

KEYWORD: Criminal Conduct

DIGEST: Applicant "cloned" cell phones for drug dealers using telephone numbers of innocent third parties, frequently in exchange for illegal drugs. In March 1995, he was arrested and charged with use of a device to defraud telephone company, a felony. He pled guilty and was sentenced, in part, to three years imprisonment, suspended. In December 1995, he was arrested on an outstanding warrant for probation violation. The suspension was vacated and he was ordered to prison where he served for about 14 months. He has turned his life and lifestyle around, and vows to never become involved with any criminal activity in the future. Under 10 U.S.C. § 986, as revised, Applicant is disqualified from eligibility for a security clearance. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

CASENO: 04-06906.h1

DATE: 03/06/2006

DATE: March 6, 2006

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 04-06906

**DECISION OF CHIEF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

**APPEARANCES**

## **FOR GOVERNMENT**

Candace Le'i, Esquire, Department Counsel

## **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant "cloned" cell phones for drug dealers using telephone numbers of innocent third parties, frequently in exchange for illegal drugs. In March 1995, he was arrested and charged with use of a device to defraud telephone company, a felony. He pled guilty and was sentenced, in part, to three years imprisonment, suspended. In December 1995, he was arrested on an outstanding warrant for probation violation. The suspension was vacated and he was ordered to prison where he served for about 14 months. He has turned his life and lifestyle around, and vows to never become involved with any criminal activity in the future. Under 10 U.S.C. § 986, as revised, Applicant is disqualified from eligibility for a security clearance. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

### **STATEMENT OF THE CASE**

On September 9, 2005, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR 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 a clearance should be granted, continued, denied, or revoked.

In a sworn, written answer, dated October 11, 2005, Applicant responded to the allegations set forth in the SOR, and elected to have his case decided on the written record in lieu of a hearing. He requested a waiver under 10 USC § 986.

Department Counsel submitted the government's written case on November 15, 2005. A complete copy of the file of relevant material (FORM)-(1) was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. A submission was made on December 18, 2005, and admitted into evidence without objection of Department Counsel. The case was assigned to me February 28, 2006.

### **FINDINGS OF FACT**

Applicant has admitted the two factual allegations (subparagraphs 1.a. and 1.b.) pertaining to criminal conduct under Guideline J. Those admissions are incorporated herein as findings of fact. He did not address the conclusory allegation (subparagraph 1.c.), and his silence will be treated as a denial.

After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 32-year-old employee of a defense contractor, and is seeking to obtain a security clearance the level of which has not been divulged. He is an electronics technician with the same government contractor since August 2002. (2) During the previous five years he held similar positions with five other government contractors. The quality of his work performance has been outstanding and he has received numerous accolades, commendations, and awards for performance, productivity, and service. (3)

Applicant was a substance abuser whose choice of illegal substances was marijuana, methamphetamine, and cocaine. (4) His substance abuse commenced in about 1991 when he was 18 or 19 years old and ceased in about 1996-97. (5) The combination of his substance abuse and his technical abilities eventually resulted in situations where he was programing cell phones for individuals involved in illegal activities, including drug dealing. (6) Applicant would retrieve usable information from the trash outside the offices of cell phone providers and "clone" cell phones using telephone numbers of innocent third parties. (7) While Applicant purchased drugs on occasion, he usually received them free in exchange for his cell phone "cloning" services. (8)

On March 16, 1995, following up on a tip, police officers approached Applicant, searched his residence, and arrested him. (9) Applicant was charged with (1) use of a device to defraud telephone company, a felony, and (2) possession of controlled substance, a misdemeanor. (10) He pled guilty to the first charge and was sentenced, in part, to three years imprisonment, (11) suspended, (12) and the second charge was dismissed. (13) He served three and one-half to four (14)

months in the county jail before being released.

Upon his release from jail, Applicant failed to report to his probation officer and continued using drugs and "cloning" cell phones.<sup>(15)</sup> He moved into a motel where he and an acquaintance made a living "cloning" cell phones.<sup>(16)</sup> On one occasion, while partying and "cloning" cell phones, Applicant paid a pizza bill with what he correctly suspected was a counterfeit \$20 bill.<sup>(17)</sup> The pizza restaurant notified the authorities, and when the police came to his room, they saw the cell phones and suspected Applicant was involved in something illegal.<sup>(18)</sup> While there was no further evidence of counterfeit money, they confiscated the cell phones and took Applicant and his colleague to the station where they were questioned.<sup>(19)</sup> They were subsequently released.

On December 15, 1995, Applicant was stopped by police and arrested on an outstanding warrant for probation violation, stemming from his March 1995 arrest.<sup>(20)</sup> The judge who had previously sentenced him vacated the three year prison suspension and ordered him to prison on the initial charge of using a device to defraud telephone company, a felony.<sup>(21)</sup> He served about 14 months in several different prison facilities before being released to a half-way house where he remained for about two months.<sup>(22)</sup> He was on parole for about one year.<sup>(23)</sup>

Since his release from prison, Applicant moved away from his old friends and associates, attended some Narcotics Anonymous meetings, and has abstained from using any illegal substances.<sup>(24)</sup> Likewise, he has not been involved in any further criminal activity.<sup>(25)</sup> With added maturity, he has turned his life and lifestyle around, and vows to never become involved with any criminal activity in the future.<sup>(26)</sup>

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

**Criminal Conduct - Guideline J: 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, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the conclusions below.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provided policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. § 986) that precluded the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

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

(2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. 802));

(3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or

(4) has been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases." Implementing guidance attached to the memorandum indicated that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of *more than* one year, regardless of the amount of time actually served."

On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 was approved and adopted, amending portions of Subsection (c)(1) of 10 USC § 986, thereby altering it to read as follows:

(1) 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 change supplied)

Since the protection of the national security is the paramount consideration, the final decision in each case must be arrived at by applying the standard the issuance of the clearance is "clearly consistent with the interests of national security," [\(27\)](#) or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation or mitigation

sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegation set forth in the SOR:

The government has established its case under Guideline J. By his own admission, Applicant was involved in criminal behavior in 1991-95 that resulted in his arrests and a conviction. As a result of the March 1995 arrest and subsequent conviction for the one charge, he was sentenced to three years imprisonment, suspended. His continued criminal conduct and violation of his probation eventually culminated in his being rearrested and returned to prison to serve 14 months of his original three year sentence. Applicant's criminal conduct clearly falls within Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1. (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*), CC DC E2.A10.1.2.2. (*a single serious crime or multiple lesser offenses*), and CC DC E2.A10.1.2.3. (*conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year*).

I acknowledge CC DC E2.A10.1.2.3. has not yet been formally amended to conform with the 2004 change in the law,

and no implementing guidance has yet been provided. Nevertheless, in complying with the mandate that these security clearance review decisions be fundamentally fair commonsense decisions, I have concluded that the new law was intended to be applied retroactively.

It has been over 10 years since that conviction and sentence. The criminal conduct for which he was convicted is not considered recent since it ceased with his subsequent arrest in December 1995. Aside from his substance abuse--conduct which was not alleged in the SOR and which is of no current security concern--Applicant has refrained from further criminal conduct since his last arrest and has apparently turned his life around and avoided further criminal endeavors. Those facts support the application of Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1. (*the criminal behavior was not recent*). However, given the frequency and duration of his criminal conduct involving cell phone "cloning," I cannot find that it was isolated as set forth in CC MC E2.A10.1.3.2. (*the crime was an isolated incident*).

A person should not be held forever accountable for misconduct from the past when there is a substantial indication of subsequent reform, remorse, or rehabilitation. Under other circumstances, it would appear that Applicant's criminal conduct had otherwise been mitigated. However, Applicant's criminal conduct still falls within 10 U.S.C. § 986. While he was convicted in a state court of a crime and sentenced to three years imprisonment--a term that obviously exceeded the one-year period envisioned in the initial version of the law, that sentence was suspended. Had Applicant's criminal conduct ceased with that initial court action, the matter would not be under security clearance review scrutiny today.

Unfortunately for Applicant, his continuing criminal conduct eventually resulted in the suspended portion of his original sentence being replaced by "hard" jail time consisting of 14 months imprisonment. That period of actual time served brings this matter within the revised portions of Subsection (c)(1) of 10 USC § 986 (*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*). Consequently, under 10 U.S.C. § 986, as revised, unless he receives a waiver, Applicant is disqualified from eligibility for a security clearance. Considering all of the above, I conclude Applicant has failed to mitigate or overcome the government's case. Accordingly, allegations 1.a. through 1.c. of the SOR are concluded against Applicant.

For the reasons stated, I conclude Applicant is not eligible for access to classified information. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:



Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.a.: Against the Applicant

Subparagraph 1.b.: Against the Applicant

Subparagraph 1.c.: 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. Further consideration of this case for a waiver of 10 U.S.C. § 986 is not recommended.

Robert Robinson Gales

Chief Administrative Judge

1. The government submitted seven items in support of its contentions.
2. Item 4 (Security Clearance Application (SF 86), dated February 27, 2003), at 2.
3. Item 3 (Response to SOR, dated October 11, 2005), at attachments 1-15.
4. Item 5 (Statement, dated February 9, 2004), at 3-4.
5. *Id.*
6. *Id.* at 1-2.
7. *Id.*

8. *Id.* at 4.

9. *Id.*

10. Item 3, *supra* note 3.

11. *Id.*

12. *Id.*

13. *Id.*

14. Item 5, *supra* note 4, at 2.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 2-3.

20. *Id.* at 3.

21. Item 6 (U.S. Department of Justice, Federal Bureau of Investigation (FBI), FBI Identification Record, dated March 7, 2003), at 2.

22. Item 5, *supra* note 4, at 3.

23. *Id.*

24. *Id.* at 4.

25. *Id.*

26. *Id.*

27. Exec. Or. 12968, "*Access to Classified Information*," as implemented by Department of Defense Regulation 5200.2-R, "*Personnel Security Program*," dated January 1987, as amended by Change 3, dated November 8, 1995, and further modified by memorandum, dated November 10, 1998. However, the Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec.2.5.3.; Sec. 3.2.; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.)