

DATE: November 2, 2005

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 02-22603

DECISION ON REMAND
ADMINISTRATIVE JUDGE
RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esquire

FOR APPLICANT

Pro Se

SYNOPSIS

The Applicant has three felony convictions, which occurred in 1977 and 1978, when he was still a teenager. The provisions of 10 U.S.C. 986, as amended on October 9, 2004, still apply as to his second incarceration, which exceeded one year. Furthermore, I can not ignore his continued, post incarceration, illegal conduct, which ended with his addiction to crack cocaine in 1994. This is not meritorious conduct that merits waiver consideration; and as such, I do not recommend further consideration of this case for waiver of 10 U.S.C. 986. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On October 17, 2003, 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 the Applicant, which detailed the 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 the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked. Applicant filed an Answer to the SOR on November 16, 2003.

The case was initially received by the undersigned on January 27, 2004. A notice of hearing was issued on February 12, 2004, setting this case for hearing on arch 5, 2004; but pursuant to a request for a continuance from the Applicant, the case was continued to and heard on April 2, 2004. The Government submitted documentary evidence. Testimony was taken from the Applicant who also submitted documentary evidence, and called two witness to testify on his behalf. The transcript was received on April 21, 2004. The issues raised here are whether the Applicant's past criminal conduct militates against the granting of a security clearance. [The Applicant admits the underlying factual bases of the allegations.]

An unfavorable Decision was issued on April 26, 2004. The Applicant appealed my original Decision, and on September 3, 2004, the Appeal Board remanded that Decision with the following instruction:

The Judge must issue a new decision - consistent with the requirements of Directive, Additional Procedural Guidance, Items E3.1.35 and E3.1.25 - that: (a) includes findings as to whether Applicant demonstrated reform and rehabilitation of his drug use; and (b) explains how the Judge's findings fit into his analysis of Applicant's security eligibility. If the Judge's remand decision is an unfavorable one, the Judge must explicitly state whether it is based solely on the application of 10 U.S.C. §986. If the Judge makes an unfavorable decision based solely on the application of 10 U.S.C. §986, then the Judge must comply with the requirements of Paragraph 3.e. of DOHA Operating Instruction. However, if the Judge makes an unfavorable decision not based solely on application of 10 U.S.C. §986, then the Judge must explicitly state what else besides the application of 10 U.S.C. §986 forms the basis for his unfavorable decision.

On September 17, 2004, I issued a Decision on Remand, based solely on the application of 10 U.S.C. 986, and denied the Applicant a security clearance.

On October 9, 2004, 10 U.S.C. Section 986 was amended precluding the granting of a security clearance when an Applicant "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**" (Emphasis of amendment supplied).

On August 9, 2005, the Appeal Board again remanded my Decision "to allow the parties an opportunity - consistent with basic principles of due process - to present their views on the effect of Section 1062 [the October 9, 2004, amendment] on Applicant's case."

On August 16, 2005, Department Counsel responded to the Appeal Board's second Remand Order, *sua sponte*, averring, in part, the following:

Applicant was incarcerated from the date of his arrest in October of 1978 through April 1980, when he received parole. Thus, Applicant is barred from possessing a security clearance by Section 1062 of the Defense Authorization Act for Fiscal Year 2005, amending 10 U.S.C. Section 986 (Appellate Exhibit (AppX) A).

On October 12, 2005, I issued another Order on Remand to the parties pursuant to the Appeal Board's second Remand Order. On October 27, 2005, the Applicant responded, averring, in part, the following: "Unfortunately, the second conviction does still place my case under the guidance of 10 U.S.C. Section 986" (AppX B).

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 45 years of age, and is employed by a defense contractor that seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact.

Guideline J - Criminal Conduct

The Applicant was the product of a broken marriage, which resulted in his being raised in a number of foster homes and also by an uncle (Transcript (TR) at page 24 line 3 to page 28 line 24). He had little guidance as a child (TR at page 39 lines 3~20).

1.a.~1.c. and 1.f. In September of 1977, the Applicant was arrested and subsequently charged with Burglary (Government Exhibit (GX) F). One of his accomplices broke into a restaurant at about 1:00 a.m. in the morning and took \$200 in cash (TR at page 28 line 25 to page 30 line 16). He pled guilty to a charge of Storehouse Breaking (*id*). A week later, in September of 1977, the Applicant was involved in a second incident where he and an accomplice stole a car, broke into two houses, and, when he was arrested, marijuana was found in his possession (TR at page 30 line 17 to page 33 line 3). He was subsequently convicted of Daytime House Breaking (*id*). He was 18 years of age at the time of these two incidents (*ibid*). As a result of these two convictions, the Applicant was sentenced to six years of

incarceration, four and a half years of which were suspended (TR at page 52 line 22 to page 53 line 19, and GXs D and E).

1.d.~1.f. A month after being released from incarceration, in October of 1978, the Applicant was arrested and subsequently charged with Burglary (GX F). He and an accomplice took \$43,000 worth of costume jewelry from a store at about 2:00 a.m. (TR at page 33 line 4 to page 38 line 20, and at page 55 line 5 to page 59 line 3). He was 19 years of age at the time of this incident (*id*). As a result, he had violated his probation, and was found guilty of Storehouse Breaking (*ibid*, and GX C). He was sentenced to ten years of incarceration, eight and a half years of which were suspended (*id*).

Although the Applicant has had no further arrests since his release from incarceration in December of 1979, he soon thereafter began to use illegal substances, and this unlawful conduct continued for the next 14 years (TR at page 61 line 16 to page 64 line 18). From 1980 to 1986, he smoked marijuana a "couple [of] times a week" (TR at page 62 lines 4~11). He continued this marijuana use, on and off, through the remainder of the 1980s through the early 1990s, until he became addicted to crack cocaine in 1994 (TR at page 62 line 15 to page 64 line 18).

The SOR does not allege Drug Involvement, Guideline H, and the SOR has not been amended to include Drug Involvement. The Applicant has not used any illegal substances since June of 1994; and as such, with the passage of time he has demonstrated reform and rehabilitation as to his past drug use (*id*).

Mitigation

Two of the Applicant's friends, one of whom is a Sergeant First Class on active duty with the Army, think most highly of the Applicant and would recommend him for a position of trust (TR at page 10 line 24 to page 15 line 6, and at page 16 line 19 to page 19 line 13). Two other friends, by way of written statements, further aver to the Applicant's trustworthiness (Applicant's Exhibits 38 and 39). Finally, the Applicant's pastor notes that since 1995, the Applicant's life has been exemplary, and she recommends him for a position of trust without reservation (Applicant's Exhibit 45).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, as set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

- a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.
- b. Frequency and recency of the conduct.
- c. Age and maturity of the applicant.
- d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.
- e. Absence or presence of rehabilitation.
- f. Probability that circumstances or conduct will continue or recur in the future."

Under the provisions of 10 U.S.C. 986, as amended, ". . . a person who has been convicted in a Federal or State court . . . and sentenced to imprisonment for a term exceeding one year, **and was incarcerated as a result of that sentence for not less than one year**, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense . . . may authorize a waiver of this provision" (Emphasis supplied).

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence that are speculative

or conjectural in nature.

The Government must make out a case under Guideline J (Criminal Conduct); which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations at all times and in all places. If an applicant has demonstrated a lack of respect for the law, there then exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

The Applicant has three felony convictions that occurred about 25 years ago, when he was a teenager. Because his second incarceration exceeded one year, a fact candidly admitted by the Applicant, the third disqualifying condition is applicable; i.e., "[c]onviction in a Federal or State court . . . of a crime and sentence to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year." However, his criminal conduct did not cease with his last arrest for burglary in 1978, but he continued to use illegal substances for another 14 years after his release from incarceration. His illegal drug involvement culminated in 1994 with addiction to crack cocaine.

Under the provisions of 10 U.S.C. 986, ". . . a person who has been convicted in a Federal or State court . . . and sentenced to imprisonment for a term exceeding one year, and was incarcerated as a result of that sentence for not less than one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense . . . may authorize a waiver of this provision." The Applicant's continued, post incarceration, criminal conduct is clearly not meritorious conduct; and as such, this case does not merit the waiver provision of the federal statute. Under the provisions of 10 U.S.C. 986, as amended, mitigation is not shown, and Guideline J is found against the Applicant.

Considering all the evidence, the Applicant has not rebutted the Government's case regarding his criminal conduct. The Applicant has thus not met the mitigating conditions of Guideline J, and of Section F.3. of the Directive. Accordingly, he has not met his ultimate burden of persuasion under Guideline J.

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT

- a. Against the Applicant.
- b. Against the Applicant.
- c. Against the Applicant.
- d. Against the Applicant.
- e. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light 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 the Applicant. This Decision is based solely on the application of 10 U.S.C. 986, as amended, and I do not recommend further consideration of this case for waiver of 10 U.S.C. 986.

Richard A. Cefola

Administrative Judge