DATE: April 15, 2004

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-21075

DECISION OF ADMINISTRATIVE JUDGE

CHARLES D. ABLARD

APPEARANCES

FOR GOVERNMENT

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant, a civilian employee of a defense contractor, was convicted of embezzlement from a former employer in 1986. He was sentenced to imprisonment for three years, suspended, five years supervised probation and to pay restitution in the amount of $3,500.00. The provisions of 10 U.S.C. §986 require that any person so convicted cannot hold a security clearance absent a waiver from the Secretary of Defense. The law requires that the finding be adverse. I do not recommend further consideration of this case for a waiver of 10 U.S.C. §986. Clearance is denied.

STATEMENT OF CASE

On August 6, 2003, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Information Within Industry,* as amended and modified, 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 of Reasons (SOR) to 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 the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On September 5, 2003, Applicant, in a sworn written statement, responded to the allegations set forth in the SOR, and requested a hearing. The case was assigned to me on December 22, 2003. A notice of hearing was issued on February 12, 2004. A hearing was held on March 8, 2004. The Government introduced two exhibits and Applicant introduced none. Both exhibits were admitted into evidence. The Applicant testified as did another on his behalf. The transcript was received March 16, 2004.

FINDINGS OF FACT

After a complete review of the evidence in the record and upon due consideration of the record the following findings of fact are made.

Applicant was convicted of embezzlement from his employer, an insurance company, in 1986 and sentenced to three years imprisonment, suspended, and five years supervised probation. He was ordered to pay restitution in the amount of $3,500.00 and perform 50 hours of community service. Applicant was an agent for the company and company records had twice showed him to be short in his accounts. He believed the reports to be erroneous and has since learned that they might have been. However, he then collected premiums from a number of insured in the amount of $1,600.00 in a one day period, kept the money and left the city of his employment spending the next two months living alone in a larger city 300 miles away. Applicant attributed this conduct to personal difficulties he was having with a former wife. He recognizes that his irrational conduct was reprehensible and knows that it will not recur. He has not had any similar problems since that time. He paid the restitution and performed the community service.

Applicant had one earlier conviction as a teenager for theft of personal property that was the result of a youthful prank with some friends that went awry.

Applicant is now a long distance truck operator who hauls freight including some materiel for the Department of Defense. His work takes him away from his home constantly and he spends only a few days a month in the city where he lives. He is remarried and his wife travels and works with him.

Applicant's single witness was a friend and associate who had rented him a home and then sold him his present home. He testified that Applicant was a person of good repute who paid his debts and had learned his lesson. He believed Applicant has spent sufficient time being rehabilitated from his earlier crime and conviction. The witness had been convicted on a drug charge in 1978 and sentenced to six months imprisonment.

In his Answer, Applicant stated that he could produce statements from employers and his church members but did not do so either through testimony or written statements of support.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information." *Id.* at 527.

An evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (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; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence. Directive, ¶ E2.2.1. Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2. *See* Executive Order No. 12968 § 3.1(b).

Initially, the Government must establish, by something less than a preponderance of the evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information *See Egan*, 484 U.S. at 531. The applicant then bears the burden of demonstrating that it is clearly consistent with the national interest to grant or continue the applicant's clearance. "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive, ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. *See* Executive Order No. 12968 § 3.1(b)

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors and conditions above, I conclude the following with respect to all allegations set forth in the SOR.

Disqualifying Condition Criminal Conduct (DC) 2 is applicable to Applicant in that he was convicted of a serious crime

and sentenced to a three year term in prison. It could be mitigated by application of the facts in the case to certain of the Mitigating Conditions (MC) l, the conduct was not recent; 2, the crime was an isolated incident; 4 the factors leading to the violations are not likely to recur; and 5, there is clear evidence of successful rehabilitation.

Based on the evidence of record, including Applicant's admissions, the Government has established reasons to deny him a security clearance because of criminal conduct. Having established such reasons, the Applicant has the burden to establish security suitability through evidence which refutes, mitigates, or extenuates the disqualification and demonstrates that it is clearly consistent with the national interest to grant a security clearance. ISCR Case No. 99-0424 (App. Bd. Feb. 8, 2001).

As the policy prescribes, the burden shifted to the Applicant to show that the mitigating conditions are applicable to him. Unfortunately for Applicant, the proof offered consisted of only his own uncorroborated statements of his conduct over the past 18 years since he was sentenced and the one witness who, while seemingly credible, did not have the background and experience with the Applicant that would have been helpful in making a determination to find that the itigating Conditions were applicable to justify a recommendation for a waiver in this case.

The provisions of 10 U.S.C. §986 and the implementing guidance are unequivocal that a person is disqualified from holding a security clearance if convicted of a crime and sentenced to more than one year of imprisonment.

In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information.

The "whole person" concept recognizes that we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

After considering all the evidence in its totality and as an integrated whole to focus on the whole person of Applicant, I conclude that he is not eligible for access to classified information. Thus, I find against the Applicant.

FORMAL FINDINGS

Formal findings as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or renew a security clearance for Applicant. I do not recommend further consideration of the case for a waiver under 10 U.S.C §986. Clearance is denied.

Charles D. Ablard

Administrative Judge