

KEYWORD: Personal Conduct; Criminal Conduct

DIGEST: Applicant's 1977 conviction and sentence to more than one year in prison requires a denial of his clearance request under 10 USC 986. Clearance denied.

CASENO: 01-07981.h1

DATE: 05/08/2002

DATE: May 8, 2002

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 01-07981

**DECISION OF ADMINISTRATIVE JUDGE**

**JOSEPH TESTAN**

**APPEARANCES**

## **FOR GOVERNMENT**

Matthew E. Malone, Department Counsel

## **FOR APPLICANT**

*Pro Se*

## **STATEMENT OF THE CASE**

On November 1, 2001, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to applicant which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on November 30, 2001. The case was assigned to the undersigned on January 4, 2002. A Notice of Hearing was issued on March 22, 2002, and the hearing was held on April 16, 2002. Following the hearing, applicant submitted eleven pages of documents. These documents, along with Department Counsel's two page letter indicating that he has no objection to applicant's submission, were marked as Exhibit A and admitted into evidence. The transcript was received on April 29, 2002.

## **FINDINGS OF FACT**

Applicant is fifty-four years of age. He served in the US military, including two years in Vietnam.

In his response to the SOR, applicant admitted that he was arrested, charged, convicted and/or sentenced as alleged in SOR Paragraphs 1a through 1i. These allegations are therefore incorporated by reference as Findings of Fact.

After returning from military service in Vietnam in 1970, applicant became employed with a major corporation. He left that job in 1971 and moved to a different city where he joined some friends he had from the military. After working for the city fire department for about nine months he quit the job. He quit because he felt his "partying" would eventually lead to his firing anyway. Applicant then met a woman who taught him the finer points of criminal life. The two of them made a career of stealing merchandise and fencing the stolen goods (Exhibit 2). Applicant's criminal career continued until early 1977 when he was convicted of a theft-related crime and was sentenced to "not less than one year nor more than ten years" in the state prison (Exhibit 4). Applicant actually served about two years and was released on parole sometime in 1979 (Exhibit 3).

While he was serving his time in prison, he "had a lot of time to ponder where (he) had been and where (he) wanted to go." He decided that when he was released, he would start "with a clean slate and start on a new path" (Exhibit 2). In 1980, he was hired by a Federal agency under a program that sought to rehabilitate Vietnam veterans who were having difficulty readjusting to society. At the time he was hired, applicant's criminal record was known to the Federal agency. Applicant has been continuously employed by the Federal Government since 1980, and Exhibit A establishes that he has performed well at various jobs he has held during the past twenty-one years. Applicant also met and married his wife shortly after being released from prison. His steady employment and marriage resulted in a complete lifestyle change for applicant. Instead of spending time at bars associating with criminals, he began attending church with his wife, which resulted in applicant acquiring a new set of friends. He has not been arrested since before being sent to prison in 1977 (TR at 48-49).

The Government alleges that applicant intentionally falsified material facts about his criminal record in response to Question 21 on the Questionnaire for National Security Positions (QNSP) that he executed on August 24, 1999 (Exhibit 1). Question 21 appeared on the QNSP as follows: "Have you ever been charged with or convicted of any felony offense?" In response to this question, applicant stated "yes," and then disclosed the theft-related conviction for which he served two years in prison. He did not, however, disclose any of his other criminal history. Applicant testified that he "did not deliberately try to mislead the Government" in response to Question 21 (TR at 29). He further testified, in essence, that he reported the theft-related conviction because it was a felony conviction, but did not report any of the other incidents because the charges were either dismissed or he was convicted of a misdemeanor. In his mind, if the original felony charges were either dismissed or reduced to a misdemeanor, they did not have to be disclosed in response to Question 21 (TR at 32-33). Although applicant's understanding of what he was required to disclose in response to Question 21 was incorrect, after considering the evidence presented, particularly the fact that applicant had to know at the time he completed the QNSP that his entire criminal record was known to the Federal Government, and the fact that he disclosed the most damaging part of his criminal history (in terms of recency and severity) on the QNSP, I find that applicant did not intentionally falsify the QNSP.

## POLICIES

Enclosure 2 of the Directive sets forth Guidelines (divided into conditions that could raise security concerns and conditions that could mitigate security concerns) which must be followed by the Administrative Judge. Based on the foregoing Findings of Fact, the following Guidelines are applicable:

### **Criminal Conduct**

#### Disqualifying Conditions

1. Criminal conduct.
2. A single serious crime or multiple lesser offenses.

#### Mitigating Conditions

1. The criminal behavior was not recent.
4. The factors leading to the violation are not likely to recur.
5. There is clear evidence of successful rehabilitation.

In addition to the formal Guidelines discussed above, the Enclosure 2 of the Directive provides that each decision should take into consideration the following factors:

The nature, extent and seriousness of the conduct;

The circumstances surrounding the conduct, to include knowledgeable participation;

The frequency and recency of the conduct;

The individual's age and maturity at the time of the conduct;

The voluntariness of participation;

The presence or absence of rehabilitation and other pertinent behavioral changes;

The motivation for the conduct;

The potential for pressure, coercion, exploitation, or duress; and

The likelihood of continuation or recurrence.

## CONCLUSIONS

The evidence establishes that after returning from serving in Vietnam in 1970, applicant tried, but failed, in his attempt to become a productive member of society. From 1971 to 1977, he earned a living as a criminal, which led to numerous arrests and convictions. His criminal lifestyle finally caught up with him in 1977 when he found himself facing a theft-related charge that he could not "beat." Applicant was convicted of the charge and was sentenced to a prison term of "not less than one year nor more than ten years." He served approximately two years before being paroled.

While serving his time, applicant made the decision to turn his life around. After he was released from prison, applicant was given a second chance by the Federal Government when he was hired by an agency that knew about his criminal background. Applicant made the most of this rare opportunity, as evidenced by his twenty plus years of commendable service to the Government. His personal priorities also changed after being released from prison. Instead of renewing his association with the criminal element, he met and married a woman who he began accompanying to church, which resulted in him acquiring a new set of friends. Other than two traffic tickets, he has had no adverse contact with law enforcement since 1977, approximately twenty-five years ago.

In view of applicant's successful transformation from criminal to productive member of society, as evidenced by his twenty year marriage and twenty plus years of honorable Federal service, I conclude that, under the "whole person" concept discussed in the Directive,<sup>(1)</sup> applicant has mitigated the allegations under the Criminal Conduct Guideline. Nevertheless, in view of his 1977 conviction, sentence, and the time he actually served, he is ineligible for a security clearance under 10 U.S.C. 986.

Because I have concluded that applicant's criminal conduct is mitigated under the Guidelines set forth in DoD Directive 5220.6, this is a case where my decision to deny or revoke is solely a result of 10 U.S.C. 986. In such a case, the Administrative Judge is required to state, *without explanation*, whether he recommends further consideration of the case for a waiver of 10 U.S.C. 986.<sup>(2)</sup> Pursuant to this requirement, I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

## FORMAL FINDINGS

### PARAGRAPH 1: AGAINST 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.

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Joseph Testan

Administrative Judge

1. Directive, Section E2.2.1., "The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination."
2. DOHA Operating Instruction dated July 10, 2001, paragraph 3e.