

DATE: April 8, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-18032

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's 1984, 1989, 1995 and 1996 criminal conduct and his personal conduct in omitting material information from his security forms all raise security concerns. In completing 1997 and 1999 security forms, he failed to reveal the 1989 criminal conviction and offered discrepant defenses for this omission. With the 1995 and 1996 charges and guilty pleas, he served consecutive sentences that totaled 480 days. To his credit Applicant was granted an early discharge from sentence in 1998, has a successful work record, moved away from his fixation with guns, and has not subsequently been involved with any criminal activity. This evidence mitigates the 1984 and 1989, but not the 1995-96, criminal conduct. The Smith Amendment (10 U.S.C. Section 986) disqualifies anyone convicted and sentenced to imprisonment for more than one year. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on September 26, 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 1995 and 1996 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, and over personal conduct (Guideline E). Applicant responded to these SOR allegations in an Answer notarized on November 14, 2001, where he admitted subparagraphs 1.a. through 1.d. and denied 1, 1.e., 2, 2.a., 2.b., 2.c. and 2.d. He requested a hearing.

The case was assigned to Department Counsel who on November 30, 2001, attested it was ready to proceed. On December 3, 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 December 13, 2001, which set the matter for January 17, 2002, at a location near where Applicant works and lives. At the hearing the Government introduced six exhibits which were all admitted into evidence (Exhibits 1-6). The Applicant testified, and offered eleven exhibits which were admitted into evidence

(Exhibits A-K) (TR 32). Subsequently, he was allowed an additional seven days, until January 24, 2002 to submit additional evidence. (TR 79-81; 95) On January 22, 2002, another exhibit (Exhibit L) was submitted to which Department Counsel did not object, so Exhibit L was also admitted into evidence. The transcript (TR) was received on January 28, 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, 41 years old, has worked as a technician with Defense Contractor #1 in State #1 since April 1999; previously he worked as a technician for Defense Contractor #2 in State #1 from 1998 to 1999 and as a technician for Defense Contractor #3 in State #1 from 1997 to 1998. In 1995 he had been terminated from an employer for attendance reasons when he was arrested and jailed for his criminal conduct. (Exhibits 1, 2; TR 69-74)

Applicant was married to Wife #1 in 1985 and divorced in 1989. He has custody of his three children from that marriage. He married Wife #2 in 1991 and has one step-child; at the time of the hearing he had been separated from his wife for six months. His divorce was pending from Wife #2 who nevertheless testified on his behalf. (Exhibits 1 & 2, TR 33-34, 75-76)

Criminal Conduct

Applicant has had a series of arrests and four guilty pleas in State #1 from 1984 to 1996.

- In April 1984 when he was 24 years old Applicant was driving a friend's car when he was pulled over for a sobriety test which he failed. In a subsequent search of the vehicle his friend's marijuana pipe was found; since his friend was on probation, Applicant claimed it was his. Later he was involved in an automobile accident where he was in possession of cocaine. These incidents were condensed in one trial. He was charged with Criminal Possession of a Controlled Substance (cocaine) and Driving while Impaired. He pled guilty to the possession charge and was sentence to one year probation and was released in October 1985. (Answer; Exhibit 5; TR 51-52, 56-57)

charged with Criminal Possession of a Loaded Firearm, Criminal Possession of a Controlled Substance, Criminal Possession of a Weapon with Intent to Use; Criminal Possession of Stolen Property; and Unlawful Possession of Marijuana. In 1990 he pled guilty to Criminal Possession of Stolen Property and was sentenced to three years probation and given a \$913 fine and a \$87 surcharge. The remaining charges were resolved with his \$1,000 contribution to a "stop DWI program." None of his firearms from his gun collecting hobby were registered in State #1 as he had purchased them in State #2. (Answer; Exhibit 3, 5; TR 52, 56-57, 61-64, 66) spoke to his wife in a way she found threatening; she believed the gun to be loaded. Normally, he would only handle his guns in the basement or backyard. Even though he did not directly threaten her with the gun, she called the police and allowed them to search the house. He was arrested and charged with Criminal Possession of a Weapon in the 3rd degree; in the 2nd degree (a felony, as the firearm was loaded with intent to use against another), Menacing in the 2nd Degree; Criminal Possession of a Weapon in the 3rd degree (shotgun with barrels less than 18 inches long), a felony; Criminal Possession of a Weapon in the 3rd Degree (machine gun), a felony; Criminal Possession of a Weapon in the 3rd Degree (firearm silencer/four pipe bombs), a felony; and Criminal Possession of a Controlled Substance (hashish). In April 1996 he was further charged with Criminal Possession of a Weapon in the 3rd Degree (45 caliber ruger blackhawk, without a license), a felony. In August 1996 he plead guilty to one count of Attempted Criminal Possession of a Weapon in the 2nd degree, a felony, and was sentenced to ten months in jail for the 1995 incident and was sentenced to six months in jail and a \$155 fine for the 1996 charge. He served the time consecutively for a total of 480 days in jail as the August 1995 offense was combined with the April 1996 charge. (Answer, Exhibits 3, 4, 5, 6; TR 35-36, 38-41, 45-48; 53, 63-64, 76-79)

Rehabilitation

Since the 1995-96 charges, Applicant has not subsequently been arrested. He has disassociated himself from his prior friends with questionable conduct. Although he was sentenced to five years probation and six months incarceration on August 1996 for the 1996 incident, Applicant was granted an early discharge from this sentence in October 1998, but he never sought a pardon⁽²⁾ which might have provided further mitigating evidence. Following his release from jail in 1997, Applicant did seek marital counseling. (Exhibit L; TR 66-67, 68-69, 79-80, 87-88)

Indeed, his wife does not consider him a threat to herself or any of the children and recommended him for a security clearance. (TR 37)

Several co-workers, the corporate security manager, and family members wrote recommendations on behalf of Applicant. (Exhibits A, B, D, E, F, G, H, I, J, & K)

His mother described him as having an "obsession" with guns, but he now sees the damage his gun fixation has effected on his life, so he has not been near weapons since 1995. She recommends him for a security clearance. (Exhibit C; TR 76)

Applicant does request a waiver from the statutory requirements of 10 U.S.C. Section 986 ("The Smith Amendment") alleged in the SOR. (TR 65-66, 92-93)

Personal Conduct

Applicant completed security forms in 1997 and in 1999, but he failed to reveal his 1989 criminal charges and conviction in response to questions on the forms. He offered inconsistent defenses for his omissions: first, he believed the 1989 charge was outside the seven year limitation he presumed (but was not stated on the form). Nevertheless he revealed a 1984 charge. Secondly, he claimed that he had hired a lawyer to handle the 1995-96 charges and was not aware of the details of all the charges; however that does not impact his omission of the 1989 incident. Thus, these defenses do not justify his failure to disclose the 1989 charge on his 1997 and 1999 security forms. (Answer; Exhibits 1 & 2; TR 54-66)

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, memorandum, 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." 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

GUIDELINE E - PERSONAL CONDUCT

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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

[First] Refusal to undergo or cooperate with required security processing, including medical and psychological testing; or

[Second] Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination.

Conditions that could raise a security concern and may be disqualifying also include:

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;

Conditions that could mitigate security concerns include:

None

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. 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 to criminal charges

from 1984 and in 1989. An incident in 1995 led to his guilty plea to two felony charges from this incident: one charge was issued in 1995 and the other in 1996. Subsequently, he was sentenced in 1996 to two consecutive terms of ten months for one charge and six months for the other charge. Since these two consecutive terms totaled 480 days in jail, the Government argued this total dictates this case fall within a statutory provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001. The Smith Amendment (10 U.S.C. Section 986), 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. Since these two charges grew out of the same incident and the court imposed these sentences jointly, I conclude this interpretation is reasonable even though the statutory language does not mandate this conclusion.

In 1998 Applicant was granted an early discharge from sentence, but he never sought a pardon which would have been another mitigating factor to consider. To his credit there is no evidence that he has subsequently been involved with any criminal activity since 1995 when the incident happened that led to the 1995 and 1996 charges and guilty plea. He has moved away from his fixation on guns that led to the 1995-96 felony charges. Moreover, Applicant has a successful work record and favorable references. Consequently, the actions that led to his 1984 and 1989 convictions 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.

However, as implemented by DoD, the statutory provision in 10 U.S.C. Section 986 makes no exception for subsequent rehabilitation in evaluating the 1995-96 felony charges where he was sentenced to two consecutive terms of more than one year in jail. Consequently, despite the passage of six years and his rehabilitation steps, this statutory provisions creates doubt over his current trustworthiness and access to classified information. Whether he is fully rehabilitated from his criminal conduct is not material under 10 U.S.C. Section 986 as he was sentenced for a two consecutive terms from the same incident which exceed one year in jail. Thus, his 1995-96 criminal conduct cannot be mitigated⁽³⁾ under this statutory provision. Further, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. and 1.b., but against Applicant on subparagraph 1.c., 1.d., and 1.e. incorporated under SOR Paragraph 1.

Request for Waiver

Applicant has requested a waiver based on the length of time since his 1996 conviction, a period of six years. He based his request for waiver on his testimony that he was rehabilitated and on the documentary evidence of his post-conviction conduct, character, and reputation in the community. DOHA OI 64 explicitly prohibits an administrative judge from providing an explanation for a waiver recommendation. I do not recommend further consideration of this case for a waiver under 10 U.S.C. 986.

Personal Conduct

The Government advanced security concerns over personal conduct issues: Applicant had two opportunities to disclose the totality of his criminal conduct, but failed to do so in answer to questions on the 1997 and 1999 security forms.

Applicant's behavior⁽⁴⁾ reflects questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations and could indicate that he may not properly safeguard classified information.

To rebut and overcome the Government's case, Applicant would have to demonstrate that he has mitigated⁽⁵⁾ this past conduct. His current proficient work place conduct and favorable reference letters have to be measured against his failure to disclose required information on two security forms. He offered inconsistent defenses for his omissions: first that he believed the 1989 charge was outside the seven year limitation he presumed (but that limitation was not stated on either of the forms). That argument is not persuasive as he revealed a 1984 charge. His second explanation (that he had hired a lawyer to handle the 1995-96 charges and was not aware of the details of all the charges) does not explain the 1989 omission from the forms. These defenses do not justify his failure to disclose the totality of his past criminal conduct on his 1997 and 1999 security forms.

Hence, after considering the Appendix I Adjudicative Process factors and the Adjudicative Guidelines, I rule against Applicant on subparagraphs 2.a. through 2.d. under SOR Paragraph 2.

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.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Paragraph 2. Guideline E: AGAINST APPLICANT

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: 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 do not 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. 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.

3. 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.

4. Conditions that could raise a security concern and may be disqualifying also include: 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;

5. Conditions that could mitigate security concerns include: 1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability; 2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily; 3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts; 4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided; 5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress; 6. A refusal to cooperate was based on advice from legal

counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; 7. Association with persons involved in criminal activities has ceased.