

DATE: December 18, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-01793

DECISION OF ADMINISTRATIVE JUDGE

BARRY M. SAX

APPEARANCES

FOR GOVERNMENT

Martin H. Mogul, Esquire, Department Counsel

FOR APPLICANT

Jerry C. Aglietti, Esquire

SYNOPSIS

This 45-year-old laborer for a defense contractor has a history of criminal conduct, with four convictions from 1988 to 1997 and probation violations based on drug use after the last conviction. The 1988 conviction also was followed by probation violations, and resulted in a sentence of more than one year imprisonment, which brings that conviction within the scope of 10 USC 986. No mitigation was established. Clearance is denied.

STATEMENT OF THE CASE

On May 24, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons

why DOHA could not make the preliminary affirmative finding required under the Directive that it

is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and

determine whether a clearance should be granted, denied or revoked.

On June 11, 2002, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The case was assigned to me on September 24, 2002. A Notice of Hearing was issued on October 15, 2002 and th hearing was conducted on October 24, 2002. The transcript was received at DOHA on November 1, 2002.

FINDINGS OF FACT

Applicant is a 45-year-old laborer employed by a defense contractor that is seeking a security clearance for Applicant in connection with his employment. In his response to the SOR, which contains five allegations under Guideline J, Applicant denied allegations 1.a., with an explanation, and admitted the remaining four allegations, 1.b. - 1.e.

After considering the totality of the evidence derived from Applicant's testimony and the exhibits submitted by both parties, I make the following FINDINGS OF FACT as to each SOR allegation:

Guideline J (Criminal Conduct)

1.a. - Applicant was arrested on April 29, 1988 in State A, and charged with two counts of Misconduct Involving a Controlled Substance, felonies under State A law. Applicant pleaded *nolo contendere* to both counts and sentence was suspended for three years on each count. On January 19, 1990, a Petition for Probation Revocation was filed, based on a urine sample provided by Applicant on December 13, 1989 that tested positive for marijuana *and* cocaine. On January 31, 1990, a Supplemental Petition for Probation Revocation was filed after Applicant failed another urinalysis test for marijuana *and* cocaine on January 17, 1990. As a result, a Judgment and Order of Commitment/Probation were issued, and Applicant was ordered to be committed to the State A Department of Corrections for 18 months on each count, with 16 months suspended on each count

(GX 1, GX 2, and GX 3, and Tr. at 22 - 32).

1.b. The Finding of Fact as to SOR 1.a., above, brings this matter within the specific prohibition of 10 USC 986(C)(1), which states that anyone convicted of a crime and sentenced to more than one year imprisonment is disqualified from obtaining or retaining a security clearance.

10 USC 986 also states that the Secretary of Defense or the Secretary of one of the Military Services can waive the prohibition in meritorious cases.

1.c. Applicant was charged with Assault in State A on March 2, 1989. Applicant pleaded No Contest and was sentenced to ten days in jail (nine days suspended), fined \$500.00 (\$250.00 suspended), and placed on probation for two years and 210 days (GX 1, GX 2, and GX 4, and Tr at 32 - 34).

1.d. Applicant was charged in State A with (1) Theft and (2) Harassment on November 22, 1997. He pleaded No Contest to Count (1) and was placed on probation for one year and ordered to make restitution of \$85.95. Count (2) was dismissed (GX 1, GX 2, and GX 5, and Tr at 34 - 48 and 49 - 58).

1.e. Applicant was arrested and charged in State A with Driving While Intoxicated (DWI) on November 26, 1997. He pleaded No Contest and was sentenced to 30 days in jail (27 days suspended), fined \$500.00 (\$250.00 suspended), ordered to pay \$270.00 for the cost of incarceration, had his driver's license suspended, and placed on probation for three years. Applicant failed to pay the fine and costs, and on November 1, 1998, his account was placed for collection with the State A Attorney General. The fine and costs were garnished from State funds that Applicant was otherwise entitled to receive in 1998 and 1999 (GX 1 and GX 2, and Tr at 49 - 58).

Applicant received positive letters from eight individuals (AX A - H), including individuals in local government (AX D, AX F, and AX H), and law enforcement (AX C and AX E) (Tr at 57 - 68).

POLICIES

Each adjudicative decision must also include an assessment of nine generic factors relevant in all cases: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowing 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 (Directive, E.2.2.1., on page 16 of Enclosure 2). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

Because each security case presents its own facts and circumstances, it should not be assumed that the factors cited above exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior.

Considering the evidence as a whole, I find the following specific adjudicative guidelines to be most pertinent to this case:

GUIDELINE J (Criminal Conduct)

The Concern: 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 maybe disqualifying include:

1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
2. A single serious crime or multiple lesser offenses.

Conditions that could mitigate security concerns:

None that are applicable under the facts of this case.

Eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. In reaching the fair and impartial overall common sense determination based on the Directive's "whole person" concept, I am not permitted to speculate, but can only draw those inferences and conclusions that have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses.

In the defense industry, the security of classified information is entrusted to civilian workers who must be counted on to safeguard classified information and material twenty-four hours a day. The Government is therefore appropriately concerned where available information indicates that an applicant for a security clearance, in his or her private life or connected to work, may be involved in conduct that demonstrates poor judgment, untrustworthiness, or unreliability. These concerns include consideration of the potential, as well as the actual, risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons. If the Government meets its burden (either by an applicant's admissions or by other evidence) and establishes conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, at E2.2.2., "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

In addition to the general and specific guidelines found in Directive 5220.6, a federal statute, 10 USC 986, imposes restrictions that, among other things, prohibit granting a clearance to anyone who is convicted and sentenced to more than one year. The only exception is that the Secretary of Defense or Secretary of a Military Service may grant a waiver

in cases they find to be meritorious.

CONCLUSIONS

I have considered the evidence in light of the appropriate legal standards and factors, and have assessed Applicant's credibility based on the entire record. I conclude the totality of the evidence establishes a case as to all five SOR allegations, and the proven misconduct in turn establishes a nexus or connection with Applicant's security clearance eligibility.

Although the facts of the 1988 conviction and sentencing are enough, by themselves, to trigger application of 10 USC 986, an evaluation of the circumstances surrounding that crime and the other arrests and convictions is relevant to an evaluation of Applicant's explicit contention that he merits a waiver of the statute.

The totality of the evidence, including Applicant's admissions and explanations, establishes the validity of all five allegations. SOR 1.a., 1.c., 1.d., and 1.e. show criminal activity in 1988, 1989, and twice in November 1997, when Applicant was 31, 32, and 41 years old, respectively. This history is particularly troubling in that it shows that Applicant's criminal activity is not attributable to youthful indiscretions, and is not an isolated event, and is not an aberration in an otherwise praiseworthy life, even considering the positive information provided by the authors of his eight exhibits. One of Applicant's exhibits, AX C, is from the Chief of Police of the small community where Applicant lives, and who has known Applicant since 1998. He is "aware of [Applicant's] criminal history, where over the course of eight years, he has been convicted of five (*sic*) minor misdemeanor offenses (*sic*). [Applicant] has always been open about it and took responsibility for his actions. However, I have not seen him say or act in a manner which would cause me concern." This language does not indicate either a full knowledge of Applicant's criminal misconduct or an understanding of its seriousness or negative impact on his eligibility for access to the nation's secrets.

In addition, Counsel for Applicant argues that the criminal conduct alleged in SOR 1.a occurred "over fourteen years ago," and that Applicant's criminal conduct is not "recent" (Response to SOR). While the conviction alleged in SOR 1.a did occur about 14 years ago that fact does not limit the scope of the evaluation. In determining eligibility to possess a security clearance, the totality of the evidence must be considered. In the present case, four arrests and convictions over a nine year period, including one conviction with a sentence of more than one year, is too serious to minimize or ignore. Although the most recent arrest occurred on November 26, 1997, that date does not define the end of the conduct that causes concerns about Applicant's behavior. A year later, in November 1998, the State A Attorney General took action to recover, by garnishment, the fine and costs that Applicant had failed to pay as ordered by the court, and the last garnishment occurred in 1999. I conclude from these facts that Applicant had not met his legal obligations until 1999, and, impliedly, would have continued to have failed to do so if the fines and costs had been higher than they were.

Department Counsel was correct when he stated that under the facts of our case, "10 USC 986 makes it very clear that there really is no discretion at this level" (Tr at 70). The facts alleged in SOR 1.a. and established by the full record do make 10 USC 986 both applicable and controlling.

However, I also conclude that, apart from the applicability of 10 USC 986, the overall record of Applicant's criminal conduct, as discussed above, compels the conclusion that Applicant has not met his burden of demonstrating that he currently possesses the level of judgement, reliability, and trustworthiness required of anyone seeking a security clearance. Thus, my decision is not based solely on the applicability of 10 USC 986.

Mitigation

Applicant's testimony and his eight exhibits, although certainly helpful, do not overcome the negative impact of his history of criminal conduct. In context, his criminal conduct remains "recent" (Mitigating Condition (MC) 1); is not an isolated incident (MC 2); and there is as yet no "clear evidence of successful rehabilitation" (MC 6).

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline J (Criminal Conduct) Against the Applicant

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Subparagraph 1.d. Against the Applicant

Subparagraph 1.e. 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.

BARRY M. SAX

ADMINISTRATIVE JUDGE