DATE: May 1, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-00407

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Katherine A. Trowbridge, Esquire, Department Counsel

FOR APPLICANT

Kenneth Craig Smith, Esquire

STATEMENT OF THE CASE

On September 24, 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, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On October 17, 2001, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The case was assigned to me on January 18, 2002. Because Applicant's chosen counsel was unexpectedly called to active duty with the Navy, setting the matter for a hearing was delayed until Applicant's representation was finalized. Applicant shortly retained a different counsel and a Notice of Hearing was issued on February 28, 2002, setting the matter for March 12, 2002. At the hearing, the Government offered seven exhibits, to which the Applicant made no objection. The exhibits were marked and admitted as Government Exhibits (GX) 1 - 3. Applicant testified on his own behalf and had two other witnesses. He offered 11 exhibits, to which the government did not object (Applicant's Exhibits (AX) A - K). All exhibits from both parties were admitted into evidence as marked. At the request of the parties, I took official notice of copies of 10 U.S.C. 986 and a number of cases cited in their arguments (ON 1, ON 2, and ON 3).

The transcript (Tr) was received on March 20, 2002. Timely post hearing memoranda were received from the Government (dated April 12, 2002) and from Applicant (dated April 15, 2002).

FINDINGS OF FACT

Applicant is a 55-year-old manager of the security division of a defense contractor and is seeking a security clearance in connection with his position. In his response to the SOR, Applicant admits SOR allegations 1.a. and 1.b. with

explanations. He denies allegation 1.c., contesting applicability of 10 U.S.C. 986.

Based on Applicant's testimony and all documentary evidence, and considering all arguments by both sides, I find the following as to all three SOR allegations:

Guideline J (Criminal Conduct)

1.a. - Applicant was arrested on March 17, 1972 and charged with Burglary and Passing Credit Cards. He was convicted of the charge of Forgery and was sentenced to two years probation.

(GX 7).

1.b. - Applicant was arrested and charged with felony theft on August 23, 1989. He entered a plea of guilty to the felony theft charge and was sentenced to a five-year prison term and $2,500.00 fine. His sentence was suspended and he was placed on probation for two years, later extended to five years. Applicant completed his probation in August 1994 (GX 6).

1.c. - The Finding of Fact as to SOR 1.b., above, bring this matter within the specific prohibition of 10 USC 986(C)(1), which states that anyone convicted of a crime and sentenced to more than one year imprisonment is disqualified from obtaining or retaining a security clearance. The record shows that Applicant was sentenced to five years imprisonment.

Applicant received positive testimony from two witnesses (Tr at 34 - 54 and 54 - 69) and letters of recommendation from a number of work and personal friends (AX D - K).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing participation; (3) the frequency and recency of the conduct; (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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

The Concern: 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 maybe disqualifying include:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

1. The criminal behavior was not recent.

2. The crime was an isolated incident.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the "whole person" concept required by the Directive, the Administrative Judge is not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an

applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

In addition to the general and specific guidelines found in Directive 5220.6, a federal statute, 10 USC 986 (Official Notice (ON) 3), imposes restrictions that, among other things, prohibit granting a clearance to anyone is convicted and sentenced to more than one year. The only exception is that the Secretary of Defense or Secretaries of the Military Services may grant a waiver in cases they find to be meritorious.

CONCLUSIONS

I have considered the evidence in light of the appropriate legal standards and factors, and have assessed Applicant's credibility based on the entire record. I conclude the totality of the evidence establishes a case as to all three SOR allegations, which in turn establishes a nexus or connection with Applicant's security clearance eligibility.

Although the fact of the conviction and sentencing is enough, by itself, to trigger application of 10 USC 986, an evaluation of the circumstances surrounding the crime is relevant to an understanding of Applicant's implicit contention that he merits a waiver of the statute.

SOR 1.a. - As to the 1972 conviction, I have carefully considered Applicant's explanations, found in his response to the SOR, in GX 3, GX 4, and GX 7, and in his hearing testimony (Transcript (Tr) at 77, 85 - 91, and 116 - 120). I find that Applicant's testimony explaining and seeking to mitigate and/or extenuate his culpability for using the stolen credit card (bearing the name Molly Marx) is not credible. From the totality of the evidence, I conclude he did know he was doing something wrong when he sought to use the card.

SOR 1.b. - As to the 1989 conviction, I likewise find Applicant's explanations to be not credible as mitigation and/or extenuation. Throughout most the investigative and adjudicative process, including most of his hearing testimony, he has insisted that he wrote the bad checks in anticipation of a loan he had been promised by a bank officer (Tr at 92 - 97, 121, 122). However, a 1991 FBI report (GX 5) establishes that the loss of $25,000 by the victim bank resulted from a check kiting scheme in which Applicant "floated" about "seven or eight checks" of about "$7,000.00 or $8,000.00" each, over a "two week period" between two banks (Tr at 123 - 126). The FBI report (GX 5) cites Applicant as stating he conducted the check kiting scheme while waiting for the expected loan from the victim bank. His testimony appears to be that he started the check kiting after he learned he would not get the loan (Tr at 123, 124). The different versions of what happened raise additional questions and doubts and none of the explanations are acceptable excuses for his criminal conduct.

Disqualifying Condition (DC) 1 clearly applies. DC 2 also applies because Applicant's criminal conduct qualifies as a "single serious crime or multiple lesser offenses." I also find that while Mitigating Condition (MC) 1 may apply, since the crimes occurred in 1972 and 1989, MC 2 is of questionable application, since Applicant's criminal conduct is not isolated (in the sense of a single act) but a pattern, small as it may be. Highly positive letters from business acquaintances and friends establishes some evidence of Applicant's rehabilitation (MC 6) over the past decade or more (AX D - K). I conclude, however, that the evidence of rehabilitation is not "clear"(as established in the previous two paragraphs) and that overall, the mitigating evidence is insufficient to overcome the impact of the disqualifying evidence.

However, the above discussion is academic as to Applicant's eligibility since 10 USC 986 is controlling. I conclude this statutory provision is applicable under the facts of this case. There are a conviction and sentence of more than one year (SOR 1.b.). The statute does not contain any statute of limitations, so it applies regardless of how long ago the conviction and sentence occurred.

I have carefully considered the hearing argument and post hearing memoranda from both parties. Counsel for Applicant argues:

(1) that the application of 10 U.S.C. 986 is permissive rather than mandatory, because of the use of the word *may* in 10 USC 986 ( ).

From the DoD-internal guidance provided to DOHA, as well as Appeal Board precedent, anyone convicted of a crime and sentenced to more than one year is *per se* ineligible. Department Counsel's memorandum correctly states the controlling rules, regulations, and guidelines.

(2) that 10 U.S.C. 986 does not apply because the conviction was in a state court and not in a federal court.

As correctly stated in Department Counsel's post hearing memorandum, controlling policy within DoD is that the term "court of the United States," as used in 10 U.S.C. 986, was meant to include state courts.

(3) that the term "sentenced" should be read to include "and served."

Again, Department Counsel's memorandum correctly cites DoD governing policy as being that "sentenced" means just that. It is not a requirement tt any time actually be served.

(4) that Applicant's 1994 pardon and/or 2001 "judgment of acquittal" means that for purposes of determining his security clearance eligibility, Appellant does not stand convicted of the 1989 offense.

Pardons and/or post conviction acquittals instate courts are not mentioned in 10 U.S.C. 986 and do not change the fact that for purposes of determining security clearance eligibility, the fact of the original conviction and sentence makes 10 U.S.C. 986 applicabl= e. I conclude that Department Counsel's memorandum correctly states precedent, and the governing rules, regulations, and guidelines.

In summary, I find that the analysis of Applicant's claims contained in Department Counsel's April 12, 2002 memorandum correctly states the controlling guidance that DOHA Administrative Judges must follow. Under the facts

and circumstances of this case, the fact of the 1989 conviction and sentence makes Applicant ineligible to hold a security clearance. Because the age of the 1972 conviction can be considered mitigating, I conclude that this is a case where my decision to deny or revoke is "solely a result of 10 USC 986."

Accordingly, pursuant to DOHA Operating Instruction No. 64, dated July 10, 2001, I am required to make a recommendation as to whether a waiver should be granted. I do not recommend further consideration of this case for a waiver of 10 USC 986.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE