DATE: April 13, 2004

In Re:

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

Applicant for Security Clearance

ISCR Case No. 02-33144

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

SYNOPSIS

On March 30, 1987, Applicant was convicted of Conspiracy to Possess Cocaine and Possession With Intent to Distribute Cocaine. He was sentenced to be confined for a term of three years on each count, the sentences to run concurrently. He served slightly more than two years in federal prison camps before being paroled to a halfway house on May 11, 1989. Because of the statutory disqualification imposed by 10 U.S.C. § 986, he is unable to mitigate the security concern his criminal conduct has created. Clearance is denied. I do not recommend further consideration of this case for a waiver.

STATEMENT OF THE CASE

On August 4, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.(1) The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J, for criminal conduct, based upon Applicant's two convictions of drug-related offenses in 1987. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed because he was sentenced to more than one year in prison for those offenses. Applicant submitted a sworn answer to the SOR that was signed by him on August 25, 2003, and requested a hearing. Applicant admitted both allegations contained in the SOR.

This case was assigned to me on October 31, 2003. A notice of hearing was issued on November 6, 2003, scheduling the hearing for November 25, 2003. The hearing date was thereafter cancelled, and a second notice of hearing was issued on December 3, 2003, rescheduling the hearing for January 9, 2004. The hearing was conducted as rescheduled. The government submitted three documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-3 and admitted into the record without an objection.(2) Applicant testified at the hearing, called three witnesses to testify on his behalf, and submitted three documentary exhibits that were marked as Applicant's Exhibits 1-3 and admitted into the record without an objection. The transcript was received on January 21, 2004.

PROCEDURAL MATTERS

A notice of hearing was initially issued, scheduling the hearing for November 25, 2003. A conference call was held on November 10, 2003 with Applicant's attorney and Department Counsel, in which Applicant requested that the hearing be continued to a later date. I directed that written pleadings be filed and that a second conference call be held on November 12, 2003 to rule on the requested continuance. Applicant timely filed a Motion for Extension of Time. Department Counsel did not file a written response. The second conference call was conducted and, without an objection from Department Counsel, the request for a continuance was granted, and I indicated the case would be rescheduled for hearing on December 18, 2003. Subsequently, I was made aware that Department Counsel would be unavailable on that date. The hearing was then rescheduled to the mutually agreeable date of January 9, 2004.

After the presentation of all evidence, Applicant requested that I hold in abeyance issuance of a decision, until such time as the Secretary of Defense takes action in response to the Congressional mandate contained in the National Defense Authorization Act for Fiscal Year 2004, HR 1588, as approved by both Houses of Congress and signed by the President, now designated Public Law 108-136. That law simply requires the Secretary of Defense to report to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives an assessment of the effects of 10 U.S.C. § 986 on the granting or renewal of security clearances for DoD personnel and defense contractor personnel, and include such recommendations for legislation or administrative steps as he considers necessary.

Public Law 108-136 does require Congress to take action on any recommendations submitted by the Secretary of Defense. Further, it does not lay out any time limit within which Congress will take action, in the event any proposed legislation or administrative steps are submitted by the Secretary. It would be pure speculation on my part at this time to presume that Congress will enact any change to 10 U.S.C. § 986.

I am bound to apply the law, procedures, and guidelines in effect at the time a case is decided by me. I am not free to delay taking action based upon speculation that the applicable law, procedures, and/or guidelines may change at some undetermined date in the future. Applicant's request that I delay issuance of a decision in this case is denied.

FINDINGS OF FACT

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is 42 years old, and has been employed by a defense contractor as a project manager since February 2001. He has been employed in similar positions with other defense contractors since February 1989. His current position requires him to frequently travel to foreign countries where he oversees the modernization of security systems in U.S. State Department facilities. His foreign travel is often to hazardous locations where his personal safety is in jeopardy. His supervisors consider him to be technically superior, trustworthy, honest, and of high integrity. Fully aware of his past criminal history, they most strongly recommend him for positions of trust, and express complete confidence in his willingness and ability to protect the nation's secrets if granted access to classified information.

Applicant has possessed a security clearance since approximately 1990. His work on and knowledge of the security systems in place at United States embassies has necessarily exposed him to classified information. There have never been any complaints made or investigations conducted of any alleged breeches of security or mishandling of classified information on his part. Since he was granted a clearance in 1990, no other action has been taken to revoke or downgrade a clearance held by Applicant because of security concerns.

Applicant was born in a foreign country while his father was stationed there as an active duty member of the United States Air Force. He graduated from high school in 1980, and held a number of unskilled jobs in the following years. He was married in April 1993, and has two children, ages four years old, and ten months old. The family resides in a house Applicant purchased in August 1996.

Applicant was arrested in September 1981, convicted of petty larceny for stealing beer from a retail store, and fined

$200.00. He was arrested in June 1983, convicted of Driving Under the Influence (DUI), and fined $200.00. He was arrested on August 25, 1986, convicted of Conspiracy to Possess Cocaine and Possession With Intent to Distribute Cocaine[(3)] and sentenced to concurrent three years terms of imprisonment on March 30, 1997. While awaiting trial for this last offense, he was convicted of Possession of Marijuana and Open Container, and sentenced to 30 days in jail and a combined fine of $332.00.[(4)]

Applicant's convictions for the cocaine-related offenses resulted from his attempt to purchase a kilo of cocaine from an undercover government agent/informer for $28,000.00. He was arrested as he completed the transaction in a hotel room that was being surveilled by federal agents. He had on previous occasions completed three separate half-kilo purchases. He had a partner in these transactions who was responsible for distributing the cocaine. Applicant's motive on each occasion was profit, and he estimates he had made approximately $1,000.00 as his share from the three prior transactions.

Following his convictions, Applicant was confined in federal prison camps until being paroled to a halfway house on May 11, 1989. He remained a resident of the halfway house for approximately four months, during which time he worked for a cellular telephone company. He has not been charged with any criminal offenses, other than minor traffic violations, since being released from confinement.

Applicant has routinely informed his employers of his prior criminal history. He disclosed his criminal history when he applied for a security clearance in approximately 1990, and, following an initial denial of granting a security clearance, the case was subsequently adjudicated in his favor.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[(5)] The government has the burden of proving controverted facts.[(6)] The burden of proof in a security clearance case is something less than a preponderance of evidence[(7)], although the government is required to present substantial evidence to meet its burden of proof.[(8)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(9)] Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.[(10)] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(11)]

No one has a right to a security clearance[(12)] and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(13)] Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.[(14)]

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to

break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. The evidence establishes he committed the offenses of Conspiracy to Possess Cocaine, Possession With Intent to Distribute Cocaine, and Possession of Marijuana. On March 30, 1987, he was sentenced to prison for concurrent three year terms for the cocaine-related offenses. He actually served slightly more than two years and was then paroled to a halfway house to complete the few remaining months of his sentence. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 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* apply in this case.

In addition to the 1987 controlled substance convictions, Applicant had a petty larceny conviction in 1981, and a DUI conviction in 1983. Since being released from confinement in 1989, he has lived an exemplary and law-abiding life. The testimony and character letters in evidence attest to his professional competency, excellent reputation, and personal trustworthiness. Mitigating Conditions (MC) 1*: The criminal behavior was not recent*; MC 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* apply in this case.

In all adjudications the protection of our national security is the paramount concern. Security clearance decisions are not intended to adjudge guilt or to impose further punishment for past transgressions. Rather, 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. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions, including all criminal conduct, whether or not otherwise mitigated. However, because of the statutory disqualification imposed by 10 U.S.C. § 986, Applicant is unable to mitigate his cocaine-related criminal conduct. Guideline J is decided against Applicant.

I do not recommend further consideration of this case for a waiver of the disqualification mandated by 10 U.S.C. § 986.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: For 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. I do not recommend further consideration of this case for waiver of the 10 U.S.C. § 986 disqualification.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. GE 3 as originally presented consisted of six pages. Applicant objected to the exhibit as offered, and, after discussion about the contents of pages 3-6 of the document, Department Counsel withdrew those pages from the exhibit. Applicant did not object to GE 3 following the removal of pages 3-6. Pages 3-6 were then marked as Appellate Exhibit C and attached to the record.

3. Although there is no dispute that Applicant was convicted of two drug related offenses and sentenced to concurrent

three year sentences, the testimony and various documents do differ as to what the actual charges were. The charges listed here are those listed as dispositions in GE 2, the Federal Bureau of Investigation arrest record.

4. Applicant testified he was sentenced to pay a fine for these offenses. GE 2, records the dispositions as 216/30D and 116/30D for these offenses. I interpret this entry to mean that which I have stated in the text, but, because of the conflicting evidence, will not rely upon whether or not a jail sentence was imposed in arriving at a decision.

5. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

6. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

7. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

8. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

9. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

10. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

11. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

12. *Egan*, 484 U.S. at 528, 531.

13. Id at 531.

14. *Egan*, Executive Order 10865, and the Directive.