

DATE: September 25, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 05-13528

**DECISION OF ADMINISTRATIVE JUDGE**

**MARTIN H. MOGUL**

**APPEARANCES**

**FOR GOVERNMENT**

Candace Le'i, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

On May 26, 1972, Applicant was arrested for Unlawful Delivery of Marijuana. He was found guilty on two counts and sentenced to imprisonment for a term of five years and seven years, concurrently. He was incarcerated for a period of more than two years. Since 1972, Applicant has not used or distributed Marijuana or any other illegal substance, nor has he been arrested for anything else. Mitigation has been shown. However, the provisions of Title 10 U.S.C. 986 apply. Clearance is denied. I do recommend further consideration of this case for a waiver of 10 U.S.C. 986.

**STATEMENT OF THE CASE**

On March 28, 2006, 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 granted.

Applicant filed a notarized response, dated April 21, 2006, to the allegations set forth in the SOR, and requested a hearing before a DOHA Administrative Judge. On May 31, 2006, the case was assigned to this Administrative Judge to conduct a hearing. Pursuant to a formal notice dated August 8, 2006, a hearing was held on August 29, 2006.

At the hearing, Department Counsel offered five documentary exhibits (Government's Exhibits 1- 5) and no witnesses were called. Applicant offered three letters of reference, marked collectively as Applicant's Exhibit A, and offered his own testimony. The transcript (Tr) was received on September 7, 2006.

**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 three allegations 1.a., through 1.c. under Guideline J. In his response to the SOR, Applicant admits allegation 1.a. and denies 1.b. and 1.c. The admitted allegation is incorporated as a finding of fact.

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 58 years old. He is married and he has two adult sons. He is a high school graduate. He is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

### **Guideline J (Criminal Conduct)**

1.a. On May 26, 1972, Applicant was arrested for Unlawful Delivery of Marijuana. He was ultimately found guilty and was sentenced to a term of five years imprisonment. He was incarcerated for a period of two years, eight months and 29 days (Tr at 25).

1.b. The Government alleges in this allegation that Applicant was also arrested a second time on June 2, 1972, for Unlawful Delivery of Marijuana, and he was fined \$4000 and sentenced to serve seven years concurrently with allegation 1.a., above. Applicant testified credibly that he was only arrested on one time, May 26, 1972, for distributing two small "finger" bags of marijuana to the same individual. I find Applicant's testimony convincing that he was only arrested for one sale of marijuana that occurred on May 26, 1972.

Applicant served in the United States Army from 1968 through 1972 and received an Honorable Discharge. He did a tour in Vietnam, and while there he used Marijuana. When he returned to the United States, he and some of his friends purchased Marijuana, and they would sell it to each other and sometimes to friends of friends. He did this for a period of six months. Applicant testified that on May 26, 1972, he actually gave, not sold, two small bags to an individual, whom he met through a friend, and whom he later learned was an undercover police officer. For this he received the two sentences, five and seven years concurrently, and he served two years, eight months and 29 days.

1.c. The Government also alleges that Applicant was sentenced to more than one year of confinement, and he actually served more than one year of confinement. Because of this, under the provisions of 10 U.S.C. 986, Applicant is disqualified from receiving a security clearance. The allegation does state that under 10 U.S.C. 986, in a meritorious case, an exception may be made to this provision.

### **Mitigation**

For a period of 34 years, since 1972, Applicant has not used or distributed Marijuana or any other illegal substance. Since he got out of prison, he has maintained a stable life-style with his wife and sons, and he has not been arrested or involved with any other illegal activity. Applicant has not associated with any of the friends with whom he was involved in the Marijuana distribution since his arrest in 1972.

Applicant introduced three positive letters from friends, and co-workers (Exhibit A). The first one was signed by his supervisor and three co-workers, and they state they know Applicant as someone who is trustworthy and with good character and someone they recommend for a clearance. The second letter is from a neighbor of Applicant, who is also a Technical Sergeant in the United States Air Force. He spoke very highly of Applicant and also recommended him for a position of trust. Finally, the third letter is from a long time co-worker and friend, who also gave him a very strong recommendation.

### **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 Guideline J:

The Government has established its case under Guideline J. Applicant's conduct that is the basis for allegation of 1.a. of the SOR is criminal and did result in his receiving a term of five and seven years imprisonment, for which he was incarcerated for more than two years. Under the provisions of Title 10 U.S.C. §986 (2005), a person who has been convicted in any United States court, sentenced to imprisonment to a term exceeding one year, and incarcerated as a result of that sentence for not less than one year, may not be granted or have renewed access to classified information.

Under Guideline J, I conclude that Disqualifying Conditions a, Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; b, A single serious crime or multiple lesser offenses, and c, Convictions in a Federal or State court . . . of a crime and sentence to imprisonment for a term exceeding one year, all apply. However, I find that several Mitigating Conditions apply. The criminal behavior was not recent, it occurred 34 years ago; and Applicant has offered strong evidence of his rehabilitation. I find that the Mitigating Conditions do overcome Disqualifying Conditions a and b, but because of 10 U. S. C. 986, they can not overcome Disqualifying Condition c. Therefore, I resolve Guideline J against the 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: AGAINST APPLICANT**

Subparagraph 1. a.: For Applicant

Subparagraph 1. b.: For Applicant

Subparagraph 1. c.: 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. I do recommend further consideration of this case for a waiver of 10 U.S.C.986.

Martin H. Mogul

Administrative Judge