

DATE: December 6, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-18297

## **EMAND DECISION OF ADMINISTRATIVE JUDGE**

**JOSEPH TESTAN**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Jennifer I. Campbell, Department Counsel

Edward W. Loughran, Department Counsel

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Following the issuance of the original Decision in this case, 10 U.S.C. 986 was amended. As amended, this statute precludes the granting of a DoD security clearance to anyone who was sentenced to more than one year of incarceration **and** who actually served at least one year. Because I conclude (1) applicant served less than one year in prison, and (2) this statute, as amended, should be applied to this case, 10 U.S.C. 986 is no longer applicable. Given the passage of time since applicant engaged in criminal conduct, and his clear evidence of reform and rehabilitation, I conclude that applicant is now worthy of a security clearance. Clearance is granted.

### **STATEMENT OF THE CASE**

On April 19, 2004, 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 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 and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on May 3, 2004. The case was assigned to the me on June 17, 2004. A Notice of Hearing was issued on June 22, 2004, and the hearing was held on July 7, 2004. The transcript was received on July 29, 2004.

On August 6, 2004, a decision was issued in which I concluded that 10 U.S.C. 986 precluded granting applicant's security clearance request. Applicant appealed the August 6, 2004 decision. While the case was pending on appeal, 10 U.S.C. 986 was amended. On November 8, 2004, the DOHA Appeal Board remanded the case to me for further consideration in light of the amendment. Following the remand, Department Counsel submitted a Brief in which he stated it is his position that "applicant's case should be decided in light of 10 U.S.C. 986, as amended."

## FINDINGS OF FACT

Applicant is a 39 year old employee of a defense contractor.

In May 1984, applicant was charged in an Amended Information with (1) Criminal Damage to Property, (2) Burglary (two counts), and (3) Theft. <sup>(4)</sup> In May 1984, he pleaded guilty to the amended charges, and was sentenced to one year in jail on the Criminal Damage to Property charge, three to five years on each of the two Burglary counts, and three to five years on the Theft charge, with all sentences to run concurrently. Immediately after handing down this sentence, the Court granted applicant's "oral application for probation," and changed the sentence to 30 days in jail and four years probation. In July 2000, the Court ordered that all records of applicant's conviction be expunged.

In 1985, applicant was charged with (1) Possession of Marijuana With Intent to Sell (a felony), and (2) Possession of Drug Paraphernalia. He pleaded guilty to both charges. In April 1986, he was sentenced to four to ten years in prison on the first charge, and one year in jail on the second charge. In August 1986, applicant's sentence was changed by the Court to four years of supervised probation. In September 1988, the Court released applicant from probation. In July 2000, the Court ordered that all records of applicant's conviction be expunged.

Applicant completed a Security Clearance Application (SCA) on October 17, 2001. Applicant provided false, material information in response to two questions on the SCA. In response to Question 21, which asked, "Have you ever been charged with or convicted of any felony offenses? (Include those under the Uniform Code of Military Justice.) For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607," applicant stated "no."

In response to Question 24, which asked, "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607," applicant stated "no."

Based on applicant's aforementioned criminal history, the correct response to both questions was "yes." Applicant admitted that he had doubts about the correctness of his responses (TR at 41), but testified he thought, based on the language of the expungement orders issued in his cases, that he qualified for the exception referenced in the two questions. He denies any attempt to mislead the Government. Based on applicant's testimony, and the fact he voluntarily disclosed his criminal history to the DSS agent who interviewed him in August 2002 *before the DSS agent confronted him with the facts* (TR at 49-51), I find that applicant did not intentionally falsify his SCA. Accordingly, Guideline E is found for applicant.

Letters from two former clients and two coworkers of applicant, including applicant's supervisor, were admitted into evidence (Exhibits A, B, C and D). It is clear from these letters that applicant is very talented, a hard worker, and greatly appreciated by his employer. His supervisor is of the opinion that allowing applicant access to classified information "poses no risk to this country."

## CONCLUSIONS

With respect to Guideline J, the evidence establishes that (1) in 1984, applicant was convicted of one count of Criminal Damage to Property, one count of Theft, and two counts of Burglary, and was sentenced to three to five years in prison, and (2) in 1986, he was convicted of Possession of Marijuana With Intent to Sell and Possession of Drug Paraphernalia, and was sentenced to four to ten years in prison. This conduct reflects adversely on applicant's judgment, reliability and trustworthiness. It also requires application of Disqualifying Conditions b. (*a single serious crime or multiple lesser offenses*), and c. (*conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year*).

Since his release from prison in 1986, applicant has been a model citizen. He went to college, earned two Associate degrees in 1990, and in the same year went to work for his current employer, where, by all accounts, he does an excellent job. He has not been involved in any additional criminal activity. Based on the evidence presented, applicant qualifies for Mitigating Conditions a. (*the criminal behavior was not recent*) and f. (*there is clear evidence of successful rehabilitation*).

Given the passage of time since applicant engaged in criminal conduct, and his clear evidence of reform and rehabilitation, I conclude that he is unlikely to engage in criminal conduct in the future. Because I further conclude that the amended version of 10 U.S.C. 986 should be applied to this case, it is now clearly consistent with the national interest to grant applicant a security clearance.

### **FORMAL FINDINGS**

#### PARAGRAPH 1: FOR THE APPLICANT

Subparagraph 1a: For the Applicant

Subparagraph 1b: For the Applicant

Subparagraph 1c: For the Applicant

#### PARAGRAPH 2: FOR THE APPLICANT

Subparagraph 2a: For the Applicant

Subparagraph 2b: For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for applicant.

Joseph Testan

Administrative Judge

1. The Burglary and Theft charges were felonies.