KEYWORD: Criminal Conduct

DIGEST: In January 1989, Applicant was convicted of theft by unauthorized taking or transfer, a Class B felony. He was sentenced to three years imprisonment, all but one year and ten days, suspended, with the final 12 months served in an intensive supervision program under the custody of the Department of Corrections. 10 U.S.C. § 986 as amended does not apply where Applicant was not incarcerated for one year or more, but criminal conduct concerns persist given the seriousness of the offense. An October 1997 driving under the influence offense is mitigated by the absence of any recurrence of abusive drinking. Clearance is denied.

CASENO: 03-08336.h1

DATE: 01/17/2006

DATE: January 17, 2006

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 03-08336

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro se

SYNOPSIS

In January 1989, Applicant was convicted of theft by unauthorized taking or transfer, a Class B felony. He was sentenced to three years imprisonment, all but one year and ten days, suspended, with the final 12 months served in an intensive supervision program under the custody of the Department of Corrections. 10 U.S.C. § 986 as amended does not apply where Applicant was not incarcerated for one year or more, but criminal conduct concerns persist given the seriousness of the offense. An October 1997 driving under the influence offense is mitigated by the absence of any recurrence of abusive drinking. Clearance is denied.

STATEMENT OF THE CASE

On February 20, 2004, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to the 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 the Applicant. (1) DOHA recommended referral to an administrative judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked. The SOR was based on criminal conduct (Guideline J), including statutory disqualification under 10 U.S.C. § 986.

Applicant responded to the SOR on March 18, 2004, and requested a hearing before an administrative judge. The case was assigned to me on November 18, 2004. On December 10, 2004, I scheduled a hearing for January 18, 2005. On December 14, 2004, the Director, DOHA, placed a moratorium on all cases involving paragraph (1) or (4) of subsection (c) of 10 U.S.C. § 986, as that statute had been amended on October 28, 2004. Since that statute was involved in the instant case, I cancelled the hearing on January 13, 2005. With the lifting of the moratorium in August 2005, I issued a new notice on September 14, 2005, scheduling the hearing for September 23, 2005.

At the hearing, five government exhibits and one Applicant exhibit were admitted into evidence, and Applicant testified. The transcript, received on October 21, 2005, was missing salient portions of Applicant's direct and cross examinations. An accurate transcription of the September 23, 2005 hearing was received on December 22, 2005.

At the hearing, the government also presented federal case law to assist me in resolving whether Applicant's criminal sentence for his 1989 theft by unauthorized taking falls within the statutory disqualification of 10 U.S.C. § 986, as amended. The record was held open for two weeks for Applicant to submit written closing argument as well as documentation concerning the extent of his actual incarceration for the felony theft. On October 7, 2005, Applicant submitted written closing, which was forwarded to Department Counsel for review and comment by October 28, 2003. The government filed no argument in rebuttal.

RULING ON PROCEDURE

Under the provisions of 10 U.S.C. § 986 then in effect, the government issued an SOR to Applicant on February 20, 2004, alleging in part that Applicant is statutorily disqualified from having a security clearance granted or renewed absent a meritorious waiver because he had been sentenced to a prison term of three years. In October 2004, 10 U.S.C. § 986 was amended to apply to persons sentenced to a term of imprisonment of more than one year and incarcerated as a result for not less than one year.[(2)]

Concerning the amendment to 10 U.S.C. § 986, the prohibition on granting an applicant a clearance for criminal conduct applies only if the person actually served at least one year incarceration for his or her offense. Congress did not expressly prescribe whether the amendments to 10 U.S.C. § 986 should apply retroactively. In *Landgraf v. USI Film Products et al.*, 599 U.S. 244, 280 (1994), the U.S. Supreme Court held:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Application of the amendment retroactively would not "impair rights a party possessed when he acted, increase a party's

liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* Accordingly, 10 U.S.C. § 986 as amended applies.

FINDINGS OF FACT

In addition to the theft conviction and statutory disqualification under 10 U.S.C. § 986, DOHA alleged criminal conduct (Guideline J) concerns due to Applicant's October 1997 driving under the influence offense. Applicant admits his criminal offenses, but contests the application of 10 U.S.C. § 986 on the basis he spent only ten days incarcerated and served one year under intensive supervision of correctional authorities where he was allowed to remain at home and to go to work. After a thorough review of the record, I make the following findings of fact:

Applicant is a 45-year-old married father of two children, who was employed by a defense contractor from April 1987 to January 2005. In April 2005, he started working in life cycle engineer support for another company at the same facility. He seeks a secret-level clearance for his duties.

In the mid-1980s, Applicant was employed as a broker for an insurance company. In his business, he advised clients, who were often elderly, to convert their old whole life insurance policies to new policies or annuities. In about November 1986, he began to misappropriate client funds, taking without authorization for his personal use over the next year approximately $16,500 in total belonging to about eight clients. The clients borrowed against their whole life policies, depositing the funds with Applicant by directly signing their checks over to him. Instead of depositing the entire amounts into the annuities in a timely fashion, Applicant converted client monies for his own use because of financial pressures, as by then he was working on commissions only (salary draw from commissions) and had an infant son and a spouse to support.

In August 1988, he was indicted for theft by unauthorized taking or transfer, a class B felony. Before appearing for trial in January 1989, he paid restitution to his eight victims. He had to take a loan of $6,500 to repay his victims as he did not have enough in his business account to cover all that he had misappropriated. In late January 1989, he pleaded guilty and was sentenced to three years imprisonment, all but one year and 10 days suspended, and he was committed to the custody of the division of probation and parole for two years. The first ten days were to be spent in the county jail. The remaining one year of his unsuspended term of imprisonment was to be served in an intensive supervision program (ISP) under the custody of the Department of Corrections, Division of Probation/Parole. Conditions of his intensive supervision were that he: 1) abide by a curfew as established by his ISP officer; 2) remain at his residence at all times except when approved in advance by his ISP officer for travel to and from a specific location and for a specific purpose; 3) submit to search of person, residence, papers and/or effects at a time with or without a search warrant by or on the request of an ISP officer; 4) refrain from excessive use of alcohol and any illegal drugs; 5) submit to any chemical tests if requested by an ISP officer; 6) identify himself as on ISP if stopped by law enforcement; 7) abide by federal, state, and municipal laws; 8) report to ISP officer as directed and permit him to visit at any time; 9) not change his residence without prior approval of his ISP officer; 10) not quit or change his program without approval in advance from

supervising ISP team; 11) waive extradition to answer any charge of escape or violation of ISP conditions; 12) be responsible for own health insurance, dental/medical care; 13) obtain permission from ISP officer prior to allowing any visitor to residence. Failure to abide by the conditions imposed would result in his removal from the ISP program and from the community and into institutional confinement. Applicant spent only about three days in the county jail. During the year of intensive supervision, he was allowed to work in his defense contractor job, and even to coach sports teams in his local community, although he had to obtain preapproval for his outside activities, and a program officer checked on his whereabouts outside of work every two to four days. After he finished his year in the intensive supervision program, he fulfilled the terms of his probation, also without adverse incident.[(3)]

After drinking three or four beers while playing golf and "a few more" after his round at the clubhouse in October 1997, Applicant drove his vehicle into a parked vehicle while en route home. He appeared to responding police to be visibly intoxicated (glassy eyes, slurred speech, swaying, breath smelling of alcohol) and was arrested for operating under the influence (OUI). A charge of operating after suspension was added when it was discovered Applicant had not paid the fee to reinstate his license after it had been suspended for one month in May 1997. Applicant changed his plea to guilty in June 1998, and he was fined $500, sentenced to 96 hours in jail which was deferred in favor of an alternative sentencing program, ordered to perform community service, and his driver's license was suspended for 90 days. Applicant successfully completed a driver's education and evaluation program.

Overextended on credit due largely to home repair expenses and living only on his income for about a year, Applicant and his spouse filed for Chapter 7 bankruptcy in October 1997 and their debts were subsequently discharged. As of May 2002, with his spouse's income, Applicant estimated a net monthly remainder of $2,009. Applicant's drinking habits were about a six-pack of beer on the weekends plus a couple of beers on occasion during the work week.

Applicant performed exceptionally well as a senior technician and more recently as life cycle services manager for advanced programs. For the July 2002 through June 2003 rating period, he supported two high profile programs, demonstrating an "absolutely remarkable ability to lead, manage and work at the deck plate level across multiple programs and efforts simultaneously." (Ex. A) Applicant's work performance was rated as "Exceptional, Exceeds Requirements" for July 2003 through June 2004 as well, but in January 2005, he was separated from his employment for protecting another employee who had done wrong in his presence. After a few months of unemployment, Applicant began working for his present employer in life cycle engineering support on the same program.

As of September 2005, Applicant was not drinking alcohol to excess and his financial situation was under control. His salary was $84,000 annually and his spouse had started her own pet kennel business boarding cats and dogs.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, Safeguarding Classified Information within Industry § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) 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.

Considering the evidence as a whole, the following adjudicative guideline is most pertinent to an evaluation of Applicant's security suitability:

Criminal Conduct. A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. (¶ E2.A10.1.1.)

CONCLUSIONS

In January 1989, Applicant pleaded guilty to theft by unauthorized taking or transfer, a class B felony, after he stole funds belonging to several clients. His crime is especially egregious because it involved repeated breach of the fiduciary relationship he had with his insurance clients, some of whom were elderly. Also serious but not repeated, Applicant committed an OUI offense in October 1997. Disqualifying conditions ¶ E2.A10.1.2.1. Allegations or admission of criminal conduct, and ¶ E2.A10.1.2.2. A single serious crime or multiple lesser offenses, are clearly pertinent to an evaluation of Applicant's security worthiness.

The Government also argues for the applicability of 10 U.S.C. § 986. Should that statute as amended October 28, 2004, apply, Applicant is barred from having a clearance granted or renewed absent a meritorious waiver if he served not less than one year in jail. While Applicant was sentenced to a term of three years imprisonment, all but one year and ten days of the sentence was suspended, with the final 12 months (year) of the unsuspended portion of the term of imprisonment served in an intensive supervision program. Applicant testified he was released after only three days. Whether he spent ten days or three days in a correctional environment, the salient issue is whether the intensive

supervision program qualifies as incarceration under 10 U.S.C. § 986 as amended.

With no guidance from Congress on the issue, Department Counsel requested review of federal case law interpreting incarceration under the federal sentencing guidelines and addressing liberty interests of prisoners challenging their incarceration. Department Counsel submits the intensive supervision program at issue was akin to "work release,"which federal courts have found to be incarceration, since Applicant was confined to his home unless he received prior approval from the correctional officials for work, etc.

Federal courts have found the level of restriction and removal from the community to be significant factors in determining whether there is incarceration. In *Asquith v. Volunteers of America*, 1 F. Supp. 2d 405 (D. N.J. 1998), the plaintiff was terminated from a work release program run by a halfway house[(4)] and imprisoned for an alleged major violation that he was later found not guilty of. The district court rejected the plaintiff inmate's argument that he had a liberty interest in his continued participation in the work release program, and distinguished his situation from that of a parolee, who has a conditional ability to be gainfully employed, conditional freedom to be with family and friends and to "form the other enduring attachments of normal life." The court noted the parolee's condition is very different from confinement in a prison. The parolee relies on at least an implicit promise that his parole will be revoked only for failure to live up to the conditions. Unlike the parolee, the plaintiff in *Asquith* had not been released from incarceration. Although he might have resided beyond actual penitentiary walls, he had not been "released" from prison or liberated from institutional life. When he was in the halfway house program, he was required to obtain a pass or permission to visit family, go shopping, or dine out, his family visits were supervised, and he was considered an "escapee" if his whereabouts for two consecutive hours were unknown. In *Carter v. McCaleb*, 29 F. Supp 2d 423 (W.D. Mich. 1998), the plaintiff had been sentenced to a 12-month jail sentence (credit for 61 days), with the court authorizing work release at the discretion of the sheriff. The district court noted a split in the federal courts on the issue of whether work release gives rise to a liberty interest, citing *Asquith* (work release is a "species of incarceration" that does not give rise to a liberty interest) and *Greaves v. New York*, 951 F. Supp. 33 (S. D. NY 1996) (prisoner who lived at home five days a week had a liberty interest in continued participation in a temporary release program). The Michigan District Court found that denial of placement in a work release did not implicate a liberty interest, since the work release participant remains a prisoner when not at work. His situation was contrasted with that of the individual who keeps his own residence.

Boot camp and work release have both been considered incarceration for purposes of the federal sentencing guidelines. In *U.S. v. Brooks*, 166 F.3d 723 (5th Cir.1999), the U.S. Court of Appeals held that a boot camp was properly a sentence of imprisonment since there was physical confinement, and distinguishable from types of sentences not requiring "twenty-four hours a day physical confinement, such as 'probation, fines, and residency in a halfway house.'" The determinant in that case was the appellant being not free to leave the boot camp. In *U.S. v. Ruffin*, 40 F.3d 1296 (D.C. Cir. 1994), the appellant had been committed to the custody of the Attorney General for imprisonment for one year with work release. The Appeals Court held it was a sentence of incarceration, noting that the appellant was imprisoned on weekends from 6:00 p.m. to 6:00 a.m. daily. His work release was part of a term of imprisonment. The Appeals Court for the Seventh Circuit held in *U.S. v. Timbrook*, 290 F.3d 957 (7th Cir. 2002), that a sentence of work release in a county jail was a sentence of imprisonment for purposes of § 4A.1.1.(b) of the U.S. Sentencing Guidelines Manual where the appellant had been sentenced to probation with a condition work release with incarceration in the county jail when he was not at work. The court contrasted his incarceration in a "secure jail facility" from community treatment centers or halfway houses, which the court did not consider to be incarceration.

Like the plaintiff-inmate in *Asquith*, Applicant had to obtain prior approval for his work and other activities in the community. However, he was allowed to remain in his residence and to live a relatively normal life. Applicant testified, unrebutted by the government, that he was even allowed to coach sports teams in the community. His situation was more akin to that of the parolee than the incarcerated inmate who had not been liberated from the institutional life. The intensive supervision program was apparently considered by the state as other than institutional confinement, as evidenced by the following sentencing language

You have been sentenced by the court to a term of imprisonment. You are in the custody of the Department of Corrections for the duration of the unsuspended portion of that term of imprisonment, At your request, and with the indulgence of the court, you are permitted to serve some or all of that term of imprisonment on Intensive Supervision rather than institutional confinement. As a prisoner, your being housed in the community under the Intensive Supervision Program rather than in an institution depends upon your compliance with observance of the ISP conditions and program requirements. Failure to abide by the conditions imposed will result in your removal from the ISP program and from the community. (Ex. 5)

In 1997, the U.S. Supreme Court in *Young v. Harper*, 520 U.S. 143 (1997), reviewed a different state's preparole conditional supervision program. While the issue before the court was whether the preparolee deserved the procedural protections set out in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court found no distinction between the situation of the preparolee in the program and a parolee.[(5)] The preparolee in *Young* kept his own residence, obtained, and maintained a job, and lived a life generally free of imprisonment, but remained within the custody of the Department of Corrections, was required to report regularly to a parole officer, and could not leave the state. Applicant's situation was similar to that of the preparolee in Young in that he was released from institutional confinement before completion of his sentence on the condition that he abide by certain rules during the balance of the sentence. Institutional confinement, even for part of a day such as in work release programs or even in a boot camp setting, has been the determinant in courts finding incarceration or denying procedural protections, although even federal courts have split on the issue. Given that Applicant was allowed to remain in the community, albeit subject to supervision and restrictions on his movements, I find the intensive supervision program does not qualify as incarceration under 10 U.S.C. § 986, as amended. Accordingly, SOR ¶ 1.c. is resolved for Applicant.

The thefts of client funds occurred approximately 20 years ago. The dated nature of the criminal conduct is in his favor, and even considering his more recent OUI and operating after suspension, there is a basis to apply mitigating condition ¶ E2.A10.1.3.1. *The criminal behavior was not recent.* However, meaningful reform depends in large part on acknowledgment of wrongdoing--appropriate expression of remorse and acceptance of responsibility--as well as demonstration of legal compliance for a sufficient period of time to guarantee against recurrence.[(6)]

In his favor, Applicant made restitution to his victims before sentencing, taking out a personal loan to do so. While he testified at his hearing to being not proud of his criminal theft, Applicant exhibited a troubling tendency to minimize the seriousness of his misconduct:

You know what, I felt I really did--in no way or any time did I--like I said, if there was consolation or anything that helped me sleep at night is that I knew I did not cancel anybody's policy or take monies that they were--and it was their monies but it wasn't monies that--out of their, you know, bank accounts per se, or monies that had to live on a day-to-day basis. It was basically monies they did not--a lot of them didn't know that they had or was able to get. If--you know, most people at the time and this is just a sample.

And I mean this was--I mean there was more monies actually deposited and new accounts started. I mean this is the regular way that--of doing business for the office, if you update old policies to new policies. So it's far more monies that actually, you know, that I didn't even--that went right through the account right from Point A to Point B, where it belonged but that didn't. (Tr. 80-81)

Mindful that security clearance determinations are not designed to punish applicants for past misconduct but rather involve an assessment of future security risk, I am unable to conclude that it is clearly consistent with the national interest to grant Applicant a security clearance. He repeatedly breached the fiduciary relationship he had with his clients over the period of about a year and did not cease until he was caught. Trust is at the heart of the relationship the government must have with those entrusted with classified information, and Applicant's history raises very serious concerns in this regard that are not overcome by his record of considerable success with the defense contractor. Although not alleged, his recent employment termination for protecting another employee under his watch (apparently his brother-in-law) bears negative implications for whether he will do the right thing if it proves contrary to his personal interest. SOR ¶ 1.a. is resolved against him.

SOR ¶ 1.b. is concluded in his favor, as although drunk driving is not condoned, it appears to have been an aberration and is not likely to recur where Applicant drinks in moderate amount. In addition to E2.A10.1.3.1. *The criminal behavior was not recent*, mitigating conditions E2.A10.1.3.4. *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*, and E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*, apply.

FORMAL FINDINGS

Formal findings as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive are hereby rendered as follows:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: For the Applicant

Subparagraph 1.c.: 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. Clearance is denied.

Elizabeth M. Matchinski

Administrative Judge

1. The SOR was issued under the authority of Executive Order 10865 (as amended by Executive Orders 10909, 11328, and 12829) and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 (as amended by Change 4).

2. As of the issuance of the SOR, Section 986 provided in pertinent part:

§ 986. Security clearances: limitations

(a) Prohibition.--After the date of the enactment of this section, the Department of Defense may not grant or renew a security clearance for a person to whom this section applies who is described in subsection (c).

(b) Covered Persons.--This section applies to the following persons:

(1) An officer or employee of the Department of Defense

(2) A member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status.

(3) An officer or employee of a contractor of the Department of Defense.

(c) Persons Disqualified From Being Granted Security Clearances.--A person is described in this subsection if any of the following applies to that person;

(1) The person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year. . .

(d) Waiver Authority--In a meritorious case, the Secretary of Defense or the Secretary of the military department concerned may authorize an exception to the prohibition in subsection (a) for a person described in paragraph (1) or (4) of subsection (c). The authority under the preceding sentence may not be delegated.

On October 28, 2004, Subsection (c)(1) of 10 U.S.C. § 986 was amended to disqualify those persons convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than one year.

3. Although sentenced to two years probation, Applicant testified he was discharged after one year. (Tr. 49)

4. In addition to being permitted to leave the halfway house for work or school, inmates in the work release program could obtain passes to visit family, shop, eat at restaurants or go to the local YMCA but they apparently had to obtain specific passes for each outing.

5. The U.S. Supreme Court's decision in *Young* was discussed in some detail by the U.S. District Court in *Asquith v. Volunteers of America.*

6. *See e.g.*, DISCR Case No. 87-1457 (App. Bd. Mar. 29, 1989); ISCR Case No. 94-1109 (App. Bd. Jan. 31, 1996).