

DATE: August 11, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-19649

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Kathryn A. Trowbridge, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Arrested for Driving While Intoxicated (DWI) in May 1983, Applicant pleaded guilty and was given two years probation. In November 1983 after another DWI subsequent arrest where he pleaded guilty, his probation was revoked; he was sentenced to 18 months in jail with work release for each DWI offense. While clear evidence of successful rehabilitation and the absence of any subsequent criminal conduct over the past 20 years might otherwise mitigate security concerns over his actions, 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 his rehabilitation and the length of time since his conviction. 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 September 16, 2002. 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 October 5, 2002, where he admitted paragraphs 1.a., 1.b., and 1.c., and requested a waiver. He asked for an administrative decision on the record

The case was assigned to Department Counsel who on February 19, 2003, prepared a File of Relevant Material (FORM) for the Applicant's review and advised Applicant that he had 30 days to submit objections and/or information before the FORM was submitted to an administrative judge and that he had the right to be represented by counsel. A Personnel Security Specialist (PSS) sent the FORM to Applicant on February 25, 2003, and again notified the Applicant that he had 30 days from receipt of the letter to submit objections and/or information before the FORM was submitted to an administrative judge. Applicant received the FORM on March 6, 2003, with a response due on April 5, 2003. The

Applicant submitted no response. Subsequently, on June 5, 2003, the DOHA Director assigned the case to me for a decision on the record.

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, 52 years old, has been employed with Defense Contractor #1 in State #1 since 1992. He was granted a Department of Defense a Secret clearance in April 1974. He completed a Security Clearance Application (SF 86) in January 2000. He served in the military from 1974-1977 and again from 1978 to 1980. (Item 4)

Applicant was married in 1969 and divorced in 1970. (Item 4)

Criminal Conduct

Applicant reported four arrests in State #1 on his SF 86: two DWI arrests in November 1971 where he paid a fine and received probation, one public intoxication arrest in May 1982 where he was fined, and one DWI arrest in June 1983 where he received two years of probation. He also revealed a revocation of probation in October 1983 and a "12 year sentence"⁽²⁾ along with an October 1983 DWI with an 18 month sentence. (Item 4) Court records confirmed his plea of guilty to a DWI in May 1983 with a sentence of two years probation. In November 1983 the court revoked his probation because of an October 1983 "DWI Subsequent" where he pleaded guilty and was sentenced to 18 months in the county jail with work release for each offense. In April 1984 a letter confirmed his incarceration since October 1983 and the deputy's "no objection" to his being released early on his sentence as he has "caused no problems whatsoever on his work release." (Item 5)

In his Defense Security Service (DSS) interview statement, Applicant stated that after the October 1983 arrest for DWI subsequent he was incarcerated for 3 years, 7 months, and 4 days. Since that October 1983 arrest he has not had a drop of alcohol to drink and has not been subsequently arrested. (Item 6) Applicant stated that he is "a very reliable and trustworthy person." (Item 2). He has not requested a pardon.

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." 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 the relevant 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 based on his two DWI guilty pleas in May and October 1983 where in November 1983 his earlier probation for the May 1983 offense was revoked, and he was sentenced to 18 months in the county jail with work release for each DWI offense. Applicant stated that after the October 1983 arrest he was incarcerated for 3 years, 7 months, and 4 days. The Criminal Conduct guidelines indicate that a person may be disqualified where the following conditions apply: 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. Also, 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, since 1983 there is no evidence that Applicant has subsequently been involved with any criminal activity in twenty years. Consequently, the alcohol abuse and criminal actions that led to his 1983 conviction and incarceration 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 as he no longer drinks; 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. Consequently, despite the passage of time since conviction, 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 1983 criminal conduct cannot be mitigated⁽³⁾ under this statutory provision. After considering the 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. under SOR Paragraph 1.

Request for Waiver

Applicant in his Answer to the SOR requested a waiver based on the length of time since his 1983 conviction, a period of 20 years. He based his request for waiver based on his statement that he is "a very reliable and trustworthy person" who has not had a drink of alcohol in over twenty years. 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.: For 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. This 12 year sentence reported in the SF 86 was not confirmed by court records which show instead an 18 month sentence in the county jail with work release allowed.

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.