

DATE: February 14, 2002

In Re:

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SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-21172

**DECISION OF ADMINISTRATIVE JUDGE**

**ELIZABETH M. MATCHINSKI**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn Antigone Trowbridge, Esq., Department Counsel

**FOR APPLICANT**

Thomas Albin, Esq.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA), pursuant to 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 and the implementation of Title 10, Section 986 of the United States Code), issued a Statement of Reasons (SOR), dated October 18, 2001, to the 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 the Applicant. 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) due to Applicant's conviction of gross misconduct with a motor vehicle, a felony offense committed when he was driving while intoxicated in September 1964. That offense, for which Applicant was sentenced to two to four years in state prison, was alleged to disqualify him from having a security clearance granted or renewed pursuant to Title 10, Section 986 of the United States Code.<sup>(1)</sup>

Applicant filed a response dated November 5, 2001, to the SOR in which he requested a hearing before a DOHA Administrative Judge. The case was assigned to me on November 30, 2001. Pursuant to formal notice dated December 3, 2001, the hearing was scheduled for December 14, 2001, Applicant having waived the fifteen-day notice requirement. At the hearing, which was held as scheduled, the Government submitted three documentary exhibits, which were entered into the record. Testimony was taken from the Applicant and his spouse. On the Government's motion, subparagraph 1.a. of the SOR was amended to reflect Applicant was sentenced to two to four years for the crime of gross misconduct with a motor vehicle.<sup>(2)</sup> With the receipt on January 4, 2002, of the transcript of the hearing, this case is ripe for a decision.

**FINDINGS OF FACT**

After a thorough review of the evidence, and on due consideration of the same, I render the following findings of fact:

Applicant is a 65-year-old welder seeking a Secret security clearance so that he can be recalled to work as a welder for a defense contractor (company A).

Applicant dropped out of high school in the tenth grade in 1955 and enlisted in the United States military where he worked on diesel engines. Following his discharge from active duty in 1959, Applicant enlisted in another branch of the United States military, but he served only six months.

Circa 1960, Applicant secured a job in the civilian sector building outboard motors. When he got laid off from that job, he went to work as a busboy for a hotel until it was torn down. Applicant then took a job as a busboy for a restaurant. In June 1960, Applicant met his future spouse, a native of the area.

In Spring 1961, Applicant relocated to another state where he attended welding school in the hope of being hired by the local defense contractor (company A). After three months of schooling, Applicant was hired in May 1961 by company A as a third step welder. The company granted him at that time a Confidential security clearance ("green badge"). Applicant progressed as a welder at the company, eventually reaching first class welder status.

In August 1961, Applicant's fiancée joined him and they were married a week later. In 1962, Applicant and his spouse had a son.

Applicant drank to intoxication when out socializing with friends at a bar on a Sunday night in September 1964. After his friends dropped him off at his home, Applicant elected to drive to a neighboring state where the bars were open later. While en route, Applicant passed out and his car veered off the road, striking and killing two male youths who had been walking on the side of the roadway. Charged with operating under the influence, evading responsibility, reckless driving, negligent homicide, and gross misconduct with a motor vehicle, Applicant pleaded nolo contendere on the advice of legal counsel. In mid-February 1965, he was found guilty of gross misconduct with a motor vehicle, a felony, and sentenced to two to four years in state prison. Applicant was terminated from his employment with company A due to his incarceration. After serving eighteen months in prison, Applicant was paroled to serve the remainder of his four year sentence on probation.

Applicant was required to have a job lined up before his release from incarceration. For the two and a half years that he was on probation, Applicant worked unloading trucks for the same company that employed his mother. After he fulfilled the terms of his criminal sentence, Applicant in about 1969 was hired back by company A, his former supervisor having advocated successfully for his return. Applicant was again granted a Confidential clearance for his duties. In 1970, Applicant and his spouse, a homemaker, had another son.

Circa 1971, Applicant left company A to become a manager of a grocery store. Ninety days later, Applicant was out of a job as corporate plans changed. Applicant was rehired by company A as a first class welder in about 1972, and from late 1975 to 1982, he had supervisory responsibility over eighteen coworkers.

Applicant was charged with assault in the third degree in August 1972 after he got into an altercation with a youth in the neighborhood who had come over to Applicant's house and insulted Applicant's wife. He was fined \$35.00 for the offense. The family remains in the neighborhood, and Applicant has been on good terms with them since.

In October 1996, Applicant was laid off from his welding position with company A. To June 1997, Applicant collected unemployment compensation while he worked part-time at a local convenience store as a counter clerk. In June 1997, Applicant commenced employment for a service station and as a dishwasher for a local diner. Recalled to work in September 1997 by company A, Applicant at that time executed a Questionnaire for National Security Positions (SF 86). In response to question 23.a., "Have you ever been charged with or convicted of any felony offense?," Applicant indicated he had been sentenced to prison for misconduct with a motor vehicle back in September 1964. Applicant was granted an Interim Confidential security clearance by his employer.

Circa January 1998, Applicant was laid off again for a period of three months. Applicant during that time worked for the convenience store. In Spring 1998, he was rehired by company A as a maintenance person responsible for cleaning the bathrooms. One of only two employees brought back to company A at that time, Applicant had a commendable attendance record, having missed only five hours of work in twelve years of employment at company A. After eleven

months in the maintenance department, Applicant was transferred back to welding. In addition to working six days per week at company A, Applicant worked on Friday and Saturday nights as a dishwasher for a local diner.

In August 2001, Applicant was interviewed by a Defense Security Service (DSS) special agent about his criminal record. Applicant admitted he had been intoxicated on the occasion of his arrest in September 1964, but indicated he had no personal recall of having struck the two males walking on the side of the road. Sentenced to two to four years for gross misconduct with a motor vehicle, Applicant related he was placed on parole after eighteen months incarceration, which he successfully completed. Applicant denied any other alcohol-related incidents and described his current consumption of alcohol as one beer two or three times per year.

On October 18, 2001, DOHA issued a SOR under criminal conduct because of Applicant's commission of felony gross misconduct with a motor vehicle in September 1964. Since he was sentenced to a term in prison in excess of one year, Applicant was alleged to be ineligible for grant or renewal of a security clearance by the Department of Defense pursuant to Title 10, Section 986 of the United States Code. Shortly after he received the SOR, Applicant's Interim clearance was revoked and he was terminated from his employment with company A in November 2001. Applicant is subject to recall if his clearance should be adjudicated favorably.

Applicant had planned to retire from company A in June 2002. Since his recent termination from company A, Applicant has worked forty hours per week as a clerk for the local convenience store in addition to continuing as a dishwasher at the diner fifteen hours per week. Applicant's spouse is unable to work due to physical disability.

Applicant continues to feel remorse over the September 1964 incident. Realizing he can do nothing about it, he has spent the last 37 years trying to do his best.

### POLICIES

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, favorable and unfavorable, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines which must be carefully considered according to the pertinent criterion in making the overall common sense determination required. Each adjudicative decision must also include an assessment of the nature, extent, and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the motivation of the individual applicant and extent to which the conduct was negligent, willful, voluntary or undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation and other pertinent behavioral changes; the potential for coercion, exploitation and duress; and the probability that the circumstances or conduct will continue or recur in the future. *See* Directive 5220.6, Section 6.3 and Enclosure 2, Section E2.2. Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility or emotionally unstable behavior. *See* Directive 5220.6, Enclosure 2, Section E2.2.4.

Considering the evidence as a whole, I find the following adjudicative guidelines to be most pertinent to this case: [\(3\)](#)

#### GUIDELINE J

##### Criminal Conduct

The Concern: 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:

- a. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.

- b. A single, serious crime. . .
- c. Conviction in a Federal or State court, including a court-marital of a crime and sentenced to imprisonment for a term exceeding one year<sup>(4)</sup>

Conditions that could mitigate security concerns include:

- a. The criminal behavior was not recent
- b. The crime was an isolated incident
- d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur
- f. There is clear evidence of successful rehabilitation
- g. Potentially disqualifying conditions c. and d., above, may not be mitigated unless, where meritorious circumstances exist, the Secretary of Defense or the Secretary of the Military Department concerned has granted a waiver.

\* \* \*

Under the provisions of Executive Order 10865 as amended and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, the Administrative Judge can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. In addition, as the trier of fact, the Administrative Judge must make critical judgments as to the credibility of witnesses. Decisions under the Directive include consideration of the potential as well as the actual risk that an applicant may deliberately or inadvertently fail to properly safeguard classified information.

#### Burden of Proof

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets its burden and establishes conduct cognizable as a security concern under the Directive, the burden of persuasion then shifts to the applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of criterion conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials." Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security. *See* Enclosure 2 to the Directive, Section E2.2.2.

#### 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:

Applicant's criminal conduct was extremely egregious, although not premeditated. Applicant not only drove his motor vehicle when he was intoxicated, but his actions led to the consequence so feared by drunk driving--the death of innocent victims. While he did not intend the death of the two young males that he struck with his vehicle, he bears criminal responsibility for their tragic demise. His conviction of gross misconduct with a motor vehicle, for which he spent eighteen months in prison, raises significant security concerns, notwithstanding the passage of 37 years time since the offense. Under the criminal conduct adjudicative guideline, disqualifying conditions a. (allegations or admissions of

criminal conduct), b. (a single serious crime) and c. (conviction in a state court and sentenced to a term of imprisonment exceeding one year) must be considered in an evaluation of Applicant's current security suitability.

Several of the Directive's mitigating conditions (MC) apply to Applicant's criminal conduct: a. (the criminal behavior was not recent); b. (the crime was an isolated incident); <sup>(5)</sup> d. (the factors leading to the violation are not likely to recur); and f. (there is clear evidence of successful rehabilitation). The gross misconduct with a motor vehicle was committed in September 1964, when Applicant was 27 years old. He is now 65. Applicant resolved thereafter not to drink and drive, and there is no evidence he has operated a motor vehicle after drinking since that day in 1964. Given his limited consumption of alcohol, there is little likelihood of a recurrence. He successfully completed the terms of the sentence imposed for gross misconduct of a motor vehicle and returned to his work as a welder for company A. Dedicated to his job, he missed only five hours of work in twelve years. During periods of layoff from company A, Applicant always found employment to support his family, working in a convenience store, at a gas station, and at a diner. He continues to feel remorse for his conduct which occurred in the distant past. There is no evidence of recent or recurring questionable judgment or irresponsibility which would give rise to a present security risk.

Yet, criminal conduct punished by imposition of a prison term in excess of one year is regarded as sufficiently serious to where it cannot be mitigated unless meritorious circumstances exist (See MC g.). Pursuant to Title 10, Section 986 of the United States Code, the Department of Defense is prohibited from granting or renewing access to classified information to a defense contractor employee who has been convicted in a Federal or State court and sentenced to imprisonment for a term exceeding one year. Applicant was sentenced in February 1965 to two to four years in state prison for his gross misconduct with a motor vehicle. Hence, Applicant's request for continued access to classified information must be denied and an adverse finding returned as to subparagraph 1.b. of the SOR. This statutory prohibition may be waived in meritorious circumstances as determined by the Secretary of Defense. I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

### **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.: For 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. I recommend further consideration of this case for a waiver of 10 U.S.C. §986.

**Elizabeth M. Matchinski**

**Administrative Judge**

1. With the issuance of the SOR, Applicant was given a copy of the Federal statute, which states 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.

2. The effect of the amendment was to conform the SOR to the evidence, which was that Applicant served eighteen months of a two to four year prison sentence before he was placed on parole.

3. The adjudicative factors considered most pertinent are identified as set forth in guideline J following the implementation of 10 U.S.C. §986.

4. Under the provisions of 10 U.S.C. 986 (P.L. 106-398) a person who has been convicted in a Federal or State court, including courts martial, and sentenced to imprisonment for a term exceeding one year, may not be granted or have renewed access to classified information. In a meritorious case, the Secretary of Defense or the Secretary of the Military Department concerned, may authorize a waiver of this prohibition.

5. Although Applicant was fined \$35.00 for assault in 1972, the Government apparently did not consider it of security significance since it was not alleged. There is no evidence Applicant has engaged in any drunk driving since September 1964.