

DATE: September 12, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-02221

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Juan Rivera, Esquire, Department Counsel

**FOR APPLICANT**

Mark Rife, Esquire

**SYNOPSIS**

Applicant is precluded by 10 U.S.C. § 986 from holding a clearance because he served 17 months in jail after being convicted of a drug trafficking charge and subsequently violating the terms of his probation. Applicant also has significant financial problems and failed to mitigate the resulting security concerns under Guideline F (financial considerations). Clearance is denied.

**STATEMENT OF THE CASE**

After reviewing the results of Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>(1)</sup> it is clearly consistent with the national interest to give Applicant a security clearance. On November 24, 2003, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Directive under Guideline F (financial considerations) and Guideline J (criminal conduct). Applicant timely answered the SOR (Answer), and admitted all of the allegations under Guideline J. Applicant also admitted five of the 12 allegations under Guideline F, and he requested a hearing.

The case was assigned to me on August 5, 2004 and I convened a hearing on October 6, 2004. The parties appeared as scheduled and the government presented 14 exhibits, which were admitted without objection. Applicant submitted nine documents admitted without objection (AE A through I),<sup>(2)</sup> testified in his own behalf, and presented the testimony of three other witnesses. DOHA received the transcript (Tr) on January 21, 2005. Issuance of this decision was delayed due to a moratorium imposed on all cases involving potential application of 10 U.S.C. §986. That moratorium was recently lifted.

**FINDINGS OF FACT**

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

Applicant is 55 years old and seeks a security clearance in connection with his work as a pilot for a company doing business with the U.S. State Department. He received his flight training as an officer in the U.S. Marine Corps between 1971 and 1975, but left active duty after being injured in the line of duty. He was medically discharged from the service in 1978, but had effectively been inactive between 1975 and 1978.

Before joining the Marines, Applicant and a friend were arrested in 1967 and charged with grand theft, a felony. They were caught stealing wheel covers from a car in a shopping center parking lot. (SOR ¶ 1.k) Available information does not reflect any subsequent prosecution of this charge.

Between 1975 and 1977, Applicant ran a small jewelry business with his parents while living in State A. In 1976, his parents were robbed of cash and inventory and the still-fledgling business did not have the cash flow needed to survive. Desperate for money to support the jewelry business, Applicant began flying airplanes as part of a drug smuggling operation. He was soon arrested and charged with possession of marijuana for sale and transportation of marijuana. Approximately 309 kilograms of marijuana were seized during the investigation that led to his arrest. (SOR ¶¶ 1.i and 1.j)

Because he then cooperated with drug enforcement authorities, Applicant received a suspended prison sentence of no less than one nor more than three years, and he was placed on three years probation beginning in March 1978. However, before his arrest he had begun using marijuana and other illegal drugs, and he developed an addiction to alcohol. This behavior led to further criminal conduct, such as forgery and possession of stolen property, including his father's car and credit cards. This conduct violated the terms of his probation, and, after he was eventually arrested, Applicant was sentenced in July 1979 to three and three-quarter years in jail for theft and forgery convictions as well as for violating the terms of his probation from his drug trafficking conviction. Applicant spent the next 17 months in jail before being paroled. (SOR ¶¶ 1.f, 1.g, and 1.h) His civil rights in State A were restored in 1984 after he completed the terms of his parole.

After finishing his parole in State A, Applicant moved to State B to pursue a career in aviation. However, Applicant also continued to abuse alcohol and drugs. Twice in November 1988, he was arrested for forgery and possession of stolen property. This time he had stolen his uncle's car and checks. He was also charged with these same offenses in March 1989. The following October, Applicant was placed on three years probation and ordered to complete a residential drug and alcohol treatment program. (SOR ¶¶ 1.b, 1.c, and 1.d)

Except for a brief relapse during his last divorce in 1993, Applicant has been clean and sober since 1989. His only other adverse contact with law enforcement occurred in May 1993, when he was charged with trespassing. This charge was made by his soon-to-be fourth ex-wife and was later dismissed as groundless. (SOR ¶ 1.a)

After completing his drug and alcohol treatment, Applicant held a series of jobs as a pilot. He also started his own flight school, and later a company that sold aerial advertising. The flight school failed in 1993 and poor decision-making relative to stock ownership cost him control of his advertising company. It also saddled him with debts he could not pay. His debts consisted of tax liens, credit card accounts used for business expenses, and unpaid loans from relatives. He still owes about \$7,700 in unpaid credit card debt for accounts he used in trying to salvage his businesses. (SOR ¶¶ 2.b, 2.c, and 2.d)

Applicant also owes \$790 for a civil judgment entered against him in 2001 (SOR ¶ 2.a), \$685 for a delinquent telephone account (SOR ¶ 2.f), \$366 for a delinquent check cashing service and paycheck advance loan account (SOR ¶ 2.h), and \$256 for a delinquent cell phone account (SOR ¶ 2.1). Further, Applicant owes about \$3,700 for four overdue dental and medical bills (SOR ¶¶ 2.e, 2.g, 2.j, and 2.k), of which he has paid about \$1,000.

When he was interviewed by the Defense Security Service (DSS) in September 2002, Applicant's personal financial statement showed he had a negative monthly cash flow. (SOR ¶ 2.1) As of the hearing, Applicant was earning about \$41,000 annually with about \$350 left over each month. However, these figures do not reflect any payments to any debts listed in the SOR. Applicant also disclosed he is delinquent on four other recent accounts not alleged in the SOR. Further, he and his wife still have pressing medical needs. His wife no longer works and his medical coverage pays all but a 20% deductible; however, he estimates the deductible currently totals about \$40,000.

Applicant is highly regarded for his accomplishments as a pilot and for the wealth of expertise he brings to the field of flight instruction and other facets of the aviation industry. He has earned a solid reputation as a pilot who is willing to fly even the most difficult missions, as shown by his many overseas assignments in support of U.S. State Department efforts in hostile countries. As for his problems with alcohol and drugs, Applicant is active in Alcoholics Anonymous (AA) and now lives a sober lifestyle aided by friends and associates.

### POLICIES

The Directive sets forth adjudicative guidelines<sup>(3)</sup> to be considered in evaluating an Applicant's suitability for access to classified information. Security clearance decisions must reflect consideration of both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. 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 of a conclusion for or against an Applicant. However, specific applicable 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. Having considered the record evidence as a whole, I conclude the relevant adjudicative guidelines to be applied here are Guideline F (financial considerations) and Guideline J (criminal conduct). Also applicable here is the statutory prohibition, expressed in 10 U.S.C. § 986, against granting Applicant a clearance because of his 1978 criminal conviction and prison sentence.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(4)</sup> for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for the Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it establishes that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to 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.<sup>(5)</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her 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>(6)</sup>

### CONCLUSIONS

The security concern under Guideline F is that someone who is financially overextended through delinquent debt and poor personal financial management may be at risk of engaging in illegal acts to generate funds to resolve their fiscal difficulties. The government presented sufficient information to support the SOR allegations, thereby establishing a case for disqualification under Guideline F. Applicant admitted and the available information further shows Applicant has accrued nearly \$12,000 in unpaid debts as alleged in the SOR. By itself, this total debt may not be cause for concern; however, his financial difficulties have been ongoing for more than ten years and are not likely to improve. Applicant at hearing testified he is currently delinquent on four recent debts, and he and his wife expect to owe more than \$40,000 in medical bills through a 20% deductible in their insurance coverage. In light of the foregoing, Guideline F disqualifying condition (DC) 1<sup>(7)</sup> and DC 3<sup>(8)</sup> apply here.

Applicant has made partial payment on three delinquent medical bills, but he continues to accrue debts he will have difficulty paying and, by his own account, is now delinquent on four debts. While many of the debts listed in the SOR arose from an unforeseen business downturn and medical problems, more than ten years has passed since those events and Applicant has taken only minimal corrective action. Mitigating condition (MC) 3<sup>(9)</sup> must be considered here, but its benefit to Applicant is greatly attenuated by the passage of time without resolution of those debts.

Further, as noted above, Applicant is still struggling to keep up with his current obligations. I am not unmindful of the medical nature of his recent debts, but at some point even circumstances beyond one's control may still present an unacceptable risk under Guideline F. Applicant's inability to pay or otherwise resolve his old debts, his recent

delinquencies, and the ongoing likelihood he will continue to amass debts he cannot pay, presents such a risk. By contrast, Applicant presented no evidence to show how his financial problems will not be a concern in the future. I conclude Guideline F against the Applicant.

The security concern expressed through Guideline J is that a person who is willing to disregard the law and risk fines or incarceration may also be willing to disregard rules and regulations governing the protection of classified information. (10) The criminal activity at issue may consist of a single serious crime or multiple lesser offenses. It is not necessary that the applicant was actually arrested and/or charged with the conduct.

Excepting the allegations in SOR ¶¶ 1.a and 1.e, the government has presented sufficient information in addition to Applicant's admissions to support the reasons in the SOR for its decision to deny Applicant's request for clearance. As to SOR ¶ 1.a, it appears Applicant did not commit any crime and the charge was, in fact, dismissed as without merit. As to SOR ¶ 1.e, this allegation appears to be based on information from the FBI report (GE 3), and that information duplicates other charges against Applicant. At any rate, Applicant was in jail at the time of this alleged conduct.

On the facts established in support of the remaining SOR allegations, Guideline J disqualifying condition (DC) 1 (11) and DC 2 (12) apply. Applicant has a history of criminal conduct that occurred between 1969 and 1989. The record also shows Applicant has not been involved in any similar conduct since then, due in large measure to his now well-established sobriety. For the past 15 years, Applicant has been steadily employed in the aviation industry. Along with his sobriety, his credentials as a professional, reliable pilot and instructor support a conclusion he is not likely to repeat his earlier criminal conduct. Guideline J mitigating condition (MC) 1 (13) and MC 6 (14) apply.

Absent application of the Smith Amendment, I would conclude Guideline J for Applicant. However, because Applicant served more than one year in jail for his conviction of a drug trafficking offense and for crimes that violated the probation in lieu of jail he received for that conviction, 10 U.S.C. § 986 (also known as the Smith Amendment) applies to bar Applicant from receiving a clearance. The Defense Department and the military departments may not grant or renew a clearance for any DoD officer or employee, any employee, officer, or director of a DoD contractor, or a member of the armed forces, both active and inactive, whose circumstances fall within one of four statutory categories. (15) The specific category at issue here is 10 U.S.C. § 986(c)(1), which, when first enacted, barred grant or renewal of a clearance where a person has been convicted of a crime and sentenced to "imprisonment for a term exceeding one year." In October 2004, Congress amended the statute in relevant part to impose this prohibition in cases where the person was sentenced "to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year." Therefore, under either the original or amended versions of the Smith Amendment, Applicant's criminal record bars him from holding a security clearance.

The Smith Amendment also provides that the appropriate authority may authorize a waiver, in meritorious cases, of the statutory prohibitions in 10 U.S.C. § 986(c)(1) and (4). DOHA Operating Instruction (OI) 64, dated July 10, 2001, further requires administrative judges to state whether or not they recommend further consideration of Smith Amendment cases for possible waiver of the statutory bar, but only in cases where the Smith Amendment is the sole basis for denial or revocation. As noted above, even though I would otherwise conclude Guideline J for Applicant, Guideline F also serves as a basis for disqualification. Accordingly, absent a meritorious waiver, Applicant is ineligible for a security clearance.

I have carefully weighed all of the available evidence, and I have applied the appropriate disqualifying and mitigating conditions. Further, I have tried to make a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. Reasonable doubts persist about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. Absent substantial information to mitigate these doubts, which Applicant has failed to provide, and in light of the statutory requirements applicable here, I make no recommendation as to waiver and cannot conclude he has otherwise overcome the government's case.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline J (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a: For the Applicant

Subparagraph 1.b: For the Applicant

Subparagraph 1.c: For the Applicant

Subparagraph 1.d: For the Applicant

Subparagraph 1.e: For the Applicant

Subparagraph 1.f: For the Applicant

Subparagraph 1.g: For the Applicant

Subparagraph 1.h: For the Applicant

Subparagraph 1.i: For the Applicant

Subparagraph 1.j: For the Applicant

Subparagraph 1.k: For the Applicant

Subparagraph 1.l: Against the Applicant

Paragraph 2, Guideline F (Financial): AGAINST THE APPLICANT

Subparagraph 2.a: Against the Applicant

Subparagraph 2.b: Against the Applicant

Subparagraph 2.c: Against the Applicant

Subparagraph 2.d: Against the Applicant

Subparagraph 2.e: Against the Applicant

Subparagraph 2.f: Against the Applicant

Subparagraph 2.g: Against the Applicant

Subparagraph 2.h: Against the Applicant

Subparagraph 2.i: Against the Applicant

Subparagraph 2.j: Against the Applicant

Subparagraph 2.k: Against the Applicant

Subparagraph 2.l: 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 the Applicant. Clearance is denied.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.
2. On January 12, 2005, Applicant's counsel sent to me by facsimile transmission ten additional documents in support of Applicant's case. Because the hearing record had closed on October 6, 2004 without any provision made for the record to remain open, and absent any showing of good cause why I should re-open the record, I have declined to consider the proffered documents. They are, however, included in the case file for possible appellate purposes.
3. Directive, Enclosure 2.
4. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
5. *See Egan*, 484 U.S. at 528, 531.
6. *See Egan*; Directive E2.2.2.
7. Directive, E2.A6.1.2.1. A history of not meeting financial obligations;
8. Directive, E2.A6.1.2.3. Inability or unwillingness to satisfy debts;
9. Directive, E2.A6.1.3.3. The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation);
10. Directive, E2.A10.1.1.
11. Directive, E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
12. Directive, E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
13. Directive, E2.A10.1.3.1. The criminal behavior was not recent;
14. Directive, E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
15. 10 U.S.C. § 986(c)(1) through (c)(4).