

DATE: December 6, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-07187

DECISION ON REMAND OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

Edward W. Loughran, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used methamphetamine, marijuana and cocaine during part of the year 1995, and possibly in 1994, while he was in the United States Air Force (USAF), for which he was sentenced to a bad conduct discharge and confinement for two years. Applicant's actual period of incarceration was less than one year. The provisions of Title 10 U.S.C. 986 do not apply. Applicant last used any illegal substance in August 1995. Mitigation has been shown. Clearance is granted.

STATEMENT OF THE CASE

On August 31, 2005, 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 him and recommended referral to an Administrative Judge to determine whether clearance should be denied or granted .

Applicant filed a notarized response dated September 18, 2005, to the allegations set forth in the SOR, and initially requested a decision based solely on the record. Thereafter, he requested a hearing before a DOHA Administrative Judge. On November 25, 2005, the case was assigned to this to Administrative Judge to conduct a hearing, and pursuant to formal notice dated January 5, 2006, a hearing was held on February 8, 2006.

At the hearing, Department Counsel offered ten documentary exhibits (Government's Exhibits 1- 10) and no witnesses were called. Applicant also offered ten documentary exhibits (Applicant's Exhibits A-J) and offered his own testimony. The transcript (Tr) was received on February 16, 2006.

The Government appealed my original Decision, which was dated March 13, 2006. The Appeal Board has remanded that Decision and instructed me to consider all the record evidence, including documents and testimony concerning whether Applicant's served more than one year of confinement. This has been done in this remand decision.

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 two allegations 1.a., and 1.b. under Guideline J. In his response to the SOR, Applicant admitted some aspects of the allegations, but modified his response at the hearing.

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

Applicant is 45 years old. He is married and has two children and four stepchildren. He is employed as a production operation manager 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 December 12, 1995, Applicant, an active member of the USAF, was charged by the USAF with (1) Wrongful Use of Methamphetamine, Marijuana and Cocaine, (2) Wrongful Introduction of ethamphetamine onto a USAF base, (3) Wrongful Solicitation of a member of the USAF to use Methamphetamine, and (4) Adultery. At a March 1, 1996 Court-Martial, Applicant plead guilty to Count (1), and the other charges were withdrawn.

Applicant was sentenced to a bad conduct discharge, confinement for two years, and reduction to the grade of E-3. On March 4, 1997, he was paroled and placed on probation until February 28, 1998, which he satisfactorily completed.

Applicant used methamphetamine, marijuana and cocaine during some part of the year 1995, and possibly in 1994. The amount and the frequency of his usage during that period is not clear, since Applicant's testimony about his drug usage was challenged by Department Counsel, based on statements of other witnesses. However, the evidence has not been controverted that Applicant did not use any illegal substances from 1980 until 1994, the previous years that he was a member of the USAF, and he has not used any illegal substance for more than 10 years, since August 1995 (Tr at 60-61).

Length of Term of Confinement

The Government has alleged that Applicant served more than one year of confinement. Applicant denied that his actual confinement exceeded one year. In writing my initial decision, I considered all of the evidence presented in the case regarding the exact length of confinement, although not all of it was discussed in the decision. It will be reviewed and discussed in more detail in this remand decision.

At the hearing, Applicant testified that he was taken into custody immediately subsequent to his Court Martial on March 1, 1996. However, he was shortly thereafter released from the "brig", and for the first two weeks after he plead guilty at the court-martial, he was not actually kept in confinement, but rather received into the custody of his First Sergeant. He further testified that with the provision that he must make his First Sergeant aware of where he was going at all times, he was not confined to the base, but was free to go where he desired, including sleeping off base (Tr at 61-63). He averred that he was not actually placed in confinement until March 14, 1996, and since he was released on March 4, 1997, his confinement was less than one year.

In his Response to the SOR, Applicant had admitted that he did serve for a period of one year and three days in confinement. At the hearing when confronted with this admission, Applicant testified that he assumed that his custody began on March 1, 1996, the time he was first released from the brig, and he had not understood the distinction between more or less than twelve months of confinement.

During the hearing, Applicant argued that his confinement of less than one year did not place him beyond the scope of 10 U.S.C. 986, but only that this should be considered in recommendation of a waiver.

In a sworn statement made to a special agent of the Defense Security Service and signed on August 24, 2000, Applicant stated that after being taken into custody at the Air Force base where he was serving, he was transferred two weeks later to a United States correction facility (Exhibit 3). This statement corroborates his testimony at the hearing. It was made in the year 2000, before 10 U.S.C. 986 had been amended. At that time the duration of actual confinement was not an issue.

A report from the Federal Bureau of Investigation (FBI), indicated that Applicant was "arrested or received 1996/03/14", and "1997/03/04 status - parole"(Exhibit 7). This FBI Report shows a period of confinement of Applicant of less than one year.

I also considered evidence that raised some question about Applicant's credibility. This evidence, a case synopsis (Exhibit 5), written in December 1995, and which included a summary of statements made by Applicant's former wife, niece and other individuals, offered different versions than Applicant regarding his illegal drug usage, the frequency used, and with whom he used it. Applicant offered an explanation that these people had poor relationships with him, and they had not been accurate at that time of these prior statements. Also based on the time lapse of more than ten years, he offered that his memory regarding the specifics of drug usage from that relatively brief period was not concise. Since this evidence concerned events that happened more than ten years before the hearing, and since none of these individuals testified at the hearing, offered any current evidence about Applicant's drug usage in 1995, or could be confronted by Applicant, this contradictory evidence was given limited weight as a means to determine Applicant's credibility.

Two other potential adverse factors were considered by me before I reached my final conclusion about this issue. Exhibit 6 includes the General Court-Martial Order (GCMO) No. 122 dated May 7, 1997. The GCMO indicates among other things that Applicant was sentenced to a bad-conduct discharge, and confinement to two years. It does not address the issue of deferment of sentence. While there may be a general presumption that if there were a deferred sentence, it should have been addressed in the GCMO, the fact that the sentencing is not discussed in any way makes this document less than dispositive on the issue of whether Applicant began confinement on March 1, 2006. It simply is one piece of evidence considered as to this issue, and less than ultimately persuasive as to when confinement began.

DD Form 214, the Certificate of Release From Active Duty, dated May 20, 1997, (Exhibit 8) includes the "Dates of time lost during this period" to include "1 March 1996 through 12 May 1997." I do not find that including the period from March 1, 1996, through March 14, 2006, as time lost contradicts the testimony of Applicant. Whether or not he was in confinement during that two week period, he certainly would not have been considered as performing his duties for the USAF during that time period, so considering this two week period as time lost is consistent with either finding regarding time in confinement.

Ultimately I determined that Applicant was confined for a period of less than one year. There are a number of factors that have been considered in my determination. I first considered Applicant's testimony itself, including his manner, his demeanor, his voice, his body language, and other factors, which can only be assessed by someone present during his testimony. I found his testimony credible. Also, I considered the fact that Applicant asserted that his confinement would not render him outside the scope of 10 U.S.C. 986, but only that this should be considered in recommendation of a waiver. If he had lied about his confinement for less than a year, it seems rather more likely that he would have attempted to argue that this lack of confinement would place him beyond the scope of 10 U.S.C. 986.

Taken as a whole I found his testimony persuasive; but it was not the only factor that I considered in this remand decision and also in the initial decision. I considered additional evidence as well.

Two significant pieces of evidence, that have been discussed above, were also considered positively in assessing the veracity of Applicant's testimony. The first is his sworn statement of August 2000, which corroborates his hearing testimony, that he was transferred to a United States correctional facility two weeks after he was taken into custody. The second is the only independent document that actually provides information as to the time of Applicant's confinement, the FBI report, which indicates that his confinement was less than one year, from March 14, 1996 to March 4, 1997.

I also attempted to assess Applicant's overall character, to further aid in the determination of whether he was a credible witness. I considered that no evidence was introduced to contradict the assertion by Applicant that he did not use any

drugs while in the USAF from 1980 until 1994, and he stopped using illegal substances in 1995, and he has used nothing since.

I also considered his USAF career. Applicant offered into evidence every Personnel Evaluation he received while he was in the USAF, from 1980 to 1995 (Exhibit G). In his first rating in 1981, he was described as an "exceptionally well motivated and dedicated individual. He constantly strives to gain expertise in a complicated career field by assisting on every job possible." In his 1995 rating, he was evaluated as an "Outstanding professional NCO who consistently demonstrates top-notch leadership and management skills." In every one of the eighteen Personnel Evaluations that he received there was nothing but the most laudatory praise of Applicant's ability and the highest rating in all areas of his performance. Clearly with the exception of his drug usage in 1995, which ultimately caused him to be discharged from the USAF, he exhibited excellent character, and he performed his duty for 15 years in an outstanding manner.

Finally, Applicant submitted a letter from the Operations Manager of his current employer, by whom he has been employed for the past six years (Exhibit J). His manager stated that Applicant, "is a positive role model who demonstrates outstanding leadership skills for others in the company to emulate. I am vouching for [Applicant's] character and hard work mentality." He also stated that Applicant has been subjected to random drug screens, during the six years that he has been employed at this company, and there have been no positive findings.

After reviewing all of the evidence in total, I find it more likely that Applicant was under confinement for a period of less than one year, and 10 U.S.C. 986 does not apply.

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 initially established its case under Guideline J. Applicant's conduct that is the basis for allegation 1.a. of the SOR is criminal and did result in his receiving a term of more than one year imprisonment. However, as discussed above, I find that Applicant was not actually under confinement for a period of more than one year. Therefore Title 10 U.S.C. §986, does not apply to this Applicant in this case.

Under Guideline J, I conclude that Applicant's criminal conduct falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1., allegations or admissions of criminal conduct, regardless of whether the person was formally charged; and DC E2.A10.1.2.2., a single serious crime or multiple lesser offenses, because of Applicant's use of illegal drugs in 1995, a period when he was in the USAF. In reviewing the Mitigating Conditions (MC) I find that MC E2.A10.1.3.1., the criminal behavior was not recent and MC E2.A10.1.3.1., there is clear evidence of successful rehabilitation, both strongly apply to Applicant. I resolve Guideline J for Applicant.

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: FOR APPLICANT

Subparagraph 1. a.: For Applicant

Subparagraph 1. b.: 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.

Martin H. Mogul

Administrative Judge