

DATE: October 31, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-21012

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Juan J. Rivera, Esq., Department Counsel

FOR APPLICANT

Gregory S. Seador, Esq.

SYNOPSIS

On July 2, 1984, Applicant entered a plea of nolo contendere to the offense of Manslaughter by Operation of an Automobile While Intoxicated or Deprived of Full Possession of Normal Faculties. He was sentenced to be imprisoned for a term of four years followed by a period of three years on probation. Because of the statutory disqualification imposed by 10 U.S.C. § 986, he is unable to mitigate the security concern his criminal conduct has created. Clearance is denied. I do not recommend further consideration of this case for a waiver.

STATEMENT OF THE CASE

On April 30, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline J for criminal conduct based upon Applicant's 1984 manslaughter conviction. The SOR also alleges that 10 U.S.C. § 986 disqualifies Applicant from having a security clearance granted or renewed.

Applicant submitted a sworn answer to the SOR on July 22, 2003, and requested a hearing. Applicant admitted that he was convicted of vehicular manslaughter on July 2, 1984 and sentenced to four years in prison and three years probation, but denied that his conviction created doubt about his judgment, reliability or trustworthiness. He also acknowledged that his criminal conviction prohibited renewal of his security clearance because of the applicability of 10 U.S.C. § 986 to his case. He requested that his case be referred to the Secretary of Defense for consideration of a waiver.

This case was assigned to me on September 24, 2003. A notice of hearing was issued on October 3, 2003, scheduling the hearing for October 14, 2003.⁽²⁾ The hearing was conducted as scheduled. The government submitted seven documentary exhibits at the hearing that were marked as Government Exhibits (GE) 1-7 and admitted into the record without an objection. The Applicant testified at the hearing and submitted ten documentary exhibits that were marked as Applicant's Exhibits A-J and admitted into the record without an objection. The transcript was received on October 23, 2003.

FINDINGS OF FACT

Applicant's partial admission to the sole allegation in the SOR is incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and character reference letters, I make the following findings of fact:

Applicant is 66-years-old, has never been married, and he has no children. He quit high school before graduation and worked as a runner on Wall Street in New York City until he joined the United States Navy in August 1954, one month after his seventeenth birthday. He served on active duty in the Navy until May 1958, attaining the rank of Seaman, paygrade E-3, and was then transferred to the inactive reserve. He received an Honorable Discharge in 1962. He was awarded a Good Conduct Medal and European Occupation Ribbon.

Following his release from active duty, Applicant was employed on the docks in New York City until he joined the Military Sea Lift Command in 1962. He served with the Military Sea Lift Command until he was fired in 1984 as a result of his criminal conviction. After being released from prison he started a small business and worked at that until he was hired as a merchant mariner in 1988 or 1989. He has continued to work as a merchant mariner since that time, and is presently serving aboard ships as a Chief Mate.

Applicant received a suspended sentence in 1951, when he was approximately 14-years-old, for grand larceny car. He was taken to a summary court-martial while on active duty with the Navy for the offense of Unauthorized Absence and fined \$25.00. He was convicted on July 2, 1984 of the offense of manslaughter by Operation of an Automobile While Intoxicated or Deprived of Full Possession of Normal Faculties. He was sentenced to be imprisoned for a term of four years followed by a period of three years on probation.

Applicant's manslaughter conviction resulted from his driving an automobile after he had taken Tylenol with codeine and then consumed alcohol for approximately three to four hours on October 28, 1983. The Tylenol had been administered by medical personnel to alleviate pain he was experiencing from a work-related injury to a finger. Applicant does not recall the incident, but police reports disclose he struck a parked automobile that was then forced into two pedestrians, killing one and injuring the other. He entered a plea of nolo contendere to the offense on July 2, 1984 and received the above sentence.

Applicant participated in alcoholics anonymous (AA) meetings and obtained a general equivalency diploma (GED) while serving his penitentiary sentence. He also assisted other inmates in learning to read and by writing letters for them. The record does not disclose how much time Applicant actually served in the penitentiary, however, he was discharged from probation on December 18, 1986. He was issued a certificate of restoration of civil rights by the office of executive clemency of the state in which he was convicted on August 6, 1987. Applicant has not been convicted of any offenses since his release from the penitentiary, to include minor traffic offenses.

Applicant has not consumed any alcohol beverages since he was arrested for the manslaughter offense. He no longer attends AA meetings, but does keep in contact with friends whom he met through AA. He has earned a reputation among his friends, co-workers, supervisors, and others for being loyal, trustworthy, dependable, competent, and dedicated to our country.

Applicant has possessed a security clearance for much of the time since he first joined the Navy in 1954. There have never been any complaints made or investigations conducted of any alleged breeches of security or mishandling of classified information on his part. No action has ever been taken to revoke or downgrade a clearance held by Applicant because of security concerns, prior to the action herein involved. Applicant has on many occasions worked on ships that were engaged in highly classified activities on behalf of the United States.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline J, pertaining to criminal conduct, with its respective DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽³⁾ The government has the burden of proving controverted facts.⁽⁴⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁵⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁶⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁷⁾ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁽⁸⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁹⁾

No one has a right to a security clearance⁽¹⁰⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they
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must, on the side of denials." Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security. [\(12\)](#)

CONCLUSIONS

Under Guideline J, criminal conduct is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the Nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

The government has established its case against Applicant under Guideline J. The evidence establishes that he did commit the offense of Manslaughter by Operation of an Automobile While Intoxicated or Deprived of Full Possession of Normal Faculties on October 28, 1983. He was sentenced on July 2, 1984 to be imprisoned for a term of four years followed by a period of three years on probation. While the record does not disclose how much time he served in the penitentiary, it is clear that he was actually imprisoned for some period of time. Disqualifying Conditions (DC) 2: *A single serious crime or multiple lesser offenses*; and DC 3: *Conviction in a Federal or State court, including a court-martial of a crime and sentenced to imprisonment for a term exceeding one year* apply in this case.

In addition to the 1984 manslaughter conviction, Applicant had a juvenile adjudication when he was 14-years-old, and he committed a minor military offense approximately fifty years ago. He has otherwise lived an exemplary and law-abiding life. He has committed no offenses since being released from the penitentiary more than fifteen years ago, and has not consumed alcohol since that incident. The character letters and record of training he submitted attest to his competency as a merchant mariner, excellent reputation, and personal trustworthiness. I find that Mitigating Conditions (MC) 1: *The criminal behavior was not recent*; MC 2: *The crime was an isolated incident*; MC 4: *The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur* and MC 6: *There is clear evidence of successful rehabilitation* apply in this case. However, because of the statutory disqualification imposed by 10 U.S.C. § 986, Applicant is unable to mitigate his criminal conduct. Guideline J is decided against Applicant.

In all adjudications the protection of our national security is the paramount concern. Security clearance decisions are not intended to adjudge guilt or to impose further punishment for past transgressions. Rather, the objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions, including all criminal conduct, whether or not otherwise mitigated. I have given full consideration to the nature and seriousness of the offense committed by Applicant, as well as the character references, training record, and personal testimony he provided. I do not recommend further consideration of this case for a waiver of the disqualification mandated by 10 U.S.C. § 986.

FORMAL FINDINGS

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraph a: 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 do not recommend further consideration of this case for waiver of the 10 U.S.C. § 986 disqualification.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Although the notice was issued less than 15 days prior to the hearing, Applicant's attorney was actually notified of the date of the hearing by Department Counsel more than 15 days prior to the hearing. Additionally, a pre-hearing telephonic conference call was conducted with Department Counsel and Applicant's attorney wherein Applicant's attorney confirmed he had been given prior notice of the hearing date by Department Counsel and declined an offer to reschedule the hearing if he so requested. The substance of the telephone conference was placed on the record (Tr. pp. 12-13), and agreed to by both sides. Applicant's attorney also indicated at the hearing that he was prepared to proceed and did not require any additional time to prepare (Tr. p. 13).
3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
10. *Egan*, 484 U.S. at 528, 531.
11. *Id.* at 531.
12. *Egan*, Executive Order 10865, and the Directive.