

DATE: November 28, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-00906

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Emilio Jaksetic, Esq., Department Counsel

FOR APPLICANT

David P. Price, Esq.

SYNOPSIS

Applicant's criminal conduct culminated in April 1998 when he pleaded guilty to three felony offenses: (1) malicious wounding; (2) attempted malicious wounding; and (3) failure to appear on a felony charge. As a result, he served about 13 months in confinement. He completed supervised probation in December 2000, and he is required to be of good behavior until April 27, 2008. There is ample evidence of successful rehabilitation, to include passage of time without recurrence of criminal activity, extensive job training, a good employment record, and a stable personal life. But due to serving more than one year in prison, he is disqualified from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986(c)(1). In other words, this case is decided against Applicant based solely on 10 U.S.C. § 986. 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 June 26, 2006, 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. 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, the so-called Smith Amendment. Applicant's reply to the SOR was received by DOHA on July 14, 2006, and he requested a hearing.

The case was assigned to me August 9, 2006. A notice of hearing was issued September 20, 2006, scheduling the hearing for October 18, 2006. Applicant appeared with counsel and the hearing took place as scheduled. DOHA received the transcript November 2, 2006.

FINDINGS OF FACT

In reply to the SOR, Applicant admitted the criminal conduct allegations in subparagraphs 1.a - 1.c. He denied the Smith Amendment allegation in subparagraph 1.d, because he served less than one year in confinement for each of his three offenses for a total of about 13 or 14 months. 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 45-year-old man who is employed as a senior programmer for a communications technology company engaged in defense contracting. He has worked for this company since March 2004, and he earns an annual salary of about \$84,000. He is seeking to obtain a secret level security clearance.
2. Applicant has a history of mostly minor criminal conduct. His record includes the following misdemeanor convictions: (1) possession of alcohol in 1979; (2) trespassing in 1979; (3) refuse to pay toll fare in 1979; (4) threatening bodily harm in 1982; (5) disorderly conduct in 1982; (6) possession of drug paraphernalia in 1984; and (7) driving under the influence in 1996. In addition to his misdemeanor convictions, in 1998 Applicant pleaded guilty to the felony offenses of malicious wounding, attempted malicious wounding, and failure to appear on a felony charge. As a result, he served about 13 months in confinement. The circumstances giving rise to his felony convictions are discussed below.
3. On or about August 15, 1996, Applicant was driving his auto on a neighborhood street when he was forced to stop and wait behind another vehicle that was stopped talking to a pedestrian. After waiting a while, Applicant asked the vehicle to move, which led to an exchange of angry words. The pedestrian's husband arrived on the scene and had some angry or threatening words for Applicant. When the husband was about to reach in the car, Applicant drove away, turned his car around, and used it to chase the husband around a bit. The husband slipped or tripped and fell resulting in biting and cutting his tongue. Applicant left the scene, ran his errand, and returned to find the police who arrested him. He was held in jail for a few weeks until he made bail. Assigned a public defender to represent him, Applicant was told he was facing 30 years for the charges. Although he knew charges were pending, he decided to leave Virginia and move to Missouri where he had found a programmer job. During his time in Missouri, Applicant started to clean up his life. He worked hard at his job, stopped drinking and smoking, and was otherwise a law-abiding citizen. Applicant found he liked the lifestyle and it allowed him to save money.
4. In March 1998, Applicant arrived home from work and found police waiting for him. He was placed under arrest and returned to Virginia where he was now facing additional charges based on his failure to appear for the initial charges. With the assistance of retained counsel, Applicant entered into a plea agreement on or about April 27, 1998, when he agreed to plead guilty to the felony charges of malicious wounding, attempted malicious wounding, and failure to appear. The state court accepted the plea agreement and sentenced Applicant to: (1) five years for the malicious wounding charge; (2) three years for the attempted malicious wounding charge; and (3) two years for the failure to appear charge. In other words, the court imposed a sentence of ten years of confinement. Also, the court suspended all but six months of confinement on each charge resulting in a total time to serve of 18 months.
5. Applicant was confined in prison until his release on or about May 26, 1999, when he immediately started serving supervised probation, per his plea agreement. The state terminated his supervised probation in December 2000. He is required, per his plea agreement, to be of good behavior until April 27, 2008.
6. Three months after his release from prison, Applicant started working as a programmer. He had this job until April 2001 when he accepted a position as a developer with another company. He worked there until he started his current position of senior programmer in March 2004. In conjunction with this position, Applicant was required to apply for a security clearance. He completed two security-clearance applications in March and April 2004 (Exhibits 1 and 2). In doing so, he disclosed his felony convictions as required.
7. Applicant has made extra efforts to improve his knowledge, skills, and abilities on the job (Exhibits D, E, and J). For example, he has received three certificates of excellence for completing the requirements to be recognized as a Microsoft Certified Solution Developer, a Microsoft Certified Professional, and a Microsoft Certified Application Developer (Exhibit D).
8. Applicant is well regarded at work for his knowledge, skills, and abilities on the job (Exhibits B, C, and J). Numerous people, on paper or in person, have vouched for Applicant's good employment record and suitability for a security clearance. For example, a former Army officer and now a government employee (and a customer of Applicant) believes

Applicant is a very trustworthy person. He notes that Applicant does an excellent job, cares about his work, and is a very customer-focused individual. Another example is a retired Army colonel who has held a security clearance for about 40 years. He is Applicant's senior-level manager, he hired Applicant, and he believes Applicant is one of his best programmers. He singles out Applicant's technical expertise, work ethic (describing him as a bulldog), and pride in his work as Applicant's best attributes.

9. Applicant has made great strides in improving his personal life. He married in June 2003, and the couple have two children, a 25-month-old son and an 8-month-old son. His wife describes Applicant as a very good husband and father. In this regard, she points out Applicant spends a lot of time teaching their eldest son. Also, she points out Applicant has encouraged and supported her efforts to improve herself and continue her formal education. His wife, who is now a stay-at-home mother, has studied accountancy in the past, and she has the main responsibility for managing their three rental properties. Applicant estimates the market value of their rental properties at about \$700,000. Likewise, Applicant and his wife own their own home with an estimated market value of about \$300,000. All four properties have mortgages. Besides the real estate, Applicant has money in investment accounts and bank accounts.

10. Applicant believes he now enjoys a stable lifestyle, and it appears he is enjoying being a husband and father. Concerning his stability, he credits two factors: (1) his job, where he actively tries to be the best; and (2) his wife. Applicant has a valid driver's licence. Other than a couple of minor traffic offenses, Applicant has not engaged in any further criminal activity since his release from confinement more than six years ago.

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.⁽²⁾ 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.⁽³⁾ 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.⁽⁴⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁵⁾ The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.⁽⁶⁾ An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽⁷⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance.⁽⁹⁾ 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."⁽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. The Criminal Conduct Security Concern

Under Guideline J,⁽¹¹⁾ 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 of criminal conduct. His criminal conduct culminated with his guilty plea to the three felony offenses, which resulted in Applicant serving about 13 months in prison. Given these facts and circumstances, both DC 1 [\(12\)](#) and DC 2 [\(13\)](#) apply against Applicant.

I reviewed the MCs under the guideline and conclude that Applicant receives substantial credit in mitigation. In particular, the initial incident occurred in 1996, he accepted responsibility for his crimes by pleading guilty in 1998, he was released from prison in 1999, and he completed supervised probation in December 2000. Given the passage of time since December 2000, his criminal conduct is not recent within the meaning of the guideline. [\(14\)](#) In addition, there is clear evidence of successful rehabilitation [\(15\)](#) based on the following: (1) the passage of time since his release from prison without further criminal activity; (2) his continuous employment starting a few months after his release from prison; (3) his extensive efforts to improve his knowledge, skills, and abilities on the job; (4) his good employment record; (5) his financial responsibility as evidenced by the real estate holdings and other investments; and (6) his wholly changed and now stable personal life. Taken together, these circumstances are strong evidence of reform and rehabilitation.

2. Applicability of 10 U.S.C. § 986

In addition to the typical security concern under Guideline J, the SOR alleges (in subparagraph 1.d) that Applicant is statutorily ineligible for a security clearance based on a conviction and sentence that resulted in him serving more than one year in prison. The statute at issue is 10 U.S.C. § 986, the so-called Smith Amendment. [\(16\)](#)

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." [\(17\)](#) 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 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." [\(18\)](#) 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 ineligible to hold a security clearance.

The law also authorizes a waiver in a meritorious case if there are mitigating factors. A waiver of the prohibition is permitted for two of the four types of cases covered by the Smith Amendment: (1) where, as here, a person has been convicted and sentenced to imprisonment for more than one year; and (2) where a person has been discharged or dismissed from the Armed Forces under dishonorable conditions. [\(19\)](#)

In September 2006, the Director, DOHA, issued a revised operating instruction (OI) for cases subject to 10 U.S.C. § 986. [\(20\)](#) 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. [\(21\)](#) 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 [\(22\)](#)

the specific subparagraph under 10 U.S.C. § 986(c) applicable to the case.

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 prison based on his three felony convictions in 1998, which resulted in him serving about 13 months in prison. Applicant contends he did not serve more than one year in prison, as the court sentenced him to six months for each offense. Nowhere in the court's order (Exhibit I) is there an indication that Applicant was to serve concurrent sentences running simultaneously--i.e., the time served in prison is credited against two or more sentences. If it had, Applicant's argument would be well taken. But the record evidence shows the court sentenced Applicant to serve six months on each charge for a cumulative sentence of 18 months (Exhibit I). 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.⁽²³⁾ Accordingly, the Defense Department may not grant or renew a security clearance for Applicant without a waiver.

3. The Whole-Person Concept

I have also considered the available information in light of the whole-person concept. Applicant is now a 45-year-old man who is married with children. He enjoys gainful employment in a lucrative field. He has done a good job turning his life around.⁽²⁴⁾ He served his time in prison, he completed supervised probation, and he has been continuously employed in his field since a few months after his release from prison. Also, he has a stable relationship with his wife, he has two young sons, and he and his wife own a home and three rental properties. Indeed, based on observing Applicant and his wife, it appears that she has been a blessing (a beneficial thing for which one is grateful) in his life. These circumstances, taken together, are a sign of maturity, responsibility, and reliability. Also, they suggest that his history of criminal conduct is a thing of the past unlikely to recur.⁽²⁵⁾ Although Applicant is required to be of good behavior until April 27, 2008, his track record of good behavior since his release from prison in 1999 shows this requirement is a formality at this point and it does not change the substance of the case. Considering all the facts and circumstances, the indicators suggest that Applicant will continue to be a law-abiding citizen.

Viewing the record evidence as a whole, I conclude Applicant presented sufficient evidence to explain, extenuate, or mitigate the criminal conduct security concern under subparagraphs 1.a - 1.c of the SOR. But based on serving more than one year in prison, 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--as a matter of law--to decide this case against Applicant. In other words, this case is decided against Applicant based solely on the Smith Amendment.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline J: Against Applicant

Subparagraphs a - c: For Applicant

Subparagraph d: 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. Directive, Item E2.2.1 (setting forth nine factors to consider under the whole-person concept).

3. Executive Order 10865, § 7.

4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

6. Directive, Enclosure 3, Item E3.1.14.

7. Directive, Enclosure 3, Item E3.1.15.

8. Directive, Enclosure 3, Item E3.1.15.

9. *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).

10. 484 U.S. at 531.

11. Directive, Enclosure 2, Attachment 10 (setting forth disqualifying and mitigating conditions).

12. Directive, Item E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

13. Directive, Item E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

14. Directive, Item E2.A10.1.3.1. The criminal behavior was not recent.

15. Directive, Item E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

16. 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.

17. 10 U.S.C. § 986(c)(1) (2001).

18. 10 U.S.C. § 986(c)(1) (2004).

19. 10 U.S.C. § 986(d) (2004).

20. DOHA Operating Instruction No. 64, dated September 12, 2006.

21. OI 64, ¶ 2.e.

22. OI 64, ¶ 3.f.

23. See ISCR Case No. 02-21060 (August 9, 2004) (Appeal Board decided that an administrative judge did not err by deciding applicant's case fell under 10 U.S.C. § 986 where applicant was sentenced to three one-year sentences, to run consecutively, instead of being sentenced to a single term of imprisonment exceeding one year).

24. Directive, Item E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes.

25. Directive, Item E2.2.1.9. The likelihood of continuation or recurrence.