DATE: February 5, 2002

In Re:

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

Applicant for Security Clearance

ISCR Case No. 01-17235

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's 1983 criminal conduct raises security concerns: while chief procurement counsel to a federal agency, he violated 18 U.S.C. Section 201(g) when he received gratuities from a federal contractor. After he pleaded guilty, the sentence of the U.S. District Court in November 1985 included two years imprisonment (suspended). Clear evidence of successful rehabilitation and the absence of any subsequent criminal conduct over the past 16 years mitigates security concerns over his actions that led to his debarment being extended in 1988. His state Supreme Court reinstated him to the practice of law in 1988, and Applicant represents government contractors. The Smith Amendment (10 U.S.C. Section 986) disqualifies anyone convicted and sentenced to imprisonment for more than one year. Clearance is denied. Applicant requested a waiver based on the length of time since his 1985 conviction and his 1988 readmission to practice law. A waiver is recommended.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on August 30, 2001. The SOR detailed reasons why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.(1) The SOR alleges specific concerns over criminal conduct (Guideline J), including an allegation that his criminal conduct disqualifies Applicant from having a security clearance because of 10 U.S.C. Section 986, unless in a meritorious case the Secretary of Defense authorizes an exception. Applicant responded to these SOR allegations in an Answer notarized on September 24, 2001, where he admitted with explanations paragraph 1.a., admitted in part and denied in part paragraph 1.b. and under paragraph 1.c. requested a waiver. He requested a hearing.

The case was assigned to Department Counsel who on November 1, 2001, attested it was ready to proceed. On November 5, 2001, the case was assigned to me. Subsequently, a mutually convenient date for hearing was agreed to and a Notice of Hearing was issued on November 28, 2001, which set the matter for December 17, 2001, at a location near where Applicant works and lives. At the hearing the Government introduced nine exhibits which were all admitted

into evidence (Exhibits 1-9). The Applicant testified, but offered no[(2)] exhibits. The transcript (TR) was received on December 26, 2001.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 73 years old, has been self-employed[(3)] with Defense Contractor #3 in State #1 since March 1986. He anticipates working two more years before he retires but does not foresee handling any classified materials. He previously had been a federal government employee from May 1966 to November 1985 where he handled dozens of classified documents. While in federal service in 1972, he became a GM-15 chief counsel for a federal agency which was located in State #1; he resigned in November 1985. In May 1967 the Office of Personnel Management had granted him a Secret clearance. (Exhibits 1, 2, 7; TR 18, 20-25, 26)

Applicant served in the military from 1951-1956 and subsequently on inactive reserve duty. He was married in 1953 and widowed in January 1991; he has three children. He remarried in November 1996. (Exhibit 1)

Criminal Conduct

Applicant in October 1983 received a 1982 sedan from a defense contractor with a retail value in excess of $14,000 for which he paid $7,000. He initially misrepresented to his co-workers the source of the car. Applicant was indicted in August 1985 for federal felony offenses under 18 U.S.C. Sections 201(c) for accepting a bribe and 201(g), for accepting gratuities from a defense contractor while Applicant was employed as chief counsel to a federal agency where his official duties were to provide legal advice and service to contracting officers to assist in federal contract administration. In his position he came to know Mr C, an officer[(4)] of Defense Contractor #1, a company that did federal contracting with Applicant's agency. When he learned that Mr. C would sell company vehicles, he purchased one from Mr. C for $7,000. While Applicant considered that a "fair" price, federal investigators determined that the vehicle was instead worth approximately $14,000. At the time he had matters pending before him regarding contracts awarded to this defense contractor. He was charged with receiving the vehicle as a gratuity for a favorable decision rendered on behalf of Mr. C's company. Applicant pleaded[(5)] guilty in September 1985 to two counts of accepting gratuities while a federal employee, a violation of 18 U.S.C. Section 201(g). (The bribery charge was dropped.) In November 1985 the U.S. District Court in State #1 sentenced Applicant to two years imprisonment (suspended), three years federal probation, a $20,000 fine, and 400 hour of community service. He never served any time in prison and had an early release from probation in June 1988. He has not subsequently been involved with any criminal activity. (Exhibits 1, 2, 5, 6, 7, 8; TR 22, 27-30, 34-35, 40-43)

Based on his November 1985 conviction he was advised in December 1985 that a federal agency proposed that he be debarred from contracting with any agency in the Executive Branch of the Federal Government for a three year period as his conduct evidenced a lack of business integrity and honesty that affected his ability to do business responsibly with the Federal Government. (Exhibit 3) He was debarred from December 1985 to December 1988. (Exhibit 6; TR 35-36) Further, he was advised of his Expulsion from United States Military Installation as his presence was prejudicial to good order and discipline and maximum effectiveness because of his guilty plea to a violation of 18 U.S.C. Section 201g. (Exhibit 4)

Applicant was still debarred in February 1988 when he attended[(6)] a meeting in State #2 with Defense Contractor #2. The government concluded he improperly acted as a consultant in contract discussions with the Government; consequently, Applicant's debarment was extended six months until June 1989 because his action violated his existing debarment. (Exhibit 6; TR 31-32, 37)

Successful Rehabilitation

Under the rules of State #1, Applicant was suspended from practicing law in State #1 when he was convicted. Later, even though the state Disciplinary Board asked for his disbarment, the state Supreme Court reinstated him to the

practice of law in 1988. (Applicant provided no documentation of this decision, but testified to his current good standing in the bar of his state.) (TR 22, 25-26, 37-38, 41-42)

Currently, Applicant practices law and represents government contractors; he has appeared before the Armed Services Board of Contract Appeals. (TR 37-38) He never sought a pardon[(7)] although he knows his Member of Congress socially. (TR 46) Applicant's community service includes being treasurer of his condo association and involvement with health charities and charitable work with lawyers which provides anonymous charitable donations and no cost legal services. (TR 45-46) He is a member of his state bar association as well as the American Bar Association and the Federal Bar Association. (TR 46)

STATUTORY REQUIREMENTS

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, emorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Statutory provision (1) disqualifies a person who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." DoD implementing guidance interpreted this language to including "person with convictions in both State and Federal courts, including UCMJ offenses with sentences imposed of more than one year, regardless of the amount of time actually served." This case falls within this statutory provision. However, the Smith Amendment establishes authority for the Secretary of Defense (or the Secretary of the military department concerned) to grant a waiver where meritorious cases exist. This authority may not be delegated. Neither the statute, nor DoD, nor the DOHA Director in the OI has defined "meritorious circumstances."

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I weighed relevant Adjudication Guidelines as set forth below :

Guideline J - Criminal Conduct

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

b. A single serious crime or multiple lesser offenses.

c. Conviction in a Federal or a State court. . .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

d. . . .the factors leading to the violation are not likely to recur;

f. There is clear evidence of successful rehabilitation

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government,

and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criminal Conduct

The Government maintains security concerns over Applicant's criminal conduct: he pleaded guilty in November 1985 to violating18 U.S.C. Section 201(g) when he received gratuities from a federal contractor in 1983 while he served as chief procurement counsel to a federal agency as detailed in the Findings above. In November 1985 the U.S. District Court in State #1 sentenced Applicant to two years imprisonment (suspended), three years federal probation, a $20,000 fine, and 400 hour of community service. Applicant's felony conviction was an integrity offense that he committed while he was chief counsel for a federal agency. Further this conduct led to his being debarred from doing business with the U.S. Government from December 1985 to December 1988, and he was formally expelled from the US military installation where he had previously worked. When he later attended a contractual meeting in February 1988 with a defense contractor, the Government concluded he had violated the debarment and extended the prohibition for six more months. Finally, a provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), as implemented by DoD, mandates restrictions on the granting or renewal of security clearances: provision (1) disqualifies persons with convictions in both State and Federal courts with sentences imposed of more than one year, regardless of time actually served.

To his credit Applicant never served any time in prison and had an early release from probation in June 1988. There is no evidence that he has subsequently been involved with any criminal activity. In 1988 Applicant was reinstated to the practice of law and has subsequently practiced law in State #1 for over a decade and also represented government contractors in federal administrative proceedings. He has appeared before the Armed Services Board of Contract Appeals. Further, Applicant's community service includes being treasurer of his condo association and involvement with health charities and charitable work with other lawyers. Consequently, the actions that led to his debarment and the extension of his debarment in February 1988 may now be mitigated under condition (a) as the behavior was not recent, (d) . . . the factors leading to the violation are not likely to recur; and (f) there is clear evidence of successful rehabilitation. Indeed, debarment is a civil, not a criminal action by the Government. Currently, Applicant practices law and is a member of his state, Federal and American bar associations.

However, as implemented by DoD, the statutory provision in 10 U.S.C. Section 986 makes no exception for the amount of time actually served or subsequent rehabilitation. Consequently, despite the passage of time and his rehabilitation as a lawyer, this statutory provisions mandates doubt over his current trustworthiness and access to classified information as he was previously convicted of a crime and sentenced for a term exceeding one year. Whether he is fully rehabilitated from his criminal conduct is not material under 10 U.S.C. Section 986. Thus, his 1985 criminal conduct cannot be mitigated[(8)] under this statutory provision. After considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraph 1.a. and 1.c., but for Applicant on subparagraph 1.b. incorporated under SOR Paragraph 1.

Request for Waiver

Applicant has requested a waiver based on the length of time since his 1985 conviction, a period of sixteen years. He based his request for waiver on his testimony that he was reinstated to the practice of law in 1988 and his testimony of his community service work. Applicant was given the opportunity to submit additional evidence of his meritorious circumstances, but did not provide any documentary evidence of his post-conviction conduct, character, and reputation in the community or other factors that might be considered relevant in evaluating a case for waiver. He no longer foresees his having any need to have access to classified information as he has resigned from being an operating officer at the company which had originally sought a security clearance for him. DOHA OI 64 explicitly prohibits an administrative judge from providing an explanation for a waiver recommendation. I recommend further consideration of

this case for a waiver under 10 U.S.C. 986.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against 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. I recommend further consideration of this case for a waiver under 10 U.S.C. Section 986.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

2. Applicant was given an additional ten days (until December 27, 2001) to submit exhibits, but did not submit any documents. (TR 38-40, 46-48, 56)

3. Applicant's client had to apply for a facility clearance; since he was a minority stock holder and was working at that facility at that time, the Defense Security Service concluded Applicant himself needed a security clearance as Applicant was asked to handle the security applications. When Applicant's security clearance was initially not granted, the company lost its facility clearance. Thus, Applicant subsequently resigned from being an operating officer at the company and sold back his stock. (TR 23-25)

4. Mr. C , Defense Contractor #1's CEO, pled guilty in December 1985 to one count violation of 18 U.S.C. Section 201(f) and was sentenced in January 1986 to one year in jail, suspended; placed on probation for two years; fined $10,000; and ordered to do 200 hours of community service. (Exhibit 8; TR 43-44)

5. Applicant chose to plead guilty rather than go to trial as his wife had cancer at the time. He did not want her to go through a trial as they anticipated she would only have one year to live; she lived for four years. (TR 43)

6. Applicant admits he attended the meeting, but disputes that he represented this contractor at the meeting: Applicant claimed to be "just sitting around the house" at the time as he was still suspended from practicing law when a "good friend" asked him to attend the meeting in State #2; he did not sit at the conference table, but did have discussions with some of the people there because he knew them. He admits talking about one issue as he had experience with that issue when he worked for the agency. He was not paid to attend the meeting. (TR 21-22, 31-33, 36)

7. Seeking a pardon is an exercise of executive clemency as authorized under Article II, Section 2, of the Constitution. Under the Constitution, the President's clemency power extends only to federal criminal offenses. In general, a pardon is granted on the basis of the petitioner's demonstrated good conduct for a substantial period of time after conviction and service of sentence. **See** http://www.usdoj.gov/pardon/ The Department of Justice's regulations require a petitioner to

wait a period of at least five years after conviction or release from confinement (whichever is later) before filing a pardon application (28 C.F.R. §1.2). In determining whether a particular petitioner should be recommended for a pardon, the principal factors taken into account are outlined in Section 1-2.112 **Standards for Considering Pardon Petitions**:

1. Post-conviction conduct, character, and reputation.

An individual's demonstrated ability to lead a responsible and productive life for a significant period after conviction or release from confinement is strong evidence of rehabilitation and worthiness for pardon. The background investigation . . .focuses on the petitioner's financial and employment stability, responsibility toward family, reputation in the community, participation in community service, charitable or other meritorious activities and, if applicable, military record.

2. Seriousness and relative recentness of the offense.

When an offense is very serious (e.g., a violent crime, major drug trafficking, breach of public trust, or white collar fraud involving substantial sums of money), a suitable length of time should have elapsed in order to avoid denigrating the seriousness of the offense or undermining the deterrent effect of the conviction. In the case of a prominent individual or notorious crime, the likely effect of a pardon on law enforcement interests or upon the general public should be taken into account. When an offense is very old and relatively minor, the equities may weigh more heavily in favor of forgiveness, provided the petitioner is otherwise a suitable candidate for pardon.

3. Acceptance of responsibility, remorse, and atonement.

The extent to which a petitioner has accepted responsibility for his or her criminal conduct and made restitution to its victims are important considerations. A petitioner should be genuinely desirous of forgiveness rather than vindication.

4. Need for relief.

The purpose for which pardon is sought may influence disposition of the petition. A felony conviction may result in a wide variety of legal disabilities under state or federal law, some of which can provide persuasive grounds for recommending a pardon. For example, a specific employment-related need for pardon, such as removal of a bar to licensure or bonding, may make an otherwise marginal case sufficiently compelling to warrant a grant in aid of the individual's continuing rehabilitation. On the other hand, the absence of a specific need should not be held against an otherwise deserving applicant, who may understandably be motivated solely by a strong personal desire for a sign of forgiveness.

5. Official recommendations and reports.

The comments and recommendations of concerned and knowledgeable officials, particularly the United States Attorney whose office prosecuted the case and the sentencing judge, are carefully considered. The likely impact of favorable action in the district or nationally, particularly on current law enforcement priorities, will always be relevant to the President's decision. Apart from their significance to the individuals who seek them, pardons can play an important part in defining and furthering the rehabilitative goals of the criminal justice system.

8. **Conditions that could mitigate security concerns include:**

a. The criminal behavior was not recent; b. The crime was an isolated incident; c. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; e. Acquittal; f. There is clear evidence of successful rehabilitation; g. Potentially disqualifying conditions. . . .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.