

DATE: October 17, 2005

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

CR Case No. 02-19857

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN GRATTAN METZ, JR.**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn Dale MacKinnon, Esquire, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Although Applicant was sentenced to 19 months imprisonment in 1992, he served only 60 days in jail. Consequently, 18 U.S.C. §986, as amended, does not apply in this case. Applicant's criminal conduct was mitigated by the passage of time, his changed circumstances, and clear evidence of rehabilitation. Clearance granted.

**STATEMENT OF THE CASE**

Applicant challenges the 13 May 2004 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of criminal conduct. [\(U\)](#) Applicant answered the SOR on 1 June 2004 requested a hearing. DOHA assigned the case to me 10 August 2004 and I convened a hearing on 7 September 2005. DOHA received the transcript on 16 September 2005

**RULINGS ON PROCEDURE**

On 14 December 2004, this case became subject to a moratorium on all cases involving application of 18 U.S.C. 986 pending receipt of implementing guidance for statutory changes made in October 2004. The moratorium was lifted on 3 August 2005, and I later scheduled the case for hearing.

In October 2004, 18 U.S.C. §986 was amended to provide, in pertinent part, that the statute would apply only in cases in which an applicant was sentenced to prison for more than a year and served more than a year in prison. Previously, the statute applied in cases in which an applicant was sentenced to prison for more than a year, regardless of time served.

At the hearing, the evidence demonstrated that while Applicant had been sentenced to more than a year in prison, he had served only 60 days in jail. Department Counsel observed (Tr. 74) that the factual predicate for application of the amended 18 U.S.C. §986 had not been met, and I concur. Consequently, I enter a finding for Applicant on 1.b. as a matter of law.

## FINDINGS OF FACT

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

Applicant--a 33-year-old analyst for a defense contractor since July 1998--seeks access to classified information. He has not previously had a clearance, but did have an interim clearance with this employer until sometime after the SOR was issued.

Applicant had six encounters with police between April 1990 and October 2000. Five of those encounters occurred between April 1990 and August 1992, when Applicant was 18-20 years old. The sixth was an October 2000 DWI.

Applicant's offenses ran the gamut from underage possession of alcohol and misrepresenting his age to breaking and entering, theft, and the DWI. The disposition of charges ranged from outright dismissal to fines and community service to jail time. In general, the disposition of charges was consistent with Applicant's description of the incidents. <sup>(2)</sup>

Applicant attributed his early-1990s incidents to his immaturity and hanging out with the wrong kind of friends, especially a new friend who persuaded him help with the breaking and entering and theft from a audio store (i.e.). He admits his October 2000 DWI was just plain poor judgment. He had gone to a party at a friend's house intending to spend the night and not drive home. However, when the friend lost power and ran out of food, Applicant changed his plans and attempted to drive home. He was stopped and arrested with a .14 B.A.C.

The little bit of time Applicant spent in jail as a result of the 1991 breaking and entering and theft charges was sobering time for him. He realized how much he had let down his family and other friends. He stopped associating with the friends he had gotten in trouble with in the early 1990s. He focused on getting his college degree, sometimes working three jobs to meet those expenses. He obtained sole custody of his two-year old daughter in December 1998. He had no criminal incidents between August 1992 and October 2000, when he had the DWI. After the DWI, but before his court appearance, he attended an alcohol education course. He was evaluated as a social drinker, but he also realized the risks he had undertaken by drinking and driving. He no longer drinks and drives.

Applicant's supervisor noted his excellent work ethic and his security consciousness during the time he had an interim clearance. His father described the changes in Applicant's behavior after his legal problems in the early 1990s. Applicant serves in two outside fiduciary positions: He is the cookie manager for his daughter's Girl Scout troop and he serves as treasurer for a football league he plays in.

## POLICIES

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guideline is Guideline J (Criminal Conduct).

## BURDEN OF PROOF

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and

confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.<sup>(3)</sup>

### CONCLUSIONS

The government established a Guideline J case by demonstrating that Applicant had six encounters with police between April 1990 and October 2000.<sup>(4)</sup> However, Applicant mitigated the criminal conduct by demonstrating that the most recent incident was over five years ago,<sup>(5)</sup> that he had stopped associating with the friends who were involved with him in the 1990-1992 incidents,<sup>(6)</sup> and that he had changed his lifestyle, in part because he now had sole custody of his young child.<sup>(7)</sup> Although the number of incidents and the span of time covered by the incidents preclude a conclusion that the criminal conduct was isolated,<sup>(8)</sup> the offenses belong to two distinct periods of Applicant's life, neither of which is likely to recur. I resolve Guideline J for Applicant.

### FORMAL FINDINGS

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

Subparagraph c: For the Applicant

Subparagraph d: For the Applicant

Subparagraph e: For the Applicant

Subparagraph f: For the Applicant

Subparagraph g: For the Applicant

Subparagraph h: For the Applicant

### DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).
2. In April 1990, Applicant received 3-days in a work program, 8-16 hours community service, and a \$35-net fine for theft less than \$300.00, misrepresenting age, and possessing alcohol under age 21 (1.a., 1.b.). In March 1991, he received a \$35-net fine for minor misrepresenting age (1.c.). In August 1991, he was given probation before judgment and fined \$20.00 for minor misrepresenting age (1.d.). In September 1991, he received 19 months imprisonment, \$1,000.00 in fines, \$100 restitution, and three-years probation for breaking and entering and theft under \$300.00. Sixteen of the 19 months were suspended and Applicant served 60 days in jail with time off for good behavior (1.e.). In August 1992, a charge of alcohol possession under age 21 was dismissed when the judge accepted Applicant's testimony that the beer in the vehicle he was riding in was not his and he had not been drinking (1.f.). Applicant's October 2000

DWI resulted in a 45-day suspension of his license.

3. *See, Department of the Navy v. Egan*, 484 U.S. 518 (1988).

4. 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;

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

6. E2.A10.1.3.4. . . .the factors leading to the violation are not likely to occur;

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

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