

DATE: September 9, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 02-12410

**DECISION OF ADMINISTRATIVE JUDGE**

**MATTHEW E. MALONE**

**APPEARANCES**

**FOR GOVERNMENT**

Juan Rivera, Esquire, Department Counsel

**FOR APPLICANT**

Elizabeth Newman, Esquire

**SYNOPSIS**

Applicant was convicted in June 1973 of two counts of embezzlement for having used his position as a clerk tasked with issuing food stamps to steal approximately \$4,600.00. He was sentenced to 18 months in jail. On reconsideration in August 1973, he was released from jail after 43 days and he was continued on supervised probation for two years. In October 1973, while on probation, Applicant was arrested for felony armed robbery, a charge that was dismissed before trial for lack of evidence. Because he received a jail sentence in excess of one year, 10 U.S.C. §986 applies to disqualify Applicant from receiving a security clearance. Clearance is denied. However, Applicant has lived without incident as a solid, law-abiding citizen for the past 30 years. I recommend further consideration of his case for meritorious waiver.

**STATEMENT OF THE CASE**

On January 23, 2003 the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns under Guideline J (Criminal Conduct). The SOR informed Applicant that, based on information available to the Government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant or continue Applicant's security clearance.<sup>(1)</sup>

On February 15, 2003, Applicant answered the SOR (Answer) and requested a hearing. The case was assigned to me on April 10, 2003. On April 16, 2003, DOHA issued a Notice of Hearing setting this case to be heard on May 13, 2003. Thereafter, Applicant requested a continuance to which Department Counsel did not object. I granted Applicant's request and re-scheduled the hearing for May 22, 2003. All parties appeared as scheduled and the government presented six exhibits (GE 1 through 6). Applicant relied on 17 exhibits (AE A through Q), which were admitted without objection, on his own testimony and on that of three witnesses. DOHA received the transcript (Tr) on June 2, 2003.

**FINDINGS OF FACT**

After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact:

Applicant is 51-years-old. When he was 18-years-old, he went to work for the state food stamp program as a clerk assigned to distribute food stamps. In the summer of 1972, a state audit of the food stamp program showed approximately \$1,800.00 in cash and food stamps unaccounted for during a two month period. When asked about the audit discrepancies, Applicant admitted to having embezzled more than \$3,000.00 from the food stamp program over the previous 10 months. Subsequently, a full audit for the prior year showed a cash and food stamp shortfall of \$4,646.25. <sup>(2)</sup>

On November 2, 1972, he was arrested and charged with 10 violations of five sections of the state criminal code. Specifically, he was charged with felony embezzlement of state funds (two counts), grand larceny (two counts), grand receiving (two counts), petty larceny (two counts), and petty receiving (two counts). On May 2, 1973, he pled guilty to two counts of embezzlement and was sentenced to incarceration for 18 months, the last 15 months of his sentence to be suspended on payment of restitution. He was released after less than two months, but was still subject to two years supervised probation. <sup>(3)</sup>

Applicant joined the Army in November 1972<sup>(4)</sup> - after he was arrested, but before he was convicted and sentenced. When the Army became aware Applicant had to return home to stand trial, it initiated discharge proceedings. In August 1973, after he was released from jail, he petitioned the Army to allow him to remain in the Army if he could convince the court to release him from jail. On August 23, 1973, the Army decided to retain Applicant on active duty where he remained for the next 26 years.<sup>(5)</sup> The Army's decision also had the effect of terminating his supervised probation if he remained in the service for the two year term of probation originally imposed.<sup>(6)</sup>

In October 1973, Applicant was arrested and charged with armed robbery. He had been riding in a car with three other men when they stopped at a gas station. Two of the men went inside while Applicant and the fourth person stayed in the car. The first two men assaulted and robbed a gas station employee. All four were arrested a short time later and all were charged with armed robbery. Bail was set at \$20,000.00, which Applicant could not afford to pay. Thus, he remained in jail for five months while awaiting trial, but the charges against him were dropped when one of the other defendants, who had originally implicated Applicant as an accomplice, changed his story during trial.<sup>(7)</sup> Applicant credibly insists he did not know beforehand that the other men in the car intended to rob the gas station.<sup>(8)</sup>

Applicant went on to have a solid military career as evidenced by the many letters of appreciation and commendation submitted.<sup>(9)</sup> After leaving the military in 1999, Applicant went to work for his current employer, a defense contractor whose contracts with DoD require Applicant to hold a clearance. Applicant has held a secret clearance since at least August 1992.<sup>(10)</sup> He is highly regarded by friends and co-workers who testified in his behalf for his integrity, reliability, and truthfulness. Testimony from the government manager where he works, a retired Navy admiral, and the pastor at Applicant's church, all of whom have known Applicant for several years and have frequent, close contact with him, revealed the following: Applicant is a dedicated family man who has immersed himself in his work and in good works through his church. Applicant spends several hours each day outside work in service to other families and individuals. He was unanimously approved as a deacon at his church on the first ballot. His performance at work is characterized by thorough professionalism and reliability. All of the persons who testified for Applicant were impressive in their bearing and sincerity. Further, each witness had some knowledge of Applicant's past misconduct, but remained enthusiastic in recommending Applicant for a position of trust.<sup>(11)</sup>

### **PROCEDURAL ISSUES**

Applicant challenges, through oral argument at hearing and in a post-hearing brief, the applicability of 10 U.S.C. §986 (hereinafter §986). Applicant asserts that, because subsequent state court action in the form of reconsideration reduced his jail sentence to a term less than one year, §986 should not apply.<sup>(12)</sup> I disagree with Applicant and have concluded, based on a review of the evidence, consideration of Applicant's argument at hearing, and post-hearing briefs submitted by Appellant and Department Counsel, and pursuant to Appeal Board precedence on this issue, that §986 applies in this case.

Applicant was sentenced in June 1973 to 18 months in jail with 15 months suspended once he met certain court-imposed

conditions. Applicant essentially argues that the sentence reconsideration by the state court negates the original 18-month sentence, thus removing Applicant's sentence from the ambit of §986. The Appeal Board has issued two decisions<sup>(13)</sup> addressing the effect on §986 application of subsequent state court action modifying an initial sentence of more than a year in jail. Both times, the Board has held that, absent specific Congressional intent to the contrary, state action may not supercede the requirements of a federal statute such as §986. Further, the presence of relief albeit limited through the meritorious waiver provisions of §986 indicates that Congress considered including exceptions to the statute. They evidently declined to include as a statutory exception the fairly common occurrence in state courts of sentence reconsideration and other post-sentencing actions.

In support of his position, Applicant has offered an analogy between the DOHA decision-making process and that of another federal agency faced with similar questions of sentence modification and the legal effects thereof.<sup>(14)</sup> As appealing as that analogy is, I decline to use it as justification for expanding my authority in these matters. DOHA Administrative Judges only have the authority to manage and decide cases according to the requirements of DoD Directive 5220.6 as implemented by applicable DOHA Operating Instructions, as interpreted by the DOHA Appeal Board, and as clarified by the Office of the Secretary of Defense or his authorized designees. Absent guidance or Appeal Board precedence to the contrary, that another agency may address similar questions of law in a different manner has no bearing on this case.

As factual matter, Applicant asserts the state court "re-sentenced" Applicant; that is, it did not suspend Applicant's 18-month sentence, as alleged, but vacated the original sentence and substituted a new, less severe sentence which would not otherwise invoke §986. He urges that AE A and not GE 6 is the best source of information about what the court did. However, a review of both documents clearly shows the court suspended the remaining period of incarceration in less than the three months originally stated conditioned on Applicant's payment of full restitution, and placed Applicant on two years supervised probation. Nothing in any of the evidence admitted in this case shows the court at any time relinquished its control over Applicant's freedom should he fail to abide by the court's terms.

In short, this case is virtually indistinguishable from cases where all or part of a jail sentence in excess of one year is suspended on condition of probation, alcohol counseling, restitution or any number of other terms imposed by the court. The court's intent and ability to incarcerate the defendant are still in play should he not meet the court's requirements. The fact this or any other Applicant does not actually serve jail time of more than one year is irrelevant by terms of the statute and implementing guidance. All that occurred here was that the Applicant was successful in accelerating his release from incarceration. The original sentence contemplated release after three months on payment of restitution. The court was clearly ready to jail Applicant for more than a year had he been unable to make restitution. On reconsideration, Applicant was released after less than two months. The remaining terms of sentence were virtually unchanged.

Based on the foregoing and on the facts as discussed below, I conclude that §986 applies and have applied its requirements accordingly.

### **POLICIES**

The Directive sets forth adjudicative guidelines<sup>(15)</sup> to be considered in evaluating an Applicant's suitability for access to classified information. The Administrative Judge must take into account both disqualifying and mitigating conditions under each adjudicative issue applicable to the facts and circumstances of each case. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable 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. Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct) is the relevant adjudicative guideline to be applied here.

### **BURDEN OF PROOF**

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>(16)</sup> for an

Applicant to either receive or continue to have access to classified information. The Government bears the initial burden of proving, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If the government meets its burden it establishes a *prima facie* case that it is not clearly consistent with the national interest for the Applicant to have access to classified information. The burden then shifts to the Applicant to 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. <sup>(17)</sup> A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. The Government, therefore, has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her 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. <sup>(18)</sup>

## CONCLUSIONS

**Guideline J (Criminal Conduct).** The security concern under Guideline J is that a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. <sup>(19)</sup> The government has established through its documentary evidence and through Applicant's admissions that Applicant was engaged in criminal conduct in 1972 and, through unintentional association with persons he did not know very well, in 1973. Disqualifying Condition (DC) 1 <sup>(20)</sup> and DC 2 <sup>(21)</sup> apply. By contrast, Mitigating Condition (MC) 1 <sup>(22)</sup> applies due to the passage of more than 30 years since his last criminal act. Because he was an unwitting party to the 1973 armed robbery, I conclude he did not engage in further criminal conduct after 1972. Therefore, MC 2 <sup>(23)</sup> also applies as his criminal conduct consists of a single event. Finally, and most importantly, this record thoroughly supports application of MC 6. <sup>(24)</sup> Applicant's outstanding military career, the fact he has lived his entire adult life as a law-abiding citizen who has held a clearance since 1992 without incident, and is respected and admired both at work and in his community speaks volumes about his suitability for access to classified information.

I have carefully weighed all of the evidence in this case, and I have applied the aforementioned disqualifying and mitigating conditions as listed under each applicable adjudicative guideline. I have also considered the whole person concept as contemplated by the Directive in Section 6.3, and as called for by a fair and commonsense assessment of the record before me as required by Directive Section E2.2.3. But for the application of §986, I would grant Applicant's request for clearance. Clearance is denied.

## FORMAL FINDINGS

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Criminal Conduct (Guideline J): AGAINST THE APPLICANT

Subparagraph 1.a: Against the Applicant

Subparagraph 1.b: 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 the Applicant. I recommend further consideration of this case for meritorious waiver of §986.

Matthew E. Malone

Administrative Judge

1. Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

2. GE 5.

3. GE 2, GE 5, GE 6.
4. GE 1.
5. AE B through G.
6. GE 6; AE A.
7. GE 2, GE 3, GE 4. Per GE 4, each of the defendants' cases were severed so that they received separate trials.
8. Tr., p. 63 - 64, 66 - 67.
9. AE H through Q.
10. GE 1.
11. Tr., p. 71 - 94.
12. Applicant's Post-hearing Brief, dated May 30, 2003.
13. ISCR Case No. 01-00407 (September 18, 2002) and ISCR Case No. 01-06337 (September 24, 2002).
14. Id.
15. Directive, Enclosure 2.
16. *See Department of the Navy v. Egan*, 484 U.S. 518 (1988).
17. *See Egan*, 484 U.S. at 528, 531.
18. *See Egan*; Directive E2.2.2.
19. Directive, E2.A10.1.1.
20. E2.A10.1.2.1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged;
21. E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
22. E2.A10.1.3.1. The criminal behavior was not recent;
23. E2.A10.1.3.2. The crime was an isolated incident;
24. E2.A10.1.3.6. There is clear evidence of successful rehabilitation.