

KEYWORD: Criminal Conduct

DIGEST: At age 18, Applicant was convicted in May 1982 of theft by unlawful taking, a second degree misdemeanor, after he used a BB gun to rob a gas station attendant. In July 1982, he was sentenced to a term of incarceration in the county jail of 15 days to 23 1/2 months and ordered to pay a \$500 fine. After serving the minimum, he was placed on parole, which he successfully completed in July 1984. Applicant has achieved considerable success in his career and has a stable lifestyle, but doubts persist for his judgment because of his reluctance to acknowledge the seriousness of his past criminal conduct. Sentenced to a term of incarceration of up to 23 1/2 months, he is statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986. Clearance is denied.

CASENO: 03-10571.h1

DATE: 07/28/2004

DATE: July 28, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-10571

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Catherine Engstrom, Esq., Department Counsel

## **FOR APPLICANT**

Clayton S. Miller, Esq.

### **SYNOPSIS**

At age 18, Applicant was convicted in May 1982 of theft by unlawful taking, a second degree misdemeanor, after he used a BB gun to rob a gas station attendant. In July 1982, he was sentenced to a term of incarceration in the county jail of 15 days to 23 1/2 months and ordered to pay a \$500 fine. After serving the minimum, he was placed on parole, which he successfully completed in July 1984. Applicant has achieved considerable success in his career and has a stable lifestyle, but doubts persist for his judgment because of his reluctance to acknowledge the seriousness of his past criminal conduct. Sentenced to a term of incarceration of up to 23 1/2 months, he is statutorily disqualified from having a clearance granted or renewed under 10 U.S.C. § 986. Clearance is denied.

### **STATEMENT OF CASE**

On October 3, 2003, the Defense Office of Hearings and Appeals (DOHA) 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. [\(U\)](#) 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).

On November 11, 2003, Applicant executed an Answer to the SOR, and requested a hearing before a DOHA administrative judge. The case was assigned to me on December 4, 2003. Pursuant to formal notice of December 9, 2003, a hearing was held as scheduled on January 15, 2004, with Applicant representing himself. The Government submitted four exhibits that were entered in the record. Applicant testified during his case, as reflected in a transcript received on January 26, 2004. The record was held open until January 30, 2004, for Applicant to submit documentation.

On January 30, 2004, counsel for Applicant entered his appearance and requested a two-week extension to submit character reference letters. Department Counsel having no objection thereto, the deadline was extended to February 17,

2004. Counsel for Applicant submitted 20 documents that were marked and entered as Applicant exhibits A through T. On March 1, 2004, Department Counsel submitted written closing argument. By Order dated March 5, 2004, counsel for Applicant was given until March 19, 2004, to file written closing. With the submission of Applicant's closing argument dated March 15, 2004, the record closed.

## FINDINGS OF FACT

The SOR alleges Criminal Conduct (Guideline J) concerns due to Applicant's arrest in February 1982 for robbery, theft by unlawful taking, receiving stolen property, and theft of services, and his subsequent conviction of theft by unlawful taking, a second degree misdemeanor. That offense, for which Applicant was sentenced to a term of incarceration of 15 days to 23 1/2 months, was alleged to disqualify him from having a security clearance granted or renewed under 10 U.S.C. § 986. <sup>(2)</sup>

In his response, Applicant admitted his conviction of the "lower graded misdemeanor" for which he spent 15 days in jail and supervised parole/probation of 23 months. He cited the isolated nature of the conduct, his immaturity at the time of the offense, and stable lifestyle in support of his request for a waiver of the statutory disqualification. In a written closing, counsel for Applicant questioned the applicability of 10 U.S.C. § 986 to indeterminate sentences. After a complete and thorough review of the evidence of record, and upon due consideration of the same, I make the following findings of fact:

Applicant is a 40-year-old married father of four children. <sup>(3)</sup> He has been employed by the same defense contractor since June 1988. He held a confidential security clearance for his engineering duties from 1988 to July 1993, when his clearance was upgraded to the secret level, although he subsequently held a position where he did not require the clearance. In November 2002, he submitted a security clearance application to update the clearance that he requires for his present position as an engineering manager with direct or second-level supervisory responsibility for 40 engineers.

In Fall 1981, Applicant matriculated in the state university. Raised by a father who emphasized the importance of making it on one's own, Applicant financed his education through a combination of student loans and employment at the local YMCA. During the second semester of his freshman year, Applicant did not have the funds to cover about \$100 in bills after he paid his tuition. Applicant decided to hold up a service station. In February 1982, he pulled into a station and had the attendant fill his vehicle, knowing that he did not have the funds to pay for the gas. When the attendant asked him to pay, Applicant pulled a bandana over his face, pointed a marksman repeater BB pistol (.177 caliber) at the attendant, and demanded the attendant's wallet. Applicant took the wallet containing \$102.00 cash and drove off. The station attendant managed to get his vehicle license number, and Applicant was apprehended without incident at the YMCA.

Arrested on charges of robbery, theft by unlawful taking, receiving stolen property, and theft of services, Applicant

pleaded guilty in May 1982 to theft by unlawful taking, a second degree misdemeanor, and the remaining charges were nolle prossed. In July 1982, Applicant was sentenced to incarceration in the county jail for a term of 15 days to 23 1/2 months, to pay \$500.00 plus the costs of prosecution, and ordered to undergo evaluation and treatment in an outpatient life coping program on his release. In August 1982, after serving 15 days in jail, Applicant was released on parole under supervised probation for the remainder of his sentence. Applicant complied with all the requirements of his parole and was successfully discharged in July 1984.

While on parole, Applicant returned to college. In December 1982, he married his first wife, and a daughter was born to them in 1983, but the marriage ended in divorce in July 1985. In May 1986, he earned his Bachelor of Science degree in mechanical engineering.

On earning his degree, Applicant began working for a defense firm. He borrowed \$2,000 from his father to relocate and repaid the funds. In June 1988, Applicant went to work for his present employer as an entry-level process engineer. Over the next fifteen years, he progressed through the ranks with increasing levels of responsibility to his present position as an engineering manager with supervisory authority for 40 engineers. In 1994 he received a company leadership award, and in 1998 a special award, in appreciation for his outstanding contributions. As a senior development engineer in September 1998, Applicant was nominated by his employer for an executive M.B.A. program because of his demonstrated capability to manage and complete many challenging tasks. Selected, he earned the degree in April 2001. In January 2004, he was nominated as a candidate for a newly created engineering executive leadership position in the company. As of January 2004, Applicant needs three credits to earn his master's in engineering.

Married to his present wife since September 1989, Applicant has a stable lifestyle. He has received speeding tickets, but has not otherwise violated the law. As of January 2004, he intended to pursue a possible pardon of his 1982 conviction.

## 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 (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.

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.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case: [\(4\)](#)

## **GUIDELINE J**

### **Criminal Conduct**

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

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 . . .

c. Conviction in a Federal or State court, including a court-marital of a crime and sentenced to imprisonment for a term exceeding one year<sup>(5)</sup>

Conditions that could mitigate security concerns include:

a. The criminal behavior was not recent

b. The crime was an isolated incident

g. Potentially disqualifying conditions c. and d., 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

Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following with respect to guideline J:

In July 1982, Applicant pleaded guilty to one count of theft by unlawful taking, a second degree misdemeanor. While the criminal conduct appears to have been isolated, it was also much more serious than indicated by the offense pleaded guilty to. The theft was committed by pointing a .177 caliber marksman repeater BB gun at a service station attendant and demanding the station attendant's wallet. By intentionally placing the attendant in fear of immediate serious bodily injury, Applicant showed little regard for the well-being of another. Disqualifying conditions a. *Allegations or admission of criminal conduct*, and b. *A single serious crime*, are clearly pertinent to an evaluation of Applicant's security worthiness.

Moreover, although Applicant contends he was sentenced to only 15 days in jail with no conditions, the court records indicate with regard to sentencing:

[I]t is the SENTENCE of this Court that he pay for the benefit of [the county] the sum of Five Hundred (\$500.00) Dollars together with Costs of Prosecution, that he be incarcerated in the [county jail] for a term the minimum of which shall be Fifteen (15) Days and the maximum of which shall be Twenty-Three and One-Half (23 1/2) Months, upon release from said incarceration the Defendant shall seek and undergo evaluation and treatment and the Involuntary Outpatient Life Coping Program for which he pays the Costs of Fifty (\$50.00) Dollars. (Ex. 3)

By virtue of this sentence, disqualifying condition *c. Any conviction in a Federal or State court, including a court-marital of a crime where the person has been sentenced to imprisonment for a term exceeding one year*, also applies in this case. Although Applicant served only 15 days, he could have spent as long as 23 1/2 months in jail had he violated the terms of his parole.

Applicant's criminal conduct occurred more than 20 years ago when he was only 18 years old. The dated nature of the offense and the absence of any recurrence are factors in his favor (see mitigating conditions *a. The criminal behavior was not recent*, and *b. The crime was an isolated incident*). At his hearing, he acknowledged the shame his actions brought his family, but he also exhibited a troubling tendency to minimize the seriousness of his criminal conduct. When asked on cross examination to describe the incident of February 1982, Applicant initially testified:

I broke into the gas station. I was out of gas and I had no money, And I asked the attendant to pay and go fill it up, and I got, I had a couple of dollars but the bill was more than what I could pay. And then he had a wallet full of money sitting there in my face, and the opportunity presented itself, and so I had a toy gun beside the seat of my car. (Tr. 54)

As reflected in the robbery charge brought against him, the law regards a BB gun as more than "a toy." While he later indicated it was a BB gun that was involved in the commission of the crime, he denied any premeditation, claiming the gun had been in his car since the summer before ("it was just sitting there"), and that it was when he saw the money that he decided to steal it. (Tr. 55) While Applicant eventually acknowledged, albeit reluctantly, that he went to the gas station with the intent of holding it up ("There probably was a, an indication to do something like that"), he also testified he didn't know whether he intended to point a gun at somebody (Tr. 55), and claimed to have no recall of covering his face with a bandanna. (Tr. 56) Despite the passage of time since the incident, it is simply not credible that he would fail to recall the conduct that led to time spent in jail and considerable embarrassment to himself and his family. Such minimization of his misconduct undermines his claim of successful rehabilitation.

Furthermore, Applicant is statutorily disqualified from having a security clearance granted or renewed under 10 U.S.C. § 986. Criminal conduct punished by a term of incarceration in excess of one year is regarded as so serious to where it cannot be mitigated unless meritorious circumstances exist as determined by the Secretary of Defense (*see MC g.*). Applicant has had considerable success in his career as an engineer for the same defense contractor for the past 16 years, and he has a stable lifestyle free of any legal violations apart from some speeding tickets. Yet they are not enough to

overcome the very serious criminal conduct concerns. Adverse findings are returned with respect to subparagraphs 1.a. and 1.b. of the SOR. As I found against Applicant on the underlying criminal conduct, no recommendation as to a waiver is appropriate. DOHA OI 64 ¶ 3.e. [\(6\)](#)

## **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.: 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. 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. Section 986 states 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.

3. Applicant testified he has four children (Tr. 39). Only three are listed on his security clearance application.

4. The adjudicative factors considered most pertinent are identified as set forth in guideline J following the implementation of 10 U.S.C. § 986.

5. 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 marital, 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.

6. To implement the June 7, 2001 memorandum, the Director, DOHA issued Operating Instruction No. 64 (dated July 10, 2001) which indicates with respect to waiver recommendations:

e. If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement "I recommend further consideration of this case for a waiver of 10 U.S.C. 986" or "I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986."

In this case, the decision to deny or revoke clearance was not solely because of the statutory disqualification set forth in 10 U.S.C. § 986.