DATE: July 30, 2004

In re:

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

Applicant for Security Clearance

ISCR Case No. 03-01055

ECISION OF ADMINISTRATIVE JUDGE

ROBERT J. TUIDER

APPEARANCES

FOR GOVERNMENT

Marc Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 47-year-old woman employed by a defense contractor as a professional staff member. Charged with felony larceny, Applicant pled guilty to two misdemeanor counts of petit larceny. In November 1999, the state court found Applicant guilty and sentenced her to be incarcerated in the county jail for a term of 12 months for each count, for a total of 24 months. The court suspended the entire 24 month sentence for one year. Under 10 U.S.C. § 986, the Defense Department is prohibited from granting or renewing Applicant's security clearance based on her sentence to confinement exceeding one year unless the prohibition is waived by the Secretary of Defense. Clearance is denied.

STATEMENT OF THE CASE

On November 18, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.[(1)] The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct and under Guideline E for personal conduct. The SOR also alleges under Guideline J that Applicant is ineligible for access to classified information under 10 U.S.C. § 986--the so-called Smith Amendment--based on a sentence to confinement exceeding one year.

Department Counsel indicated he was ready to proceed on February 25, 2004, and the case was assigned to me on March 2, 2004. A notice of hearing was issued on March 26, 2004, scheduling the hearing for April 15, 2004. Applicant appeared without counsel and the hearing took place as scheduled. At the commencement of the hearing, Department Counsel indicated the government would not be going forward with evidence in support of the Guideline E (falsification) concern. DOHA received the transcript on April 23, 2004.

FINDINGS OF FACT

In her Answer, Applicant neither admitted nor denied the Guideline J allegation and in essence denied the Guideline E

allegation. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact:

Applicant is a 47-year-old woman. She is seeking to obtain access to classified information for her employment as a professional staff member for a defense contractor. She is a high school graduate and has completed a program of study through an technical school.

Applicant has been legally separated from her husband since 1996. At the time of separation, they had a daughter, who is now 16 years old. This separation occurred in State A. In 1996, her husband moved from State A to State B. In 1997, her daughter moved from State A to State B to be near her father's family. In 1999, Applicant moved from State A to State B and has physical custody of her 16-year-old daughter. Her daughter has been diagnosed with oxalosis and requires continuous medication, medical monitoring, and supervision to prevent over exertion and dehydration. Tr. 35.

In 1991, Applicant was arrested for theft in State A. She was modeling clothes for a fashion show and left with the clothing she was modeling. She received a small fine.

In 1992, Applicant was arrested for larceny when she stole a pair of earrings from a department store in State A. She received a small fine.

On April 11, 1997, Applicant was arrested on the charge of petit larceny in State A, when she attempted to leave a service station with two T shirts. She did not leave the store with the merchandise. GE 3.

On April 12, 1997, the next day, Applicant was arrested again on the charge of petit larceny in State A, when she attempted to leave the same service station with two T shirts. She did not leave the store with the merchandise. GE 3.

On October 14, 1997, Applicant was indicted on felony larceny as a result of the arrests on April 11 and 12, 1997, for unlawfully without authority and with the intention of converting merchandise to her use with the intention of defrauding the owner, by willfully concealing merchandise valued at less than $200.00 belonging to the service station. GE 3

On October 12, 1999, Applicant represented by her court appointed attorney, pled guilty to two misdemeanor charges of petit larceny. The prosecutor moved to amend the indictment, which originally charged the Applicant with felony charges of shoplifting to misdemeanor charges of petit larceny. GE 3.

On November 19, 1999, Applicant was sentenced to incarceration in jail for a term of 12 months for each charge. These sentences ran consecutively with the total sentence imposed being 24 months. The 24 months confinement was suspended on the condition of good behavior. Specifically, that Applicant was required to keep the peace and violate no local, state or federal penal laws for a period of one year from the date of sentencing. The Applicant was also ordered to pay all court costs of $1,236.00 by December 31, 2000. GE 3. The one year suspension would have ended on November 19, 2000.

Applicant was 40 years old at the time of her two arrests in April 1997. Applicant testified that she did not mature until she was 40-years-old, that she "didn't get a grip on everything until I was like 40 years old." She was devastated that her marriage fell apart after ten years. Tr. 28.

Applicant testified: "[T]his should have never happened. This was a joke. It got away. It went too far. And nothing was taken from that store. Nothing was taken. It should have never happened, Your Honor, but it did and it's on the record. But it really didn't happen. It's on paper, but it really, really never happened. . . . And even though you have these arrest records for larceny, nothing was ever taken. It was a big joke, and it just got out of hand. And I wish it hadn't happened, but - and I wish I hadn't met that guy. But I did, and it's a matter of record now and very humiliating and embarrassing. But I'm not really - this is not who I am. That's not the way I act." Tr. 30-31. Applicant made several references to what occurred as being a "joke." Tr. 26, 27, 44, 45

The "guy" she referred to above is an individual who was known to law enforcement for his involvement in drug activity. Tr. 26. Applicant "began to hang around with him" in 1996 and had known him approximately 10 months when

he accompanied her to the service station on April 12, 1997. Tr. 25, 47. After the April 1997 arrest, Applicant testified the authorities wanted her to "wear a wire" to gather evidence against her friend. She chose not to cooperate with authorities because she "was afraid of getting beat up or killed." Tr. 46. Applicant continued to associate with this individual approximately 10 months after her arrest. Tr. 56.

Applicant submitted six documents, which were character references. AE A through F.

Other than what is already mentioned, the record evidence reveals no other criminal history. The character of her job performance is not developed in the record.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

BURDEN OF PROOF

The only 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.[(2)] There is no presumption in favor of granting or continuing access to classified information.[(3)] The government has the burden of proving controverted facts.[(4)] The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.[(5)] The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.[(6)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(7)] Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against them.[(8)] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(9)]

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[(10)] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. Criminal Conduct

Under Guideline J,[(11)] criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. 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.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant was charged with a felony indictment. Per a plea agreement, she pled guilty to two misdemeanor charges of petit larceny and pursuant to her plea was found guilty of those two counts. These facts and circumstances are evidence of a history or pattern of illegal behavior that creates doubt about her judgment, reliability, and trustworthiness. Given these circumstances, both DC 1[(12)] and DC 2[(13)] apply against Applicant.

I have reviewed the MC under Guideline J and conclude none apply in Applicant's favor. Given the two or more instances of criminal conduct by Applicant, and two prior arrests in 1991 and 1992 for similar conduct, I cannot

characterize her behavior as an isolated incident.[(14)] And, given that she has minimized or attempted to explain away her behavior and culpability suggests she has not accepted responsibility for her conduct. It is not clear that she has reformed and rehabilitated[(15)] herself. The remaining MC do not apply given the facts and circumstances here. Given the lack of any applicable MC, coupled with Applicant's recalcitrance in accepting responsibility, I conclude the unfavorable information outweighs the favorable information, and SOR subparagraph 1.a is decided against Applicant.

2. Applicability of 10 U.S.C. § 986

Turning to the allegation that Applicant is ineligible for a security clearance under 10 U.S.C. § 986, the so-called Smith Amendment, the following issue is presented:

The court sentenced Applicant to two terms of incarceration in the county jail for 12 months each, to run consecutively. Under federal law, a person is ineligible for a security clearance if the person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. Is Applicant eligible for a security clearance based on consecutive sentences to confinement for a total of 24 months?

My conclusion is that 10 U.S.C. § 986 applies and Applicant is ineligible for a security clearance.

Under federal law, the Defense Department and the military departments may not grant or renew a security clearance for an employee of a DoD contractor who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." 10 U.S.C § 986(c)(1). The statute also provides that the Secretary of Defense may, in a meritorious case, authorize an exception to this statutory prohibition. The statute does not define, explain, or describe a "meritorious" case.

In June 2001, the Deputy Secretary of Defense issued official policy guidance designed to assist the DoD and military departments in uniformly implementing 10 U.S.C. § 986. Concerning criminal convictions, the policy guidance is the statute disqualifies persons with convictions in both state and federal courts, including military courts, with sentences imposed for more than one year regardless of the amount of time actually served. Like the statute, the policy guidance does not define, explain, or describe a "meritorious" case. And DOHA issued Operating Instruction 64, dated July 10, 2001, which requires, among other things, administrative judges to take the following action concerning waiver recommendations:

If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement 'I recommend further consideration of this case for a waiver of 10 U.S.C. 986' or 'I do not recommend further consideration of this case for a wavier of 10 U.S.C. 986.'

As a starting point, it is important to define concurrent and consecutive sentences. The most comprehensive guide to legal style and usage contains the following discussion:

These phrases are used in reference to more than one penal sentence assessed against a person. *Concurrent sentences* run simultaneously--i.e., the time served in prison is credited against two or more sentences. *Consecutive sentences* (known also as *cumulative sentences*) run one after the other--i.e., the prisoner begins serving the second sentence only after completely serving the first. E.g., '[L]egal usage shows that the phrase [*cumulative sentences*] denotes consecutive sentences, whether imposed under counts of the same indictment or under different indictments, as distinguished from concurrent sentences.'[(16)]

At common law, cumulative terms of imprisonment, if definite and certain, are valid where the accused is convicted of separate and distinct crimes in different indictments or in different counts of the same indictment.[(17)]

Neither the statute nor the department's official policy guidance addressed the issue of consecutive sentences of less than one year that if aggregated result in more than one year of confinement. To my knowledge, the DOHA Appeal Board has yet to address this specific issue. Other hearing-level administrative judges have concluded that 10 U.S.C. § 986 applies when an applicant receives consecutive sentences, when aggregated, that exceed one year.[(18)] Although not

controlling, these decisions are persuasive authority. Finally, nothing in Operating Instruction 64 suggests that sentences should be read other than they were pronounced by the sentencing court.

Here, the record evidence shows that in November 1999, the state court sentenced Applicant to two terms of incarceration of 12 months each, to run consecutively, one after the other. In particular, according to the sentencing court's judgment, Applicant was sentenced as follows: to "Incarceration in the [...] County Jail for a term of: 12 months for each charge. The total sentence imposed is 24 months. These sentences shall run consecutively with all other sentences." It makes no difference the confinement was suspended and Applicant was placed on probation. Confinement for 24 months exceeds one year and falls within the scope of 10 U.S.C. § 986, and so, SOR subparagraph 1.a is decided against Applicant. Accordingly, unless the Secretary of Defense grants a waiver, Applicant is--by operation of federal law--ineligible for access to classified information. Because I am not deciding this case against Applicant based solely on 10 U.S.C. § 986, a waiver recommendation is not appropriate.

The allegation in SOR subparagraph 2.a of Guideline E[(19)] is that Applicant falsified material facts on her security clearance application. As previously stated, Department Counsel indicated the government would not be going forward with evidence in support of this allegation. Accordingly, Guideline E is decided for Applicant.

In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, as well as the whole-person concept and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

As required by ¶ E3.1.25 of Enclosure 3 to the Directive, below are my conclusions as to the allegations in the SOR:

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: Against the Applicant

SOR ¶ 2-Guideline E: For the Applicant

Subparagraph a: 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. Clearance is denied.

Robert J. Tuider

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

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

3. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

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

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

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

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

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

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

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

11. Directive, Enclosure 2, Attachment 10, at p. 37.

12. "Allegations or admissions of criminal conduct, regardless of whether the person was formally charged."

13. "A single serious crime or multiple lesser offenses."

14. MC 2 is "The crime was an isolated incident."

15. MC 6 is "There is clear evidence of successful rehabilitation."

16. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 195 (2d. ed. 1995) (citation omitted, emphasis in original).

17. *Ex parte Lamar*, 274 F. 160, 170 (2nd Cir. 1921), *aff'd*, 260 U.S. 711 (1923), *citing Morgan v. Devine*, 237 U.S. 632 (1915).

18. ISCR Case No. 01-26057 (February 26, 2003) (applicant found guilty of four counts of check fraud and sentenced to one year in jail for each count for a total of 48 months); ISCR Case No. 02-02487 (November 25, 2003) (applicant convicted of three counts of receiving stolen property and sentenced to serve consecutively one year for each of two of the counts and six months on the third count); ISCR Case No. 02-21060 (April 19, 2004) (applicant sentenced to serve 12 months each on two counts of simple sexual battery and 12 months for indecent exposure, said sentences to run consecutively).

19. Directive, Enclosure 2, Attachment 5, at pp. 27-28.