DATE: June 9, 2004

In re:

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

Applicant for Security Clearance

ISCR Case No. 03-02784

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esq., Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 52-year-old man employed by a defense contractor as a janitor. Charged with five counts of misdemeanor violations of a domestic-protection order, Applicant pled no contest to two counts. In October 2002, the state court found Applicant guilty and sentenced him to be incarcerated in the county jail for 364 days for each count, to run consecutively, for a total of 728 days, which exceeds one year. The court suspended the sentence to incarceration and placed him on probation for two years, which should end in October 2004. Under 10 U.S.C. § 986, the Defense Department is prohibited from granting or renewing Applicant's security clearance based on his sentence to confinement exceeding one year unless the prohibition is waived by the Secretary of Defense. Clearance is denied.

STATEMENT OF THE CASE

On October 20, 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.

In his one-page answer to the SOR, dated November 17, 2003, Applicant requested a clearance decision based on a written record in lieu of a hearing. His responses to the SOR allegations were mixed. Thereafter, Department Counsel prepared and submitted their written case. The File of Relevant Material (FORM) was mailed to Applicant on or about December 10, 2003, and it was received by Applicant January 9, 2004. Applicant's written response to the FORM was due February 8, 2004. No response was received, and the case was assigned to me February 24, 2004.

FINDINGS OF FACT

Applicant's admissions are incorporated into my findings, and after a thorough review of the pleadings and the record evidence, I make the following essential findings of fact:

Applicant, a 52-year-old man, is employed by a defense contractor as a janitor. He has worked for this employer since August 2000. He served as a Sailor on active duty with the U.S. Navy from June 1970 until his retirement in August 1993. He was serving in the pay grade of E-6 when he retired.

Applicant married in September 1999. He and his wife separated for about three weeks in April 2001. His wife asked him to return to the marriage and he did. They separated again in May or June 2001 and Applicant elected to initiate a divorce. When he contacted his wife about signing the divorce papers she said she did not want a divorce and asked Applicant to return, which he did. Finally, in October 2001, his wife informed Applicant she wanted a divorce.

On October 11, 2001, Applicant's wife filed a petition for an order of protection from domestic abuse in a state court. In her petition, she alleged Applicant's threats caused her to fear that she would be injured. The state court granted the petition and Applicant was made aware of the order, which included a no contact portion.

On or about November 2, 2001, based on complaints from Applicant's wife, the local district attorney's office filed a criminal complaint against Applicant alleging he violated the no contact portion of the protection order on October 27th. The complaint also alleged Applicant committed a misdemeanor, which carried a basic sentence of 364 days incarceration or a $1,000.00 fine or both.

Applicant initially entered a not guilty plea in November 2001. On or about January 16, 2002, the district attorney's office filed an amended criminal complaint alleging five counts of violating the protection order, citing one violation in October 2001 and four violations in November 2001. Each count was the same misdemeanor offense carrying a basic sentence of 364 days incarceration or a $1,000.00 fine or both.

Per a plea agreement, Applicant pled no contest to counts 1 and 2 and the remaining counts were dismissed. He entered his no contest plea in May 2002. In October 2002, the state court found Applicant guilty of counts 1 and 2, and the court sentenced him to be incarcerated in the county jail for 364 days for count 1 and 364 days for count 2, to run consecutively. The court suspended the sentence to incarceration and placed him on probation for two years. The court also imposed certain terms and conditions typical of a domestic violence case.

When the record closed in this case, on or about February 24, 2003, Applicant had served probation without adverse incident and had eight more months to serve. The record evidence reveals no other criminal history. The character of his 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 has established its case under Guideline J. Applicant was charged with five counts of violating a domestic-protection order. Per a plea agreement, he pled no contest to two counts and 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 his 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. First, his criminal conduct took place in October - November 2001, he was found guilty in October 2002, and he is currently serving the court's sentence. Given these circumstances, I cannot characterize his criminal behavior as not recent.[14] Second, given the two or more instances of criminal conduct by Applicant, I cannot characterize his behavior as an isolated incident.[15] And third, given that he has yet to complete probation, it is to soon to tell if he has reformed and rehabilitated[16] himself. The remaining MC do not apply given the facts and circumstances here. Given the lack of any applicable MC, coupled with Applicant's probation status, 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 confinement of 364 days 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 728 days?

My conclusion is yes--10 U.S.C. § 986 applies--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 any DoD officer or employee, an employee, officer, or director of a DoD contractor, or a member of the armed forces on active duty or in an active status who falls under any of four statutory categories.[17] The statutory category at issue here is § 986(c)(1), which provides: "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." The statute also provides that the Secretary of Defense or the secretary of the relevant military department may, in a meritorious case, authorize an exception to the statutory prohibition for persons in two of the four statutory categories; namely, paragraphs (1) and (4) of § 986(c). 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.'[(18)]

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.[(19)]

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.[(20)] 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 October 2002, the state court sentenced Applicant to two terms of confinement of 364 days each, to run consecutively, one after the other. In particular, according to the sentencing court's judgment, Applicant was sentenced as follows: to "be incarcerated in the [county jail] for a period of three hundred and sixty-four (364) days as to Count 1 and three hundred and sixty-four (364) days as to Count 2, to run consecutive." (Item 5). The reality of the situation is: (1) based on the same amended criminal complaint, Applicant was convicted of two counts that were separate and distinct crimes occurring in October and November 2001; and (2) the court sentenced Applicant to an aggregated or cumulative term of imprisonment for 728 days--that is the definite and certain meaning of the court's judgment. It makes no difference the confinement was suspended and Applicant was placed on probation. Confinement for 728 days exceeds one year and falls within the scope of 10 U.S.C. § 986, and so, SOR subparagraph 1.b 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.

3. Personal Conduct

The allegation in SOR subparagraph 2.a of Guideline E[(21)] is that Applicant violated the protection order on five occasions as described in SOR subparagraph 1.a of the Guideline J allegation. This is nothing more than a redundant cross-allegation based on the same underlying conduct. It adds nothing of security significance to the case, and is more properly considered as criminal conduct under Guideline J, which I have done. Moreover, the allegation was not argued by counsel in the FORM. For these reasons only, 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

Subparagraph b: 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.

Michael H. Leonard

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 1 is "The criminal behavior was not recent."

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

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

17. 10 U.S.C. § 986(c)(1) through (c)(4).

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

19. *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).

20. 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).

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