DATE: September 29, 2006

In Re:

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

Applicant for Security Clearance

CR Case No. 04-07308

DECISION OF ADMINISTRATIVE JUDGE

JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT

Nichole L. Noel, Esquire, Department Counsel

Caroline Jeffries, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was sentenced to three years imprisonment for non-support, and served 13 months in prison. The provisions of 10 U.S.C. § 986 require denial of his clearance. Clearance denied.

STATEMENT OF THE CASE

Applicant challenges the 23 November 2005 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of criminal conduct.[(1)] Applicant answered the SOR on 1 December 2005 requested a hearing. DOHA assigned the case to me 8 June 2006, and I convened a hearing 3 August 2006. DOHA received the transcript 11 August 2006.

RULINGS ON PROCEDURE

At hearing, Department Counsel moved to amend the SOR by striking the allegations at 1.a. and 1.n. I granted the motion. In addition, the record evidence demonstrates that the offenses alleged at 1.b. and 1.c. are the same offense. Accordingly, I find 1.c. for Applicant to avoid duplication of findings.

FINDINGS OF FACT

Applicant admitted the factual allegations of the SOR, except for the allegations at 1.a. and 1.n., which were stricken; accordingly, Applicant's admissions are incorporated as findings of fact. He is a 47-year-old senior electronic assembler employed by a defense contractor since November 2001. He has not previously held a clearance.

Between April 1981 and December 1993, Applicant was involved in 11 run-ins with law enforcement officials. The offenses run the gamut from simple marijuana possession, to bad check and other financial charges, to robbery with a

deadly weapon. Four of the alleged offenses were nolle prossed (1.e.) or dismissed (1.g., 1.k., and 1.m.) under circumstances that suggest that the incidents lack security significance, particularly where the most recent of those incidents is over 15 years old. Of the remaining seven offenses, four (1.h., 1.i., 1.j., and 1.l.) involved charges that were never formally resolved. Two drug offenses (1.d. and 1.f.) involved sentences of less than one year.

On the remaining offense (1.b.), Applicant was sentenced to three years imprisonment for non-support, and served approximately 13 months. Applicant attributes all these offenses to his occasional use of marijuana and heroin, his addiction to cocaine, and the financial fallout of losing jobs because of his problems with drugs.

Since being released from prison in 1995, Applicant kicked his drug habit and remained drug free, has been steadily employed, has paid off his child support arrearage, and has not engaged in any further criminal conduct.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive, the "whole person" concept. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative 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. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative Guideline is Guideline J (Criminal Conduct). Of particular importance to this case, the October 2004 amendments to Subsection (c)(1) of section 986 of Title 10, United States Code, require denying the clearance application of any applicant who "has been convicted in any court of the United States of a crime, [been] sentenced to imprisonment for a term exceeding one year, *and [been] incarcerated as a result of that sentence for not less than one year.* (Emphasis of change supplied)

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then 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.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interests as their 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.[(2)]

CONCLUSIONS

The government established a Guideline J case by demonstrating that Applicant had a pattern of criminal conduct between April 1981 and December 1993, was convicted of non-support, was sentenced to three years imprisonment, and ultimately served approximately 13 months. I would ordinarily find the conduct mitigated, both because of the passage of time without recurring criminal conduct and the application of the "whole person" concept. Although the alleged criminal offenses span over 12 years, the last significant conduct occurred in December 1993, nearly 13 years ago.[(3)] While the conduct over those 13 years cannot be considered isolated,[(4)] Applicant has addressed all the issues that led to his criminal conduct.[(5)] Finally, he has remained drug free and employed, and has paid his child support arrearages.[(6)]

Unfortunately, Applicant's criminal conduct cannot be mitigated under 10 U.S.C. § 986, even as amended. The statute requires that I not grant Applicant's clearance because he was sentenced to three years imprisonment and ultimately served approximately 13 months in prison.[(7)] Accordingly, I conclude Guideline J against Applicant.

Having denied Applicant's clearance solely because of the requirements of 10 U.S.C. § 986, DOHA procedural regulations require me to recommend--without explanation--whether this case should be considered for meritorious waiver.[8] The DOHA regulations implement the requirements of the Deputy Secretary of Defense Memorandum of 7 June 2001.[9] The Appeal Board has ruled that administrative judges lack the legal authority to make the required recommendation under the amendments to the waiver language in the statute.[10] The Appeal Board equates a recommendation for waiver by the Administrative Judge with a decision by the Secretary concerned to grant a waiver and it presumes that no appropriate guidance exists for processing waiver requests. Nevertheless, the amended waiver language[11] does not void--expressly or by implication--the requirements of the DOHA regulations, which are procedural only. Nor does it void the procedural requirements of the 7 June 2001 Memorandum.[12] The administrative judge is not the waiver authority under either version of 10 U.S.C. § 986, and the waiver authority is not bound in any fashion to follow the recommendation. Further, the required recommendation is made without explanation, and thus without reference to any factors, whether mandated by implementing guidance or instructions to the original statute or later mandated in compliance with the new statutory language. Consequently, any waiver recommendation made in compliance with the DOHA administrative regulations complies with the plain language of the amended waiver provision. Alternatively, any error in making the required recommendation is, at worst, harmless error. I conclude that I may note my recommendation as directed by the waiver authority without prejudicing Applicant's case. Recognizing my recommendation is not binding on the waiver authority, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

FORMAL FINDINGS

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

Subparagraph d: For Applicant

Subparagraph e: For Applicant

Subparagraph f: For Applicant

Subparagraph g: For Applicant

Subparagraph h: For Applicant

Subparagraph i: For Applicant

Subparagraph j: For Applicant

Subparagraph k: For Applicant

Subparagraph l: For Applicant

Subparagraph m: For Applicant

Subparagraph n: For Applicant

Subparagraph o: Against 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 denied.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended (Directive).

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

3. E2.A10.1.3.1. The criminal behavior was not recent;

4. E2.A10.1.3.2. The crime was an isolated incident.

5. E2.A10.1.3.4. . . .the factors leading to the violation are not likely to recur.

6. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

7. E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year (As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.).

8. E2.A10.1.3.7. Potentially disqualifying conditions 3. . ., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver (Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.).

9. The memorandum required "all addressees with the responsibility for granting or denying security clearances or other classified access in DoD" to submit "procedures for considering meritorious cases and for submitting them to the Secretary concerned." The memorandum further provided that were a clearance would be denied solely because of the statute, "the authority responsible for making that decision may recommend to the Secretary of Defense. . .that the case merits a waiver."

10. ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).

11. "In a meritorious case, . . . 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." 10 U.S.C. § 986(d) (2004).

12. The 7 June 2001 Memorandum would be void only where its terms directly conflict with the amended statutory language. For example, the Memorandum's policy guidance stated that the statute applied to crimes where an applicant had been sentenced to more than a year in prison regardless of the amount of time actually served. The amended statute specifies that the criminal provisions apply only to cases where an applicant is sentenced to more than a year in prison and serves more than a year in prison.