

DATE: December 26, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-06749

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

Pro Se

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended by Executive Orders 10909, 11328 and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4 and the implementation of Title 10, Section 986 of the United States Code), issued a Statement of Reasons (SOR), dated August 27, 2001, to the 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 the Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. The SOR was based on criminal conduct (guideline J) due to Applicant's involvement in October 1978 in a breaking and entering of a residence when he was sixteen years of age. Applicant's conviction of misdemeanor breaking and entering, for which he was sentenced to a term of two years in jail (suspended to five years probation), was alleged to disqualify him from having a security clearance granted or renewed pursuant to Title 10, Section 986 of the United States Code. [\(1\)](#)

Applicant filed an undated response to the SOR in which he requested a hearing before a DOHA Administrative Judge. The case was assigned to me on November 5, 2001. Pursuant to formal notice dated November 6, 2001, the hearing was scheduled for November 14, 2001, Applicant having waived the fifteen-day notice requirement. At the hearing, which was held as scheduled, the Government submitted three documentary exhibits, which were entered into the record. Testimony was taken from the Applicant. At Applicant's request, the record was ordered held open for ten days following the hearing to allow him to submit documentation of his work performance. By facsimile on November 20, 2001, Applicant timely forwarded his performance appraisals and documentation of rate increases for him. The Government having no objection to their admission, the records were marked collectively as Applicant Exhibit A and admitted into evidence on December 3, 2001. With the receipt on December 6, 2001, of the transcript of the hearing, this case is ripe for a decision.

FINDINGS OF FACT

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 40-year-old marine electrician who has worked for his current employer, a defense contractor (company A), since February 1988. (2) He seeks to retain a Secret security clearance which was granted to him in 1999 in connection with his defense-related duties.

Applicant got in serious legal trouble when he was sixteen years of age after he skipped school to drink beer with two friends. Having just broken up with his girlfriend, Applicant left school early one day with a friend in late October 1978. After purchasing a couple of six-packs, they were joined by another friend who lived near the store. As the three of them sat drinking alcohol in the backyard of a residence located in the vicinity, the friend with whom Applicant skipped school asked Applicant for his knife. After Applicant handed him the knife, this friend told Applicant he was going to break into the home, which was not occupied at the time. Intoxicated at the time, Applicant did not stop him, and the friend cut the screens on two residences. Applicant passed out on the lawn. The father of the friend who lived in the neighborhood called the police when he overheard their conversation. While Applicant did not attempt to enter the residences, he had provided the instrument used in the crime, so he was arrested along with his friend for felony breaking and entering. Applicant spent the night in jail and was released the following day. In court in late November 1978, Applicant pleaded guilty to a reduced charge of misdemeanor breaking and entering. He was sentenced to two years in jail, suspended in favor of five years probation, and ordered to pay court costs, a \$250.00 fine as well as restitution. Applicant was released after serving two and a half years of his five-year probation.

On his graduation from high school, Applicant attempted without success to gain admission to a United States military academy. He secured a variety of jobs thereafter, gaining some experience in electrical work. Over the September 1984 to March 1985 time frame, Applicant took some courses at a local vocational technical school.

In February 1986, Applicant and his then girlfriend (now spouse) moved to their present locale at the invitation of her grandmother. They were married in June 1986. His spouse's grandfather, who worked at company A until his retirement, attempted without success to get Applicant a job there. While working various jobs, including for a newspaper, Applicant learned welding with the goal of securing a position with company A. Hired in November 1987 by the defense contractor to work as a welder, Applicant passed all tests but found the task of welding itself difficult. As his ninety-day, probationary term was ending, he was asked if he would consider a position switch to electrician. Applicant was then terminated and brought on board as an electrician in mid-February 1988. Applicant completed his probationary term successfully in April 1988 with a good evaluation. Applicant has since proved to be a hard worker and good producer who requires little supervision. Consistently awarded the rate increases for which he was recommended between June 1988 and November 1991, Applicant reached the status of a first class A electrician. Rated as an average worker in February 1993, Applicant was assessed as needing improvement in his ability to work with others. The following year, his work performance was rated as very good in most areas, with his work habits assessed as excellent. In February 1996, the quality of his work was rated as exceptional.

Hoping to test for areas in his department which require a security clearance, Applicant executed a security clearance application (SF 86) in February 1999. Applicant reported thereon in response to financial inquiries that tax liens had been filed against him in 1995 for \$36.00, in 1996 for \$191.00 and in 1997 for \$256.00 (3); his wages had been garnisheed by the state to repay a \$800.00 debt; and he had a vehicle repossessed in 1993. He responded "NO" to question 21 regarding whether he had ever been charged with or convicted of a felony offense, even though he had been charged with felony breaking and entering in 1978. Applicant thought he was not required to report the offense because he was convicted of a misdemeanor rather than a felony and he was a juvenile at the time of the offense. Applicant was granted his Secret clearance approximately three weeks later.

In January 2001, Applicant was interviewed by a special agent of the Defense Security Service (DSS) regarding the 1978 criminal offense. Applicant detailed his involvement in the breaking and entering and reported the disposition of the charge. Applicant denied any additional criminal arrests or any intent to deliberately conceal the offense from the Government, explaining that he understood the crime to be a misdemeanor rather than a felony. Asked about his use of alcohol, Applicant described his drinking as a few beers five or six times per year with an occasional glass of liquor.

As of November 2001, Applicant was no longer drinking beer. Approximately five times per year, Applicant consumes

five or six mixed drinks when he gets together with friends. He does not drive after drinking in that quantity.

Applicant has not been cited with any violations of the law since October 1978 with the exception of some minor speeding. He and his spouse are expecting their first child in February 2002. Applicant realizes he made a "stupid mistake" when he was sixteen. He has no intention of repeating it.

POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors 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. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case: [\(4\)](#)

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 may be disqualifying include:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
- b. A single, serious crime. . .
- c. Conviction in a Federal or State court, including a court-marital of a crime and sentenced to imprisonment for a term exceeding one year [\(5\)](#)

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent
- b. The crime was an isolated incident
- d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur
- f. There is clear evidence of successful rehabilitation
- g. Potentially disqualifying conditions c. and d., 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.

* * *

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which 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. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern 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 criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 is nonetheless security worthy. As noted by the United States Supreme Court in *Department of 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." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. See Enclosure 2 to the Directive, Section E2.2.2.

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:

Applicant admits he made a very "stupid mistake" as a juvenile when he knowingly stood by while a friend used his (Applicant's) knife to cut the screens of two residences in an attempt to gain illegal entry. Charged with felony breaking and entering, Applicant in November 1978 pleaded guilty to a reduced charge of misdemeanor breaking and entering, for which he was sentenced to two years in jail (suspended), five years probation, a \$250.00 fine, costs and restitution. Paragraph 6.3 of Department of Defense Directive 5220.6 requires that each clearance decision be a "fair and impartial common sense determination" based on, inter alia, the guidelines and factors set forth in enclosure 2 of the Directive. The evidence shows Applicant committed a single crime twenty-three years ago, when he was sixteen years old and so impaired by alcohol that he passed out shortly after his companion cut the screens in an attempt to gain illegal entry. While his conduct falls within disqualifying conditions a. (allegations or admissions of criminal conduct), b. (a single serious crime) and c. (conviction in a state court to a term of imprisonment exceeding one year), pertinent factors in mitigation include a. (criminal behavior was not recent), b. (crime was isolated), d. (the factors leading to the violation are not likely to recur) and f. (there is clear evidence of successful rehabilitation). Apart from some minor speeding citations, Applicant has not committed any other infractions of the law. He has been employed by the same defense contractor for more than ten years, with all reviews of record being favorable as to his work performance and work ethic. Applicant and his spouse are expecting their first child in February 2002. His efforts to establish a career as an electrician and to support his family confirm his personal maturation. There is no evidence of recent or recurring questionable judgment or irresponsibility which would give rise to a present security risk. A favorable finding is warranted as to subparagraph 1.a. of the SOR.

Pursuant to Title 10, Section 986 of the United States Code, the Department of Defense is prohibited from granting or renewing access to classified information to a defense contractor employee who has been convicted in a Federal or State court and sentenced to imprisonment for a term exceeding one year. Although the offense of which Applicant stands convicted was a misdemeanor, he was sentenced to a term of two years (suspended). Hence, Applicant's request for continued access must be denied and an adverse finding returned as to subparagraph 1.b. of the SOR. This statutory

prohibition may be waived in meritorious circumstances as determined by the Secretary of Defense. I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

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 THE APPLICANT

Subparagraph 1.a.: For the Applicant

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

Elizabeth M. Matchinski

Administrative Judge

1. With the issuance of the SOR, Applicant was given a copy of the Federal statute, which states in pertinent part:

§986. Security clearances: limitations

(a) Prohibition.--After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons Disqualified From Being Granted Security Clearances.--A person is described in this subsection if any of the following applies to that person;

(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. . .

(d) Waiver Authority--In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

2. Applicant testified he initially went to work for the company in November 1987 as a welder, but that he had difficulty with the welding tasks. Near the end of his ninety day probationary period, the company asked if he would consider working as an electrician in another department. Terminated from the welding job, he was hired back as an electrician. (Transcript pp. 38-39).

3. Applicant explained the tax liens were the result of the manner in which he paid his tax bills and his relocation. ("I got my tax bill, I paid half of it in 6 months, half of it in approximately 6 months or a little longer, it was over a year. Most of the tax liens were put on one day, and we moved two to three days afterwards and it was paid. I never knew that the

tax liens were there. . . ." Transcript p. 34).

4. The adjudicative factors considered most pertinent are identified as set forth in guideline J following the implementation of 10 U.S.C. §986.

5. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts marital, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.