DATE: April 3, 2003

In re:

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

Applicant for Security Clearance

ISCR Case No. 01-24997

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Henry Lazzaro, Esq., Department Counsel

FOR APPLICANT

Henry G. Smith, Esq.

SYNOPSIS

In 1985, Applicant pled guilty to the felony offense of assault with injury to a child (his two-month-old infant daughter) and was sentenced to 10 years confinement, suspended, and placed on probation for 10 years, which he successfully completed. He has otherwise been a law-abiding citizen, steadily employed, and he was awarded custody of his daughter in 1999. Under 10 U.S.C. § 986, the Department of Defense is prohibited from granting Applicant a security clearance based on his sentence to confinement exceeding one year unless the prohibition is waived by the Secretary of Defense; a waiver is recommended. Clearance denied.

STATEMENT OF THE CASE

On August 7, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.(1) The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct based on Applicant's 1985 felony conviction and ten year sentence to confinement (suspended) for physical child abuse of his then two-month-old daughter. The SOR also alleges that Applicant is ineligible for access to classified information under 10 U.S.C. § 986--the so-called Smith Amendment--based on his sentence to confinement exceeding one year.

On August 31, 2002, Applicant answered the SOR, and he requested a clearance decision based on a hearing record. In his Answer, Applicant admits to the allegations in SOR subparagraph 1.a., but he denies the Smith Amendment allegation in subparagraph 1.b.

On October 28, 2002, DOHA assigned this case to me to conduct a hearing and issue a written decision. Thereafter, a notice of hearing was issued to the parties scheduling the hearing for November 13, 2002, at a location near Applicant's place of employment.

At the hearing, Department Counsel offered two documentary exhibits; no witnesses were called. Applicant appeared with counsel, offered his own testimony and that of six witnesses, and offered eight documentary exhibits.

After adjournment, the record remained open for Applicant to offer additional documentary exhibits. Applicant did so in a timely manner, and, Department Counsel having no objections, those documents are marked and admitted into the record as Exhibits I and J, both affidavits from character witnesses. DOHA received the transcript on November 21, 2002, and the record closed on November 27, 2002.

PROCEDURAL MATTERS

During the hearing, Applicant's counsel moved to amend Applicant's answer to SOR subparagraph 1.a. based on counsel's contention that Applicant was sentenced only to probation for ten years and not confinement for ten years. I took the motion under advisement. The motion to amend is denied based on: (1) Applicant's admission, in his Answer, to being sentenced to confinement for ten years; (2) Applicant's hearing testimony admitting to being sentenced to confinement for ten years; and (3) Exhibit 2, which shows Applicant was sentenced to ten years confinement.

Consistent with his contention, Applicant's counsel objected to Exhibit 2, which is an Identification Record from the Federal Bureau of Investigation, sometimes called an FBI rap sheet, which shows Applicant was sentenced to ten years confinement. Counsel's objections were based on Federal Rule of Evidence 609. I overruled the objections and admitted the exhibit. In addition to the reasons mentioned during the hearing, the objections are also overruled because counsel's reliance on Rule 609 is misplaced. The rule governs impeachment by proof of a witness's criminal convictions and has no applicability to the admissibility of a conviction as substantive evidence.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 44-year-old married man seeking to obtain access to classified information for his employment with a defense contractor where he works as a senior technical writer/editor. He previously held a security clearance at the secret level when he was on active duty with the U.S. Air Force.

Applicant enlisted in the Air Force in March 1981 and was honorably discharged at the rank of sergeant (pay grade E-4) on or about June 13, 1985. While on active duty, Applicant married his first wife in December 1982. The couple's second child, their first daughter, was born on April 12, 1985, a few months before his discharge. On or about May 27, 1985, Applicant went to tend to his crying child and, acting out of frustration and anger toward his wife, he struck the child with his fist three times in the head. The blows resulted in a small fracture of the right side of the child's skull, but without permanent injuries or damage. edical authorities reported the incident resulting in a criminal investigation by Texas authorities. Applicant readily admitted his misconduct.

Although discharged from the military in June 1985, Applicant was required to remain in Texas due to the pending criminal charges. On or about November 1985, Applicant pled guilty to the felony offense of assault with injury to a child. He was sentenced to confinement for ten years, all of which was suspended, except for 120 days, and was placed on 10 years probation. The court allowed Applicant to return to Georgia, his home of record, to move his family from Texas. Applicant returned to Texas in January 1986 and served 120 days confinement. He was released and placed on probation for ten years starting April 7, 1986.[(2)] Applicant returned shortly thereafter to Georgia and served his probation through that state's probation system.

Applicant's probation was initially quite strict, including weekly reporting to his probation officer and on-the-spot checks at both work and home. Applicant was required to complete 200 hours of community service, which he did by working at a community recreation center. Applicant was also required to complete counseling, which included anger management counseling and parenting-skills classes. Applicant successfully completed the probation on or about April 1996.[(3)] It is the opinion of a marriage and family therapist, who is also a Baptist Minister, that Applicant matured a great deal during the counseling process and that Applicant has rehabilitated himself.[(4)]

During the probation period, Applicant discovered his wife was unfaithful. The couple divorced in May 1992. Before their divorce, however, the couple had two more children, another daughter and son. The third child was born in 1986 early into Applicant's probationary period. The probation officer at the time strongly encouraged the couple give up the child for adoption, which they did. The same is true for the fourth child.

Applicant's parents were awarded formal custody of Applicant's son and daughter in November 1986. His son, who is now age 19, remained in his grandparent's custody, although Applicant has had regular contact and interaction with him. In July 1999, with his probation successfully completed and now gainfully employed, Applicant obtained custody of his then 14-year-old daughter. The court, without objections from the grandparents, awarded custody to Applicant based on the daughter's election to be in the permanent custody of Applicant.(5)

Applicant has a loving and happy relationship with his daughter. She's in good health and believes Applicant is a positive role model and influence in her life.

Applicant remarried in March 2001. Applicant believes his second marriage is going well as he is more "in tune" with his emotions and able to share his thoughts with his wife.(6) The couple have an infant child and Applicant described the parenting of this child, to date, as "wonderful" as he is far more confident in interacting with both his child and wife.(7)

Six witnesses testified during the hearing vouching for Applicant's honesty and trustworthiness. In addition, two additional witnesses vouched, via affidavits,(8) for Applicant's general character and trustworthiness.

Aside from his felony conviction, Applicant has no other record of criminal conduct and he has otherwise been a law-abiding citizen. Except for when he was on active duty, Applicant has been a lifelong resident of the same community and has lived at the same address since 1990.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility. Chief among them is the disqualifying and mitigating conditions for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1. through ¶ 6.3.6. of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J for criminal conduct,(9) with its respective disqualifying and mitigating conditions, is most relevant here. In addition, this case involves application of 10 U.S.C. § 986 based on Applicant's 1985 conviction and sentence to confinement exceeding one year.

BURDEN OF PROOF

The only purpose of a security-clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.(10) The government has the burden of proving controverted facts.(11) The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.(12) The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.(13) "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."(14) Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.(15) In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.(16)

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."(17) Under *Egan,* Executive Order 10865, and the Directive, any reasonable doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

In addition, under 10 U.S.C. § 986, the DoD and the military departments may not grant or renew a security clearance for any DoD officer or employee, an employee, officer, or director of a DoD contractor, or a member of the armed forces on active duty or in an active status who falls under any of four statutory categories.[(18)] The statutory category at issue here is § 986(c)(1), which provides: "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." The statute also provides that the Secretary of Defense or the secretary of the relevant military department may, in a meritorious case, authorize an exception to the statutory prohibition for persons in two of the four statutory categories; namely, paragraphs (1) and (4) of § 986(c). The statute does not define, explain, or describe a "meritorious" case.

In June 2001, the Deputy Secretary of Defense issued official policy guidance designed to assist the DoD and military departments in uniformly implementing 10 U.S.C. § 986. Concerning criminal convictions, the policy guidance is the statute disqualifies persons with convictions in both state and federal courts, including military courts, with sentences imposed for more than one year regardless of the amount of time actually served. Like the statute, the policy guidance does not define, explain, or describe a "meritorious" case.

Here, based on the record evidence as a whole, the government has established its case under Guideline J. Applicant's 1985 conviction for physical child abuse is evidence of a history of illegal behavior. Accordingly, disqualifying condition DC 2[(19)] applies raising a security concern about his judgment, reliability, and trustworthiness. Indeed, the record evidence shows Applicant was unable to control his emotions resulting in injuring his infant daughter who was plainly defenseless and in need of his care, protection, and safeguarding.

Beyond the normal security concerns under Guideline J, Applicant's conviction and 10 year suspended sentence, adjudged by a state court, falls within the scope of 10 U.S.C. § 986. Accordingly, absent a waiver by the Secretary of Defense, Applicant is ineligible for access to classified information.

I have reviewed the mitigating conditions (MC) under Guideline J and four apply in Applicant's favor. First, MC 1[(20)] applies because Applicant's criminal behavior took place in 1985, and so, it is not recent. Second, MC 2[(21)] applies because the record evidence shows Applicant's criminal behavior is limited to the 1985 incident. Third, MC 4[(22)] applies because Applicant committed the offense when he was a relatively young man in a difficult marriage. He has since completed a lengthy probationary period (including counseling), divorced his first wife, obtained custody of his now teenage daughter, and remarried. Given this change of circumstances, it is unlikely that factors leading to the child abuse will recur. Fourth, MC 6[(23)] applies because Applicant has reformed and rehabilitated himself as demonstrated by: (1) successful completion of his probationary period without additional criminal conduct; (2) his steady and progressively more responsible employment since his return from Texas to Georgia; and (3) obtaining custody of his daughter. These, and other facts and circumstances evident in the record, are clear evidence of successful rehabilitation.

To sum up under Guideline J, approximately 17 years have since passed without recurrence of any criminal conduct, and I assess the likelihood of additional criminal conduct as low. Accordingly, absent the prohibition in 10 U.S.C. § 986, I would decide Guideline J for the Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a : For the Applicant

Subparagraph 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. In addition, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Michael H. Leonard

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. Exhibit F.

3. Exhibits A and B.

4. Exhibit A.

5. Exhibit E.

6. Transcript at p. 135.

7. Transcript at p. 137.

8. Exhibits I and J.

9. As revised by the Deputy Secretary of Defense in a memorandum, dated June 7, 2001.

10. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

11. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

12. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

13. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

14. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

15. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

16. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

17. *Egan*, 484 U.S. at 528, 531.

18. 10 U.S.C. § 986(c)(1) through (c)(4).

19. DC 2 ("A single serious crime or multiple lesser offenses.").

20. MC 1 ("The criminal behavior was not recent.").

21. MC 2 ("The crime was an isolated incident.").

22. MC 4 ("The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.").

23. MC 6 ("There is clear evidence of successful rehabilitation.").