

DATE: February 21, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 05-13877

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Braden Murphy, Esq., Department Counsel

FOR APPLICANT

Sandal Miller, Personal Representative

SYNOPSIS

Applicant is 53 years old and has worked for a federal contractor since 1986. He has held a top-secret security clearance since 1995. Applicant had numerous criminal arrests and convictions in the 1970s. He served over a year in prison for burglary from 1972-1973. Applicant used marijuana regularly from the 1970s up to 1994, including while he was holding a confidential security clearance. He no longer uses drugs. His criminal conduct is mitigated by time. However, in accordance with 10 U.S.C. 986, Applicant cannot be granted a security clearance. 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. On July 24, 2006, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline J, (criminal conduct) of the Directive. Applicant answered the SOR in writing on September 13, 2006, and elected to have a hearing before an administrative judge. In his Answer, Applicant admitted all of the allegations under Guidelines J. The case was originally scheduled for November 30, 2006. Applicant requested a continuance due to a family emergency. The continuance was granted. The case was transferred and reassigned to me on December 15, 2006, due to regional rotation. On December 19, 2006, Department Counsel discussed a proposed hearing date of January 23, 2007 with Applicant. Applicant concurred and a notice of hearing was issued on January 4, 2007, scheduling the hearing for January 23, 2007. Applicant received the written notice on January 10, 2007. He waived the 15-day written notice requirement and I conducted the hearing as scheduled to consider whether it is clearly consistent with the national interest to grant or continue a security clearance. The Government offered ten exhibits for admission in the record and were marked as Government Exhibits (GE) 1-10. The exhibits were admitted into evidence without objection. Applicant testified on his own behalf, and offered seven exhibits for admission into the record. They were marked as Applicant's Exhibits (AE) A-G and were admitted into evidence without objection.

Department Counsel had previously forwarded additional documentary matters to Applicant, but he did not receive

them due to a delivery glitch. Applicant was provided an opportunity to review the documents and make objections, which he had none. He was also afforded an opportunity to request a continuance or to proceed and I would allow the record to remain open for additional documentary matters. Applicant agreed to proceed and the record remained open. He provided additional documentary evidence that was marked AE H-O and was admitted without objection. DOHA received the hearing transcript (Tr.) on January 31, 2007.

PROCEDURAL ISSUES

SOR ¶ 1.j alleges facts that raise a disqualification from having a security clearance granted or renewed by the Department of Defense under 10 U.S.C. 986 (the Smith Amendment). It also provides that, in a meritorious case, the Secretary of Defense may authorize an exception to this prohibition.⁽³⁾

The SOR was issued July 24, 2006. DOHA Operating Instruction (OI) 64 was reissued on September 10, 2006. Applicant had previously been provided with DOHA OI 64 that was in effect prior to the current reissued OI. He subsequently was provided with the current OI 64, and a copy of the Memorandum from Stephen Cambone regarding Implementation of Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (December 29, 2005) dated August 30, 2006, and a copy of 10 U.S. C. 986. In this case the Adjudicated Guidelines under the Department of Defense Directive 5220.6 (Jan. 2, 1992) are applicable because the SOR was issued prior to September 1, 2006, the date of implementation of the revised Guidelines. However, the current reissued OI, 64 is applicable to this hearing.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR, are incorporated herein. In addition, after a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 53 years old, married and has two children. One child recently graduated from college and the other is a senior in college. Applicant has two bachelor's degrees and is working toward earning a master's degree. His wife is also college educated with both a bachelor's and master's degree. Applicant has worked for a federal contractor since 1986. The name of the contractor has changed as divisions of the company were sold, but he has not technically changed employers. He works as a technical writer and is involved in specialty engineering functions. In 1982, Applicant was granted a Confidential security clearance.⁽⁴⁾ In February 1988, Applicant was denied a Secret security clearance due to drug abuse. In 1995, Applicant applied for and was granted a top-secret security clearance.

Applicant has a history of criminal conduct that commenced in 1968 until 1976. In June 1968 he was charged and found guilty of being a minor in possession of alcohol. He was fined. On July 27, 1969, he was charged with auto theft and placed on probation. In October 1969, he was charged with breaking and entering, was found guilty and committed to the State Training School for Boys from about November 7, 1969 to July 29, 1970. On February 10, 1971, Applicant was charged with theft. He pleaded guilty to a reduced charge of destruction of private property under \$50 and was sentenced to one day in jail and fined \$100. On June 22, 1971, he was charged with (1) possession of narcotic, (2) illegal possession of alcoholic beverages, and (3) possession of marijuana. Counts (1) and (3) were no billed and he was found guilty of Count (2), sentenced to four days in jail and fined. On September 2, 1971, Applicant was charged with possession of drugs. The charge was no billed.

On March 29, 1972, Applicant was charged with interfering with an arrest. The charge was dismissed. On April 22, 1972, he was charged with minor in possession of alcohol and fined \$27.50. On ay 6, 1972, he was charged with (1) fleeing, (2) burglary, (3) auto theft, (4) breaking and entering a motor vehicle, and (5) minor in possession. The charges were dropped.

On June 6, 1972, Applicant was arrested and charged with burglary, a felony. He was incarcerated in the county jail on that date. He pled guilty on September 8, 1972, and was sentenced to two years in jail. He was given credit for the time he served in jail from June 6, 1972, until he was transferred to the state's correctional facility on September 14, 1972. He was released early on August 30, 1973.⁽⁵⁾

Applicant was arrested and charged with driving while intoxicated on October 7, 1973. He passed a sobriety test and was not booked. On June 12, 1976, Applicant was arrested and charged with public intoxication. He was found guilty and fined \$30. He was arrested in September 1976 and charged with public intoxication. He was found guilty and fined \$55.

Applicant used marijuana on a daily basis beginning in December 1970 until June 1972, when he was incarcerated. (6) He used marijuana once while he was in prison. (7) From August 1973, when he was released from prison, until January 1985, he used marijuana on a weekly basis, basically on the weekends. (8) In a sworn statement dated January 16, 1985, he stated his last use of marijuana was December 1984. During the 1970s he also used hashish and hallucinogens. (9) He tried amphetamines between 1971-1972, and used barbiturates approximately three times. (10) He bought marijuana and sold it. He stated he quit using all illegal drugs except marijuana in 1972. In 1985, he would spend approximately \$50 a month on marijuana. (11) At that time he stated he did not intend to use any other illegal drugs except marijuana. (12)

Applicant made a sworn statement on March 4, 1987 to a Special Agent of the Defense Investigative Service. In the statement he said:

I have never received professional counseling or treatment for my drug use, to include alcohol. My future intentions for alcohol and marijuana use remain about the same, as far as I can presently figure. This is because I personally feel no moral turpitude toward my habits as they presently exist. I am aware of most laws concerning this use. I also know that at some point in time I may be forced to stop or face loss of employment, position, pleasure, etc. This I can handle. I know that my possession of marijuana is illegal but I also feel that in my home that to partake is not wrong, nor will it result in eternal damnation. Prior to 1980, I purchased and sold marijuana to friends at their request but never for profit. These are the only times I was involved in the sale or distribution or trafficking of drugs. (13)

On a security clearance application dated April 14, 1995, Applicant listed his last marijuana use as December 1988. (14) In a sworn statement made on February 8, 1996, Applicant admitted he last used marijuana in February 1990. (15) Applicant used marijuana after he had been denied a secret security clearance in 1988, and while holding a confidential security clearance. In another sworn statement made on July 1, 1996, Applicant admitted his February 1996 statement was false and admitted continuing to use marijuana until sometime in 1994. He stated:

I started using marijuana sometime in 1968; the last time was sometime in 1994. During this period, my usage varied from daily, to weekly, and sometimes monthly, depending on whether I had some or if friends/ acquaintances had some. The last three times I used it was at the lake (twice) and at a friend's house once. (16)

He also admitted he purchased different drugs beginning in 1968 and he last purchased marijuana in 1988. (17) He went on to say in his 1996 statement, "The only illegal drug I sold was marijuana. From 1970 until 1988, I would buy extra quantities from a dealer and sell to friends and associates who had standing orders. I did sell for profit." (18) Applicant further stated:

I have no future intentions to using any illegal drugs or misusing prescription drugs. I was not completely honest in my previous statement because of embarrassment and that enough information on my drug use was given. In effect, I had given enough information to adversely effect my chances of getting a clearance. These incidents of drug use after prison did not coincide with my view of myself, as a non-drug user. (19)

Applicant's statement of March 4, 1987, contradicts his statement made on February 8, 1996, in that in his earlier statement he says he stopped selling drugs for profit after 1980, and the other statement says he continued to do so until 1988.

Applicant completed a security clearance application (SCA) on September 18, 2002. Question 28 inquired whether he had ever used illegal drugs while possessing a security clearance? Applicant answered "no" to this question. He could not provide an explanation for why he answered no.

Applicant has not been arrested since 1976. He received excellent performance evaluations in 2004 and 2005, and "far exceeded expectations" in several categories. (20) He has a diligent work ethic and was often the key person responsible for the success of projects with his company. (21) He was always willing to go the extra mile for his employer and customer. (22) He was rated as having the highest work standard. (23)

Applicant provided character letters and they attest that he has turned his life around and is a good family man, whose children have excelled. (24) He is an exemplary performer and has made impressive and considerable contributions to the projects he was assigned. (25) He has outstanding initiative to complete the job and has repeatedly been praised for his efforts. (26) He received a certificate for his twenty years of dedicated service to his employer. (27)

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these 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. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant. (28) The government has the burden of proving controverted facts. (29) The burden of proof is something less than a preponderance of evidence. (30) Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him. (31) Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision. (32)

No one has a right to a security clearance (33) and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." (34) Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. (35) The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant. (36) It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Based upon consideration of the evidence, I find the following adjudicative guideline most pertinent to the evaluation of the facts in this case:

Guideline J-Criminal Conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

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

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established that Applicant served a year or more in jail for the offense of burglary that is listed in SOR ¶ 1.j. The Government has met its burden that 10 U.S.C. 986 (c) (1) applies.

Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admissions 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*) apply. Applicant was arrested on June 6, 1972, and confined in jail until his hearing on September 8, 1972. He was found guilty and awarded a two-year jail sentence. He was given credit for the time he was in jail from June 6, 1972 to his court date. He was then transferred to the state correctional facility where he served the remainder of his sentence until August 30, 1973, when he was released early due to good behavior. Applicant had numerous other arrests and convictions beginning in 1968 through 1976.

I have considered all of the mitigating conditions and especially considered Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*). Applicant's last criminal offense for which he was arrested occurred in 1976. Since then he has not been arrested or convicted of a crime. I find CC MC E2.A10.1.3.1 applies. Due to the frequency of Applicant's prior criminal activity, CC MC E2.A10.1.3.2 does not apply. I have considered Applicant's drug abuse when deciding whether there is clear evidence of successful rehabilitation. Although he was never caught, he did repeatedly and continually break the law from 1973, when he was released from prison, to 1994, when he finally stopped using drugs. Since it appears Applicant has not used drugs for a significant period of time, I find CC MC E2.A10.1.3.6 applies.

The Whole Person Analysis

In all adjudications, the protection of our national security is the paramount concern. The objective of the security-clearance process is the fair-minded, common sense assessment of a person's life to make an affirmative determination that the person is eligible for a security clearance. Indeed, the adjudicative process is a careful weighing of a number of variables in considering the "whole person" concept. It recognizes that we should view a person by the totality of their acts, omissions, motivations and other variables. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

I considered the whole person with regard to Applicant's conduct and actions since being released from prison. Although Applicant has not been arrested or convicted of an offense since 1976, he used illegal drugs, with regularity, since leaving prison up to 1994, a period of eighteen years. Applicant's drug abuse was not alleged and cannot be used as a disqualifying condition, but it can be used when assessing the whole person. I have considered the longevity of Applicant's drug abuse and his indifferent attitude about its legality. I have considered his admissions that he sold marijuana for profit, and the conflicting statements as to when he ceased this activity, including his admission that he falsified his sworn statement. Especially troubling is that Applicant was a regular drug user while holding a confidential security clearance. However, since 1994, Applicant has been drug-free and has not committed other criminal offenses. I find he mitigated Guideline J, criminal conduct, however in accordance with 10 U.S. C. 986 (c) (1) Applicant cannot be granted a security clearance. Accordingly, Guideline J is decided against Applicant.

FORMAL FINDINGS

Formal Findings for or against Applicant 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: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

Subparagraph 1.d: For Applicant

Subparagraph 1.e: For Applicant

Subparagraph 1.f: For Applicant

Subparagraph 1.g: For Applicant

Subparagraph 1.h: For Applicant

Subparagraph 1.i: For Applicant

Subparagraph 1.j: Against Applicant

Subparagraph 1.k: For Applicant

Subparagraph 1.l: For Applicant

Subparagraph 1.m: For Applicant

Subparagraph 1.n: 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.

Carol G. Ricciardello

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960) as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. The authority to authorize an exception to this prohibition was delegated by letter dated August 30, 2006, from The Under Secretary of Defense, Mr. Stephen A. Cambone to certain officials, including the Director, Defense Office of Hearings and Appeals or designee.
4. Tr. at 42.
5. Applicant admitted SOR ¶ 1.j. GE 3 and 4 also corroborate and verify Applicant's jail time served was over one year. Applicant's jail time served before his sentence, for which he received credit toward his two year sentence, is included in calculating the total amount of time he served in jail for the offense committed. *See* ISCR Case No. 03-02181 (App. Bd. May 24, 2006).
6. Guideline H(drug involvement) was not alleged as a disqualifying condition. The facts provided are imperative for a whole person analysis. I have included findings of facts regarding Applicant's conduct since he was released from prison, so a complete picture is presented for a determination if a waiver of the Smith Amendment is appropriate.
7. GE 4 at 4.
8. *Id.*
9. *Id.* He used the hallucinogens LSD, psilocybin and mescaline approximately 40-50 times.

10. *Id.*
11. *Id.*
12. *Id.* at 5.
13. GE 6 at 2.
14. GE 8.
15. GE 9 at 3.
16. GE 10 at 2.
17. *Id.*
18. *Id.* at 3.
19. *Id.*
20. AE A and B.
21. *Id.*
22. *Id.*
23. *Id.*
24. AE C.
25. AE D and E.
26. AE F.
27. AE I.
28. ISCR Case No. 96-0277 at 2 (App. Bd. Jul 11, 1997).
29. ISCR Case No. 97-0016 at 3 (App. Bd. Dec. 31, 1997); Directive, Enclosure 3, ¶ E3.1.14.
30. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
31. ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995); Directive, Enclosure 3, ¶ E3.1.15.
32. ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995); Directive, Enclosure 3, ¶ E3.1.15.
33. *Egan*, 484 U.S. at 531.
34. *Id.*
35. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
36. Executive Order 10865 § 7.