

KEYWORD: Criminal Conduct

DIGEST: Applicant pleaded guilty to death by vehicle (a felony) after the vehicle he was driving crossed the centerline and struck an oncoming vehicle killing the driver (October 1985); his blood-alcohol level was .12. He was sentenced to five years supervised probation and 728 hours community service; all of his two-year sentence to the state department of corrections was suspended, and he was released from supervised probation after two years. Applicant's criminal conduct is mitigated as an isolated event, by the passage of time, and by evidence of Applicant's successful rehabilitation. However, because he was sentenced to imprisonment for more than one year, Applicant is ineligible for security clearance under 10 U.S.C. 986 unless granted a waiver by the Secretary of Defense. Clearance is denied.

CASENO: 02-05451.h1

DATE: 08/20/2002

DATE: August 20, 2002

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-05451

DECISION OF ADMINISTRATIVE JUDGE

JOHN R. ERCK

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant pleaded guilty to death by vehicle (a felony) after the vehicle he was driving crossed the centerline and struck an oncoming vehicle killing the driver (October 1985); his blood alcohol level was .12. He was sentenced to five years supervised probation and 728 hours community service; all of his two-year sentence to the state department of corrections was suspended, and he was released from supervised probation after two years. Applicant's criminal conduct is mitigated as an isolated event, by the passage of time, and by evidence of Applicant's successful rehabilitation. However, because he was sentenced to imprisonment for more than one year, Applicant is ineligible for security clearance under 10 U.S.C. 986 unless granted a waiver by the Secretary of Defense. Clearance is denied.

STATEMENT OF THE CASE

On March 26, 2002, 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 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 finding under the Directive that it is clearly consistent with the national interest to grant a security clearance to Applicant and recommended referral to an Administrative Judge to determine whether a security clearance should be granted, denied or continued.

Applicant answered the SOR on April 19, 2002, and requested a hearing before a DOHA Administrative Judge. The case was assigned to this Administrative Judge on June 5, 2002. On July 11, 2002, a hearing was convened for the purpose of considering whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government's case consisted of three exhibits. Applicant testified on his own behalf and submitted two exhibits. A transcript (Tr.) of the proceeding was received on July 22, 2002.

FINDINGS OF FACT

The SOR alleged that because Applicant had been charged with and convicted of voluntary manslaughter (pursuant to his guilty plea) in 1985, he was disqualified from having a security clearance under 10 U.S.C. 986. Applicant admitted that he had pleaded guilty to a charge of death by vehicle, and assured that he has demonstrated his honesty, judgment, reliability and trustworthiness in the intervening years.

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:

Applicant is 44-years-old and has been employed by a DoD Contractor as an "Engineer II" since August 2000. He had previously worked as a commercial service technician for four other employers. He has not previously applied for or been granted a security clearance. Applicant is married to his second wife; his two children from a previous marriage reside with their mother.

In October 1985, Applicant caused an accident when the vehicle he was driving crossed the center line on a rainy afternoon, hit an on-coming car, and killed the driver--a young mother of two children. Applicant had consumed a quantity of alcohol before the accident; his blood-alcohol level was .12.

Applicant pleaded guilty to felony death by vehicle. He was sentenced to two years in the state department of corrections, ordered to complete 728 hours of community service, required to surrender his driver's licence and to not operate a motor vehicle in the state for a period of two years, and he was required to pay \$10.00 per month supervision fee for each month of supervised probation.⁽¹⁾ The court suspended the confinement portion of the sentence and placed Applicant on supervised probation for five years. At the suggestion of the deceased' husband, he completed the 728 hours of community service at a hospital trauma center (Tr. 28). After he completed the court-ordered community service, the hospital asked Applicant to continue on, and he worked for an additional six months (Tr. 24-25).⁽²⁾ Applicant was released from supervised probation in October 1988, after having served only two of the five years of supervised probation to which he had been sentenced.

Except for speeding and parking tickets, the tragic event described above represents Applicant's only encounter with the law. Although he consumed alcohol regularly before the accident, he had never been arrested for alcohol-related misconduct. At the time of the accident, Applicant explained he had consumed alcohol at work because his employer--at the time--provided alcohol to its employees during working hours on Wednesday and Friday afternoon as an employee benefit (Tr. 21). Applicant stopped consuming alcohol completely three months after the accident (Tr. 31)

Applicant testified about the impact the accident has had on his life:

Taking someone's life 17 years ago was something I still deal with daily. I have made a lot of efforts to change and improve (Tr. 20)...I can't explain to you everything I have learned from it in this short amount of time. It was basically a character change for me. I never forget it. It had an even bigger impact since I had my own kids and it's something that I deal with on a daily basis. Memory is always

there (Tr. 26).

Applicant is a quiet and sincere individual who is not easily given to overstatement and hyperbole. He impressed me as being truly sorry for having taken another person's life, and as being willing to do everything within in his power to make amends for the death and sadness he has caused. Applicant believes that his actions since the event together with the time that has passed warrant the granting of his security clearance.

Applicant has submitted a statement from the official of the military department under whose supervision he has worked for the past two years. This official describes Applicant as one of the more valued engineers who has had a significant impact on the timely and effective completion of the department's programs. Although being aware of the reason Applicant has not been granted a clearance, he was willing to submit his personal endorsement as to Applicant's character and professionalism.

Five years ago, Applicant relocated from the state where he was born and where the accident had occurred to the state where he currently resides.

POLICIES

The Adjudicative Guidelines of the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case by case basis with an eye toward making decision with reasonable consistency which are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but also in the context of the factors set forth in Section E2.2. of the Directive. In that vein, the Government not only has the burden of proving any controverted fact(s) alleged in the SOR, it must also demonstrate the facts proven have a nexus to Applicant's lack of security worthiness.

The following Adjudicative Guidelines are deemed applicable to the instant matter:

CRIMINAL CONDUCT⁽³⁾

(Guideline J)

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:

- b. A single serious crime or multiple lesser offenses;
- c. 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:

- a. The criminal behavior was not recent;
- b. The crime was an isolated incident;
- 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.

Burden of Proof

The Government has the burden of proving any controverted facts alleged in the SOR. If the Government established its case, the burden of persuasion shifts to Applicant to establish his security suitability through evidence which refutes, mitigates, or extenuates the disqualifying conduct and demonstrates it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters a fiduciary relationship with the Government predicated upon trust and confidence. Where the facts proven by the Government raise doubts about Applicant's judgment, reliability, or trustworthiness, Applicant has a heavy burden of persuasion to demonstrate 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 security clearance determinations should err, if they must, on the side of denials." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against an Applicant.

CONCLUSION

Having considered the record evidence in accordance with appropriate legal precepts and factors, this Administrative Judge concludes the Government has established its case with regard to Guideline J. In reaching my decision, I have considered the evidence as a whole, including each of the factors enumerated in Section E.2.2., as well as those referred to in the section dealing with the Adjudicative Process.

A security concern is raised by Applicant's conviction of felony death by vehicle as the result of his being at fault (because of being intoxicated) in an October 1985 automobile accident which resulted in the death of the occupant of the vehicle with whom Applicant's vehicle collided. His commission of a single, serious offense creates doubt about a person's judgment, reliability and trustworthiness.

The criminal conduct represented by Applicant's at-fault involvement in a 1985 fatal automobile accident has been mitigated. Almost 17 years have passed since this tragic accident. Applicant has accepted full responsibility for his actions. He has not been involved in any alcohol-related misconduct before or after this accident. Nor has he been involved in any other criminal conduct more serious than parking or speeding tickets. By any definition of the word, Applicant's involvement in the October 1985 fatal accident was an "isolated" event in his life.

Also mitigating the October 1985 event is evidence of Applicant's successful rehabilitation.

He testified the accident was a character changing event for him; it is something he thinks about every day. He has done everything he, or any other person, can do to put the events behind and move on with his life. He has stopped consuming alcohol. While obviously saddened by the experience and recognizing he can do nothing to change the outcome, he has worked hard and continues to work hard to build a meaningful life for himself and his family.

Finally, favorable consideration has been given to the court's suspending the entire period of confinement to which Applicant had been sentenced. Although near in time to the tragic event, the court decided Applicant's prior record, together with his culpability in causing the accident did not warrant his incarceration. Applicant has proven himself worthy of the trust placed in him by the court. He has not been involved in any further misconduct in the 17 years since the 1985 event. I recommend further consideration of this case for waiver of 10 U.S.C. 986.

FORMAL FINDINGS

Formal Findings as required by Section 3, Paragraph 7, of Enclosure 1 of 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 this case, it is not clearly consistent with the national interest to grant Applicant's security clearance. I recommend further consideration of this case for waiver of 10 U.S.C. 986.

John R. Erck

Administrative Judge

1. Applicant testified he paid approximately \$1,000.00 in fines (Tr. 28).
2. Applicant did not indicate if he volunteered or was reimbursed for his services.
3. The disqualifying and mitigating conditions for Guideline J are taken from the OSD Memorandum (dated June 7, 2001) implementing the restrictions on the Granting or Renewal of Security Clearances under the provisions of 10 U.S.C. 986.