

KEYWORD: Personal Conduct; Criminal Conduct; Financial

DIGEST: In the 1970s, applicant was convicted of a crime and sentenced to more than one year in prison. He actually served a year or more in prison. These facts disqualify him from receiving a security clearance under 10 U.S.C. 986. Clearance is denied.

CASE NO: 05-04034.h1

DATE: 04/27/2006

DATE: April 27, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-04034

**DECISION OF ADMINISTRATIVE JUDGE**

**JOSEPH TESTAN**

**APPEARANCES**

**FOR GOVERNMENT**

Jennifer I. Campbell, Department Counsel

## **FOR APPLICANT**

Alan R. Johns, Esq.

### **SYNOPSIS**

In the 1970s, applicant was convicted of a crime and sentenced to more than one year in prison. He actually served a year or more in prison. These facts disqualify him from receiving a security clearance under 10 U.S.C. 986. Clearance is denied.

### **STATEMENT OF THE CASE**

On September 14, 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 applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on September 30, 2005. The case was assigned to the undersigned on November 30, 2005. A Notice of Hearing was issued on January 25, 2006, and the hearing was held on March 29, 2006. Following the hearing, applicant submitted nine pages of documents. These nine pages, and Department Counsel's letter forwarding them to me with no objection, were marked as Exhibit 14 and admitted into evidence. The transcript was received on April 11, 2006.

### **RULINGS ON PROCEDURE**

At the hearing, four SOR subparagraphs were amended. As amended, subparagraph 1g references subparagraph 1e, not subparagraph 1a. Subparagraphs 3a, 3b, and 3c are amended by deleting the first portion of the first sentence which reads, "You falsified material facts on a Security Clearance Application, Standard Form 86, executed by you under the date March 13, 2003" and replacing it with the following: "You caused falsified material facts to be transmitted on a

### FINDINGS OF FACT

Applicant is a 64 year old employee of a defense contractor.

In June 2000, State police found marijuana plants on applicant's property. He was subsequently charged with Misconduct Involving a Controlled Substance, sixth degree. In February 2001, he was convicted of the charge and fined \$500.00.

In April 1987, applicant was charged with Theft In the Second Degree. In May 1991, the charge was dismissed.

In January 1982, applicant was charged with Driving While Intoxicated (DWI). In November 1982, the DWI charge was dismissed. Based on the same incident, applicant was subsequently charged with Negligent Driving. He was convicted of the charge and fined \$200.00.

In 1976, applicant was charged with Possession of Marijuana (POM). He was convicted of the charge and fined \$50.00.

In 1973, applicant was arrested and charged with Dangerous Drugs and Carrying a Concealed Weapon. He was convicted of the charges and sentenced to five years in prison. He served at least one year. <sup>(1)</sup> Applicant offered into evidence an Amended Order Setting Aside Defendant's Conviction, which purportedly set aside this particular conviction (Exhibit 14). Since there are no case numbers to match up, and none of the documents filed with the Court supporting the request for the Amended Order (e.g., the Accompanying Affidavit) was offered into evidence, there is no way to know for sure whether it was this conviction that was set aside. Assuming that it is, however, this does not affect the applicability of 10 U.S.C. 986. <sup>(2)</sup>

In 1968, applicant was charged with Assault and Battery. The case was dismissed.

In the late 1990s, at least four tax liens were filed against applicant. These liens arose from a bankrupt business applicant inherited from his father. Three of the tax liens, in the total amount of \$75,824.00, were released in the 1999. The fourth lien, in the amount of \$19,109.00, is still on file. Applicant testified that the IRS told him the debt "will go away" in August 2006 so he does not intend to address it (TR at 57-58). This testimony is questionable at best because the lien was placed by a State Department of Revenue, not the IRS (Exhibit 3). As to applicant's financial condition in general, he testified that he is "doing quite well" (TR at 60). There is no evidence to the contrary.

Applicant completed a Security Clearance Application (SCA) in March 2003 (Exhibit 1). The Government alleges he intentionally provided false, material information in response to three questions on the SCA. In response to Question 21, which asked, "Have you ever been charged with or convicted of any felony offenses?" applicant stated "no." The Government alleges this response was false because he had been charged with Assault and Battery in 1968. Because there is no evidence that the Assault and Battery charge was a felony, this allegation is found for applicant. In response to Question 24, which asked, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" applicant stated "yes," but in explanation, listed just the 2000 incident. He did not disclose the 1982 DWI charge or the 1976 POM charge and conviction. Accordingly, applicant's response was false. However, given the passage of time since these omitted incidents occurred, and the fact applicant disclosed the more recent and more serious charge, I find his testimony that he did not recall these two incidents when he completed the SCA (TR at 77-78), and that he did not intentionally omit the two incidents, to be credible and worthy of belief. Accordingly, this allegation is found for applicant. In response to Question 29, which asked, "In the last 7 years, have you been involved in the illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any narcotic, depressant, stimulant, hallucinogen, or cannabis for your intended profit or that of another?" applicant stated "no." The Government alleges that this response was false because he had been convicted of the drug offense in 2000 after marijuana plants were found growing on his property. Because there is no evidence that applicant was intending to profit, or was intending to help someone else profit, from the marijuana plants, this allegation is found for applicant.

## CONCLUSIONS

With respect to Guideline J, the evidence establishes that applicant was arrested, charged and convicted of numerous offenses between 1968 to 2000. This conduct reflects adversely on applicant's judgment and reliability, and requires application of Disqualifying Condition E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*).

All of these criminal incidents were either minor or occurred in the distant past, and on a common sense basis have little current security significance. Nevertheless, I am required to apply the law, and as it now stands, applicant's Dangerous Drugs and Carrying a Concealed Weapon convictions in the 1970s, which resulted in applicant serving a year or more in prison, preclude him from holding a DoD security clearance. Accordingly, based on 10 U.S.C. 986, I have no choice but to conclude it is not clearly consistent with the national interest for applicant to have a security clearance.

With respect to Guideline F, the evidence establishes that a lien in the amount of \$19,109.00 was filed against applicant in the 1990s and is still outstanding. This lien arose as the result of a bankrupt business applicant inherited from his father. Although applicant's refusal to address this lien is somewhat troubling, it does not justify an adverse finding under Guideline F. Given that the lien was largely the result of factors beyond his control, that it was filed and has been on record for years with no apparent attempt to collect it, and that it does not, standing alone, support a finding that applicant is currently experiencing any financial problems, Guideline F is found for applicant.

Guideline E is found for applicant for the reasons set forth in the Findings of Fact.

### **FORMAL FINDINGS**

GUIDELINE J: AGAINST THE APPLICANT

GUIDELINE F: FOR THE APPLICANT

GUIDELINE E: FOR THE 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.

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Joseph Testan

Administrative Judge

1. Exhibits 2 and 3.

2. *See* ISCR Case No. 01-00407 (App. Bd. September 18, 2002).