

DATE: April 30, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 01-26021

## **DECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Kathryn D. MacKinnon, Esq., Department Counsel

#### **FOR APPLICANT**

Philip D. Cave, Esq.

### **SYNOPSIS**

In 1983. Applicant pled guilty to, and was convicted of, manslaughter for causing the death of a pedestrian as a result of a drunk driving accident. He was sentenced to between 2 and 6 years' imprisonment. He has abstained from consuming any alcohol since the accident, been gainfully employed, and has not been in trouble with the law since then. He has held a security clearance for a number of years. However, 10 U.S.C. § 986 prohibits the Department of Defense from granting Applicant a security clearance absent a waiver by the Secretary of Defense. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

### **STATEMENT OF THE CASE**

Applicant, an employee of a defense contractor, applied for a security clearance. The Defense Office of Hearings and Appeals (DOHA), the federal agency tasked with determining an applicant's eligibility for access to classified information, declined to grant Applicant a clearance. In accordance with the applicable Executive Order<sup>(1)</sup> and Department of Defense Directive,<sup>(2)</sup> DOHA issued a Statement of Reasons (SOR) on 8 January 2003 detailing why a clearance was not granted and recommending Applicant's case be referred to an administrative judge to determine whether the clearance should be denied/revoked. In the SOR, DOHA alleged Applicant failed to meet the criminal conduct (Guideline J) personnel security guideline.

Applicant answered the SOR in writing on 27 January 2003. The case was assigned to me on 10 February 2003. On 28 March 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of six exhibits. Applicant testified on his own behalf, called three other witnesses, and submitted 46 exhibits. A transcript (Tr.) of the proceeding was received on 8 April 2003.

### **FINDINGS OF FACT**

Applicant is a 56-year-old engineering associate. Ex. 1a at 1, 2. He served in the U.S. Navy from 1966-70 and had a security clearance. Tr. 54-55. After leaving the Navy with an honorable discharge, Applicant went to work for a defense contractor, where he maintained a security clearance. Tr 56-57. In 1977, Applicant drank approximately 10 beers on an empty stomach at a company softball game. Ex. 2 at 1. He was arrested and charged with driving while intoxicated after a police officer found him asleep behind the wheel at a stop sign. Ex. 2 at 1; Ex. 4 at 2; Tr. 95. Applicant pled guilty to driving while impaired and was given a conditional discharge. Ex. 5 at 2. He completed a drunk driving program but continued to drink. Tr. 95.

On 24 November 1982, while still possessing a security clearance, Applicant drank 10-12 beers on an empty stomach before driving. He was driving fast and struck the car in front of him, forcing it onto the esplanade, where it struck and killed a pedestrian. Ex. 2 at 2. Applicant was charged with leaving the scene of an accident, driving while intoxicated, assault, and manslaughter. Ex. 2 at 2; Ex. 4 at 2. Applicant's mother picked him up at the police station and, on the way home, made him promise to never drink alcohol again. Tr. 97. Applicant has not had an alcoholic drink since that date. Tr. 65, 97; Ex. 3 at 2.

Applicant pled guilty to manslaughter (2<sup>nd</sup> degree) and, on 15 August 1983, was sentenced to 2 to 6 years in jail. Ex. 5 at 1. While in prison, Applicant attended Alcoholics Anonymous (AA) meetings and a substance abuse treatment program. Applicant was released from jail in November 1984 and was placed in a work release program. He was released on parole in August 1985. Ex. 2 at 2. Shortly thereafter, he returned to work with the defense contractor that had employed him before his conviction. Tr. 60. In 1987, his security clearance was restored. Ex. 1 at 6. He has not been in any trouble with the law since the 1982 offense.

### POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

### CONCLUSIONS

In the SOR, DOHA alleged under Guideline J that Applicant was convicted of manslaughter (¶ 1.a.) and, as a result of

his sentence of from 2 - 6 years in prison is disqualified from having a security clearance granted or renewed (§ 1.b.). Under Guideline J, a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. Directive ¶ E2.A10.1.1.

The Government established through its exhibits and Applicant's admissions that Applicant committed a serious criminal offense (DC 1 and 2) for which he was convicted and sentenced to prison for more than one year (DC 3). Disqualifying condition 3 is based on 10 U.S.C. § 986 which provides that, absent the Secretary of Defense or the secretary of the military department concerned granting a waiver, the Department of Defense is prohibited from granting or renewing a security clearance for a person who "has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year."

Applicant's criminal behavior was not recent. MC 1. It occurred over 20 years ago. On the day he was released on bail, Applicant swore he would never drink alcohol again. His keeping of that promise these 20 years is clear evidence of successful rehabilitation. DC 6. Although he considers himself an alcoholic, Applicant no longer has any desire to drink alcohol. Tr. Tr. 96, 65. His life is stable, he is an exemplary employee, and his future appears to be bright and alcohol free. Absent 10 U.S.C. § 986, I would find Applicant has demonstrated that it is in the national interest to grant him a security clearance. However, unless Applicant is able to obtain a waiver from the Secretary of Defense, the Department of Defense is prohibited from granting Applicant a clearance.

### **FORMAL FINDINGS**

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline G: AGAINST APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: Against Applicant

### **DECISION**

In light of all of 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. The Department of Defense is prohibited from granting or renewing his clearance absent a waiver from the Secretary of Defense. 10 U.S.C. § 986. Clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

**James A. Young**

**Administrative Judge**

1. Exec. Or. 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.