

DATE: April 3, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-00100

DECISION OF ADMINISTRATIVE JUDGE

ELIZABETH M. MATCHINSKI

APPEARANCES

FOR GOVERNMENT

Kathryn D. MacKinnon, Esq., Department Counsel

FOR APPLICANT

Kenneth R. Liebman, Esq.

SYNOPSIS

Applicant was convicted in June 1977 of vehicular homicide after he struck another automobile when driving while intoxicated, causing the death of the passenger in the other vehicle. He was sentenced from one to five years in prison (suspended), one year probation and a \$5,000.00 fine. Employed by the same defense contractor since March 1978, Applicant has done nothing to violate the trust and confidence placed in him by the Government or his employer. Despite his considerable success in his career as a support engineer and his complete abstinence from alcohol since November 1979, Applicant is ineligible for a security clearance pursuant to 10 U.S.C. §986 because he was sentenced in 1977 to a term of imprisonment of up to five years. Clearance is denied with a recommendation this case be considered for a waiver of 10 U.S.C. §986.

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 August 7, 2002, to the 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 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 vehicular homicide in 1977. That felony offense, for which Applicant was sentenced to one to five years imprisonment (suspended), one year probation and a \$5,000.00 fine, was alleged to disqualify him from having a security clearance granted or renewed pursuant to Title 10, Section 986 of the United States Code (hereafter 10 U.S.C. §986).⁽¹⁾

Applicant, acting *pro se*, filed a response dated September 4, 2002, to the SOR in which he requested a hearing before a DOHA Administrative Judge. The case was assigned to me on November 26, 2002, and pursuant to formal notice dated

December 16, 2002, a hearing was scheduled for January 7, 2003. On December 18, 2002, Applicant requested a brief continuance due to legal counsel being unavailable to meet with him about his case until January 6, 2003. The continuance was granted, and pursuant to amended notice dated January 21, 2003, the hearing was rescheduled for February 7, 2003. Counsel for Applicant entered his appearance on January 31, 2003.

At the hearing, held on February 7, 2003, the Government submitted five documents, which were admitted as exhibits. (2) Applicant's case consisted of nine documentary exhibits, and testimony from himself, his spouse, his department manager at work, and the associate pastor at his church. With the receipt on February 27, 2003, of the transcript of the proceedings, 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 47-year-old support engineer, who has been employed by the same defense contractor (company A) since March 1978. He seeks to retain a secret security clearance, which he has held since about 1985.

Following his graduation from a vocational-technical high school, Applicant enlisted in a branch of the United States military in October 1975, where he was assigned duties as an instrumentation mechanic. When he was in the service, he socialized with others who used alcohol, and off-duty activities centered around drinking.

On an occasion in April 1977, while driving under the influence of alcohol, Applicant caused a head-on collision in which the passenger in the other vehicle was killed. Indicted on a charge of homicide by vehicle, a fourth degree felony, Applicant pleaded not guilty at his arraignment, and he was released to the custody of the United States military. Pursuant to a plea bargain, Applicant subsequently entered a nolo contendere plea, which was accepted by the court. In late June 1977, he was adjudged guilty and sentenced to the state penitentiary for a term of not less than one year nor more than five years (incarceration suspended), and one year unsupervised probation with conditions, including payment of a \$5,000.00 fine within sixty days of sentencing. Unable to pay the entire fine by the due date, Applicant moved in early July 1977 to reduce the imposed fine to not more than \$2,500.00, with credit for the \$700.00 paid, and the remainder to be repaid at the rate of \$150.00 per month. In early July 1977, the court ordered Applicant could pay the remainder of his \$5,000.00 fine in installments of not less than \$150.00 per month until paid in full.

From mid-June 1977 to mid-July 1977, Applicant attended a DWI school, which was required for him to retain his operator's license. The military required him to submit to a psychiatric evaluation, and to attend weekly alcohol counseling sessions for one month. In early October 1977, Applicant was administratively discharged from the military at the rank of E3 on ground of misconduct because of the civil court disposition. (3) While his service was characterized as honorable, he was deemed not eligible for reenlistment.

Following his discharge from the military, Applicant got a job as a technician in the local area, at a pay rate of \$4.50 per hour. After only a couple of months, he lost his job due to an elimination of the position. In December 1977, he started work as an electronic technician with a contractor at the local military base where he had been stationed prior to his discharge. He left the job when it became clear he was not qualified, and moved back to his home state in January 1978.

In late February 1978, Applicant applied for a job with company A, disclosing that he had been convicted of the felony offense of homicide by vehicle. In early arch 1978, he was hired for the position of test equipment technician A at a base pay of \$6.57 per hour. While he was working at company A, Applicant was discharged from his probation in late June 1978, having fulfilled all obligations imposed for his felony offense.

Abstinent from alcohol for a period of time following the April 1977 offense, Applicant resumed drinking after he moved back to his home state. In 1978, Applicant began dating his future spouse with whom he was candid about his involvement in the vehicular homicide. Affected by the problems his sister was experiencing in her marriage to an alcoholic and fearing he could not have a successful marriage if he continued to abuse alcohol, (4) Applicant in November 1979 stopped seeing his girlfriend because he wanted to get his life together. Applicant drew on his religious upbringing to give him the strength and desire to give up alcohol. Determined not to drink, Applicant made it a point to

dissociate himself from his old friends who drank. One month later, Applicant renewed his relationship with his girlfriend, on the condition they start attending church. Circa January 1980, they started going to worship services together, and they were married that July.

In 1981, Applicant and his spouse joined a religious congregation with a strict prohibition regarding alcohol consumption and movie going. As newlyweds, they taught Sunday school to four and five-year-old children in their church. The church and his family provided Applicant the support needed to cope with desires to drink (which persisted for about five years after he stopped drinking) and the loneliness related to his alienation from his old friends.

During the first half of the 1980s, Applicant and his spouse had three children—a daughter born in August 1981, a son born in February 1984, and a son born in July 1985. With young children at home, Applicant continued to perform his work at company A with dedication while at night he pursued higher education. Granted a secret clearance for his duties with the defense contractor following the submission of a February 1985 Personnel Security Questionnaire on which he had revealed his 1977 vehicular homicide offense, Applicant progressed through the ranks at company A, attaining the highest rank in the union by the late 1980s. With respect to educational endeavors, he earned two associate in science degrees while working full-time during the day, an A.S. degree in electronic engineering in May 1986 and an A.S. degree in biomedical instrumentation technology in May 1992.

As his children grew, Applicant became involved in their activities, supporting their involvements in recreational sports in the community and church activities. In 1990, Applicant and his family joined a new church which did not have the same restrictions against alcohol use or movie going. Applicant did not return to drinking, even when faced with the illness and death of his mother. Through his oldest son, Applicant in about 2000 became involved in the youth ministry at the church, including playing a base guitar at Wednesday night youth services.

Completely abstinent from alcohol since November 1979, Applicant does not intend to consume alcohol in the future. While there have been opportunities to consume alcohol, such as at social functions like holiday parties involving other church members, Applicant has exhibited a firm commitment to remain alcohol-free. (S) Applicant has informed his children about the vehicular homicide in 1977 and advised them not to drink alcohol. Circa 1999, Applicant's older son sought the counsel of the church's associate pastor, who is in charge of the youth ministry, as to how he might help his father cope with the ongoing burden of the vehicular homicide. Applicant has shared with the youth at church that his abuse of alcohol has led to some serious consequences in his life.

In 1999, Applicant's brother informed him of an opening at a neighboring company A facility for a technical support engineer. Selected for the salaried position, Applicant has demonstrated exceptional commitment, working extensive overtime when required to ensure that the tasks are completed correctly and on-time. The recipient of five achievement awards between December 1999 and December 2002 (three in 2000) from his employer, Applicant has impressed his department manager with his "can-do attitude" and technical skill. This department manager, who has worked in close proximity with Applicant, has not seen any indication that Applicant uses alcohol.

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: ⁽⁶⁾

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. ⁽⁷⁾

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 consequences so feared by drunk driving—the death of an innocent victim. While he did not intend the death of the passenger in the other vehicle, he bears criminal responsibility for this person's tragic demise. His conviction of homicide by motor vehicle, a fourth degree felony, for which he was sentenced to a term in the state penitentiary of not less than one year nor more than five years, suspended, one year probation and a \$5,000.00 fine, raises significant security concerns, notwithstanding the passage of almost 26 years 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 evaluating Applicant's current security suitability.

Several of the Directive's mitigating conditions apply to Applicant's conduct: a. (the criminal behavior was not recent); b. (the crime was an isolated incident); d. (the factors leading to the violation are not likely to recur); and f. (there is clear evidence of successful rehabilitation). His criminal drunk driving was committed in April 1977, when Applicant was a 21-year-old airman stationed far away from his family, at a time when his social friendships and activities centered around alcohol. He is now a 47-year-old responsible adult, with years of dedicated service to his employer, family and church, who has not taken even one drink of alcohol in more than 23 years. It took Applicant a couple of years after the incident to change his attitude toward alcohol, but since he decided "to turn his life over to God," alcohol has played no part in his lifestyle. Alcohol is not permitted in the family home, and he has advised his children not to drink because of the possible adverse consequences. While his wife has not remained alcohol-free, she has consumed only three drinks total in the last five years. Applicant has shared with the youth at church that his abuse of alcohol has led to some serious consequences in his life.

In addition to being committed to remaining alcohol-free, Applicant continues to feel remorse for his drunk driving and causing the death of another human being. He testified to thinking on occasion about the victims in the other car, and to feeling "utterly helpless" to do anything with regard to ever making it right with them. (*see* Transcript p. 52). The associate pastor at Applicant's church confirmed the impact the incident continues to have on Applicant and his family. On multiple occasions three and a half to four years ago, Applicant's oldest son expressed concern to the associate pastor, to the extent of visible upset (crying), about the burden he saw in his father regarding the drunk driving incident in 1977. In discussing the peer pressure to drink in high school, this son expressed his knowledge that it would be a "major, major disappointment" to Applicant should he become involved with alcohol.

Applicant has held a secret clearance without adverse incident since about 1985, and 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 10 U.S.C. §986, 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. Although Applicant served no prison time, he could have been incarcerated for up to five years. By virtue of this sentence, Applicant falls within the provisions of 10 U.S.C. §986, as amended, which has been implemented within the Department of Defense by a June 7, 2001 memorandum from the Deputy Secretary of Defense titled *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*. Hence, Applicant's request for continued access 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. Section 986 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 Government submitted two versions of Applicant's security clearance application (SF 86)-a version signed on May 4, 2000 lacking the privacy section, and an unsigned, complete questionnaire generated on July 14, 2000. The two documents were admitted as exhibits 1a and 1b, respectively.

3. Applicant testified he was discharged involuntarily. To no avail, he wrote letters to his congressional representatives and to the respective military branch's commander and inspector general requesting he be allowed to remain in the service. (Transcript pp. 37, 52).

4. While the record contains no evidence as to the levels of alcohol consumed during this period, Applicant testified

alcohol had more influence over him than he had over it. (Transcript p. 51).

5. Applicant's spouse testified credibly that no alcohol is allowed in the family home. (Transcript p. 101). While she has not been completely abstinent, her consumption has been limited to three drinks in the last five years. (Transcript p. 99).

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

7. 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 marital, 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.