DATE: December 17, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-13566

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE R. HEINY

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Department Counsel

Jonathan Beyer, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Between 1979 and 1991, the Applicant was arrested six times and in 2001 was issued a citation for possession of drug paraphernalia. In 1989, he was sentenced to four years in jail (suspended) making Title 10 U.S.C. section 986 applicable. In September 1999, he failed to list his alcohol related arrests on a security clearance questionnaire. He owes a debt to an apartment complex. The record evidence is insufficient to mitigate or extenuate the negative security implications stemming from the falsification and his sentence of incarceration for more than one year. No waiver of Title 10 U.S.C. section 986 is recommended. Clearance is denied.

STATEMENT OF THE CASE

On April 1, 2002, 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)] it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On April 22, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on June 21, 2002. A Notice of Hearing was issued on August 15, 2002, scheduling the hearing, which was held on September 5, 2002.

The Government's case consisted of ten exhibits (Gov Ex). The Applicant relied on his own testimony and four documents. (App Ex) Following the hearing, additional documents were received, provisions having been made during the hearing for their submission following the hearing. Department Counsel (DC) having no objection to their admission, the submissions were admitted. The transcript (tr.) of the hearing was received on September 13, 2002.

DC moved to amend the SOR to combine SOR subparagraphs 1.g and 1.h into a single paragraph 1.g, which was granted. (tr. 30)

FINDINGS OF FACT

The SOR alleges personal conduct (Guideline E) and criminal conduct (Guideline J). The Applicant admits some of the arrests and tax liens and denies the remaining allegations.

The Applicant is 46-years-old, has worked for a defense contractor since September 1999, and is seeking to obtain a security clearance.

In 1979, the Applicant was convicted (SOR subparagraph 1.f) of "Driving Ability Impaired by Alcohol" and ordered to attend an alcohol treatment program and Alcoholics Anonymous (AA) meetings. In 1985, the Applicant was arrested (SOR subparagraph 1.e) for hindering a police officer. The Applicant has no recollection of the incident and indicated at that time he had lost his identification card and believes that ID card might have been used by another in this arrest.

In October 1989, he was charged with possession of cocaine. (SOR subparagraph 1.g) The Applicant admits the possession charge, but denies he was ever charged with distribution. Although alleged, the record fails to establish the Applicant was charged with distribution of a controlled dangerous substance in 1989. The FBI report (Gov Ex 4) lists only possession of cocaine. After being convicted he was fined $975.00 and court costs, sentenced to four years in prison which was suspended, and given one year of probation, which he successfully completed. The Applicant probation ended in November 1990. (Gov Ex 6)

The Applicant did not initially remember being sentenced to four years jail suspended. In Spring 2002, after the SOR had been issued, the Applicant and his attorney examined the court file and the Applicant discovered he had been sentenced to four years incarceration. (tr. 55) This was the first time the Applicant became aware he had been sentenced to jail and not merely been given probation. (tr. 78)

In October 1990, the Applicant was stopped for speeding and charged with DUI. He was found guilty (SOR subparagraph 1.d) of driving under the influence (DUI) of alcohol, fined $500.00 and court costs, ordered to attend an alcohol treatment program, and attend AA meetings three times a week. In May 1991, the Applicant was charged with disorderly conduct in a public place. (SOR subparagraph 1.b) He later pleaded guilty to the charge, was fined $100.00 plus court costs. In October 1991, the Applicant was involved in an accident while driving while intoxicated. He was found guilty of DUI. (SOR subparagraph 1.c) November 1991 was the last time the Applicant used alcohol or illegal drugs. In November 1991, he underwent a 28-day detoxification program before beginning an intensive 26 week treatment program coupled with three AA meetings a week. (tr. 49) The treatment program ended in March 1992 and his attendance at AA lasted a year. He still attends AA once or twice a month. (tr. 51, 72) The Applicant is very knowledgeable about and reads AA literature. (tr. 71)

In April 2001, the Applicant was setting in a parked vehicle waiting for his friends to return when a police officer saw, in plain view, what the officer described as a "crack pipe" on the back seat of the vehicle. The pipe was a beer car, which had been used in the smoking of crack cocaine. The Applicant was not arrested, but was given a citation (SOR subparagraph 1.a) for possession with intent to use drug paraphernalia. The citation (Gov Ex 2) indicates there was "ash" on the Applicant's jacket. The citation assumes this was ash was from illegal drugs, but no further information concerning this ash is contained in the record. The penalty listed on the citation is a $500.00 fine and no jail time. The Applicant insists the beer can belonged to someone else. The charge was *nolle prosequi*. (Gov Ex 2)

In September 1999, the Applicant completed a Questionnaire for National Security Positions, Standard Form (SF) 86. Question 24 of the form asked the Applicant if he had ever been charged with or convicted of any offense related to alcohol or drugs. He answered "yes" to the question and listed an August 1989 "probation before judgement." He failed to list his October 1991 DUI, his October 1990 DUI, and his 1979 arrest for having his driving ability impaired by alcohol. He failed to list his DUI offenses because he did not know they were criminal offenses. (tr. 56) The Applicant stated he did not know the amount of detail he had to provide in responding to the questions. (tr. 58)

In April 2001, the Applicant made a signed, sworn statement (Gov Ex 3) to a special agent of the Defense Security Service (DSS) in which he stated he had been drug free for nine years even though he had been issued a citation a week earlier for possession of drug paraphernalia.

In 1999, the Applicant rented an apartment as a cosigner with his brother. When the Applicant moved out, he settled what he owed. However, his brother did not and $547.00 (SOR subparagraph 3.a) is owed the apartment complex. (tr. 69) Within two months before the hearing, the Applicant went to the apartment complex to discuss this debt and discovered the complex had new management and had no knowledge of the debt.

In August 1995, the local state filed a $1,312.00 lien (SOR subparagraph 3.b) against the Applicant for unpaid state income taxes. (Gov Ex 7) The Applicant became aware of this lien after he had completed his SF 86 in 1999. (tr. 62) The Applicant answered "no" to SF 86 question 36, which asked him if, during the previous seven years, he had a lien placed against this property for failing to pay taxes or other debts. In March 2002, the Applicant went to federal court (not further identified) to determine why he had not received his federal income tax refund and was told it had been sent to pay off a state tax debt. The Applicant alleges this was the first time he was aware of the lien.

The August 1995 tax lien was paid by a $1,500.00 lump sum payment (tr. 35), which has satisfied and released the lien. (App Ex A) For 1994 and 1995, the Applicant received tax refunds[(2)] of $2,400.00 and $2,200.00. He was self-employed delivering newspapers, which resulted in him owing additional state income tax for 1996, 1997, and 1998. There were no tax liens for these years, but his federal tax refund was intercepted between 1996 and 2002. (tr. 37) For 1999, the Applicant was employed by two organizations, plus being self-employed. His income resulted in a $3,000.00 income tax deficit. In 2000, his self employment stopped. In September 1999, the local state issued a $3,077.00 lien (SOR subparagraph 3.c) against him for unpaid income taxes. (Gov Ex 8) In July 2000, the local state issued a $586.88 lien (SOR subparagraph 3.d) for unpaid income taxes. (Gov Ex 9) The tax liens do not indicate which tax year are covered by the liens. These two liens are being paid by garnishment of $195.81 every two weeks (App Ex C). As of the time of the hearing, $1,900.00 had been paid on the two liens. Over the years, the Applicant has had numerous telephone conversations with state tax authority employees. When these conversations occurred is not indicated in the record.

The Applicant has no other financial problems and is current on his rent, insurance, car payment, credit card payments, and other debts. Once the garnishment is concluded, he will be in ever better financial shape. Since 1991, the Applicant has changed his life style. He is now healthier, has gained weight, has a place of his own, a regular girlfriend, has money, and is mentally and physically better. (tr. 89) He Spends his free time fishing and going to motorcycle races and spends time with his brother and sisters and frequently visiting his mother. He no longer associates with this prior friends and associates and has not used alcohol or drugs for the past nine years.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

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. 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.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

Criminal Conduct (Guideline J) 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 admission of criminal conduct, regardless of whether the person was formally charged.

b. A single serious crime or multiple lesser offenses.

c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent.

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.

Personal Conduct (Guideline E) 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.

Conditions that could raise a security concern and may be disqualifying also 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities. (E2.A5.1.2.2.)

Conditions that could mitigate security concerns include:

None Apply.

Financial Considerations (Guideline F) The Concern: An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts. E2.A6.1.1.

Conditions that could raise a security concern and may be disqualifying include: E2.A6.1.2.

1. A history of not meeting financial obligations. (E2.A6.1.2.1.)

3. Inability or unwillingness to satisfy debts. (E2.A6.1.2.3.)

Conditions that could mitigate security concerns include: E2.A6.1.3.

6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. (E2.A6.1.3.6.)

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 that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. The Applicant was arrested for DUI in 1979, 1990, and 1991. In 1985, he was arrested for hindering a police officer. In 1989, he was arrested for possession of a controlled substance. In 1991, he was arrested for disorderly conduct and in 2001 he received a citation for possession of drug paraphernalia. Because of these arrests, DC a[(3)] and b[(4)] apply. The Applicant was sentenced to four years in jail (suspended) as a result of his 1989 arrest making DC c[(5)] applicable.

The Applicant's 1979 DUI and 1985 arrest for hindering a police officer are more than 22 years and 17 years old are, therefore, considered remote. Within a two-year period--1989 through 1991--the Applicant was arrested four times: in 1989, for possession of cocaine; in 1991 for disorderly conduct; and DUIs in 1990 and 1990. In 1991, following his last arrest, he went through a detoxification program, a 26-week treatment program, and attended AA three times a week for

one year. The Applicant still attends AA twice a month. Alcohol abuse is no longer a problem for the Applicant. The Applicant has changed for the better his life style, changed his associates, and changed how he spends his free time. The four arrests between 1989 and 1991 are remote in that they occurred more than ten years ago. Mitigating Condition (MC) a.[(6)] applies and find for the Applicant as to SOR subparagraphs 1.b, 1.c, 1.d, 1.e, and 1.f.

In April 2001, the Applicant received a citation for drug paraphernalia, which was a beer can used for smoking crack cocaine. The Applicant was sitting in a car and the beer can was located near him. The case was not prosecuted, which is not the same as a finding of innocence. However, the record only establishes the Applicant received a citation and nothing more. Without more, this is not criminal conduct even though the Applicant had unidentified ash on his jacket. I find for the Applicant as to SOR subparagraph 1.a.

As a result of the Applicant 1989 arrest for possession of controlled dangerous substance, he was sentenced to four years in jail which was suspended. Because the Applicant was sentenced to more than one year in jail, irrespective whether or not the sentence was suspended, Title 10 United States Code Section 986 applies. I find against the Applicant as to SOR subparagraph 1.g and 1.i.

I do not recommend further consideration of this case for a waiver of Title 10 U.S.C. 986.

The Government has satisfied its initial burden of proof under guideline E, (Personal Conduct). Under Guideline E, the security eligibility of an applicant is placed into question when that applicant is shown to have been involved in personal conduct which creates doubt about the person's judgment, reliability, and trustworthiness.

The Applicant was arrested for DUI in 1991, 1990, and 1979 and failed to list these arrests on his September 1999 SF 86. Because of his false answers, DC 2[(7)] applies. The Applicant's response that he did not think DUI arrests were criminal in nature is unpersuasive. Also unpersuasive was his statement that he did not know he had to provide detail of this depth. Question 24 simply asks if the Applicant had ever been charged with or convicted of any offense related to alcohol or drugs? The Applicant knew he had been arrested, charged, and found guilty of three alcohol related offenses. There are no mitigating conditions that apply to these falsifications. I find against the Applicant as to SOR subparagraphs 2.a, 2.b. and 2.c.

In August 1995, the local state filed a lien against the Applicant for unpaid state income taxes. However, the Applicant did not become aware of this lien until after he had completed his 1999 SF 86. (tr. 62) Therefore, his answer to SF 86 question 36, which asked him if, during the previous seven years, he had a lien placed against this property for failing to pay taxes or other debts, was not false. In March 2002, the Applicant attempted to determine why he had not received his federal income tax refund and was told it had been sent to pay off a state tax debt. This was the first time he was aware of the lien. I find for the Applicant as to SOR subparagraph 2.d.

In April 2001, the Applicant told the DSS he had been drug free for nine years and did not reveal the citation he had received six days before the statement. The Applicant was cited for possessing drug paraphernalia, the used beer can. There was no charge of use and the fact the Applicant had some unidentified "ash" on his jacket when cited is insufficient to establish he had used illegal drugs. The record is insufficient to establish the Applicant's April 2001 statement was false. I find for the Applicant as to SOR subparagraph 2.e.

The Government has satisfied its initial burden of proof under Guideline F, (Financial Considerations). Under Guideline F, the security eligibility of an applicant is placed into question when the applicant is shown to have a history of excessive indebtedness, recurring financial difficulties, or a history of not meeting his financial obligations. The United States must consider whether individuals granted access to classified information are because of financial irresponsibility in a position where they may be more susceptible to mishandling or compromising classified information or material for financial gain.

Three tax liens were filed against the Applicant by the state income tax authority totaling approximately $5,000.00. Additionally, the Applicant was a cosigner on a lease with his brother on which $547.00 is owed. Because of these proven debts, DC 1[(8)] and 3[(9)] apply.

The Applicant has satisfied the $1,312.00 tax lien (SOR subparagraph 1.b). I find for the Applicant as to SOR subparagraph 1.b. The other two state tax liens are being paid by garnishment of $195.81 every two weeks. Even though these debts are being met by garnishment, which has resulted in payment of more than $1,900.00, this is still considered to be a good-faith effort by the Applicant to pay these liens. MC 6[(10)] applies. I find for the Applicant as to SOR subparagraphs 3.c and 3.d.

The Applicant and his brother cosigned on a lease. When the Applicant moved out, he paid his half of the remaining debt. However, the other half remains to be paid. The Applicant has experienced difficulty getting information concerning the debt because the apartment complex is under new management. The mitigating conditions do not apply because the debt is recent as it is still owed, it is not an isolated incident because he also had the three tax liens, there is no showing the debt was the result of the behavior largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), there has been no showing the Applicant has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control, and there is no good-faith effort to repay this creditor or otherwise resolve debt.

The Applicant has no financial problems now and is current on his rent, insurance, car payment, credit card payments, and other debts. The debt to the apartment complex still exits and, as co-leaser, the Applicant is responsible for it. Since none of the mitigating conditions apply, I find against the Applicant as to SOR subparagraph 1.a.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: For the Applicant

Subparagraph 1.d.: For the Applicant

Subparagraph 1.e.: For the Applicant

Subparagraph 1.f.: For the Applicant

Subparagraph 1.g.: Against the Applicant

Subparagraph 1.h.: This subparagraph was combined with

Subparagraph 1.g.

Subparagraph 1.i.: Against the Applicant

Paragraph 2 Personal Conduct (Guideline E): AGAINST THE APPLICANT

Subparagraph 2.a.: Against the Applicant

Subparagraph 2.b.: Against the Applicant

Subparagraph 2.c.: Against the Applicant

Subparagraph 2.d.: For the Applicant

Subparagraph 2.e.: For the Applicant

Paragraph 3 Financial Considerations (Guideline F): AGAINST THE APPLICANT

Subparagraph 3.a.: Against the Applicant

Subparagraph 3.b.: For the Applicant

Subparagraph 3.c.: For the Applicant

Subparagraph 3.d.: 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 the Applicant.

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Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.

2. The Applicant did not indicate if these refunds were state or federal refunds.

3. DC a. Allegations or admission of criminal conduct, regardless of whether the person was formally charged.

4. DC b. A single serious crime or multiple lesser offenses.

5. DC c. Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year.

6. MC a. The criminal behavior was not recent.

7. DC 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities. (E2.A5.1.2.2.)

8. DC 1. A history of not meeting financial obligations. (E2.A6.1.2.1.)

9. DC 3. Inability or unwillingness to satisfy debts. (E2.A6.1.2.3.)

10. MC 6. The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts. (E2.A6.1.3.6.)