

DATE: November 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-01076

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's multiple convictions for drunk driving culminated with his guilty plea to the felony offense of operating a motor vehicle while a habitual offender. He was sentenced to two years in jail, which he served in a work-release program from February 1999 until his release in November 2000. He has not drunk alcohol since 1995, and the state reinstated his driver's license in about 2002. He also has financial problems stemming from his first marriage, which ended in divorce in 2001. He remarried in 2002, and the couple bought a home in 2004. Applicant mitigated the criminal conduct security concern based on passage of time without recurrence, but he failed to present sufficient evidence to mitigate the financial considerations security concern. In addition--based on serving more than one year in jail--he is disqualified from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986(c)(1). Clearance is denied.

STATEMENT OF THE CASE

Applicant is challenging the Defense Department's preliminary decision to deny or revoke his eligibility for a security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) on November 2, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its decision. The SOR--which is in essence the administrative complaint--alleges security concerns under Guideline J for criminal conduct and Guideline F for financial considerations. In addition, Guideline J includes an allegation that Applicant is disqualified from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986. Applicant's reply to the SOR was received by DOHA on November 30, 2005, and he requested a hearing.

The case was assigned to me August 16, 2006. A notice of hearing was issued September 20, 2006, scheduling the hearing for October 19, 2006. Applicant appeared without counsel and the hearing took place as scheduled. DOHA received the transcript October 31, 2006.

FINDINGS OF FACT

In reply to the SOR, Applicant admitted the criminal conduct allegations in subparagraphs 1.a - 1.f. Also, he admitted the financial considerations allegations in subparagraphs 2.a, 2.b, 2.c, 2.d, 2.g, and 2.i. His admissions are incorporated herein as findings of fact. In addition, after considering the record evidence as a whole, I make the following findings of fact.

1. Applicant is a 41-year-old man who is employed as a senior designer for a defense contractor. He has worked for his current employer since March 1988. Before his current job, Applicant served as a Sailor on active duty in the U.S. Navy from September 1983 until October 1987. He held the grade of petty officer second class (pay grade E-5) when he was honorably discharged.

2. While in the Navy, Applicant developed the habit or practice of drinking alcohol. This continued when he left the Navy and resulted in his first arrest in November 1987 for driving under the influence (DUI). As far as he recalls, he was convicted and served about 30 days in jail in a work-release program. His second DUI conviction was in 1989 and he served about 15 days in jail on the weekends. His third DUI conviction was in 1992 and he was sentenced to 90 days in jail in a work-release program. In addition, his driver's license was revoked.

3. Applicant married his first wife in June 1995. A few months later in November, Applicant was driving the family vehicle while his wife was a passenger. He was stopped by the police for a minor traffic violation and they discovered he was driving without a driver's license due to the previous revocation. Charged with the felony offense of habitual traffic offender, he was convicted of the misdemeanor offense of habitual offender.

4. In about May 1998, Applicant was again caught driving when he was stopped by the police for a traffic violation. He pleaded guilty to the felony offense of operating a motor vehicle-habitual offender. He was sentenced to two years in jail, which he served in a work-release program. He was in jail, participating in the work-release program, from February 1999 until his release sometime in November 2000, a period exceeding one year.

5. During this time, his first marriage was not going well. Indeed, Applicant describes this period as "my life was turned upside down." ⁽²⁾ Sometime in 1995, he decided to quit drinking alcohol. Nevertheless, turmoil at home continued and it was often over money and his wife's refusal to drive him where he needed to go. After his release from jail in November 2000, Applicant and his wife continued to live apart and were divorced in December 2001.

6. Also after his release from jail, Applicant decided to try to get his driver's license back. He and went through the state-mandated process to have his driving privileges restored and succeeded in 2002. His driver's license has since been renewed; it was issued in July 2005 and has an expiration date of July 2010. Since his driver's license was restored, Applicant has been stopped twice by the police for traffic violations. The first time was March 2003 when he was issued a summons or ticket for speeding and reckless driving. Rather than go to court, Applicant elected to pay a \$175 fine through the mail. The second time was sometime in 2004 when he was issued a summons or ticket for speeding. Again, he paid the fine through the mail.

7. Applicant has a history of financial problems stemming from his first marriage. All the matters alleged under Guideline F are matters that arose during the marriage, and each is discussed below.

8. In October 1995, a few months after his first marriage, Applicant filed a Chapter 13 bankruptcy petition. Although the terms are unknown, Applicant completed the Chapter 13 repayment plan and received a discharge.

9. After receiving the bankruptcy discharge, Applicant and his then wife continued on the same financial path, and he filed a second Chapter 13 bankruptcy petition in March 1999. Because he was in jail on his felony conviction, he did not attend the scheduled creditors' meeting. As a result, the bankruptcy court dismissed his Chapter 13 case in May 1999.

10. Applicant owes \$333 to a homeowners association for a judgment taken against him in about February 1999. He admits this debt and it has not been paid.

11. Applicant owes \$108 on a collection account stemming from a cable TV account. He admits this debt and it has not been paid.

12. Applicant owes about \$7,100 to a finance company for a judgment taken against him in about October 2001. The debt is a deficiency balance after an automobile repossession. Applicant denies this debt. He explained it was incurred when his first wife signed his name to loan papers. When a garnishment action was started against his salary, Applicant says he went to court and succeeded in stopping it. In support of his claim, he presented a notarized letter⁽³⁾ from his first wife wherein she explained that she was solely responsible for the debt. Other than this letter, Applicant presented no other paperwork in support of his claim. His most recent credit report,⁽⁴⁾ dated August 2006, lists this judgment based on information obtained from public records. Given the lack of documentary information showing this judgment was satisfied, vacated, or otherwise taken off the court's records, I presume the judgment is still valid and unpaid.

13. Applicant owes about \$507 on a collection account stemming from a telephone account. He denies this debt and explains this account originated when his first wife opened up an account for her sister when he was in jail. He provided no documentation on this account and it has not been paid.

14. Applicant owes about \$5,902 to a finance company for a charged-off bad debt. He admits this debt and explained it is a loan he cosigned with his first wife. He says he started making payments on it in December 2005, but he presented no paperwork on this debt.

15. Applicant owes about \$417 to a hospital for a judgment taken against him in about May 2001. He denies this debt and explains this debt was from a medical bill for his first wife. He says she is responsible. He presented no paperwork on this debt.

16. Applicant owes \$647 to a homeowners association for a judgment taken against him in about June 2001. He admits this debt and it has not been paid.

17. Applicant owes \$33 to a furniture store for a charged-off bad debt. He denies this debt and explained that he has done business with this store, but he paid all he owes. He presented no paperwork on this debt.

18. Applicant's annual salary is about \$46,000, and his wife's salary is about \$27,000. The couple bought a home in December 2004 for about \$250,000, and they are current with the mortgage payments, although the loan is not listed on his August 2006 credit account. Applicant does not have a car payment, but his wife is paying about \$350 monthly on a car loan. He has no investments other than a 401(k) retirement savings account through his employer. He did not know the balance of his 401(k) account.

19. To improve his credit, Applicant opened two revolving accounts in June 2006. One has a \$500 credit limit and the other a \$1,000 limit. Both accounts have small balances and are in good standing.⁽⁵⁾

20. During the last several years, Applicant has been extensively involved with a church. In addition to attending worship services, he participates in choir, children's church, and the companion-team program. He served as choir president for several years and is now the vice-president. Applicant's current wife is a member of the same church.

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 guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.⁽⁶⁾ A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽⁷⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

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.⁽⁸⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁹⁾ The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.⁽¹⁰⁾ An applicant is responsible for presenting witnesses and other evidence

to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽¹¹⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹²⁾

No one has a right to a security clearance.⁽¹³⁾ And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁴⁾ 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. The Criminal Conduct Security Concern

Under Guideline J,⁽¹⁵⁾ criminal conduct is a 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 sensitive information.

Here, based on the record evidence as a whole, a security concern is raised under Guideline J. The record evidence shows Applicant has a history or pattern of criminal conduct based on his DUI and other convictions. His criminal conduct culminated with his guilty plea to the felony offense of operating a motor vehicle while a habitual offender, which resulted in a sentence of two years in jail served on a work-release program. Given these facts and circumstances, both DC 1⁽¹⁶⁾ and DC 2⁽¹⁷⁾ apply against Applicant.

I reviewed the MCs under the guideline and conclude that Applicant receives credit in mitigation. In particular, his criminal behavior ended with his last conviction in 1999 and his release from jail in November 2000. Since then, although there have been a couple of traffic violations, there has been no other criminal conduct. Given the passage of time since November 2000, his criminal conduct is not recent within the meaning of the guideline.⁽¹⁸⁾ In addition, there is clear evidence of successful rehabilitation⁽¹⁹⁾ based on the following: (1) his abstinence from drinking alcohol for more than ten years; (2) the passage of time since his release from jail without further criminal activity; (3) his continuous employment with the same job for many years; (4) the restoration of his driver's license; and (5) his constructive community involvement with his church. Taken together, these matters, coupled with his stable relationship with his second wife, indicate that it is most unlikely that Applicant will return to his drinking-and-driving ways of the past. Also, it's noteworthy that none of Applicant's crimes involved violence, personal injury, or property damage or loss.

2. Applicability of 10 U.S.C. § 986

In addition to the normal security concern under Guideline J, the SOR alleges (in subparagraph 1.g) that Applicant is statutorily ineligible for a security clearance based on a conviction and sentence to two years in jail that resulted in him serving more than one year in jail in a work-release program. The statute at issue is 10 U.S.C. § 986, the so-called Smith Amendment.⁽²⁰⁾

In 2000, a federal law was enacted that prohibited the Defense Department from granting or continuing a security clearance for any applicant if that "person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year."⁽²¹⁾ The effect of the legislation was to disqualify a person with a conviction in state, federal, or military court with a sentence imposed of more than one year regardless of the amount of

time actually served, if any.

Congress amended certain parts of the law in 2004. As amended, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited or narrowed. The law now disqualifies an applicant if "the person 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."⁽²²⁾ The effect of the legislation is that an applicant who has been sentenced to more than one year, but instead served probation, or who served less than a year of incarceration, is not--as a matter of law--ineligible to hold a security clearance.

In September 2006, the Director, DOHA, issued a revised operating instruction (OI) for cases subject to 10 U.S.C. § 986.⁽²³⁾ In summary, the OI implements the waiver authority granted to the Director by the Under Secretary of Defense (Intelligence) in August 2006. Also, the OI addresses an administrative judge's responsibilities in handling a case. First, the judge is responsible for deciding if the law applies to the facts of the case.⁽²⁴⁾ And second:

If an Administrative Judge issues a decision denying or revoking a security clearance solely or in part as a result of 10 U.S.C. § 986, the Administrative Judge shall not opine whether a waiver of 10 U.S.C. § 986 is merited, nor recommend whether to consider the case for a waiver of 10 U.S.C. § 986. However, if an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. § 986, the decision shall state this fact and shall identify the specific subparagraph under 10 U.S.C. § 986(c) applicable to the case.⁽²⁵⁾

Accordingly, an administrative judge's role or authority is limited to determining if the law applies to an applicant. If it does, no waiver recommendation of any kind will be made.

Here, the government seeks to disqualify Applicant asserting he served more than one year in jail based on his habitual offender felony conviction. The record evidence is clear, and Applicant does not dispute, that he served more than one year in jail. Therefore, I conclude that 10 U.S.C. § 986(c)(1) applies here because the available, reliable information establishes that Applicant was incarcerated for more than one year, albeit serving his jail time in a work-release program. Accordingly, the Defense Department may not grant or renew a security clearance for Applicant.

3. The Financial Considerations Security Concern

Under Guideline F,⁽²⁶⁾ a security concern typically exists for two different types of situations--significant unpaid debts or unexplained affluence. An individual who is financially overextended is at risk of having to engage in illegal or unethical acts to generate funds to meet financial obligations. Similarly, an individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information.

Here, based on the record evidence as a whole, a security concern is raised under Guideline F. Applicant has a history of not meeting financial obligations as well as inability or unwillingness to pay just debts.⁽²⁷⁾ This is established by the two Chapter 13 bankruptcy cases, the unpaid judgments, the collection accounts, and the charged-off bad debts.

I reviewed the MCs under the guideline and conclude Applicant receives some credit in mitigation. It appears that all or nearly all some of his indebtedness is attributable to his troubled first marriage,⁽²⁸⁾ and I considered these matters. But the credit in mitigation is limited, however, because he has not taken any meaningful action since his divorce in 2001 to clear up these outstanding matters. Of the eight debts in the SOR, Applicant is making payments on one debt and he started doing so recently in December 2005. In addition, he has not presented sufficient evidence, including documentary evidence, to establish that he has made a good-faith effort to pay or otherwise resolve his delinquent debts. At best, his overall financial situation is a work in progress. Time will tell if Applicant will follow through and put his financial house in order.

4. The Whole-Person Concept

I considered the available information in light of the whole-person concept. Applicant is now a mature 41-year-old man

who has worked for the same employer for many years. It appears he has done a good job at turning his life around. He quit drinking years ago, he ended his troubled first marriage, he succeeded in having his driving privileges restored, he remarried and has a stable relationship with his wife, he's involved with his church, and he and his second wife are homeowners. These circumstances are a sign of responsibility and reliability, and they strongly suggest that his criminal conduct is a thing of the past unlikely to recur. Nevertheless, his financial problems from his first marriage remain unresolved and he has done little to address these past-due debts,⁽²⁹⁾ which are ongoing and likely to continue.⁽³⁰⁾

Considering the record evidence as a whole, I conclude Applicant failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the financial considerations security concern. Therefore, Guideline F is decided against Applicant. He did present sufficient evidence to mitigate the criminal conduct security concern under subparagraphs 1.a - 1.f of Guideline J. But based on serving more than one year in jail, he is disqualified from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986(c)(1). Therefore, I am required to decide Guideline J against Applicant. And he has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a - f: For Applicant

Subparagraph g: Against Applicant

SOR ¶ 2-Guideline F: Against Applicant

Subparagraphs a - j: 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 is denied.

Michael H. Leonard

Administrative Judge

1. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. R. 28.
3. Exhibit 11.
4. Exhibit A.
5. Exhibit A.
6. Directive, Item E2.2.1 (setting forth nine factors to consider under the whole-person concept).
7. Executive Order 10865, § 7.
8. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
9. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

10. Directive, Enclosure 3, Item E3.1.14.
11. Directive, Enclosure 3, Item E3.1.15.
12. Directive, Enclosure 3, Item E3.1.15.
13. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).
14. 484 U.S. at 531.
15. Directive, Enclosure 2, Attachment 10 (setting forth disqualifying and mitigating conditions).
16. Directive, Item E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
17. Directive, Item E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
18. Directive, Item E2.A10.1.3.1. The criminal behavior was not recent.
19. Directive, Item E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
20. For background information on the origin of this statutory prohibition, see Attorney Sheldon I. Cohen's publication *Loss of a Security Clearance Because of a Felony Conviction: The Effect of 10 U.S.C. § 986, the "Smith Amendment,"* which can be found at www.sheldoncohen.com/publications.
21. 10 U.S.C. § 986(c)(1) (2001).
22. 10 U.S.C. § 986(c)(1) (2004).
23. DOHA Operating Instruction No. 64, dated September 12, 2006.
24. OI 64, ¶ 2.e.
25. OI 64, ¶ 3.f.
26. Directive, Enclosure 2, Attachment 6 (setting forth disqualifying and mitigating conditions).
27. Directive, Item E2.A6.1.2.1. A history of not meeting financial obligations; Item E2.A6.1.2.3. Inability or unwillingness to satisfy debts.
28. Directive, Item 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).
29. Directive, Item E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes.
30. Directive, Item E2.2.1.9. The likelihood of continuation or recurrence.