water and sewer department for about 32 years.

Applicant has a history of marijuana use and involvement, including two convictions in state court for marijuana-related crimes. His last involvement with marijuana was in November 1987. During the hearing, Applicant described himself as a "pothead"[(2)] who smoked marijuana to unwind from work. Applicant disclosed his marijuana involvement to the Defense Department in a September 1992 sworn statement.[(3)] The Defense Department granted Applicant a secret-level security clearance on November 27, 1992.[(4)]

In January 1986, Applicant was arrested for the felony offense of unlawful possession of a controlled substance, marijuana. A few months later on May 12, 1986, he pleaded guilty as charged and the court found him guilty. The court sentenced Applicant to be imprisoned in the state penitentiary for two years and fined him $150. The court suspended the sentence to confinement and placed Applicant on unsupervised probation for two years until May 12, 1988.

In November 1987, Applicant was arrested for possession of marijuana offenses. Based on the arrest, probation officials recommended that Applicant's probation be revoked. In January 1988, acting on that recommendation, the court revoked Applicant's probation based on possession of marijuana. A few months later on May 9, 1988, Applicant pleaded guilty to the offense of unlawful possession of a controlled substance as an habitual offender, and the court found him guilty. On June 3, 1988, the court sentenced Applicant to be imprisoned in the state penitentiary for five years under the state's Habitual Offender Act. Also, the court ordered him to pay a $2,000 fine and other costs. Shortly thereafter, the court amended its judgment by reducing the fine from $2,000 to $500.

Before going to court based on his November 1987 arrest, Applicant went to a 28-day inpatient drug-rehabilitation program. This occurred during November and December 1987. After his discharge, Applicant attended an aftercare program for about two to three weeks on a daily basis.

Although sentenced to five years of imprisonment, Applicant served well less than one year. Applicant served his confinement in a correctional facility, a work-release facility, and a minimum-security facility.[(5)] After serving about three to four months of confinement--in about September or October 1988--Applicant was placed into a supervised intensive restitution (SIR) program where he remained until February 6, 1990, when he was released with no other court-ordered supervision. While in the SIR program, he was required to meet with a supervising officer weekly, pay $10 weekly, and was subject to urinalysis for drug use.[(6)] During this period, Applicant lived at home with his family; he slept at home and ate his meals at home.[(7)] And while in the SIR program, Applicant attended a local community college. His college transcript[(8)] shows he was enrolled as a student for the following terms: spring 1988, fall 1988, winter 1989, spring 1989, summer 1989, fall 1989, winter 1990, spring 1990, and summer 1990. He was awarded an associate's degree in applied science (electronics) in August 1990.

Applicant has been employed in the defense industry since about May 1992, and he has held his security clearance without a negative incident, problem, or concern. Six character witnesses, supervisors and coworkers, appeared at the hearing and vouched for Applicant's knowledge, skills, and abilities. For example, his first-level supervisor described Applicant as a very good worker who makes wise decisions and is professional in all he does.[(9)] The government senior engineer, also known as the government lead on the contract, described Applicant as an excellent employee with a strong work ethic and a person of the highest character.[(10)] Likewise, the onsite company supervisor described Applicant as a "star performer,"[(11)] a top employee who is punctual, methodical, and thorough.[(12)]

Applicant's 53-year-old spouse views his 1988 conviction and sentence to confinement as an answer to her prayer to remedy his marijuana use. She believes Applicant's time in prison changed him totally, renewed his faith, and allowed

him to become a man, a husband, and a father.

In addition to work, Applicant is active in community and church affairs. In the community, he works as a referee for local basketball leagues. In the church, he serves as the pastor's steward and he is the Sunday school teacher for the senior class.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[(13)] Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting a clearance.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[(14)] There is no presumption in favor of granting or continuing access to classified information.[(15)] The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.[(16)] An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[(17)] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(18)]

No one has a right to a security clearance.[(19)] And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(20)] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Applicability of 10 U.S.C. § 986

The issue here is whether Applicant's 16 or 17 months in the SIR program constitutes incarceration for the purpose of determining if Applicant was " . . . incarcerated as a result of that sentence for not less than one year" under 10 U.S.C. § 986. If it does, it means that Applicant is--as a matter of law--ineligible to hold a security clearance. To resolve this question, a brief review of the statute's history is appropriate.

In 2000, a federal statute was enacted that prohibited the Defense Department from granting or continuing a security clearance for any applicant if that "person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year."[(21)] The statute is sometimes referred to as the Smith Amendment.[(22)] The effect of the legislation was to disqualify a person with a conviction in state, federal, or military court with a sentence imposed of more than one year regardless of the amount of time actually served, if any.

The statute also allowed that in a meritorious case, the Secretary of Defense could authorize an exception to the prohibition. The Secretary was not authorized to delegate that authority.[(23)] In June 2001, the Deputy Secretary of Defense issued implementing guidance for processing cases under the statute. In response, the Director, DOHA, directed that, in cases in which the decision to deny or revoke a security clearance is based solely on 10 U.S.C. § 986, the administrative judge "shall include without explanation" a statement recommending or not recommending further consideration of the case for a waiver of the prohibition.[(24)]

Congress amended certain parts of the statute in 2004. As amended, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited or narrowed. The statute now disqualifies an applicant if "the person has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year."[(25)] The effect of the legislation is that an applicant who has been sentenced to more than one year, but instead served probation, or who served less than a year of incarceration, is not--as a matter of law--ineligible to hold a security clearance.

Here, starting on about June 3, 1988, Applicant was imprisoned for three to four months in a combination of three facilities. He was then placed in the SIR program where he remained until his release on February 6, 1990. While in the SIR program, Applicant reported weekly to a supervising officer, paid $10 weekly, and was subject to urinalysis. Also, he attended community college, he lived at home, he ate meals at home, he interacted with his family at home, and he slept at home.

In its posthearing submission,[(26)] the government argues that these circumstances should be considered incarceration for the purpose of applying the Smith Amendment to Applicant. In support of its argument, the government cites several cases for the proposition that both a sentence to boot camp and a work-release sentence amount to imprisonment or incarceration. The cases are not persuasive because they have distinguishable facts. In none of the cases relied on by the government was the individual in boot camp or in a work-release program permitted to live at home with family seven days a week, as Applicant did in the SIR program. In a typical work-release program, an inmate is allowed to leave a halfway house, county jail, or similar correctional facility to work at paid employment (or seek work) during the day, but is required to report back to the facility nights and weekends.[(27)] That is a far different case than Applicant's time in the SIR program.

Given the specific circumstances here, I conclude Applicant's time in the SIR program from about September or October 1988 until his release on February 3, 1990, does not constitute incarceration within the meaning of 10 U.S.C. § 986(c)(1), as amended. This 16- or 17-month period is similar to supervised probation, and it is a status fundamentally different from incarceration. Accordingly, I conclude that 10 U.S.C. § 986 does not apply to this case, because Applicant was incarcerated for less than one year.

2. Criminal Conduct

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant stands twice convicted of marijuana-related offenses. In 1986, he pleaded guilty to the first case and received a suspended sentence with two years of unsupervised probation. The court revoked the probation based on his second case. In 1988, he pleaded guilty to the second case as a habitual offender and was sentenced to imprisonment for five years. He served three to four months of confinement in a combination of facilities before being placed in the SIR program where he lived at home, attended community college, and reported to a supervising officer weekly until his release in February 1990. Given these circumstances, both DC 1[(28)] and DC 2[(29)] apply against Applicant. His history of marijuana-related criminal conduct creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the mitigating conditions and conclude the evidence of reform and rehabilitation is sufficient to mitigate the security concern under Guideline J. I considered the six mitigating conditions (MC) under the guideline and conclude three apply in Applicant's favor. Each MC is discussed below.

First, MC 1[(30)]--the criminal behavior was not recent--applies in Applicant's favor. He engaged in his last incident of marijuana-related criminal conduct in November 1987, nearly 19 years ago. Given these circumstances, his criminal behavior was not recent based on the passage of nearly 19 years without recurrence of additional criminal conduct.

[(31)]

Second, MC 2 --the crime was an isolated incident--does not apply. During the 1980s, Applicant used and possessed marijuana on a regular basis and he has two separate criminal convictions to show for it. Given this pattern, it would be illogical to view his criminal history as an isolated incident.

Third, MC 3[(32)]--the person was pressured or coerced into committing the act and those pressures are no longer present in that person's life--does not apply. There is no record evidence to support application of this MC.

Fourth, MC 4[(33)]--the person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur--applies in Applicant's favor. During the 1980s, Applicant was a self-described pothead who smoked marijuana on a regular basis. After his second arrest, Applicant completed a drug-rehabilitation program and two to three weeks of aftercare. Also, he has not used marijuana or any other illegal drug since his second arrest. Given that he has not used marijuana for nearly 19 years, it follows that additional marijuana-related criminal conduct is unlikely to recur.

Fifth, MC 5[(34)]--acquittal--does not apply. None of the offenses for which Applicant was arrested and charged resulted in a judgment of not guilty.

Sixth, MC 6[(35)]--there is clear evidence of successful rehabilitation--applies in Applicant's favor. In support of this conclusion, I note four circumstances. First, marijuana, the source of his troubles, is no longer a part of his life. He has not used marijuana since November 1987, and he has been a law-abiding citizen for many years. Second, since his release from the SIR program, Applicant made a new life for himself and his family. He earned an associate's degree and he has enjoyed continuous, successful employment as an electronics technician in the defense industry since about May 1992. Third, Applicant is now a mature 56-year-old married man and father of three adult children (with one still in college), with substantial responsibilities at work and in community and church affairs. In other words, he's not the same person he was in the late 1980s. Fourth, he has held a secret-level security clearance since November 1992. By doing so, he demonstrated that he is a suitable candidate for access to classified information. Taken together, these four circumstances are proof of a well-established track record of law-abiding behavior that assures he will not slip back into his old ways of involvement with marijuana. Based on the record evidence as a whole, Applicant presented sufficient evidence of reform and rehabilitation to mitigate the criminal conduct security concern. Accordingly, Guideline J is decided for Applicant.

To conclude, Applicant has met his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching my decision, I considered the whole-person concept, the clearly-consistent standard, and the appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline J: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).

2. R. 100.

3. Exhibit 2.

4. Exhibit C.

5. Exhibit 2 at 2.

6. R. 97.

7. R. 99, 102-103.

8. Exhibit D.

9. R. 43.

10. R. 54-55.

11. R. 79.

12. R. 82.

13. Executive Order 10865, § 7.

14. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

15. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

16. Directive, Enclosure 3, Item E3.1.14.

17. Directive, Enclosure 3, Item E3.1.15.

18. Directive, Enclosure 3, Item E3.1.15.

19. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988)("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).

20. 484 U.S. at 531.

21. 10 U.S.C. § 986(c)(1) (2001).

22. For background information on the origin of this statutory prohibition, *see* Attorney Sheldon I. Cohen's publication *Loss of a Security Clearance Because of a Felony Conviction: The Effect of 10 U.S.C. § 986, the "Smith Amendment,"* which can be found at www.sheldoncohen.com/publications.

23. 10 U.S.C. § 986(d) (2001).

24. DOHA Operating Instruction No. 64 ¶ 3.e (July 10, 2001).

25. 10 U.S.C. § 986(c)(1) (2004).

26. Appellate Exhibit I.

27. *E.g. Asquith v. Volunteers of American*, 1 F. Supp. 2d 405, 406 (D.N.J. 1998) (prisoner serving a five-year sentence to confinement for possession of cocaine with intent to distribute was allowed to participate in a work-release program where he lived in a halfway house); *United States v. Ruffin*, 40 F.3d 1296 (D.C. Cir. 1994)(work-release sentence that required defendant to be imprisoned on weekends and from 6:00 p.m. to 6:00 a.m. on weekdays was a prior sentence of imprisonment for purposes of calculating criminal history category).

28. E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

29. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

30. Item E2.A10.1.3.1.

31. Item E2.A10.1.3.2.

32. Item E2.A10.1.3.3.

33. Item E2.A10.1.3.4.

34. Item E2.A10.1.3.5.

35. Item E2.A10.1.3.6.