

DATE: April 19, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21060

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Esq., Department Counsel

Kathryn Antigone Trowbridge, Esq., Department Counsel

FOR APPLICANT

James S. Maxwell, Esq.

SYNOPSIS

Applicant was found guilty and sentenced to one year in jail for each of two counts of simple sexual battery and one year in jail for indecent exposure, with the sentences to be served consecutively. The jail time was suspended and Applicant was sentenced to four years of supervised probation. Absent a waiver authorized by the Secretary of Defense, 10 U.S.C. § 986 prohibits, by operation of law, the granting of a security clearance to an applicant who has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. 10 U.S.C. § 986 applies to the terms of Applicant's sentence. Clearance is denied. Waiver is not recommended.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On May 23, 2003, under the applicable Executive Order ⁽¹⁾ and Department of Defense Directive, ⁽²⁾ DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive and additional Departmental guidance implementing the provisions of 10 U.S.C. § 986. Applicant answered the SOR in writing on June 20, 2003 and elected to have a hearing before an administrative judge. The case was assigned to me on September 10, 2003. On October 9, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. At the close of the hearing, I granted an extension of time to enable the parties to brief the issue of whether 10 U.S.C. § 986 applied to the three criminal sentences, each for one year, ordered to be served consecutively by Applicant. All briefs were filed by November 13, 2003. DOHA received the transcript (Tr.) of the proceeding on October 16, 2003.

FINDINGS OF FACT

The SOR contains two allegations. Subparagraph 1.a of the SOR alleges disqualifying conduct under Guideline J,

Criminal Conduct. Subparagraph 1.b. of the SOR alleges that Applicant's criminal conduct under Guideline J disqualifies him from a security clearance under 10 U.S.C. § 986. In his answer and supplemental answer to the SOR Applicant admitted being arrested and charged with the felony crimes of statutory rape and sodomy. He acknowledged entering into a plea agreement under which he pled guilty to the charges and the court deferred entry of a conviction or finding of guilt for 18 months contingent upon his participation in a rehabilitation program for child sex abusers and psychotherapy. After 18 months, Applicant demonstrated participation in the rehabilitation instructions of the court, and the charges were reduced to misdemeanor indecent exposure and sexual battery. Applicant denied the provisions of 10 U.S.C. § 986 disqualified him from having a security clearance granted or renewed. Applicant's admissions are incorporated as findings of fact.

At the time of his hearing, Applicant was 57 years old and employed as a systems analyst by a government contractor. From 1966 to 1987, he had served on active duty in the U.S. Navy. On his security clearance application (SF-86), he indicated he been married and divorced twice and was separated from his third wife. At his hearing he stated he had four children, although they were not listed on his SF-86.

Applicant was first married in 1970, at the age of 24. In 1976 he had marital difficulties which led to divorce. In 1976, Applicant has an emotional breakdown and attempted suicide by overdosing on the tranquilizer Valium. Subsequently, he was hospitalized for two weeks, given psychiatric care, and discharged. Applicant married again in 1977. His wife had two daughters from a previous marriage who resided with her and Applicant. In 1979, at the age of 33, during a time when Applicant was experiencing difficulties in his second marriage, he began having sexual relations with his older step-daughter, who was 15 at the time. Applicant continued this conduct with his step-daughter for three years. He also had sexual contact with the younger step-daughter once during this time.

Applicant's second wife filed for divorce, charging him with adultery. His conduct with his step-daughters was reported to the police and he was arrested and charged with one felony count of statutory rape and three felony counts of sodomy. The charges resulted in two indictments. On the first indictment, one count of sodomy was amended to the misdemeanor charge of contributing to the delinquency of a minor. Applicant pled guilty to the amended indictment and was sentenced to 90 days of confinement, to be served on weekends, and paid court costs. On the second indictment, Applicant pled guilty to one felony charge of statutory rape and two felony counts of sodomy. Pursuant to a plea agreement, the judge heard the case without a jury and with stipulated evidence, but withheld a finding of guilt. Applicant was ordered to attend a rehabilitation program for sex abusers of children, to receive psychological treatment, and to abide by conditions set by the responsible social services agency. Eighteen months later, the court convicted Applicant of one count of misdemeanor indecent exposure and two counts of misdemeanor sexual battery. Each of the three counts carried a sentence of 12 months. The court ordered the sentences to run consecutively with each other. Then the court suspended the execution of the sentences and placed Applicant on supervised probation for a period of four years. In 1989, the coordinator of the sexual abuse rehabilitation program Applicant was assigned to by the court stated Applicant had not reached a level of self-awareness regarding his abusive conduct that was expected of individuals in the program. She also stated she saw no reason to limit Applicant from security positions unless they would bring him into contact with children. (Ex. 12.) Applicant successfully completed probation and has not been charged with any other crimes or off-duty misconduct.

Applicant informed his military supervisors of his arrests, convictions, and sentences. During his time in military service, he held secret and top secret level clearances. In 1985, while on supervised probation, he was granted top secret clearance. In 1986, the top secret clearance was reduced administratively to secret clearance for reasons unrelated to his off-duty conduct. Applicant's performance assessments for his work as an employee of a government contractor indicate that in 2001 and 2002 he performed his duties at a very high level of competence. His supervisors particularly praised his communication skills and his ability to establish positive working relationships with others.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to

United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Criminal Conduct and 10 U.S.C. § 986

In addition to the policy guidelines discussed above, adjudicators must follow additional guidance on the granting or renewal of security clearances mandated by more recent legislative action. By Memorandum dated June 7, 2001, the Deputy Secretary of Defense promulgated policy guidance for implementing Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Chapter 49 of Title 10 of the United States Code by adding a new section, enumerated 10 U.S.C. § 986. 10 U.S.C. § 986(1) provides, in pertinent part, that a person is disqualified from being granted a security clearance if "[t]he person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." The Deputy Secretary's memorandum specifies that the provisions of 10 U.S.C. § 986(1) apply "to any DoD [Department of Defense] officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in inactive status, who is under consideration for the issuance or continuation of eligibility for access to classified information."

Attachment 1 to the Deputy Secretary's Memorandum of June 7, 2001, provides general guidance for DoD adjudicators charged with making determinations of an individual's suitability for a security clearance under the provisions of 10 U.S.C. § 986. That guidance states that the disqualification from eligibility for security clearance under 10 U.S.C. § 986 applies to persons with convictions in State courts with "sentences imposed of more than one year, regardless of the amount of time actually served."

By memorandum dated July 10, 2001, the Director of DOHA promulgated an Operating Instruction (OI) implementing the Deputy Secretary's memorandum of June 7, 2001. Pursuant to section 2.b., Responsibilities, of the OI, "Department Counsel, in coordination with DOHA security specialists, are responsible for the final legal determination as to whether the SOR should cite 10 U.S.C. 986." The OI assigns to administrative judges the responsibility "for initial resolution as to whether or not 10 U.S.C. 986 applies to the facts of the case." *See* OI, Responsibilities, section 2.e.

Attached to the Deputy Secretary's Memorandum of June 7, 2001, are revised adjudication guidelines, originally promulgated by the Special Assistant to the President for National Security Affairs in March 1997, pursuant to Executive Order 12968, which pertain to criminal conduct. The Deputy Secretary's memorandum states that these

adjudication guidelines have been revised to reflect the provisions of 10 U.S.C. § 986.

The Government's concern under revised Guideline J is that a history or pattern of criminal activity creates doubt about a person's judgement, reliability and trustworthiness. Revised Guideline J conditions that could raise a security concern and may be disqualifying include:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- b. A single serious crime or multiple lesser offenses;
- c. Conviction in a Federal or State court, including a court-martial of a crime and a sentence of imprisonment for a term exceeding one year;

Conditions that could mitigate revised Guideline J security concerns include:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- f. There is clear evidence of successful rehabilitation.
- g. Potentially disqualifying condition... c. ... 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.

CONCLUSIONS

Guideline J-Criminal Conduct; 10 U.S.C. § 986.

In the SOR, DOHA alleged Applicant had been arrested and convicted of criminal acts (¶ 1.a) and had been sentenced by a state court to a prison term of more than one year for those criminal acts. (¶ 1.b.). An applicant with a history or pattern of criminal behavior raises serious doubts about his judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

Footnote 1 in revised adjudication Guideline J reads: "Under the provisions of 10 U.S.C. § 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition." An Administrative Judge may recommend that an applicant's case be considered or not considered for a grant of Secretarial waiver only if the Judge's decision to deny or revoke a clearance is based solely on the provisions of 10 U.S.C. § 986.

The Government established through Applicant's admissions that he had committed the criminal acts alleged in subparagraph 1.a. of the SOR. The allegation in SOR subparagraph 1.a. relates to Applicant's arrest in March 1982.

Applicant's admissions as to the allegations in subparagraph 1.a. of the SOR disqualified him, under subparagraphs **a**, **b** and **c** of revised Guideline J, from receiving a security clearance pursuant to the provisions of 10 U.S.C. § 986, unless he could establish, through mitigation, a meritorious case for waiver of the statute's provisions, pursuant to subparagraph **g** of revised Guideline J.

Applicant established, under subparagraph **a** of the mitigating conditions in revised Guideline J, that his criminal behavior ended in 1982, approximately 22 years ago, and thus was not recent. Applicant also admitted that at the time of his arrest, he had been engaging in criminal conduct with his minor step-daughters over a period of three years, and thus the behavior he was convicted of was not an isolated incident, but an on-going pattern of criminal behavior, making mitigating condition **b** under revised Guideline J inapplicable. The record shows that Applicant was able to overcome and set aside his criminal behavior. He demonstrates rehabilitation, thus making mitigating condition **f** of revised

Guideline J applicable. Accordingly, the allegations in subparagraph 1.a. of the SOR are concluded for the Applicant.

Applicant received three sentences of one year each, which the court ordered to be served consecutively, one after the other rather than at the same time, and then suspended, ordering Applicant to serve four years of supervised probation. Applicant argues that he has never been convicted in any court of the United States of a crime and sentenced to a term exceeding one year within the meaning of 10 U.S.C. § 986. Applicant further argues: "Three separate convictions of three separate crimes, each resulting in a sentence of one year, though ordered to run consecutive to each other, do not amount to a conviction of a crime resulting in a sentence exceeding one year. The wording of § 986(c)(1) does not require or allow the tacking of separate sentences for separate crimes." (Applicant's supplemental answer to SOR, at 1.)

Individual DOHA administrative judges have found that 10 U.S.C. § 986 applies when an applicant has been convicted of crimes that carry consecutive sentences, when aggregated, of more than a year. *See, e.g.*, ISCR Case No. 01- 26057 (Feb. 26, 2003)⁽⁴⁾ and ISCR Case No. 2-02487 (Nov. 25, 2003)⁽⁵⁾. These cases have no precedential value, and, to my knowledge, DOHA's Appeal Board has not ruled on this issue. At my request the parties briefed the issue of the applicability of 10 U.S.C. § 986 to criminal sentences of a year or less, which when ordered to be served consecutively, accrue to a year or more, as specified by the statute.

Applicant argued that 10 U.S.C. § 986 was enacted to eliminate security risks posed by convicted felons and it was not the intent of Congress to deny security clearance eligibility to applicants who had been convicted of misdemeanors carrying sentences of a year or less. Applicant admitted his speculation was not supported by the scant legislative history of 10 U.S.C. § 986.

Department Counsel argued that 10 U.S.C. § 986 contains no language limiting its applicability to felons and therefore any criminal sentenced to a prison term exceeding one year falls within the scope of the statute. Department Counsel also asserted that a court's power to impose a consecutive or concurrent sentence derives from the common law and cited *Ex parte Lamar*, 274 F. 160, 171-174 (2nd Cir. 1921), *aff'd*, *Lamar v. United States*, 260 U.S. 711 (1923).

A defendant has a right to expect accuracy in the statement of the terms of his sentence. The sentence rendered by the State court on January 3, 1984 was accurately rendered and unambiguous: "Upon an indictment for Statutory Rape and Sodomy (2). . . [Applicant], age 37. . . hereby is sentenced to confinement in the jail of this City for the term of 12 months on each [of two]count[s] of simple sexual battery, and the court further sentences the defendant to 12 months in the City jail for indecent exposure. Said sentences to run consecutively with each other." (Ex. 13-c) At common law, cumulative terms of imprisonment, if definite and certain, are valid where the accused is convicted of separate and distinct crimes in different indictments or in different counts of the same indictment. *Ex parte Lamar, supra*, at 170, citing *Morgan v. Devine*, 237 U.S. 632 (1915).

Nothing in the procedural guidance issued for the processing of cases subject to 10 U.S.C. § 986 suggests that sentences should be read other than they were pronounced by the sentencing court. Pursuant to the policy guidelines implementing 10 U.S.C. § 986, I am unable to find for Applicant on the allegation in SOR subparagraph 1.b. I find the evidence presented by Applicant under Mitigating Conditions **a** and **f** of revised Guideline J persuasive in mitigating his convictions for criminal conduct nearly 22 years ago. However, notwithstanding persuasive evidence of mitigation under revised Guideline J, the provisions of 10 U.S.C. § 986 prohibit the Department of Defense from granting or renewing a security clearance for a person who has "been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year."

Thus, the allegation in subparagraph 1.b. of the SOR is concluded against the Applicant.

FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

DECISION

In light of all of 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. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. The revised adjudication guideline for Guideline J (Criminal Conduct) incorporates DoD policy relating to 10 U.S.C. § 986. The modified Guideline identifies disqualifying and mitigating conduct by alphabetical letters and not by the Enclosure 2 code of alphabetical letters and numbers found in DoD Directive 5220.6. The policy promulgated in the revised adjudication guideline changes DoD 5200.2-R, and, according to the July 7, 2001, memorandum of the Deputy Secretary of Defense, will be codified in the next revision of the regulation.
4. Applicant was found guilty of four counts of check fraud and sentenced to one year in jail for each of the four counts, for a total of 48 months of incarceration.
5. Applicant was convicted of three counts of receiving stolen property and sentenced to serve consecutively one year apiece on each of two of the counts and six months on the third count.