DATE: April 8, 2003

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-06296

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

FOR APPLICANT

Jake B. Mathews, Jr., Esquire

SYNOPSIS

Applicant's 1974 conviction for receiving stolen property and subsequent sentence to three years imprisonment requires revocation of his clearance under 10 U.S.C. §986 notwithstanding that Applicant spent no time in prison and had his clearance granted without a hearing in 1989. Clearance denied.

STATEMENT OF THE CASE

On 20 August 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating that DOHA could not make the preliminary affirmative finding[(1)] that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 3 September 2002, Applicant answered the SOR and originally requested an determination on the record. However, on 25 October 2002, he requested a hearing. The case was assigned to me on 9 January 2003. I set the case on 19 February 2003, and issued a Notice of Hearing on 24 February 2003 for a hearing on 12 arch 2003.

At the hearing, the Government presented four exhibits--admitted without objection--and no witnesses; Applicant presented 10 exhibits and the testimony of six witnesses, including himself. DOHA received the transcript on 20 March 2003.

RULINGS ON PROCEDURE

At the hearing, I queried Department Counsel and Applicant's Counsel on their positions regarding the effect, if any, of Applicant's restoration of civil rights on the applicability of 10 U.S.C. §986 to this case, and gave Applicant's Counsel until 21 March 2003 to brief his position if he chose to do so, giving Department Counsel an opportunity to respond and to brief separately if she chose to do so (Tr. 78-86). On 21 March 2003, Applicant's Counsel argued the inapplicability of 10 U.S.C. §986 based on its retroactive application to Applicant and his restoration to civil rights in 1976. Department Counsel responded with a citation to an Appeal Board ruling holding that a state pardon or parole did not

negate the applicability of 10 U.S.C. §986. She also pointed out the plain language of 10 U.S.C. §986 that requires that no clearance be renewed if an Applicant has been sentenced to more than one year in prison. The statute makes no mention of actual time served and creates no exception for conduct previously adjudicated by granting a clearance.

I conclude the plain language of the statue applies to the circumstances of Applicant's case and is not affected by the restoration of his civil rights in 1976.

FINDINGS OF FACT

Applicant admitted the factual allegations of the SOR; accordingly, Applicant's admissions are incorporated as findings of fact.

Applicant--a 68-year-old employee of a defense contractor--seeks to retain the access to classified information he has held since 1989.

On 20 August 1971, Applicant was arrested and charged with buying, receiving, and concealing stolen property (G.E. 3).[(2)] He was acquitted of one charge in April 1973 (A.E. J)[(3)], found guilty on one charge contrary to his pleas in January 1974 (A.E. A) , and found guilty after pleading guilty on another charge on the same day in January 1974 (in the wake of the jury finding)(A.E. B). He was sentenced to three years imprisonment, but served no time in jail. He was placed on probation for two years, which he completed without incident. In June 1976, the state parole board restored his civil rights (G.E. 2).[(4)]

Applicant applied for, and obtained, his security clearance in 1989 (G.E. 1). Applicant detailed the circumstances of the offense in a sworn statement to the DSS on 23 June 1989 (G.E. 4). Applicant received his clearance in 1989 as a routine administrative matter without having to go through a due process proceeding.

In December 2000, Applicant completed a Security Clearance Application (SCA)(SF 86)(G.E. 1) for his periodic reinvestigation on which he truthfully disclosed his felony conviction above.

Applicant is a professional truck driver "leased" along with his truck to a shipping company whose largest shipper is the U.S. Government. The Government Operations Division specializes in transporting classified shipments, including munitions and highly-sensitive communications equipment. The company owns no shipping equipment; the government division "leases" approximately 300 drivers and their trucks, such as Applicant. Applicant's rig is highly specialized, suitable only for the kind of classified hauling Applicant does (A.E. I; Tr. 60-62, 64-68). He has completed specialized training for hauling hazardous cargo (A. E. H). He has been an exemplary employee of the company for over 20 years (A.E. D) and has been recognized as such by being asked to join a company-sponsored organization that only a select few of the truckers are asked to join (Tr. 51-52; A.E. E, F, G). Applicant was recognized in April 2001 by a defense agency for his excellent work in transporting communications equipment needed for Presidential communications to the Texas White House (Tr. 57-58).

Applicant produced an impressive array of witnesses in support of his request for a waiver. The probation officer[(5)] who did his pre-sentence investigation, supervised his probation, and recommended restoration of his civil rights found Applicant to be a well-respected member of the community who presented no problems while on probation (Tr. 22-28). A retired local judge[(6)] who employed Applicant's spouse as a legal secretary for a number of years knows Applicant as a very trustworthy and dependable person and has no reservations about him having a clearance (Tr. 33-37). Applicant's banker since 1985 trusts him enough to make "interesting" financial accommodations to Applicant when he is on the road and knows him to be "honest and upright," a man who's word can be trusted (Tr. 42-44). The company Director of Government Operations and Facility Security Officer traveled from company headquarters in another state to praise Applicant as one of the star performers in a division of highly-trained star performers who transport critical cargo (Tr. 46-56). Applicant's spouse, who has driven with him since about 1985 knows him as a good and honest man, sometimes to the point of being annoying (Tr. 63-69). The DIS agent who conducted Applicant's 1989 background investigation, and is now retired himself, recommended Applicant for a security clearance (A.E. C).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section 6.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness,

recency, motivation, *etc.,* under an assessment of the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year.[(7)]

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent.

E2.A10.1.3.2. The crime was an isolated incident.

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying conditions 3. . ., above, 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.[(8)]

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, §986 [the Smith Amendment], precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001.

Burden of Proof

Initially, the government must prove controverted facts alleged in the SOR. If the government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. Where facts proven by the government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

The government has established its case under Guideline J, which cannot be mitigated under 10 U.S.C. §986. The

statute requires that I not renew Applicant's clearance because he was sentenced to three years imprisonment, notwithstanding that he served no prison time, completed his probation without incident, and had his civil rights restored shortly after completing his probation. Applicant's conduct was mitigated and he was granted a clearance in 1989 without a due process proceeding under guidelines essentially the same as the current directive. That prior adjudication does not bind me in this case. However, the only fact that has changed since the 1989 adjudication is the passage of another nearly 14 years without any criminal conduct. Department Counsel concedes that but for 10 U.S.C. §986 Applicant would probably receive his clearance (Tr. 78). Accordingly, I would grant Applicant's clearance were I free to do so under the existing disqualifying and mitigating factors.

Unfortunately for Applicant, the law has changed since his 1989 adjudication and requires me to revoke his clearance. However, because I do so solely because of the requirements of 10 U.S.C. §986, I make the following statement as required under O.I. 64: I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

FORMAL FINDINGS

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph a: 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.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).

2. Applicant and his co-defendant ran an auto repair shop and were charged when parts they ordered to repair cars turned out to be stolen. Applicant and his co-defendant were charged on multiple counts.

3. Although Applicant testified he was acquitted on two charges, A.E. J covers only one charge, and there is no other documentation to corroborate the second acquittal.

4. In Applicant's home state, paroles are the exclusive province of the state board of pardons and paroles, which grants relief only after extensive investigation of an individual's circumstances. The governor is not involved in any fashion (Tr. 25-31).

5. Now retired.

6. Who did not sit on Applicant's 1973-74 cases, but was aware of them because he was a judge in the same court.

7. As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.

8. Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.