

KEYWORD: Criminal Conduct

DIGEST: Applicant has mitigated security concerns over his criminal conduct which began when he was arrested at 19 in 1984 and continued unbroken for five years until 1989; however, after he married in 1996 and began work for a defense contractor, he found his life's purpose and began his efforts at rehabilitation. While he had two more arrests in 1998, his subsequent record has been unblemished. While in his twenties he was sentenced to serve more than one year of confinement, in fact, each time he served substantially less than one year. Thus, the Smith provision as amended in 2004 (10 U.S.C. Section 986) no longer disqualifies him as he was never incarcerated for more than one year. As he has led a responsible and productive life for a significant period after release from confinement, clearance is granted.

CASENO: 03-12308.h1

DATE: 09/12/2005

DATE: September 12, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-12308

DECISION OF ADMINISTRATIVE JUDGE

KATHRYN MOEN BRAEMAN

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has mitigated security concerns over his criminal conduct which began when he was arrested at 19 in 1984 and continued unbroken for five years until 1989; however, after he married in 1996 and began work for a defense contractor, he found his life's purpose and began his efforts at rehabilitation. While he had two more arrests in 1998, his subsequent record has been unblemished. While in his twenties he was sentenced to serve more than one year of confinement, in fact, each time he served substantially less than one year. Thus, the Smith provision as amended in 2004 (10 U.S.C. Section 986) no longer disqualifies him as he was never incarcerated for more than one year. As he has led a responsible and productive life for a significant period after release from confinement, clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the Applicant on January 21, 2004. The SOR detailed reasons⁽¹⁾

why the Government could not make the preliminary positive finding that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR alleges specific concerns over criminal conduct (Guideline J), including an allegation that his criminal conduct disqualifies Applicant from having a security clearance because of 10 U.S.C. Section 986, unless in a meritorious case the Secretary of Defense authorizes an exception. Applicant responded to the SOR in an Answer notarized on February 9, 2004, where he requested a hearing and a waiver.

The case was assigned to Department Counsel who on June 10, 2004, attested it was ready to proceed; the case was assigned to me on June 17, 2004. Subsequently, a Notice of Hearing issued on June 24, 2004, set the matter for July 14, 2004, at a location near where Applicant works and lives. At the hearing the Government introduced seventeen exhibits which were all admitted into evidence (Exhibits 1-17); Exhibit 15 was admitted over Applicant's objection. (TR 14-20) Department Counsel requested that I take administrative notice of Section 986 of Title 10, United States Code. (Exhibit I) (TR 13-14) Applicant testified and offered three exhibits which were admitted into evidence. (Exhibits A - C) The transcript (TR) was received on July 28, 2004.

Procedural Delay

After the hearing, on October 9, 2004, Congress amended 10 U.S.C. 986, a statute relevant to a decision in this case. Subsequently on December 14, 2004, DOHA was advised of a moratorium established on all cases involving 10 U.S.C. 986 matters and DOHA administrative judges were directed to take no action on pending cases until receipt of further guidance. While no guidance was issued, on August 3, 2005, DOHA was advised that the moratorium was no longer in effect.

FINDINGS OF FACT

After a complete and thorough review of the evidence in the record, and upon due consideration of that evidence, I make the following Findings of Fact:

Applicant, 38 years old, has been employed with a Defense Contractor #1 in State #1 since September 1996. Subsequently, the contract was awarded to Defense Contractor #2 in January 2000; however he essentially remained in the same position doing the same job. He currently makes \$40,000 annually as a technician. (Exhibit 1; TR 48-52) He completed his Questionnaire for National Security Position (SF 86) in January 1998. (Exhibit 1) Applicant was married in March 1996. (Exhibit 1)

Criminal Conduct

On his SF 86 Applicant disclosed that he served one year in prison in State #2 in January 1984 for theft. (Exhibit 1) Applicant has had a series of arrests and convictions in three states from 1984 to 1998:

SOR 1.a. When he was 19 years old, Applicant and a friend took the wheels off a totaled vehicle that had been sitting in a field; when he was putting the tires in his truck, he was arrested in State #2 in March 1984. The arrest report valued the wheels at \$400. He was charged with Burglary of a Conveyance and Grand Larceny; in July 1984 he was sentenced to one year probation for Burglary; the prosecution of the Grand Larceny charge was deferred. (Answer; Exhibits 2, 4, 10, 11, 12, 16, 17; TR 21-23, 33-34)

SOR 1.b. Applicant admits he was arrested on May 19, 1985 in State #2 for violation of probation, not for Failure to Appear in relation to the prior Grand Larceny charge as reported in the FBI report. (Answer; Exhibits 2, 4, 17)

SOR 1.c. While Applicant denied his arrest on May 25, 1985 in B County in State #4 for Fraud-Insufficient Funds-Check, Failure to Appear in relation to Grand Larceny and Contempt of Court and was fined \$150 for Contempt of Court, the state criminal history records substantiated this arrest and fine. (Answer; Exhibits 2, 12, 13,17; TR 34-35; 39-41)

SOR 1.d. Applicant admits he was arrested on July 3, 1985 in State #2 and charged with vehicle theft; the charge was dismissed when he established his ownership; he is attempting to expunge this charge. (Answer; Exhibits 2, 11, 13, 14, 16)

SOR 1.e. Applicant denies he was arrested in October 21, 1985 in State #2 and charged with Buying/Receiving Stolen Property - Grand Theft and Failure to Appear in relation to a suspended or revoked driver's license where the charges were dismissed; he is attempting to expunge this charge. The state criminal history and FBI records substantiate this arrest and show the charges dismissed. (Answer; Exhibits 2, 4)

SOR 1.f. Applicant admits he was arrested on June 11 1986 in State #2 for Driving While Driver's License Suspended/Revoked; while he denies the Contemp of Court charge, the state criminal history records substantiate this arrest and both charges. (Answer; Exhibit 2)

SOR 1.g., 1.h. In June 1986 his probation officer filed an Affidavit of Violation of Probation because of violation of conditions. (Exhibit 11) Applicant admitted he was re-arrested in State #2 in County I in July 3, 1986 and charged with Violation of Probation. The FBI records support his testimony that after arrest in County I he was turned over to another agency. Applicant was transferred to and arrested in County B on July 9, 1986. On August 25, 1986, he was sentenced to two years probation where he had to make daily reports. Again, he did not complete probation as he was working different jobs and moving. (Answer; Exhibits 2, 4, 11, 16, 17; TR 23-24; 41-43)

SOR 1.i. In April 1987 a community control officer filed an Affidavit of Violation of Community Control which led to Applicant's re-arrest in State #2 in County B on July 3, 1987 and charge of Violation of Probation. In December 1987 he was sentenced to one year and one day incarceration with 140 days' credit for time served for violating parole and unlawful use of driver's license. Applicant attested he actually served 195 days incarcerated: "I spent six months, four and a half months of which I spent in the county jail waiting to go and then one and a half months in the actual prison system." (Answer; Exhibits 2, 4, 11, 15, 16; TR 24-27)

SOR 1.j. Applicant denied this charge as he did not remember it; but records establish he was arrested on July 21, 1987 in State #2 and charged with I Fraud-Obtaining Vehicle, II Forgery, and III Fraud-Unlawful Use of a Driver's License; he pled guilty to Count II and was sentenced to one year and one day incarceration with 142 days credit for time served, to be served concurrently with his previous sentence awarded in SOR 1.i. (Answer; Exhibits 13, 14, 15; TR 44)

SOR 1.k. Applicant admitted he was arrested again in State #3 in January 1989 for Larceny over \$250 after he took ski equipment from a dump when the ski company denied ever taking anything to the dump; he pled guilty⁽²⁾ and was sentenced to two consecutive sentences of one year in jail with probation after three months. (Answer; Exhibit 16) The FBI reports in February 1989 he was sentenced to 364 days in the county jail with record to be reviewed in 90 days and probation to be considered; in March 1989 he was given ten months probation. Applicant testified that, in fact, he was "released after three months." (Exhibits 3, 4, 6, 7, 9, 17; TR 28-29)

SOR 1.l. Applicant denied the arrest in 1.l. as it is the same offense as 1.k. He was sentenced to ten months probation in State #3 for the offense detailed in SOR 1.k. He had the probation transferred to State #1 and completed it. (Answer; Exhibit 4; TR 44-45)

SOR 1.m. Applicant was arrested in January 1998⁽³⁾ in State #1 for Theft of Check for an incident that happened in 1996; the charge was dismissed after he paid the amount due after he was arrested. He explained that a customer had given him a bad check which in turn led to one of his checks for \$599 being bad. (Answer; Exhibits 5, 8, 16; TR 31-32; TR 45-46; 51)

SOR 1.n. Applicant admits he was arrested in State #1 in April 1998 for disorderly conduct and paid a bond of \$147, but denies he was disorderly; he claims to have been upset when his mother was in an accident and not being treated properly by paramedics which led him to curse at a police officer. (Answer; Exhibits 5, 16; TR 29-31)

Applicant had no arrests from 1989 to 1998. (TR 45-47) Since his last arrest in 1998 Applicant changed his life. He began to focus on doing his job and using his expertise to support the military. (TR 37) Since he married his wife in 1996 and found his job, he began to change his life as he found a purpose. He has stepchildren and step-grandchildren as he married into a large family. He now is financially stable with a net worth of \$250,000. Since 1998 he has had no violations of law. (TR 47-48)

References

Applicant's direct supervisor, the site manager, reported that since 1996 Applicant has met customer needs superbly. When needed, Applicant has also expedited requests. He has done his work with minimal guidance and direction. (TR 38; Exhibit A)

The military chief affirmed that Applicant has supported his organization for four years. He assessed Applicant's integrity and honesty as being above reproach. Applicant has shown initiative and enthusiasm. The military chief assessed Applicant as having excellent technical expertise and being able to get "maximum production from the resources he was to work with. His dedication, loyalty and courage is unsurpassed, and he sets high standards for himself and constantly exceeds them." Applicant plays a vital support role for the organization. (TR 38; Exhibit A)

In February 2003 Applicant received a Certificate of Appreciation for his work from December 2002 to January 2003. (TR 38-39; Exhibit B) He also received a certificate of appreciation in December 2003. (TR 39; Exhibit C)

STATUTORY REQUIREMENT

A provision of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, 10 U.S.C. Section 986 ("The Smith Amendment"), mandates restrictions on the granting or renewal of security clearances. This statutory limitation was implemented within the Department of Defense by a June 7, 2001, memorandum, and within DOHA by Operating Instruction (OI) 64, issued on July 10, 2001. Statutory provision (1) disqualifies a person who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." DoD implementing guidance interpreted this language to include "person with convictions in both State and Federal courts, including UCMJ offenses with sentences imposed of more than one year, regardless of the amount of time actually served." The Smith Amendment establishes authority for the Secretary of Defense (or the Secretary of the military department concerned) to grant a waiver where meritorious cases exist. This authority may not be delegated. Neither the statute, nor DoD, defined "meritorious circumstances."

However, on October 9, 2004, portions of subsection (c)(1) of Section 986 of Title 10, United States Code were amended by Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 approved and adopted⁽⁴⁾ as follows:

(1) has been convicted in any court of the United States of a crime, 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.* [Emphasis supplied.]

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to consider in evaluating an individual's security eligibility. They are divided into conditions that could raise a security concern and may be disqualifying and conditions that could mitigate security concerns in deciding whether to grant or continue an individual's access to classified information. But the mere presence or absence of any given adjudication policy condition is not decisive. Based on a consideration of the evidence as a whole, I applied relevant Adjudication Guidelines as set forth below :

Guideline J- Criminal Conduct

***The Concern:* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.**

The responsibility for producing evidence initially falls on the Government to demonstrate that it is not clearly consistent with the national interest to grant or continue Applicant's access to classified information. Then the Applicant presents evidence to refute, explain, extenuate, or mitigate in order to overcome the doubts raised by the Government, and to demonstrate persuasively that it is clearly consistent with the national interest to grant or continue the clearance. Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's security clearance may be made only after an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination, the Administrative Judge may draw only those inferences and conclusions that have a reasonable and logical basis in the evidence of record.

CONCLUSIONS

Criminal Conduct

Applicant mitigated security concerns over his criminal conduct which initially raised disqualifying⁽⁵⁾

security concerns. In 1984 he was first arrested at age 19 in State #2 and he continued to have other multiple arrests and convictions in State #2 and later State #3 until 1989. Even after Applicant moved to State #1 he was arrested again in 1998 on two minor charges. While Applicant had several arrests where he was sentenced to serve more than one year, in fact, he never was required to serve a sentence of more than one year.

As originally enacted the Smith Amendment restricted the granting or renewal of security clearances with a conviction in both State and Federal courts with a sentence imposed of more than one year, regardless of time actually served. That provision changed when an amendment to 10 U.S.C. 986 was signed by the President on October 28, 2004 as part of the Defense Authorization Act: the first disqualifying provision of 10 U.S.C. 986 now reads: "(1) has been convicted in any court of the United States of a crime, 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."

His first arrest in 1984 for removing \$400 in tires from a vehicle led to him being given a sentence of one year of probation. This arrest led to repeated subsequent arrests when he failed to complete probation because of his unstable life-style in his 20's. In July 3, 1987, Applicant was charged with Violation of Probation and in December 1987 sentenced to one year and one day incarceration with 140 days credit for time served. Applicant attested he actually served 195 days incarcerated: "I spent six months, four and a half months of which I spent in the county jail waiting to go and then one and a half months in the actual prison system." This period of incarceration falls within the 2004 amendment as he served less than one year imprisonment. While Applicant pled guilty to Count II Forgery and was sentenced to one year and one day incarceration with 142 days credit for time served, he served that term concurrently with his previous sentence awarded in SOR 1.i., discussed above.

Applicant's second major arrest that led to security concerns was SOR 1.k. where Applicant admitted he was arrested again in January 1989 for Larceny over \$250 after he claimed to have found ski equipment in the dump when the ski company denied ever taking anything to the dump. After he pled guilty, he was sentenced to two consecutive sentences of one year in jail; however, he was granted probation after he served only three months. Again, this period of incarceration falls within the 2004 amendment as he served less than one year imprisonment.

In addition to establishing that the Smith prohibitions do not apply, Applicant demonstrated that he met conditions that mitigate⁽⁶⁾ security concerns over his multiple arrests. Significantly, he has been free of any criminal conduct since 1998, a seven year period. Thus, under MC 1, the criminal behavior was not recent.

To the extent financial instability led to his prior criminal conduct, he now is financially stable with a net worth of \$250,000. Thus, I conclude under MC 4 also that the factors leading to these repeat violations are not likely to recur. He now handles his responsibilities in a conscientious fashion according to the supervisors who praise his work performance, and character. Applicant has demonstrated his ability to lead a responsible and productive life for a

significant period after conviction or release from confinement which is strong evidence of rehabilitation.

Thus, under MC 6, there is clear evidence of successful rehabilitation. After he married in 1996 and found his job, he changed as his life had purpose. Applicant documented he successfully completed his probation for serious charges in two states and paid fines for the lesser offenses. Since 1998, Applicant demonstrated his rehabilitation and his ability to lead a responsible and productive life for a significant period after his release from confinement. He has a history of employment stability and a reputation for excellence as a productive member of his company work force. Applicant obtained a job with the defense contracting company in 1996 where he has continuously worked effectively and achieved recognition for his contributions. Both his civilian and military supervisors praise his superb work. The military chief attested that Applicant has excellent technical expertise and has demonstrated loyalty and courage. This supervisor assures that Applicant now sets high standards for himself and constantly exceeds his own standards. Applicant plays a vital support role effectively.

After also considering the Adjudicative Process factors and the Adjudicative Guidelines, I rule for Applicant on subparagraphs 1.a. through 1.o. incorporated under SOR Paragraph 1.

FORMAL FINDINGS

After reviewing the allegations of the SOR in the context of the Adjudicative Guidelines in Enclosure 2 and the factors set forth under the Adjudicative Process section, I make the following formal findings:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Subparagraph 1.g.: For Applicant

Subparagraph 1.h.: For Applicant

Subparagraph 1.i.: For Applicant

Subparagraph 1.j.: For Applicant

Subparagraph 1.k.: For Applicant

Subparagraph 1.l.: For Applicant

Subparagraph 1.m.: For Applicant

Subparagraph 1.n.: For Applicant

Subparagraph 1.o.: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Kathryn Moen Braeman

Administrative Judge

1. This procedure is required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992 (Directive), as amended by Change 4, April 20, 1999.

2. Applicant's denial that he was guilty of this crime is not material as he pled guilty and served his sentence. (TR 29) As the government argued, he is collaterally estopped from denying guilt for charges where he pled guilty. (TR 54)

3. The Warrant for Arrest in State #4 was issued in January 1986; the FBI reports this arrest as January 1998. (Exhibits 8,17)

4. The amendment to 10 U.S.C. 986 was signed by the President on October 28, 2004 as part of the Defense Authorization Act. The amendment to 10 U.S.C. 986 reads as follows:

Standards for Disqualification from Eligibility for Department of Defense Security Clearance:

(a) DISQUALIFIED PERSONS.-Subsection (c)(1) of section 986 of title 10, United States Code, is amended- (1) by

striking "and" and inserting ", was"; and (2) by inserting before the period at the end the following: ", and was incarcerated as a result of that sentence for not less than one year."

(b) WAIVER AUTHORITY.-Subsection (d) of such section is amended to read as follows:

"(d) WAIVER AUTHORITY.-In a meritorious case, an exception to the prohibition in subsection (a) may be authorized for a person described in paragraph (1) or (4) of subsection (c) if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President."

As a result, the first disqualifying provision of 10 U.S.C. 986 now reads:

"(1) has been convicted in any court of the United States of a crime, 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."

5. E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include: E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged; E2.A10.1.2 .2. A single serious crime or multiple lesser offenses.

6. E2.A10.1.3. Conditions that could mitigate security concerns include: E2.A10.1.3. 1. The criminal behavior was not recent; E2.A10.1.3. 2. The crime was an isolated incident; E2.A10.1.3.3. The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life; E2.A10.1.3. 4. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur; E2.A10.1.3. 5. Acquittal; E2.A10.1.3. 6. There is clear evidence of successful rehabilitation.