KEYWORD: Criminal Conduct

DIGEST: In 1975, Applicant was convicted of numerous drug-related offenses, conspiracy to commit perjury, and endeavoring to influence witnesses testimony and having those witnesses testify falsely. Although the drug-related convictions were overturned on appeal, Applicant served 13 months in confinement for his convictions for conspiracy and endeavoring to influence witnesses. Applicant mitigated criminal conduct security concerns, but absent a waiver, the Department of Defense is prohibited from granting him a clearance. 10 U.S.C. § 986. Clearance is denied.

CASENO: 04-11041.h1

DATE: 04/18/2006

DATE: April 18, 2006

In re:

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

Applicant for Security Clearance

ISCR Case No. 04-11041

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Ray T. Blank Jr., Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1975, Applicant was convicted of numerous drug-related offenses, conspiracy to commit perjury, and endeavoring to influence witnesses testimony and having those witnesses testify falsely. Although the drug-related convictions were overturned on appeal, Applicant served 13 months in confinement for his convictions for conspiracy and endeavoring to influence witnesses. Applicant mitigated criminal conduct security concerns, but absent a waiver, the Department of Defense is prohibited from granting him a clearance. 10 U.S.C. § 986. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Apr. 20 1999), DOHA issued a Statement of Reasons (SOR) on 11 October 2005 detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 26 October 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 28 November 2005. On 16 February 2006, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 27 February 2006.

FINDINGS OF FACT

Applicant is a 57-year-old security consultant who is requesting access to classified information. He applied for a clearance in 1993, but it was never finalized. His contract to perform duties for the defense contractor requires that he obtain a secret clearance.

In May 1974, while serving on active duty as a second lieutenant with the U.S. Army, Applicant was arrested by local police for possession of a controlled substance-marijuana. At the time, Applicant was living in a house that had been subdivided into four apartments. Police officers had found marijuana and related paraphernalia in Applicant's apartment

when they executed a search warrant on apartments in the house. Ex. 13 at 4. Applicant orally admitted possessing and using marijuana at his residence and admitted the marijuana found in his apartment during the search was his. *Id.* at 6. The charges were eventually dismissed based on lack of information in the search warrant affidavits to establish the informant has observed the use of controlled substances in each of the apartments. *Id.* at 4. Applicant now denies any marijuana was found in his apartment or that he made any incriminating admissions to police. Tr. 31.

During a six-month period from the end of 1974 through the beginning of 1975, Applicant smoked marijuana with an officer and enlisted soldiers assigned to his unit. When military authorities learned of these marijuana-smoking sessions, they initiated an investigation. Applicant engaged in activities aimed at thwarting the investigation. He was eventually convicted by general court-martial of six specifications of wrongfully using marijuana, four specifications of conduct unbecoming an officer by wrongfully possessing and using marijuana with enlisted men, conspiracy to commit perjury, and wrongfully and unlawfully trying to influence the testimony of two witnesses and having those witnesses testify falsely at an Article 32 investigation.[(1)] He was sentenced to confinement at hard labor for three and one-half years, total forfeiture of all pay and allowances, and dismissal from the service. The convening authority reduced the period of confinement by three months but otherwise approved the sentence.

Applicant's drug-related convictions were all overturned on appeal. The appellate courts determined some of the specifications failed to state an offense because they did not allege his use of marijuana was wrongful, and there was insufficient evidence that the remainder of the drug-related offenses were sufficiently connected to military service to confer jurisdiction in a military court. Applicant's convictions for conspiracy to commit perjury, and wrongfully and unlawfully trying to influence the testimony of two witnesses and having those witnesses testify were affirmed. The reassessed sentence provided for dismissal from the service and confinement for two years. Applicant was incarcerated for 13 months, between 17 August 1975 and 17 September 1976. Tr. 11, 29. Applicant admits that he committed each of the offenses alleged in the charge sheet. Tr. 26.

Since he was released from prison, Applicant has led a model life. He has raised a family and is a respected professional security consultant providing services to nuclear power plants, nuclear weapons facilities, government buildings, airports, and a host of other commercial and private facilities. He has been granted an L clearance in 1978 by the Nuclear Regulatory Commissions and a Q clearance in 1985 by the Department of Energy (DOE).[(2)] He was a member of the DOE team that inspected every nuclear weapons facility in the U.S. Tr. 27.

Applicant is a member of the American Society of Industrial Security and a board member of the International Association of Professional Security Consultants. Before he could be admitted as a member, each organization had to waive its prohibition on accepting felons. Tr. 26-27.

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. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Jan.6, 1993). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

In the SOR, DOHA alleged Applicant was arrested in May 1974 and charged with wrongfully possessing and using marijuana and destruction of private property (¶ 1.a); was convicted in 1975 of wrongfully using marijuana, conduct unbecoming an officer by using marijuana in the presence of enlisted men, wrongfully endeavoring to influence the testimony of a witness, and conspiracy to commit perjury (¶ 1.b); and is disqualified from holding a security clearance because he was dismissed from the service and served more than a year in prison for his 1975 conviction (¶ 1.c). In his answer, Applicant denied the allegation in ¶ 1.a, but admitted the allegations in ¶¶ 1.b and 1.c, all with explanation. A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

The Government's evidence established each of the allegations in the SOR. Those allegations invoke the following potentially disqualifying conditions under Guideline J: Applicant engaged in criminal conduct (DC E2.A10.1.2.1) that are serious crimes (DC E2.A10.1.2.2). In this case, the following mitigating conditions are possibly pertinent: the criminal behavior was not recent (MC E2.A10.1.3.1); factors leading to the commission of the offenses are not likely to recur (MC E2.A10.1.3.4); and there is clear evidence of successful rehabilitation (MC E2.A10.1.3.6).

Applicant's criminal conduct occurred more than 30 years ago when he was 26 years old. Since his incarceration, he has been a productive member of society. As a security consultant, he has played an important role in safeguarding sensitive

military and civilian facilities. At the same time, it is disturbing that, in light of detailed contrary evidence, Applicant insists no marijuana was found in his apartment in May 1974 and he never admitted it was. I find his denial unpersuasive. Nevertheless, after carefully considering all of the evidence in this case, the disqualifying and mitigating conditions, and the adjudicative process factors, I find for Applicant on ¶¶ 1.a and 1.b.

Absent a waiver, the Department of Defense is prohibited from granting or continuing a security clearance for any applicant who was (1) "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," or "dismissed from the Armed Forces under dishonorable conditions." 10 U.S.C. § 986(c)(1) and (4) (2004). Applicant is subject to this federal statute by virtue of his conviction, sentence to two years in prison and a dismissal, and serving 13 months in prison. Therefore, I find against Applicant on ¶ 1.c.

When initially enacted in 2000, the statute limited the power to grant a waiver to the Secretary of Defense. 10 U.S.C. § 986 (d) (2000). 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. DOHA Operating Instruction No. 64 ¶ 3.e (Jul. 10, 2001).

The waiver provision was amended in 2004 to provide that "[a]ny such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." 10 U.S.C. § 986(d) (2004). No such executive order or other guidance has been issued by, or under the authority of, the President.

Notwithstanding the direction in DOHA Operating Instruction 64 that the administrative judge make a recommendation whether the statute's prohibition should be waived, the Appeal Board has concluded that, under the 2004 amendments to 10 U.S.C. § 986, the administrative judge has

no authority to make a waiver recommendation. According to [the amendments], any waiver decision 'may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President.' Without such standards and procedures, the Judge had no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. § 986.

ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).

I disagree with the Appeal Board's conclusion. The Appeal Board conflated making a recommendation to waive with making a decision to waive. The amendment limits the authority to grant a waiver, not to recommend whether a waiver should or should not be granted. And the Director, DOHA, has not withdrawn the operating instruction. Nevertheless, I am not at liberty to disregard the Appeal Board's decision even though I disagree with it. ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004). However, to avoid the possibility of a remand if guidance is later issued by or under the authority of the President, I believe it is appropriate to note what my recommendation would be if I had authority to make one. Recognizing my recommendation is not binding on the waiver authority, I would not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: Against Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

James A. Young

Administrative Judge

1. Under military law, an Article 32 investigation is conducted to obtain recommendations as to the proper disposition of criminal charges preferred under the Uniform Code of Military Justice. 10 U.S.C. § 832. It is often compared to a grand jury proceeding.

2. A Q clearance permits the holder access to national security information at up to the Top Secret level. An L clearance permits the holder access to national security information at up to the Secret level. As Applicant's Q and L clearances are no longer current, the Department of Defense is not required to grant him reciprocity. ISCR Case No. 03-04172 (App. Bd. Jun. 7, 2005) (interpreting DoD 5220.22-M, *National Industrial Security Program (NISPOM)* ¶¶ 2-201, 2-203 (Jan. 1995). The new NISPOM contains similar rules. DoD 5220.22-M, *NISPOM* ¶¶ 2-201, 2-204 (Feb. 28, 2006).