DATE: May 28, 2002

In Re:

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

Applicant for Security Clearance

CR Case No. 01-03490

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Matthew E. Malone, Esquire, Department Counsel

FOR APPLICANT

Walter E. Sawyer, Esquire

SYNOPSIS

Although Applicant spent no time in jail and served his two-year probation without incident, his firearms conviction and sentence to two years imprisonment required denial of his clearance under the provisions of 10 U.S.C. §986. Clearance denied.

STATEMENT OF THE CASE

On 15 August 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding[(1)] that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 12 September 2001, Applicant answered the SOR and requested a hearing. The case was originally assigned to a different Administrative Judge but was then reassigned to me on 21 December 2001. I issued a Notice of Hearing on 21 February 2002 for a hearing on 7 March 2002.

At the hearing, the Government presented twelve exhibits--admitted without objection--and no witnesses; Applicant presented one exhibit and the testimony of one witness, himself. DOHA received the transcript on 14 March 2002.

FINDINGS OF FACT

Applicant admitted the factual allegations of the paragraph 1. of the SOR[(2)]; accordingly, Applicant's admissions are incorporated as findings of fact. He denied the allegations of paragraph 2.

Applicant--a 39-year old employee of a defense contractor--seeks access to classified information. He was previously granted a clearance in June 1986 and in approximately January 1993.[(3)]

Applicant has a history of criminal conduct from 1988 to 1995. On 22 January 1988, Applicant was arrested and

charged with disturbing the peace, and released on his own recognizance; Applicant was found guilty and paid a fine.[(4)] On 31 January 1988, Applicant was arrested, charged with carrying a concealed weapon, and released on his own recognizance; the charge was later placed on the "stet" docket.[(5)] On 4 June 1988, Applicant was arrested in a noted beach town in another state and charged with open container and simple possession of marijuana; on 13 June 1988, he forfeited bond on both counts.[(6)] On 3 December 1988, Applicant was arrested and charged with possession of marijuana, and released on his own recognizance; the charge was later placed on the "stet" docket.[(7)] On 23 December 1988, Applicant was arrested and charged with theft under $300.00, and released on his own recognizance; Applicant was found guilty and sentenced to four days in jail, two suspended.[(8)]

On 22 August 1992, Applicant was arrested and charged with carrying a deadly concealed weapon, possession of a short-barrelled shotgun, and defacing serial numbers, and was released on his own recognizance. In accordance with a plea arrangement, Applicant pleaded guilty to carrying a deadly concealed weapon, and was sentenced to two years in jail, suspended, and awarded two years of probation.[(9)] The other charges were nolle prosequi. Under the provisions of 10 U.S.C. §986, Applicant's two year sentence, although suspended, disqualifies him from having a Department of Defense.

On 17 November 1992, Applicant executed a National Agency Questionnaire (NAQ)(DD-Form 398-2)(G.E. 2) which required Applicant to disclose any arrest, regardless of disposition. Applicant disclosed all the above arrests, except for the beach town arrest.[(10)] However, with the exception of the 1992 firearms arrest, Applicant erred in reporting the approximate month and year of the offenses. Applicant testified (Tr.55-59) that he received his clearance as result of the 1992 background investigation.[(11)]

On 22 March 1995, Applicant was arrested and charged with driving while intoxicated, driving under the influence, and failure to display registration card; he pleaded to driving under the influence, was fined, had his license suspended, and was ordered to participate in an alcohol program. The other charges were nolle prosequi.[(12)]

On 9 July 1999, Applicant executed a Security Clearance Application (SF 86)(G.E. 1) on which he answered "yes" to two questions designed to elicit his police record for firearms/explosives offenses and his alcohol/drug offenses. In response to the firearms question, Applicant disclosed the 1992 arrest for carrying a concealed, deadly weapon. In response to the alcohol/ drug question, he disclosed his 1995 driving under the influence arrest.

Applicant is alleged to have falsified his answer to the firearms question by failing to disclose his 1988 arrest for carrying a concealed deadly weapon. The Government's evidence fails to prove that the 1988 charge involved either firearms or explosives. Further, Applicant's evidence affirmatively demonstrates that the arrest was for possessing a pocket knife, rendering this arrest clearly outside the scope of the question alleged to have been falsified.

Applicant is alleged to have falsified his answer to the alcohol/drug question by failing to disclose the June 1988 arrest for simple possession of marijuana in the beach town and the December 1988 arrest for possession of marijuana. Applicant was apparently not asked about the omission during his subject interview (G.E. 3). His Answer to the SOR denied the allegation because he misunderstood the question to call for drug arrests only in the last seven years. At the hearing, Applicant testified credibly that he read the question as calling only for alcohol and drug arrests within the last seven years (Tr. 44-45, 52-53); he acknowledged that the question did not actually call for arrests only within the last seven years. However, he credibly denied an intent to mislead the government (Tr. 45) because he knew he had told the Government about all the 1998 conduct and had gotten a clearance after 1998 even with the Government knowing about the conduct.

On 9 May 2000, Applicant made a sworn statement to the DSS (G.E. 3) concerning the circumstances of his 1992 arrest for carrying a concealed, deadly weapon. Applicant is alleged to have falsified this statement by describing one of the charges as "defacing serial numbers (serial numbers had rusted off due to age & condition of gun)," when the police report records Applicant as having admitted to filing off the serial numbers. Applicant denies the allegation, and responds that the 1992 police report is incorrect in this regard. At the hearing, Applicant testified credibly and at length about the circumstances of this arrest (Tr. 30-39, 46-51). At the time of the arrest, Applicant was separated from his

wife and had custody of his two young sons; he was in the process of moving from his mobile home to his parents house, and had put the shotgun and shell in his car so that his two young children would not have access. According to Applicant, he had bought the gun when he was about 16, had modified it to "shoot deer with deer slugs" instead of buckshot. Applicant disclosed that in the process of modifying the gun, he had sanded it from one end to the other to get rid of rough edges. He considered the gun to be in poor condition at the time he was arrested.

At the hearing, Applicant testified about the changes in his life since his criminal misconduct. He described 1988 as a time when he was "a wild and crazy guy." But parenthood began to change his perspective on life:

... first I had kids and I had to raise them myself for a while, and then I met my current wife who since adopted them and we bought a house. I made a plan for the future, and we both work real hard. I think a lot of things have changed in my life. I've tried to be a good parent and teach my kids right from wrong, try to be a good member of the community and try to do real good at work and excel at what I do (Tr. 40).

Applicant remarried in 1994. He and his spouse recently sold their first home and built a second home. Applicant's character references (A.E. A)--who include his present supervisors and coworkers, as well as clients, and supervisors from past employments[(13)]--consider him an honest, hardworking employee, who can be trusted with fiduciary responsibility and classified information, and who is actively involved raising his sons and being a responsible member of the community.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section F.3. and in Enclosure (2) of the Directive. 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.,* under an assessment of the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year.[(14)]

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent.

E2.A10.1.3.4. . . .the factors leading to the violation are not likely to recur;

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying condition 3. . ., above, may not be mitigated unless, where meritorious

circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.[(15)]

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, § 986, precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001.

PERSONAL CONDUCT (GUIDELINE E)

E2A5.1.1. The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . .;

E2.A5.1.2.3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator, . . . in connection with a personnel security or trustworthiness determination;

E2.A5.1.3. Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

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 Government 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

The Government has established its case under Guideline J. Applicant has a pattern of criminal conduct which raises doubts about his fitness for access to classified information. Nevertheless, I conclude that the criminal conduct is otherwise mitigated, but for the application of 10 U.S.C. § 986 to this case. First, the resolution of all Applicant's criminal cases--including the one for which 10 U.S.C. § 986 applies--is consistent with his explanations of the conduct.

Second, most of the offenses are minor in nature[(16)] and occurred in a single year--1988--when Applicant admitted living a little out of control. Third, the criminal conduct is not recent, the most recent offense having occurred nearly seven years ago. Finally, there is clear evidence of successful rehabilitation, documented both by Applicant's testimony about the changes in his life after becoming a father and meeting his new wife and by his character references which attest to his work performance and family involvement.

Were this the end of the analysis under Guideline J., I would conclude Applicant's criminal conduct mitigated. However, as alleged in subparagraph 1.h. of the SOR, Applicant's case falls within the purview of 10 U.S.C. § 986. Under the new regulations issued by the Deputy Secretary of Defense, because Applicant was convicted in Federal court and sentenced to imprisonment for more than one year, I may not mitigate his criminal conduct. Accordingly, I find Guideline J. against Applicant. However, I do so solely because of 10 U.S.C. § 986; consequently, I make the following statement as required by O.I. 64 in such a case: I recommend further consideration of this case for a waiver of 10 U.S.C. § 986 .

The Government has established its case under Guideline E., but I find the conduct mitigated. With regard to the firearms question, the Government's evidence failed to substantiate the information that suggested Applicant was required to report the 1988 arrest for carrying a concealed deadly weapon. Further, Applicant affirmatively demonstrated that the arrest involved a weapon that was not within the scope of the question. With regard to the alcohol/drug question, the Government demonstrated that Applicant omitted the two 1988 drug arrests, but the evidence shows that Applicant did so because he erroneously believed the question called only for arrests within the last seven years. Consequently, he lacked the intent to withhold this information. Further, Applicant had previously disclosed one drug arrest (along with four other arrests) in a 1992 clearance application. With regard to the circumstances of the 1992 shotgun offense, I am not entirely satisfied that the alleged discrepancy is material to an adjudication in this case. Assuming that it is, I see less an issue of falsification than of competing views of the situation recorded by the police and by Applicant. The police report is not Applicant's sworn statement, merely the recording of what the police say Applicant said at the time of his arrest. As such, it is hearsay (and for the falsification allegation to prevail, I would have to conclude, both that Applicant actually admitted removing the serial numbers, and that he actually removed the serial numbers).[(17)] In fact, I find Applicant's explanation of the circumstances of the arrest more credible than the police report[(18)] and essentially confirmed by the disposition of the offense. I find Guideline E. For Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

Subparagraph g: For the Applicant

Subparagraph h: Against the Applicant

Subparagraph i: For the Applicant

Paragraph 2. Guideline E: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).

2. Except for the allegations of subparagraphs 1. h. and i., which involve pure questions of statutory application.

3. Although he was not continuously employed in jobs requiring access to classified information.

4. Both the police report (G.E. 6), court record (G.E. 11), and Applicant's testimony (Tr. 26) agree on the essentials of the offense: Applicant's housemates threw a large, noisy party; the neighbors complained; Applicant and other housemates listed on the lease were charged with disturbing the peace.

5. The government's evidence (G.E. 11) confirms the charge and disposition. The credible and unrebutted testimony (Tr. 27) is that Applicant was charged when police--summoned to the scene of a confrontation between Applicant and his friends and some other locals--searched Applicant and found a pocket knife in his possession. Further, the disposition of the case suggests that Applicant's version of his culpability for this offense is credible.

6. Although Applicant admitted the SOR allegation that he was found guilty on the possession charge, G.E. 12 reflects only that Applicant forfeited bond on the two charges. The credible and unrebutted testimony (Tr. 27-28) is that Applicant's ex-girlfriend (driver), her female friend, and Applicant were stopped by municipal police for an undisclosed reason and found to have open containers; marijuana was found in the car and all three were cited for open container and possession of marijuana. They spent the night in the city holding cell, and were told that if they posted bond they would not have to come back for court, they would simply forfeit bond. The disposition of this offense is consistent with Applicant's recitation of events, and comports with my understanding of the usual practice of local police departments in beach towns.

7. G.E. 7, 10, and 11 confirm the charge and disposition. The credible and unrebutted testimony (Tr. 28-29) is that Applicant was in a car with his girlfriend outside a local bar when the girlfriend showed Applicant a bag of marijuana. Applicant was arrested by a plain-clothes policeman. The disposition of this charge tends to corroborate Applicant's account.

8. The police report (G.E. 8) and court record (G.E. 11) confirm the charge and disposition and are consistent with Applicant's credible and unrebutted testimony (Tr. 29) that Applicant and some friends, who had been drinking, were in a local store, "daring" each other to take risks; Applicant took two padlocks--valued at about $9.00 (G.E. 8, Tr. 29)--without paying, and was stopped by store security and held for the police.

9. G.E. 9 and 11 confirm the essence of the charges and disposition, and are substantially consistent with Applicant's recorded statement to the Defense Security Service (DSS)(G.E. 3) and Applicant's testimony about this incident (Tr. 30-38, 42-43, 46-51): At approximately 5:00 A.M. on 22 August 1992, Applicant was observed by local police when his vehicle "spun out." Applicant was stopped, the police noticed alcohol on his breath, and Applicant was given a field sobriety test, which he passed. Applicant was asked for, and gave, permission to search his vehicle; police found the "sawed off" shotgun and two shotgun shells (not in the gun). The arresting officer noted that the serial number "had been filed off or scraped off, and it was not readable." The officer further observed: "It should be noted that the

defendant stated to me without my asking that he had bought the shotgun when he was 16 years old and had sawed off the barrell and filed the serial numbers."

10. An omission that Applicant has apparently never been asked to address, but one which I consider insignificant at the time because of the minor nature of the offense and Applicant's thoroughness in disclosing his other arrests.

11. Applicant reported on his NAQ that he had previously been granted a clearance in June 1986, and had never had a clearance denied, suspended, or revoked. However, Applicant testified that he had not remained continually employed in jobs requiring a clearance, but had a break in service between the 1986 adjudication and 1992 adjudication, and the 1992 adjudication and the instant case.

12. G.E. 5 confirms Applicant's admission to the charges and dispostion. Applicant testified (Tr. 39)--consistent with his sworn statement (G.E. 3)--that he and some friends were celebrating the friend's return from overseas duty and departure from the military. On the way home, Applicant was stopped for crossing the yellow line, and failed the breath test.

13. Where he did not have access to classified information, but was placed in positions of increasing fiduciary duty.

14. As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.

15. Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.

16. And indeed, the stet docket resolution of two of the cases comes close to an official recognition of Applicant's minimal culpability for these offenses.

17. Beyond that, I believe that the police officer would have recorded the "statement" as he did regardless of what Applicant actually said, simply because the shorthand recording of the statement is what is required to prevail on a charge of "defacing serial numbers" which carries the connotation that the defacing is done with nefarious intent. The nolle prosequi disposition of this offense as part of the plea arrangement suggests that the prosecutor was satisfied that even if Applicant removed the serial numbers (as it appears he did as a young man when he modified the gun and sanded it from one end to the other), he did not do so with the purpose of removing the serial numbers.

18. Although frankly, the police report's observations of the accident and Applicant's description of the incident do not conflict except on the issue of the interpretation to be given Applicant's "volunteered" information.