

DATE: May 6, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 00-0025

## **DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant's 1983 convictions for armed and unarmed robbery, and subsequent sentence to more than one-year imprisonment requires revocation of his clearance under 10 U.S.C. §986 notwithstanding that Applicant's demonstrated rehabilitation warranted granting his clearance in 1990 without a due process procedure. Sexual misconduct from 1997--that resulted in revocation of his clearance in a 1998-1999 due process proceeding--lacked current security significance, both because of DOHA's granting Applicant's reapplication request in 2000 and because subsequent reinvestigation revealed Applicant's continued recovery from the condition that lead to the 1998 revocation. Clearance denied.

### **STATEMENT OF THE CASE**

On 15 October 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding<sup>(1)</sup> that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 12 November 2002, Applicant answered the SOR and requested an administrative decision on the record. On 12 February 2003, Applicant responded to the Government's File of Relevant Material (FORM)--issued 19 December 2002; the record in this case closed 28 February 2003, the day Department Counsel indicated no objection to the response. The case was assigned to me on 6 March 2003, and received by me the same day, to determine whether clearance should be granted, continued, denied, or revoked.

### **FINDINGS OF FACT**

Applicant--a 51-year-old employee of a defense contractor--seeks reinstatement of the clearance he had between 1990-1998 but lost as a result of a DOHA decision in 1998. He admits the allegations of the SOR: accordingly, his admissions are incorporated as findings of fact.

In August 1982, (when he was 30 years old) Applicant was charged with three counts of armed robbery. He pleaded not

guilty to one count and the charge was nolle prosequi. He pleaded guilty to one count of armed robbery and was sentenced to four to twenty-five years in prison. On the remaining count, he pleaded guilty to unarmed robbery and was sentenced to three to fifteen years in prison. He was paroled after serving approximately 18 months in prison. His sentence to more than one year in prison now requires that he not be granted a clearance.

After his release from prison in September 1984, Applicant turned his life around. He went to school and obtained undergraduate and master's degrees in mechanical engineering. He became a respected member of his community. He applied for, and obtained, his security clearance in November 1990 without going through a due process procedure.

In 1998, Applicant's clearance was subject to periodic reinvestigation. However, his background investigation revealed allegations of misconduct relating to misuse of his company's computer system, sexual misconduct, and personal conduct. He was issued a SOR in May 1998, had his case heard in August 1998 (Item 17), and received an unfavorable decision in October 1998 (Item 16). The Administrative Judge concluded that Applicant had not engaged in misuse of his company's computer system, but found his sexual misconduct and personal conduct disqualifying mostly because while Applicant had entered counseling for his sexual issues--and was making progress on them--insufficient time had passed to conclude that the misconduct was behind him. The Appeal Board affirmed the Administrative Judge in March 1999 (Item 15).

In accordance with Paragraph E.3.1.37 of the Directive, Applicant was barred from reapplying for his clearance for one year. When he reapplied for his clearance in January 2000, he was required by Paragraph E.3.1.38 to submit to the Director, DOHA "a copy of any adverse clearance decision together with evidence that **circumstances or conditions previously found against the applicant have been rectified or sufficiently mitigated to warrant reconsideration.**" The decision to accept a reapplication is entrusted to the Director's sole discretion; a decision to deny the reapplication is final and precludes an applicant from reapplying for another year (Paragraph E.3.1.39, E.3.1.40). If the reapplication is accepted, the case is reinvestigated, subject to application of the Directive.

Applicant demonstrated to the Director's satisfaction that the circumstances or conditions previously found against the applicant have been rectified or sufficiently mitigated to warrant reconsideration and his reapplication was accepted in March 2000 (Item 5).

This proceeding results from that reapplication. Specifically, he demonstrated that he and his wife continued to make progress in therapy addressing the sexual issues that lead to the 1998 misconduct. The background investigation uncovered no evidence of continuing sexual misconduct or personal conduct of the kind found disqualifying in 1998, and no other new adverse information. However, by the time the background investigation had been completed, Congress had enacted 10 U.S.C. §986, which required denial of any application for security clearance involving an applicant who had been sentenced to more than a year in prison.

Applicant's response to the FORM establishes that there has been no recurrence of the m 1998 misconduct, and that Applicant continues to progress in his therapy, further lessening the likelihood of recurrence of the 1998 misconduct.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section 6.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*, under an assessment of the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and

trustworthiness.

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.

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. <sup>(2)</sup>

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

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. <sup>(3)</sup>

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, §986 [the Smith Amendment], precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001.

### **PERSONAL CONDUCT (GUIDELINE E)**

E2A5.1.1. **The Concern:** Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

E2.A5.1.3. Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

### **CONCLUSIONS**

The government has established its case under Guideline J, which cannot be mitigated under 10 U.S.C. §986. Although the 1982 criminal conduct was otherwise mitigated in 1990--under adjudicative criteria essentially the same as currently in effect--Applicant's sentence to more than a year in prison now requires that his clearance be denied. The statute requires that I not renew Applicant's clearance because he was sentenced to four to twenty-five years imprisonment, notwithstanding that he served substantially less prison time, completed his probation without incident, and had his civil rights restored shortly after completing his probation. Applicant's conduct was mitigated and he was granted a clearance in 1990 without a due process proceeding under guidelines essentially the same as the current directive. That prior adjudication does not bind me in this case. However, the only fact that has changed since the 1990 adjudication is the

passage of another nearly 14 years without any criminal conduct. Accordingly, I would grant Applicant's clearance were I free to do so under the existing disqualifying and mitigating factors.

Unfortunately for Applicant, the law has changed since his 1990 adjudication and requires me to revoke his clearance. However, because I do so solely because of the requirements of 10 U.S.C. §986, I make the following statement as required under O.I. 64: I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

The government has not established its case under Guideline E. Although the government established the facts of the 1998 misconduct, it did not establish that the misconduct retained its security significance.

In accepting Applicant's reapplication, the Director specifically found that Applicant met his burden of producing evidence to show the past misconduct rectified or sufficiently mitigated to warrant reopening the case. While that finding would not be conclusive if the ensuing background investigation uncovered evidence of continued misconduct or new evidence of misconduct not previously adjudicated, that is not the case here. The government re-alleged the 1998 misconduct without any suggestion or evidence that the misconduct had continued beyond the date found by the first Administrative Judge. The Administrative Judge who found against Applicant in 1998 did so because insufficient time had elapsed to demonstrate that the misconduct was a thing of the past. Applicant's reapplication demonstrated to the Director's satisfaction that the misconduct had stopped, and the background investigation confirmed that fact. Now Applicant has demonstrated yet again that the misconduct stopped well before the 1998 hearing. I resolve Guideline E. for Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: Against the Applicant

Paragraph 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.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated 2 January 1992--amended by Change 3 dated 16 February 1996 and by Change 4 dated 20 April 1999 (Directive).
2. As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.
3. Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.