

DATE: June 30, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-27086

DECISION OF ADMINISTRATIVE JUDGE

ROGER E. WILLMETH

APPEARANCES

FOR GOVERNMENT

Kathryn MacKinnon, Department Counsel

FOR APPLICANT

Theophlise Twitty, Esq.

SYNOPSIS

In 1988, Applicant was convicted of attempted second degree murder, use of a firearm in the commission of attempted murder, and possession of cocaine. He was sentenced to 10 years imprisonment. Applicant's life from that point forward reflects clear evidence of his successful rehabilitation with regard to this isolated incident. He was paroled after 3 years of imprisonment due to his good behavior. Since his release from prison, Applicant has been gainfully employed and has contributed to his community through volunteer work with his church, where he is an active member. He has provided support to his ailing parents and is planning to marry. Despite the mitigation in this case, 10 U.S.C. § 986 prohibits the granting or continuing of a clearance, absent an appropriate Secretarial waiver. Clearance is denied. A waiver is recommended.

STATEMENT OF THE CASE

On September 26, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement Reasons (SOR) to Applicant. The SOR states that DOHA was unable to find that it is clearly consistent with the national interest to grant him access to any classified information and recommends that his case be submitted to an Administrative Judge. On October 24, 2002, Applicant executed a response to the SOR and requested a hearing. This case was assigned to the undersigned Administrative Judge on December 16, 2002. A notice of hearing was issued on January 7, 2003, and the hearing was held on January 30, 2003. During the hearing, four Government (Govt) exhibits, seven Applicant (Ap) exhibits, and the testimony of the Applicant were received. The transcript (Tr) was received on February 7, 2003.

FINDINGS OF FACT

Having thoroughly considered the evidence in the record, including Applicant's admissions to the allegations in the

SOR, I make the following findings of fact:

Applicant is a 48-year-old pipe fitter employed by a defense contractor and is seeking a security clearance.

On March 16, 1988, Applicant was convicted of committing three felonies on September 28, 1987: attempted second degree murder; use of a firearm in the commission of attempted murder; and possession of cocaine. On April 29, 1988, he was sentenced to a total of 10 years imprisonment. ⁽¹⁾ Applicant also was fined and paid the costs of his prosecution plus interest. ⁽²⁾

Applicant spent approximately two months in maximum security. At that point, his good conduct enabled Applicant to be sent to a road camp for 10 months. Following that, he was transferred to a correctional facility, where he became a trustee. Due to his trade skill, Applicant was assigned to a unit that was sent to different prisons within the state to do repairs and renovations. He also served as an inmate advisor, counseling younger prisoners, and provided GED tutoring. As a result of his good behavior, Applicant was paroled in 1991. He had no parole violations during his period of probation, which ended in 1993. ⁽³⁾

Following his release from prison, it took Applicant a couple of months to obtain a job but except for being laid off, he has been employed since then as a pipe fitter. ⁽⁴⁾ He has received awards for his work and is recognized for his skill and experience. ⁽⁵⁾ Applicant has been an active member of a church that he regularly attends. ⁽⁶⁾ He does volunteer work for the church, having served as a mentor and tutor for youth at his church's community center. ⁽⁷⁾ Applicant also has coached his 10-year-old daughter's t-ball team. ⁽⁸⁾

Applicant's daughter was born out of wedlock but he has voluntarily paid her mother child support of \$400.00 a month. ⁽⁹⁾ His support has helped pay her medical bills for treatment of asthma.

Applicant purchased a car for his daughter's mother, whom he has known for 11 years. Since they plan to marry, he also has purchased them a home. ⁽¹⁰⁾

Applicant helped care for and paid for medical care of his mother in the last years of her life. He is now providing daily care of his father, following a stroke. ⁽¹¹⁾

POLICIES

Eligibility for access to classified information is predicated upon an individual meeting adjudicative guidelines discussed in Enclosure 2 of the Directive. An evaluation of whether an applicant meets these guidelines includes the consideration of a number of variables known as the "whole person concept." Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a decision. This assessment should include the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Enclosure 2 provides conditions for each guideline that could raise a concern and may be disqualifying, as well as further conditions that could mitigate a concern and support granting a clearance. The following guidelines are applicable to this case.

Guideline J: Criminal Conduct

The concern under Guideline J is 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 single serious crime or multiple lesser offenses (Disqualifying Condition 2).

Conditions that could mitigate security concerns include:

The criminal behavior was not recent (Mitigating Condition 1);

The crime was an isolated incident (Mitigating Condition 2);

There is clear evidence of successful rehabilitation (Mitigating Condition 6).

In pertinent part, 10 U.S.C. § 986 prohibits the Department of Defense from granting or renewing a security clearance for 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." The statute further permits the Secretary of Defense or the Secretary of the military service concerned to authorize an exception to a person covered by the prohibition "in a meritorious case." DOHA Operating Instruction No. 64, *Processing Procedures for Cases Subject to 10 U.S.C. § 986*, implements the statute. [\(12\)](#)

CONCLUSIONS

Applicant's conviction for felonies establishes the applicability of Disqualifying Condition 2 under Guideline J of the Directive. However, the facts in this case also establish several mitigating conditions under Guideline J.

The offenses resulting in the Applicant's conviction occurred over 15 years ago (Mitigating Condition 1). They also represent an isolated incident in his life (Mitigating Condition 2). Applicant has not had any other encounter with law enforcement authorities in his life, other than traffic tickets. [\(13\)](#)

In fact, the isolated nature of this conviction in Applicant's life gives credibility to his explanation of the circumstances that lead to it, which he described as follows. At the time of his arrest, he was working at a shipyard and had a small plumbing business. Applicant was recently separated from his wife, from whom he was later divorced, and needed a place to live. He ended up rooming with a man he met through a mutual friend. Applicant has never used drugs and did not know that his roommate was involved with drugs. On the night of Applicant's arrest, his roommate was out. He heard someone tampering with the door to their apartment and got a pistol that his roommate kept in his room. Applicant opened the door and collided with a police officer. As Applicant fell, the pistol discharged and he was shot in both the arm and leg by police officers. As they arrested Applicant, the police referred to him by his roommate's name. [\(14\)](#)

Even if his conviction is viewed in a worst light, Applicant has presented clear evidence of successful rehabilitation (Mitigating Condition 6). Due to the manner in which he conducted himself, he did not have to serve 10 years of imprisonment but was paroled after only 3 years. Applicant appears to have been a model prisoner, becoming a trustee in only one year. In addition, he served the penal system as a counselor and tutor. Following his parole, Applicant's period of probation was without blemish as well.

Soon after his release from prison, Applicant was able to secure a job and he has been gainfully employed ever since. He is planning to marry the woman, who is the mother of his daughter, and has purchased a home for them. Applicant has provided more than financial support of his daughter, as evidenced by the fact he coached his daughter's t-ball team.

A number of character references, who all state that they have known Applicant for many years and are aware of his conviction, attest to Applicant's rehabilitation. A bank vice president and member of his church calls Applicant, "a productive member of our community." [\(15\)](#) Another member of his church commends Applicant, for providing "positive guidance and direction to youth who exhibit negative behavior." She also relates that she and her husband entrusted Applicant to care for their home when they were away, as well as caring for their son on occasions. Applicant also provided math tutoring to their son, who is now an attorney. [\(16\)](#)

The director of the transportation department for city schools in his community states, "Larry also has deep religious [\(17\)](#)

beliefs and lives his life with those guiding him." The director's wife, a program manager for the U.S. Army, says of Applicant, "his integrity and honesty are readily noticeable in his day to day lifestyle."⁽¹⁸⁾

An assistant city attorney for the community in which he lives, albeit his ex-wife's cousin, refers to Applicant as a "model citizen" and someone who is "quick to lend a helping hand to others."⁽¹⁹⁾ The vice president of his union, who also is a pipe fitter by trade, finds Applicant to be "an honest and hard working individual," as well as "the most skilled and experienced pipefitter (sic) I have had the pleasure of working with."⁽²⁰⁾ In addition, Applicant's demeanor during the hearing reflected the person described by these references.

The record in this case establishes clear evidence of Applicant's successful rehabilitation and supports a finding in his favor. Despite the applicability of several mitigating conditions, however, 10 U.S.C. § 986 prohibits a favorable finding or the granting or continuing of a clearance in this case, due to the sentence that Applicant received for his conviction.

FORMAL FINDINGS

Formal findings, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Subparagraph 1.b: Against Applicant

DECISION

In light of the record in this case, it is clearly not consistent with the national interest to grant or continue a security clearance for Applicant. However, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Signed

Roger E. Willmeth

Administrative Judge

1. Govt Ex 4.
2. Govt Ex 4; Govt Ex 2 at 2.
3. Tr 35-39.
4. Tr 40; 55.
5. Tr 42-43; Ap Ex E.
6. Ap Ex A.
7. Tr 43-45.
8. Tr 49.
9. Govt Ex 2 at 1.
10. Tr 53-54.
11. Tr 27; Ap Ex A; Ap Ex F.

12. Neither 10 U.S.C. § 986 nor DOHA OI No. 64 define "a meritorious case."

13. Govt Ex 2 at 2.

14. Tr 21-22; 30-31.

15. Ap Ex G.

16. Ap Ex B.

17. Ap Ex C at 1.

18. Ap Ex D.

19. Ap Ex A.

20. Ap Ex E.