DATE: March 22, 2004

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-08979

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Rital O'Brien, Esq., Department Counsel

FOR APPLICANT

Philip B. Herron, Esq.

SYNOPSIS

Applicant's conviction for breaking and entering on April 6, 1982, and sentence for a minimum term of one year and a maximum term of five years, requires revocation of his security clearance under 10 United States Code (U.S.C.) 986 even though Applicant's sentence was suspended and he was placed on five years probation. Even without the statutory disqualification however, Applicant has failed to meet his ultimate burden of persuasion under the criminal conduct guideline. Clearance is denied.

STATEMENT OF CASE

On June 2, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued an SOR to the Applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. On July 2, 2003, Applicant responded to the SOR and requested a hearing before an Administrative Judge.

The case was assigned to me on September 15, 2003. On October 31, 2003, this case was set for hearing on November 20, 2003. The Government submitted eight exhibits and Applicant submitted two exhibits. Testimony was taken from Applicant and seven witnesses. The transcript (Tr.) was received on December 3, 2003.

FINDINGS OF FACT

The SOR alleges criminal conduct. Applicant admitted all the factual allegations but strenuously claimed he was not the cause of the domestic violence incidents. Applicant's admissions shall be incorporated into the following factual findings:

Applicant is 41 years old and has been employed as a technician since 1990 at the same location for several defense contractors. He seeks reinstatement of his secret security clearance.

On October 14, 1981, Applicant and three friends decided to enter an abandoned armory and take whatever metal they found, and sell their findings. Applicant was outside the armory dismantling a transformer for its metal contents when the police arrived and arrested him. Applicant was charged with breaking and entering. (1.a.) On March 4, 1982, Applicant withdrew his not guilty plea and entered a plea of guilty to the crime. On April 6, 1982, Applicant was sentenced to a minimum of one year to a maximum of five years in prison; the sentence was suspended and Applicant was placed on probation for five years. Because of good conduct during probation, Applicant was discharged from probation on May 3, 1985.

On December 19, 1981, Applicant was arrested and charged with felony theft and false alarm to law enforcement agency. (1.b.) On March 4, 1982, Applicant pled guilty to theft. On April 6, 1982, Applicant was sentenced to 15 days confinement. The theft occurred while Applicant was working as a gas station attendant in December 1981. In GE 2, Applicant claimed his intention was only to borrow the employer's money to finance an attempted drug purchase, but he did not use the word "drug" in his sworn statement. Yet, in his answer to the SOR, Applicant claimed he borrowed the money from the gas station owner because he wanted help an acquaintance who was down on his luck. At the hearing, Applicant admitted he took the owner's money for a drug purchase. The dissimilar explanations for events leading to Applicant's arrest for the theft on December 14, 1981, undercut Applicant's overall credibility, even though almost 22 years have passed since the theft.

Applicant recalled that while living with a female as husband and wife from approximately 1980 to 1990, the police were called to the apartment many times for domestic problems (Tr. 125), and Applicant had moved in and out of their apartment many times because of the turbulent nature of the relationship. (GE 2) Applicant explained that when he struck his former wife, it was always in retaliation by trying to stop her from hitting him. He claimed his wife was always intoxicated when the altercations occurred. Applicant's objective during the fights was to hold his wife down to try and quiet her. (Tr. 140-142) However, on one occasion after he had lost his temper from trying to gain control over her, Applicant tried to choke his wife to calm her down. (Tr. 127)

On February 15, 1988, Applicant was arrested and charged with domestic violence. The police were called to settle a verbal dispute Applicant was having with his wife. Applicant claimed he was arrested because his wife lied when she told the police he put his hands on her. According to Applicant, the judge did not believe her story in court and the case was dismissed.

On January 27, 1991, Applicant was arrested and charged with domestic violence after his baby began to cry while Applicant was watching the television. Applicant retrieved a pacifier for the baby and placed it in her mouth. Unfortunately, Applicant had some condiments on his fingers, and surmised it had gotten into the baby's mouth causing the baby more irritation. Applicant's wife started screaming at him and he grabbed her shoulders and sat her down in a chair. (GE 2) The domestic violence charge resulted in domestic violence counseling for four or five weeks. (Tr. 123)

On March 12, 2000, Applicant was again arrested for domestic violence. After eating at a restaurant, then picking up his wife's son, Applicant was driving his entire family home. In addition to driving faster than his wife would like, Applicant had to stop somewhere to relieve himself. After getting back in the car, Applicant and his wife argued and Applicant decided to let her drive. She drove away without allowing him to reenter the car. Applicant had to walk three miles before she allowed him back in the car. They continued to argue on the way home. During their argument inside the house, Applicant's daughter called on the phone an heard the argument and perhaps the sound of a shelf-unit breaking.

Applicant received pre-trial diversion for the domestic violence in March 2000. He consulted a psychologist who indicated by letter on April 25, 2000, that, "in view of the [Applicant's] reported history, I do not view domestic violence to be a significant risk now or in the future and see no need for anger management training at this time." (AE B)

Three character references were furnished in Applicant's behalf. Applicant's coworker of three years believes Applicant does excellent work. The deputy chief of Applicant's employer has known Applicant since 1990. The deputy chief

vouches for Applicant's professionalism, attendance record, and trustworthiness. Applicant's coworker of five years has found Applicant's work to be excellent also.

Applicant's coworker of 13 years considers Applicant an honest person. The second witness, who has known Applicant since 1992, is aware Applicant has had custody problems with his former wife. The third witness has known Applicant since 1995 and considers him to be reliable and honest. The fourth witness, a task order manager, has known Applicant since 1994 and has been his supervisor since October 2000. The task order manager has found Applicant needs little supervision. The task order manager has received compliment's on Applicant's work. The fifth witness, who has known Applicant since September 1995, believes Applicant is very responsible about carrying out his job responsibilities. The senior vice president, who has known Applicant for three years, has received favorable remarks about Applicant's job performance.

Applicant's wife believes she and Applicant have had arguments about once a month. She does not think he has much of a temper because she does not allow violence in her house.

POLICIES

Enclosure 2 of the Directive ses forth disqualifying conditions (DC) and mitigating conditions (MC) that must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent guideline; however, the conditions are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Criminal Conduct

Disqualifying Conditions (DC):

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;

2. A single serious crime or multiple lesser offenses;

3. Conviction in a Federal or State court, including court-martial, of a crime and sentence to imprisonment for a term exceeding one year.

Mitigating Conditions (MC):

1. The criminal behavior was not recent;

2. The crime was an isolated incident;

6. There is clear evidence of rehabilitation;

7. Potentially disqualifying condition 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.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at pages 16 and 17 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (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 behavioral changes; (7) the motivation for the conduct; and, (8) the potential for

pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence that are speculative or conjectural in nature.

The Government must establish a *prima facie* case under foreign influence (Guideline J) that establishes doubt about a person's judgment, reliability and trustworthiness. Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation which demonstrates that the past adverse conduct is unlikely to repeat itself and Applicant presently qualifies for a security clearance.

CONCLUSIONS

The government has established criminal conduct within the scope of 10 U.S.C. 986 because Applicant was sentenced to between one and five years' imprisonment, and even though he served no jail time. The Department of Defense must deny Applicant a security clearance unless the Secretary of Defense authorizes a waiver of this statutory prohibition for meritorious reasons.

The circumstances of this case should first be evaluated under the conditions of the criminal conduct guideline and the whole person concept. DC 3 (10 U.S.C. 986) is applicable to the circumstances because of the sentence Applicant received April 1982 exceeded a year. DC 2 applies because of Applicant's conviction for the felony and also the misdemeanor offense in April 1982. DC 1 applies to the three domestic offenses that occurred in 1988, 1991, and March 2000, even though there were no convictions.

Regarding the mitigating conditions under the criminal conduct guideline, MC 1, MC 2, and MC 6 have potential application. MC 1 would clearly mitigate the conduct that occurred in 1981 because of the passage of 22 years. However, between 1988 and March 2000, Applicant was charged with three domestic violence offenses. Though Applicant fervently stresses he was only retaliating in all the marital altercations, Applicant once tried to choke his former wife to quiet her. He admitted the police were called to the apartment many times. While he blamed his former wife's abusive and violent attitude for the squabbles, Applicant was charged again in March 2000, after arguing with his current wife. In sum, MC 1 is not applicable because of the recency of the criminal conduct in March 2000.

MC 2 is also inapplicable to the circumstances here because of the pattern of conduct between 1988 and 2000.

MC 6 recognizes clear evidence of successful rehabilitation. Applicant's successful completion of the four or five domestic violence counseling sessions after his 1991 altercation constitutes some evidence of rehabilitation though undocumented. Applicant's job performance over 14 years represents favorable evidence. However, the favorable work record must be weighed and balanced against the entire record, including the overall lack of knowledge by most of the witnesses about Applicant's personal life. The one-page letter in April 2000 from the psychologist lacks foundation and credibility for two basic reasons: (1) the psychologist based his conclusions entirely on what Applicant told him in a clinical interview; and (2) the psychologist provided no reasons substantiating his conclusion about Applicant's low probability of risk for future domestic violence, and then tender his services to counsel Applicant anyway. Even without the statutory prohibition of 10 U.S.C. 986, given the inconsistent information Applicant provided in his sworn statement, answer to the SOR and testimony about his theft offense in 1981, and the domestic violence offenses between 1988 and March 2000, Applicant's evidence in support of MC 6 would not be sufficient to overcome the adverse evidence under the criminal conduct guideline.

In reaching my adverse decision under specific criminal conduct guidelines, I have also evaluated the whole person

concept factors. Considering the evidence as a whole, this case is controlled by 10 U.S.C. 986 and Applicant's clearance must be denied.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (criminal conduct, Guideline J): AGAINST THE APPLICANT.

a. Against the Applicant.

b. Against the Applicant.

c. Against the Applicant.

d. Against the Applicant.

e. Against the Applicant.

f. 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.

Paul J. Mason

Administrative Judge