KEYWORD: Criminal Conduct

DIGEST: *The Applicant was convicted of Indecent Exposure in 1968, and was convicted of Mail Fraud and Use of False Name to Conduct Mail Fraud in 1972. As a result of this last conviction, the Applicant spent about 22 months in a Federal Correction Institute. In 1976, the Applicant also admits to exposing himself. Since 1976, more than 30 years ago, the Applicant has married, fathered children, "gotten religion;" and in 1982 he received a Presidential Pardon vis-a-vis his Maid Fraud conviction. Furthermore, his good character is evidenced by six letters of recommendation. However, under 10 U.S.S. Section 986(c)(1), the Department of Defense may not grant or continue a security clearance to one who was sentenced to more than one year in jail, and actually served more than one year in confinement. Clearance is denied solely as a result of 10 U.S.S. Section 986(c)(1).

CASENO: 06-25298.h1

DATE: 09/12/2007

DATE: September 12, 2007

In Re:	)	
	)	
----------	)	ISCR Case No. 06-25298
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	
	)	

DECISION OF ADMINISTRATIVE JUDGE
RICHARD A. CEFOLA

APPEARANCES

FOR GOVERNMENT
Jennifer I. Goldstein, Esquire, Department Counsel

FOR APPLICANT

Alan V. Edmunds, Esquire, Applicant's Counsel

SYNOPSIS

The Applicant was convicted of Indecent Exposure in 1968, and was convicted of Mail Fraud and Use of False Name to Conduct Mail Fraud in 1972. As a result of this last conviction, the Applicant spent about 22 months in a Federal Correction Institute. In 1976, the Applicant also admits to exposing himself. Since 1976, more than 30 years ago, the Applicant has married, fathered children, "gotten religion;" and in 1982 he received a Presidential Pardon vis-a-vis his Maid Fraud conviction. Furthermore, his good character is evidenced by six letters of recommendation. However, under 10 U.S.S. Section 986(c)(1), the Department of Defense may not grant or continue a security clearance to one who was sentenced to more than one year in jail, and actually served more than one year in confinement. Clearance is denied solely as a result of 10 U.S.S. Section 986(c)(1).

STATEMENT OF THE CASE

On March 16, 2007, 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 the Applicant, which detailed the 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 and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

Applicant filed an Answer to the SOR on March 30, 2007.

The case was received by the undersigned on May 16, 2007. A notice of hearing was initially issued on May 22, 2007, setting the hearing for June 14, 2007. However, pursuant to a request from Applicant's Counsel, the case was continued to and heard on June 25, 2007. The Government submitted documentary evidence. Testimony was taken from the Applicant, who also submitted documentary evidence on his own behalf. The transcript (TR) was received on July 6, 2007. The issue raised here is whether the Applicant's admitted past Criminal Conduct militates against the granting of a security clearance. [The Applicant admits the underlying factual basis of all of the allegations.]

FINDINGS OF FACT

The following Findings of Fact are based on Applicant's Answer to the SOR, the documents and the live testimony. The Applicant is 60 years of age, and is employed by a defense contractor, which seeks a security clearance on behalf of the Applicant. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional Findings of Fact.

Guideline J - Criminal Conduct

1.a. The Applicant was arrested in December of 1967, and subsequently pled guilty to two

counts of Indecent Exposure (TR at page 14 line 16 to page 15 line 1, and Government Exhibits (GXs) 6~11). As a result of this conviction, the Applicant was treated in a mental hospital from about February of 1968 to about August of 1969 (TR at page 21 line 23 to page 23 line 17, and GXs 16~18). In 1976, the Applicant had a relapse and admits to exposing himself once again (TR at page 35 line 8 to page 36 line 4, and at page 45 lines 4~12). He was 29~30 years old at the time of this last incident, and has not participated in any other Criminal Conduct for more than 30 years (TR at page 35 line 8 to page 36 line 4, at page 45 lines 4~12, at page 47 lines 6~9, GX 1 at page 2, and GX 5).

1.b. and 1.c. The Applicant was again arrested in August of 1972, and subsequently charged with Mail Fraud and Use of False Name to Conduct Mail Fraud (GX 2). He was convicted, and sentenced to four years imprisonment, of which he spent about 22 months in a Federal Correction Institute (*Id*). As a result of this confinement, the provisions of 10 U.S.C. Section 986(c)(1) apply.

In 1972, the Applicant "got involved with a group of 'hippies.' And . . . part of their support was to [fraudulently] fill out credit card applications . . . for credit cards and then we would obtain the merchandise and sell it at swap meets" (TR at page 39 line 23 to page 40 line 8). In 1982, the Applicant received a "Full and Unconditional Pardon," from the President, for his 1972 conviction (TR at page 16 lines 9~16, and Applicant's Exhibit (AppX) H).

Since 1976, the Applicant was married in 1979, has fathered three children, has several grandchildren, and has "gotten religion" (TR at page 13 line 22 to page 14 line 10, at page 45 line 13 to page 46 line 2, at page 46 lines 6~9, and GX 1 at page 13). A Senior Deputy County Sheriff best describes the Applicant, in part, in the following terms:

> It is my distinctive honor to recommend such a fine individual as . . . [the Applicant] for your consideration. I have known . . . [the Applicant] and his wonderful family for almost 18 years. I have worked with . . . [the Applicant] professionally, spiritually and socially as a very dear friend.
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> * * *
>
> Again, I highly recommend . . . [the Applicant] for a position requiring integrity, honor, commitment, and dependability. Men like . . . [the Applicant] don't come [along] often, but when they do, it's tremendous (AppX C).

POLICIES

Enclosure 2 and Section E.2.2. of the 1992 Directive set forth both policy factors, and conditions that could raise or mitigate a security concern. Furthermore, as set forth in the Directive, each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

> a. Nature, extent, and seriousness of the conduct, and surrounding circumstances.

b. Frequency and recency of the conduct.

c. Age and maturity of the applicant.

d. Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequence involved.

e. Absence or presence of rehabilitation.

f. Probability that circumstances or conduct will continue or recur in the future.

The Administrative Judge, however, can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make out a case under Guideline J (criminal conduct), which establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between an applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance.

The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places. If an applicant has demonstrated a lack of respect for the law, there exists the possibility that an applicant may demonstrate the same attitude towards security rules and regulations.

CONCLUSIONS

The Applicant's admitted past Criminal Conduct is evidenced by two convictions in 1967 and in 1972, and by an admitted, but uncharged, indecent exposure in 1976. The first disqualifying condition under Criminal Conduct is therefore applicable, as there is *"a single serious crime or multiple lesser offenses*" present. However, this is countered by the first mitigating condition as "*so much time has elapsed since the criminal behavior . . . [more than 30 years] that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*."

Furthermore, I am not limited to the mitigating conditions, delineated in the Directive, in deciding if an Applicant has demonstrated extenuation or mitigation. Here, those who know the Applicant speak most highly of his character, credibility and trustworthiness (AppXs A~F, and I~P). The totality of the Appellant's conduct and circumstances, as set forth at length above, normally would warrant a favorable Decision under the "whole person concept."

However, this case also falls under the last disqualifying condition; i.e., *"conviction in a Federal . . . court . . ., sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than one year*." This implements 10 U.S.C. Section 986(c)(1), which prohibits the Department of Defense from granting a security clearance to any applicant who was so convicted.

The statute also provides that an exception to this prohibition may be authorized in a meritorious case if there are mitigating factors. The last mitigating condition states that the last disqualifying condition "*may not be mitigated unless, where meritorious circumstances exist, . . . [the Director of the] Defense Office of Hearings and Appeals (DOHA) or his designee, has granted a waiver*."

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the context of the "whole person," I conclude the Applicant has mitigated the security concerns based on his Criminal Conduct. However, based solely on 10 U.S.C. Section 986(c)(1), Applicant's clearance must be denied. In accordance with DOHA Operating Instruction No. 64, dated September 12, 2006, a copy of this decision will be forwarded to the Director, DOHA, for a determination whether to exercise his discretion to grant a waiver in accordance with 10 U.S.C. Section 986(d).

FORMAL FINDINGS

Formal Findings required by paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: AGAINST THE APPLICANT

a. For the Applicant.
b. For the Applicant.
c. Against the Applicant.

Factual support and reasons for the foregoing are set forth in **FINDINGS OF FACT** and **CONCLUSIONS**, supra.

DECISION

In light of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant or continue a security clearance for the Applicant. Clearance is denied based solely on 10 U.S.C. Section 986(c)(1).

Richard A. Cefola
Administrative Judge