DATE: September 28, 2005

In Re:

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

Applicant for Security Clearance

ISCR Case No. 03-10571

REMAND DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Catherine M. Engstrom, Esq., Department Counsel

FOR APPLICANT

Clayton S. Miller, Esq.

SYNOPSIS

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. Applicant was denied a security clearance because of 10 U.S.C. § 986 and failure to show adequate rehabilitation of his criminal conduct. Applicant appealed, and the DOHA Appeal Board remanded the case for reconsideration in light of the October 2004 amendments to 10 U.S.C. § 986. Since Applicant was incarcerated only 15 days, 10 U.S.C. § 986 as amended does not bar the grant or renewal of a security clearance to Applicant. Criminal conduct concerns remain unmitigated where he shows little appreciation for the seriousness of his past misconduct. Clearance is denied.

STATEMENT OF THE 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.[(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) because of Applicant's 1982 conviction of theft by unlawful taking, for which he was sentenced to a term of incarceration from 15 days to 23 ½ months. Pursuant to 10 U.S.C. § 986, Applicant was alleged to be disqualified from having a clearance granted or renewed.

A hearing was conducted on Applicant's security eligibility on January 15, 2004, with Applicant representing himself. On July 28, 2004, I issued a Decision finding it was not clearly consistent with the national interest to grant or renew a security clearance for Applicant. Applicant was barred from being granted a security clearance under 10 U.S.C. § 986 absent a meritorious waiver, as he could have served up to 23 ½ months in jail for his crime. Doubts also persisted for his rehabilitation because he minimized the seriousness of his criminal behavior. Accordingly, an adverse finding was returned as to SOR ¶ 1.a. as well.

Applicant appealed this Decision. While his case was pending appeal, 10 U.S.C. § 986 was amended on October 28, 2004, 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)] *See* Section 1062, Defense Authorization Act for Fiscal Year 2005. On November 8, 2004, the DOHA Appeal Board remanded Applicant's case "to allow the parties an opportunity--consistent with the basic principles of due process--to present their views on the effect of Section 1062 on Applicant's case." I was specifically directed to provide Department Counsel the opportunity to obtain guidance from the DoD as to the legal effect of Section 1062 on pending cases. The Board also indicated the evidentiary record could be reopened on a showing of good cause by either party. ISCR Case No. 03-10571 (App. Bd. Nov. 8, 2004).

In this case, the DOHA Appeal Board had before it a question of whether or not to apply the amendments to 10 U.S.C. § 986 that had not been in effect at the time I rendered my decision. Such an issue is a matter of appellate law which should have been addressed by the Board, especially where the Board did not identify error to be corrected.[(3)] However, not at liberty to disregard the Board's remand order,[(4)] I ordered Department Counsel on November 22, 2004, to apprise me and Applicant's counsel by January 5, 2005, of the DoD's position as to the possible retroactive application of 10 U.S.C. § 986 to Applicant's case. On December 14, 2004, the Director, DOHA, placed a moratorium on all actions in any case involving paragraph (1) or (4) of subsection (c)) of that statute. With the lifting of the moratorium in August 2005, Department Counsel was given until August 15, 2005, to comply with my order of November 22, 2004.

On August 8, 2005, Department Counsel indicated the amendments to 10 U.S.C. § 986 apply retroactively to all pending cases, but it remained the government's position that it was not clearly consistent to grant Applicant a security clearance. By order of August 11, 2005, Applicant was granted until August 26, 2005, to present his views on the effect of Section 1062 on his case. No response had been received by the due date.

The DoD's position is consistent with the U.S. Supreme Court's holding in *Lan dgraf v. USI Film Products et al.*, 599 U.S. 244, 280 (1994):

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.

Retroactive application does not impair Applicant's rights, increase his liability, or impose new duties. A new decision is warranted considering the applicability of 10 U.S.C. § 986 as amended to Applicant's case. Accordingly, my prior decision of July 28, 2004, is vacated.

FINDINGS OF FACT

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 41-year-old married father of four children.[(5)] He has been employed by the same defense contractor since June1988. 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.

Charged with robbery (a felony), 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 ½ 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, and that November was granted a confidential security clearance. 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 1993, his security clearance was upgraded to the secret level. 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 needed 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.

Applicant has been less than candid with the Department of Defense about his criminal conduct. In an update of his security clearance in November 2001, Applicant executed a security clearance application (SF 86). He responded "No" to whether he had ever been charged with or convicted of any felony offense.

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 personnel 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.

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

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 May 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, and it led to a charge of felony robbery.[(6)] 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 ½) 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)

Applicant served only 15 days, but had he violated the terms of his parole, he could have spent as long as 23 ½ months in jail. Disqualifying conditions E2.A10.1.2.1. *Allegations or admission of criminal conduct*, and E2.A10.1.2.2. *A single serious crime*, are clearly pertinent to an evaluation of Applicant's security worthiness. 10 U.S.C. § 986 as amended is not applicable to Applicant's case since he was incarcerated less than one year for the offense.

Applicant's criminal conduct occurred more than 20 years ago when he was only 18 years old. Immaturity certainly was a factor in the offense that cannot be ignored (*see* ¶ E2.2.1.4.). The dated nature of the offense and the absence of any recurrence are factors in his favor (*see* mitigating conditions E2.A10.1.3.1. *The criminal behavior was not recent*, and E2.A10.1.3.2. *The crime was an isolated incident*), but 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.[(7)]

At his hearing, Applicant expressed remorse for the shame he brought on his family, but he also exhibited a troubling tendency to minimize the seriousness of his criminal conduct. On direct examination, he expressed a belief that he was jailed only to be made an example of ("And you know, so I believe I was used as an example. That's why I was even put in jail in the first place." Tr. 40). When asked on cross examination to describe his behavior 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.

Applicant has had considerable success in his career as an engineer for the same defense contractor since 1988, and he has a stable lifestyle free of any legal violations apart from some speeding tickets. He successfully completed his probation for the offense, and has since become a productive member of his community. 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 nonetheless unable to conclude that it is clearly consistent with the national interest to grant or renew his security clearance. His very serious criminal behavior, albeit now dated, raises very significant security concerns, and his more recent lack of candor with the Department of Defense (failure to disclose the 1982 felony robbery charge on his SF 86 and evasive hearing testimony about his conduct in 1982) reflects a lack of reform. Although not alleged by the government, the Applicant falsified his November 2002 SF 86 when he responded "NO" to question 21 ("Have you ever been charged with or convicted of any felony offense?"). By certifying falsely that his responses were "true, complete, and correct to the best of [his] knowledge and belief," Applicant committed a felony violation of 18 U.S.C. § 1001.[(8)] While an administrative judge cannot base an adverse security clearance decision on conduct not alleged in the SOR, it can be considered where: (1) it is relevant and material to evaluating an applicant's evidence of extenuation, mitigation, or changed circumstances; (2) to determine whether a particular adjudication guideline condition is applicable to the case; and (3) to evaluate whether an applicant has demonstrated success in his rehabilitation. (*See* ISCR Case No. 94-0875 (App. Bd. November 6, 1995). The evidence before me does not support application of MC E2.A10.1.3.6. *There is clear evidence of successful rehabilitation*. SOR ¶ 1.a. is resolved against Applicant, while ¶ 1.b. is found for him since 10 U.S.C. § 986 as amended does not 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

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. Under ¶E3.1.32. of the Directive, the Board's scope of review is limited to determining whether the administrative judge's findings of fact are supported by the evidence (¶E3.1.32.1.), whether the administrative judge adhered to the procedures of the Directive (¶ E3.1.32.2.), or whether the administrative judge's rulings or conclusions are arbitrary, capricious, or contrary to law (¶ E3.1.32.3.). As noted by the Board in the remand decision at issue, "[w]hen an appeal issue raises a question of law, the Board's scope of review is plenary." The DOHA Appeal Board had the authority to request briefs from the parties to obtain their views as to the applicability of 10 U.S.C. § 986 as amended or to direct the government to submit the DoD's position as to the legal effect of the amendments on pending cases.

4. *See* ISCR Case No. 03-16516 at 4 (App. Bd. Nov. 26, 2004) ("While a Hearing Office Judge may disagree with a Board decision, a Hearing Office Judge has no more authority or discretion to 'sidestep' ir 'overrule' a Board decision that runs contrary to the Judge's preferences than an applicant or Department Counsel has to 'sidestep' or 'overrule' a ruling of the Judge during the course of the proceedings before the Judge.").

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

6. Under the pertinent state statute, the elements of the offense of robbery are as follows:

(A) OFFENSE DEFINED.--

(1) A person is guilty of robbery if, in the course of committing a theft, he:

(i) inflicts serious bodily injury upon another;

(ii) threatens another with or intentionally puts him in fear of immediate serious bodily injury;

(iii) commits or threatens immediately to commit any felony of the first or second degree;

(iv) inflicts bodily injury upon another or threatens another with or intentionally puts him in fear of immediate bodily injury; or

(v) physically takes or removes property from the person of another by force however slight.

(2) An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

(B) GRADING.- Robbery under subsection (a)(1)(iv) is a felony of the second degree; robbery under subsection (a)(1)(v) is a felony of the third degree; otherwise, it is a felony of the first degree. 18 Pa.C.S.A. § 3701.

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

8. In his answer, Applicant claimed he disclosed "the information regarding this [1982] offense in the security clearance application Form SF 86 dated 2002/04/23, even though offenses of this nature were limited to the past seven years." The only SF 86 of record is dated November 15, 2002, and he did not disclose that he had been charged with a felony in 1982. His plea to a second degree misdemeanor does not relieve him of his obligation to disclose that he had been charged with felony robbery.