

DATE: March 4, 2003

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 02-08058

**DECISION OF ADMINISTRATIVE JUDGE**

**CLAUDE R. HEINY**

**APPEARANCES**

**FOR GOVERNMENT**

Kathryn D. MacKinnon, Department Counsel

**FOR APPLICANT**

James E. Ellison, Esquire

**SYNOPSIS**

In 1971, the Applicant was involved in a shooting, which killed an individual and wounded another. The Applicant pleaded guilty to manslaughter and was sentenced to five to ten years in the state penitentiary. He has 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. Because the misconduct is remote in time and because of clear evidence of rehabilitation, I find for the Applicant as to the criminal activity. However, 10 U.S.C. § 986 prohibits the granting the Applicant a security clearance absent a waiver by the Secretary of Defense. Applicant's security clearance is denied. I recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

**STATEMENT OF THE CASE**

On July 10, 2002, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding [\(1\)](#) it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On July 29, 2002, the Applicant answered the SOR and requested a hearing. The case was assigned to me on September 30, 2002. A Notice of Hearing was issued on November 25, 2002. For good cause shown, a continuance was granted. A second Notice of Hearing was issued on January 6, 2003, scheduling the hearing, which was held on January 14, 2003.

The Government's case consisted of four exhibits (Gov Ex). The Applicant relied on his own testimony, the testimony of one additional witness, and one exhibit (App Ex). Following the hearing, three additional character letters were received, provisions having been made for their submission following the hearing. Department Counsel (DC) having no objection to their admission, the submissions were admitted as a single exhibit. The transcript (tr.) of the hearing was received on January 23, 2003.

In the SOR, the Government alleged Applicant is disqualified from obtaining a security clearance because of criminal conduct (Guideline J), based on his conviction of voluntary manslaughter and on two counts of aggravated assault and

battery, for which he was sentenced to five to ten years imprisonment and three and one-half to seven years incarceration. In his answer, Applicant admitted the criminal conduct and sentence, but denied this represented a history or pattern of criminal activity that creates a doubt about his judgment, reliability, and trustworthiness.

### **FINDINGS OF FACT**

The Applicant is 48-years-old, has worked for a defense contractor since September 1987, and is seeking to maintain a security clearance. The Applicant has a pleasant personality, treats people with respect and dignity, he is conscientious and diligent, an active member of the community, and attends church. (App Ex B) He is an honest, trustworthy individual who keeps his word.

The Applicant grew up in a rough section of a major city and joined a local gang. In December 1971, the Applicant--then 17 years old and half way through his sophomore year in high school--his younger brother, and 10 members of the gang went to a rock and roll concert. At the concert, the Applicant's brother and a rival gang member got into an argument. The argument escalated into a fistfight, which escalated to include members of both gangs. The Applicant's brother was stabbed. A member from the Applicant's gang pulled a revolver and dropped it to the floor. (Gov Ex 3) The Applicant grabbed the gun and started shooting, firing the gun three or four times. Everyone scattered and the Applicant started to run when he was apprehended by the police. The shots had struck a rival gang member, who survived, and an innocent bystander, who died.

The Applicant was motivated by his brother's stabbing, which caused him to fear for his brother's life and his desire to protect his younger brother. The Applicant no longer sees or associates with his brother and no longer associates with any members of the gang. (tr. 37)

The Applicant pleaded guilty to manslaughter and was sentenced to five to ten years in the state penitentiary. He was also found guilty of two counts of aggravated assault and battery with intent to kill and sentenced to three and one-half to seven years incarceration. While in prison, he obtained his GED and attended college prep courses. In 1974, after serving three and one-half years, he was placed in a pre-release program and sent to a half way house. After six months he was granted parole and reported to his parole officer monthly until 1981 when parole was concluded. Since the initial incident, he has not been arrested or in any type of trouble.

After his release from prison, the Applicant worked as a distribution manager for a newspaper until the newspaper went out of business in the late 1970's or early 1980's. He had been on welfare briefly after leaving prison and before getting his job with the newspaper. Since getting the newspaper job, he has never been unemployed. From September 1975 to August 1976, he attended community college. From 1981 through 1987, he and his father started and operated a variety store/delicatessen. In 1987, the Applicant started a janitorial service, which is small business administration certified. The company started by doing residential services, house cleaning, before getting into the commercial area. In 1996, the company got its first government contract. The company currently employees 19 people. When interviewed by the Defense Security Service (DSS) in 1996, the Applicant did not hide his past criminal conduct, but discussed it openly offering an explanation of what happened but offered no excuses for his conduct. In June 1996, he obtained a top secret clearance.

The Applicant has five children ages 30, 25, 23, 21, and 14. (Gov Ex 4, p. 5) His daughter is in high school, his oldest son has graduated from college, and his other son is currently in college. (tr. 29) In June 1975, he married his wife who was working for the police department at the time of their marriage. Now she works for the state judiciary. He now spends his free time picking up his daughter from school and taking her to events, visiting his sons, and traveling to job sites. He has investment property, a retirement plan, and \$20,000.00 to \$30,000.00 in savings. He has also been a little league baseball coach.

### **POLICIES**

The Adjudicative Guidelines in 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 determinations that 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 in the context of factors set forth in section E 2.2.1. of the Directive as well. 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 an Applicant's lack of security worthiness.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

**Criminal Conduct** (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. <sup>(2)</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.

### **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 that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

### **CONCLUSIONS**

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when an applicant is shown to have a history or pattern of

criminal activity which creates doubt about her judgment, reliability, and trustworthiness. In 1971, the Applicant was arrested for murder, aggravated assault and battery, carrying a concealed and deadly weapon, and conspiracy. He was found guilty of voluntary manslaughter and sentenced to five to ten years in the state penitentiary and found guilty of the aggravated assault and battery charges and sentenced to three and one-half to seven years incarceration. Because of his convictions, DC b. (3) applies and because he was sentenced to more than one year in jail, DC c. (4) applies.

Mitigating Condition (MC) a. (5) mitigates the Applicant's criminal conduct because the conduct is not recent, having occurred 31 years ago, when the Applicant was 17. The Applicant's case in mitigation becomes stronger as there has been no criminal conduct by the Applicant since December 1971. MC b. (6) applies. The criminal conduct was the act of a 17-year-old gang member. The Applicant is no longer that same person. He is 48 years old, a husband, father, successful small businessman employing 19 people, and is active in his community. Clearly he is not the same person he was when 17. Those factors leading to the criminal conduct are not likely to repeat themselves with this Applicant. MC d. (7) applies. There is clear evidence of successful rehabilitation making MC f. (8) applicable. I find for the Applicant as to SOR subparagraph 1.a.

Because the Applicant was sentenced to more than one year in jail, Title 10 United States Code Section 986 applies. I find against the Applicant as to SOR subparagraph 1.b.

After reviewing the evidence of record and observing Applicant as he testified, I am convinced that his criminal conduct in 1971 was a one-time, isolated criminal act. Applicant has demonstrated that he has been rehabilitated over the past 31 years. He has been steadily employed, performed well at his job, and has demonstrated his good judgment and reliability. Thus, 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 by 10 U.S.C. § 986. from granting Applicant a clearance. I recommend further consideration of this case for a waiver of Title 10 U.S.C. 986.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

### **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 (Criminal Conduct): AGAINST THE APPLICANT

Subparagraph 1.a.: For the Applicant

Subparagraph 1.b.: Against the 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 renew 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.

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**Claude R. Heiny**

**Administrative Judge**

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. 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.
3. DC b. A single serious crime or multiple lesser offenses.
4. DC 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.
5. MC a. The criminal behavior was not recent.
6. MC b. The crime was an isolated incident.
7. MC d. The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur.
8. MC f. There is clear evidence of successful rehabilitation.