

KEYWORD: Criminal Conduct

DIGEST: Thirty-eight year old Applicant's October 1988 arrest for murder in the 2<sup>nd</sup> degree, a felony (which was eventually reduced to manslaughter with a deadly weapon, a felony), in a stabbing death, and his subsequent plea and conviction of the reduced charge, along with his sentence to imprisonment for seven years, and the absence of clear evidence of successful rehabilitation, raise grave questions and doubts as to his security eligibility and suitability. Furthermore, the application of 10 U.S.C. 986 disqualifies him from such eligibility. Clearance is denied, and further consideration of this case for a waiver of 10 U.S.C. 986 is not recommended.

CASENO: 01-03795.h1

DATE: 12/26/2001

DATE: December 26, 2001

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-03795

**DECISION OF ADMINISTRATIVE JUDGE**

**ROBERT ROBINSON GALES**

**APPEARANCES**

**FOR GOVERNMENT**

William S. Fields, Esquire, Department Counsel

## FOR APPLICANT

*Pro Se*

### SYNOPSIS

Thirty-eight year old Applicant's October 1988 arrest for murder in the 2<sup>nd</sup> degree, a felony (which was eventually reduced to manslaughter with a deadly weapon, a felony), in a stabbing death, and his subsequent plea and conviction of the reduced charge, along with his sentence to imprisonment for seven years, and the absence of clear evidence of successful rehabilitation, raise grave questions and doubts as to his security eligibility and suitability. Furthermore, the application of 10 U.S.C. 986 disqualifies him from such eligibility. Clearance is denied, and further consideration of this case for a waiver of 10 U.S.C. 986 is not recommended.

### STATEMENT OF THE CASE

On September 27, 2001, 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 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 a clearance should be granted, continued, denied, or revoked.

In a sworn written statement, dated October 16, 2001, 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. Department Counsel submitted the Government's written case on October 25, 2001. 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. He did so on November 26, 2001. The Government did not object to the submission. The case was assigned to this Administrative Judge on December 3, 2001.

## FINDINGS OF FACT

Applicant has admitted both of the factual allegations pertaining to criminal conduct under Guideline J. Those admissions are incorporated herein as findings of fact.

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 38 year old male employed by a defense contractor, and is seeking to obtain a security clearance.

Applicant has been involved in two criminal incidents. On January 4, 1984, two months shy of his 21<sup>st</sup> birthday, he was arrested and charged with possession of drugs (marijuana).<sup>(2)</sup> He was subsequently entered into six months probation, and adjudication was withheld. No other information regarding this incident or court disposition has been developed.

Four and one-half years later, on October 18, 1988, at about 4 a.m., he became involved in a dispute over the loudness of a television. During that dispute, the victim had in his possession a butter knife and a table fork. Applicant withdrew from the dispute and went to the kitchen where he obtained a kitchen knife, of unknown length, from the dishwasher. When the victim exited his bedroom, Applicant stabbed him with the kitchen knife in the left arm and shoulder area. The victim collapsed and died at the scene.<sup>(3)</sup> After being advised of his *Miranda* rights, Applicant admitted the scenario described above to the police authorities and indicated at the time of the stabbing, he did not see anything in the victim's hands.<sup>(4)</sup>

As a result of the stabbing death, Applicant was arrested and charged with murder in the 2<sup>nd</sup> degree, a felony. The count stated, in part, that Applicant had stabbed the victim "without any premeditated design."<sup>(5)</sup> On January 3, 1989, while represented by an Assistant Public Defender, Applicant withdrew his plea of not guilty to the charge and entered a plea of guilty to a lesser charge of manslaughter with a deadly weapon, a felony.<sup>(6)</sup> He was sentenced to be imprisoned for a term of seven years and was given 78 days "jail credit" for the time he had already spent incarcerated.<sup>(7)</sup> Applicant was released from prison in March 1990.<sup>(8)</sup>

Since his release from prison, Applicant has held a number of positions with a variety of organizations, including his most recent one--as a senior technical project support specialist--which he commenced in January 2000. The quality of Applicant's performance was not documented. He currently attends college on a part-time basis, and hopes to obtain a degree.

## 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 set forth 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 guidelines 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 include:**

- (1) allegations or admissions of criminal conduct, regardless of whether the person was formally charged;
- (2) a single serious crime or multiple lesser offenses;
- (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.

**Conditions that could mitigate security concerns include:**

- (1) the criminal behavior was not recent;
- (2) the crime was an isolated incident.

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 provides 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 precludes 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 memorandum also notes that 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 indicates 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."

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,"<sup>(9)</sup> 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 endeavored to draw only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have attempted to avoid 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 each allegation set forth in the SOR:

With respect to Guideline J, the Government has established its case. By his own admission, Applicant stabbed another person with a kitchen knife during a dispute, and was arrested and charged with criminal conduct in October 1988. The original charge of murder in the 2<sup>nd</sup> degree, a felony, was eventually reduced to manslaughter with a deadly weapon, a felony, and Applicant entered a plea of guilty to the reduced charge. He was sentenced to be imprisoned for a term of seven years and was given 78 days "jail credit" for the time he had already spent incarcerated, but was released from prison the following March. Applicant's criminal conduct in this regard clearly falls within Criminal Conduct Disqualifying Condition (DC) E2.A10.1.2.1., DC E2.A10.1.2.2., and DC E2.A10.1.2.3.

It has been 13 years since the criminal conduct caused the death of the victim in this case, and aside from the earlier drug arrest, Applicant has not been involved in any additional criminal conduct. Those facts would seem to activate Criminal Conduct Mitigating Condition (MC) E2.A10.1.3.1. as well as MC E2.A10.1.3.2. However, while a person should not be held forever accountable for misconduct from the past, without a clear indication of subsequent reform, remorse, or rehabilitation, I am unable to determine with reasonable certainty the probability that such conduct will not recur in the future. In this case, there is no psychological profile to describe his past motivation or his present status. The record is silent as to Applicant's motivation for the stabbing, and aside from some brief references to subsequent jobs and current studies, there is nothing as to rehabilitation efforts. Simply stating the incident changed his life and he had

learned from it is insufficient to indicate meaningful rehabilitation on his part. Without more, I simply do not believe the period of time from the incident to the closing of the record, is sufficient to persuade me recurrence of such criminal conduct is unlikely. Under these circumstances, I am unable to find clear evidence of successful rehabilitation, and the potential application MC E2.A10.1.3.6. fails. Consequently, I conclude that Applicant has failed to mitigate or overcome the Government's case. Accordingly, allegation 1.a. of the SOR is concluded against Applicant.

Applicant's criminal conduct in this regard also falls within the application of 10 U.S.C. 986. He was convicted in a state court of a crime and sentenced to imprisonment for a term of seven years, a term which obviously exceeds the one year period envisioned in the new law. Furthermore, as noted above, the implementing guidance attached to the memorandum indicates such a sentence would disqualify persons with "sentences imposed of more than one year, regardless of the amount of time actually served. In this instance, Applicant was fortunate enough to be released from prison long before the full term of his sentence was actually served, but that fact does not help him in this issue. Consequently, by virtue of 10 U.S.C. 986, I conclude Applicant is not eligible for a security clearance. Accordingly, allegation 1.b., as it applies to allegation 1.a. of the SOR, is concluded against Applicant.

Applicant is now fully accountable for his past actions and activities. In this instance, I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

For the reasons stated, I conclude Applicant is not eligible for access to classified information.

### **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



## 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. Moreover, I do not recommend further consideration of this case for a waiver of 10 U.S.C. 986.

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Robert Robinson Gales

Chief Administrative Judge

1. The Government submitted seven items in support of its contentions.
2. *See* Item 6 (Federal Bureau of Investigation Criminal Information History, undated), at 3.
3. *See* Item 5 (Court Record, dated October 18, 1988), at 3.
4. *Ibid.*
5. *Id.*, at 1.
6. *Id.*, at 5 and 9.
7. *Id.*, at 7.
8. *See* Applicant's Response to FORM, dated November 26, 2001. *See also* Item 4 (Security Clearance Application (SF 86), dated June 25, 1999), at 6.
9. *See* Executive Order 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" (*see* 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" (*see* Enclosure 2, Sec. E2.2.3.); and "clearly consistent with national security" (*see* Enclosure 2, Sec. E2.2.2.)