

DATE: December 29, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 04-08949

DECISION OF ADMINISTRATIVE JUDGE

MARC E. CURRY

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's dismissal from the Army under dishonorable conditions after a 1973 drug conviction disqualifies him from security clearance consideration under 10 U.S.C. § 986. Notwithstanding the applicability of 10 U.S.C. § 986, Applicant failed to mitigate the underlying criminal conduct security concerns generated by the conviction and a later drug arrest in 1988. Clearance is denied.

STATEMENT OF THE CASE

On January 18, 2006, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) alleging that it was not clearly consistent with the national interest to grant or continue a security clearance. [\(1\)](#) The SOR alleged a security concern under Guideline J for criminal conduct. Applicant answered the SOR on February 22, 2006, and requested a hearing.

The case was assigned to me on September 26, 2006. DOHA issued a notice of hearing on October 13, 2006, scheduling it for November 2, 2006. At the hearing, conducted as scheduled, the government provided seven exhibits and Applicant provided 14 exhibits and the testimony of one witness. In response to a motion from department counsel, I took administrative notice of the information contained in three additional exhibits marked as Government exhibits 8 through 10. DOHA received the transcript on November 16, 2006.

FINDINGS OF FACT

Applicant's SOR admissions are incorporated into the findings of fact. In addition, I make the following findings of fact.

Applicant is a 60-year-old married man who has four adult children. The oldest child is from his first marriage. He is a mid-level executive at a telecommunications company.

In 1963, Applicant dropped out of high school to join the U.S. Army. The first eight years of his career were excellent.

He obtained his GED in 1965, and served in Vietnam from 1968 through 1969 where he earned a Bronze Star. By 1970, he was a staff sergeant. In 1971, upon the recommendation of a superior, he attended Officer's Candidate School.⁽²⁾ He completed it successfully, and was commissioned as a second lieutenant.⁽³⁾

Applicant had trouble making the adjustment from staff sergeant to second lieutenant.⁽⁴⁾ At about the same time, he began experiencing marital and financial problems. In approximately 1972, he began having an affair with a foreign national from the country where he was stationed.⁽⁵⁾

In February 1973, Applicant went to dinner with his mistress and another couple. All were passengers in a car he was driving. Shortly after leaving the restaurant, the police stopped the car, searched it, and discovered approximately 10 grams of heroin and 19 grams of hashish in his coat pocket.⁽⁶⁾ In April 1973, he was charged with two counts of possession of controlled substances.⁽⁷⁾ He pled guilty, whereupon a military judge sentenced him to dismissal from the Army and hard labor for one year, suspended.⁽⁸⁾ Applicant's court-martial contributed to his divorce in 1973.

Devastated by his dismissal from the Army and his failed marriage, Applicant drifted from job to job for approximately three years. In 1977, he began working for a telecommunications company in an entry level mail room position in. He worked at the company for the next 28 years, until his retirement in 1995. By that time, he had earned a master's degree in business administration and had advanced to an executive level position.

Throughout Applicant's career in telecommunications, he has received numerous awards for outstanding performance. Also, he is heavily involved in charitable activities. Among other things, he volunteers for an organization that provides housing and food for the homeless and another organization that restores parks and recreational facilities. On one occasion, he organized a program through his employer in which surplus computers were donated to a local school in a poor community.⁽⁹⁾

In March 1988, Applicant was charged with possession of marijuana after the police, during a routine stop, discovered a marijuana cigarette in the ashtray of the car he was driving. The charge was later dismissed. In June 1989, Applicant was arrested on an outstanding warrant for failure to pay a traffic ticket. He was released later that evening upon paying the fine.⁽¹⁰⁾

At the hearing, Applicant provided contradictory, evasive testimony about the 1973 court-martial and the 1988 drug-related arrest. Specifically, he denied being guilty of the 1973 drug possession charges, despite pleading guilty to them at the time.⁽¹¹⁾ When Department Counsel confronted him with the court-martial records, he responded, ". . . I'm not sure exactly what I did or what I said . . ." at the time of the court-martial.⁽¹²⁾ With respect to the 1988 marijuana charge, Applicant testified that the police officer discovered it after searching the car.⁽¹³⁾ In a signed, sworn statement executed in 2004, he stated the police officer saw the marijuana cigarette in the car's ashtray as soon as he approached the driver's side car window to talk with him.⁽¹⁴⁾

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (disqualifying conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (mitigating conditions).

An administrative judge need not view the adjudicative guidelines as inflexible rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is scrutiny of a number of variables known as the "whole-person concept," all available

reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

The following adjudicative guideline is most pertinent to an evaluation of the facts of this case:

Criminal Conduct - Guideline J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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

Any DoD contractor who "has been discharged or dismissed from the Armed Forces under dishonorable conditions"⁽¹⁵⁾ is precluded from either being granted a security clearance or having a security clearance renewed. A waiver may be authorized under certain circumstances.⁽¹⁶⁾

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the national interest."⁽¹⁷⁾ In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

The government is responsible for presenting evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion as to obtaining a favorable trustworthiness determination.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship 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.

Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Applicant's loyalty is not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

CONCLUSIONS

Criminal Conduct

Applicant's history of criminal activity triggers the applicability of Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*). His most serious crime occurred more than 30 years ago. The most recent offense was traffic-related, and occurred more than 17 years ago. Applicant is a pillar of his community who has excelled in his career in the telecommunications field, and has distinguished himself through his volunteer activities. CC MC E2.A10.1.3.1 (*The criminal behavior was not recent*), and CC MC E2.A10.1.3.4 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) apply.

Whole Person Concept

Upon evaluating the remoteness of Applicant's criminal conduct in light of his professional and civic accomplishments, I conclude it is unlikely it will recur. I remain troubled, however, by the lack of credibility he demonstrated at the hearing, and his failure to accept responsibility for his past criminal behavior. Consequently, although his accomplishments are commendable, I am unable to conclude he has mitigated the security concern.

10 U.S.C. § 986

Because Applicant was dismissed from the military under dishonorable conditions, 10 U.S.C. § 986 applies. Therefore, Applicant is disqualified from eligibility for a security clearance as a matter of law. My decision to deny a security clearance, however, is not solely based on the applicability of 10 U.S.C. § 986. I would deny a clearance in this case if 10 U.S.C. § 986 were not applicable.

FORMAL FINDINGS

Formal findings on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

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

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. Clearance is denied.

Marc E. Curry

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Tr. 45.

3. Tr. 46.

4. Tr. 48.

5. *Id.*

6. Exhibit 5, Copy of Applicant's 1973 General Court-Martial, Certified on September 22, 2005, at 5.

7. *Id.*

8. *Id.*; Answer, dated February 22, 2006.

9. Answer, dated February 22, 2006.

10. Answer, dated February 22, 2006; Exhibit 4 at 3.
11. Tr. 41, 52.
12. Tr. 43.
13. Tr. 66.
14. Exhibit 4, Signed, Sworn Statement, dated December 15, 2004, at 3.
15. 10 U.S.C. § 986(c)(4)(2004).
16. 10 U.S.C. § 986(d)(2004).
17. *See generally*, Directive, Sec. 2.3., Sec. 2.5.3., Sec. 3.2., and Sec. 4.2.