

DATE: December 3, 2004

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-20787

**ECISION OF ADMINISTRATIVE JUDGE**

**JOSEPH TESTAN**

**APPEARANCES**

**FOR GOVERNMENT**

Edward Loughran, Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's isolated incident of criminal conduct occurred over eight years ago. Although it was serious, the victim's criminal behavior directed toward applicant was the event that led applicant to lose control and cross the line from self defense to criminal conduct. Based on the evidence presented, it is highly unlikely applicant will engage in any further criminal conduct. Since applicant served less than one year in jail, 10 U.S.C. 986, as amended in 2004, does not bar applicant from receiving a security clearance. Clearance is granted.

**STATEMENT OF THE CASE**

On March 29, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to applicant which 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 applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

Applicant responded to the SOR in writing on April 29, 2004. The case was assigned to the undersigned on June 28, 2004. A Notice of Hearing was issued on July 8, 2004, and the hearing was held on August 10, 2004. The transcript was received on August 25, 2004.

**FINDINGS OF FACT**

Applicant is a 35 year old employee of a defense contractor.

In February 1995, the car in which applicant, his pregnant fiancée, and his two children were riding was struck by another vehicle being driven erratically by a man under the influence of drugs. The driver of the other vehicle attempted to flee the scene. Applicant chased the other driver, eventually catching up to him while he was trying to climb a fence. As applicant began pulling him off the fence, the driver hit him in the face. Applicant began to fight back, eventually

hitting and kicking the other driver in the head. The other driver died from the injuries he received in the fight. Applicant was originally charged with Felony urder. In July 1995, he pleaded guilty to the amended charge of Voluntary Manslaughter, and in November 1995, was sentenced to 402 days in county jail. Because he was also given a credit of 402 days, <sup>(1)</sup> he was released from custody. In addition to the jail sentence, he was placed on probation for five years, ordered to perform community service, ordered to attend anger management classes, and ordered to pay restitution to the victim's family. Applicant completed the probation and all other requirements of his sentence. In 2003, pursuant to state law, the Court vacated the finding of guilt, entered a plea of not guilty, and dismissed the complaint. Applicant has not been involved in any criminal activity since this incident.

### CONCLUSIONS

The evidence establishes that in 1995, applicant was convicted of Voluntary Manslaughter and sentenced to 402 days in jail. This conduct reflects adversely on applicant's judgment and reliability, and requires application of Disqualifying Conditions b. (*a single serious crime or multiple lesser offenses*), and 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*).

Although Voluntary Manslaughter is a serious crime, it is clear from the evidence that applicant was, in a sense, also a victim. He was out driving with his family when their car was struck by another vehicle being driven erratically by a man who, as it turned out, was under the influence of drugs. When the man tried to flee the scene, applicant chased him. When he caught up with the man, the man struck applicant in the face. Applicant fought back, eventually delivering fatal blows. Applicant's initial conduct was reasonable. Unfortunately, at some point in time he crossed the line and continued to strike the man after he had been subdued. Although the other man's criminal behavior does not excuse applicant's conduct, it is a mitigating factor. Mitigating Condition d. (*the*

*person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*) is applicable.

Since his release from prison in 1995, applicant has not been involved in any criminal activity. This fact requires application of Mitigating Conditions a. (*the criminal behavior was not recent*) and f. (*there is clear evidence of successful rehabilitation*). In addition, there is no credible evidence that applicant engaged in any criminal activity prior to the 1995 incident. <sup>(2)</sup> Accordingly, Mitigating Condition b. (*the crime was an isolated incident*) is applicable.

Given (1) the unique circumstances leading up to applicant's isolated incident of criminal conduct; namely, he was initially defending himself, (2) the passage of time since it occurred, and (3) his clear evidence of reform and rehabilitation, I conclude that he is unlikely to engage in criminal conduct in the future. I further conclude that he has reformed, and it is now clearly consistent with the national interest to grant him access to classified information. <sup>(3)</sup>

### FORMAL FINDINGS

PARAGRAPH 1: FOR THE APPLICANT

Both subparagraphs found for the applicant.

### DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for applicant.

Joseph Testan

Administrative Judge

1. Applicant actually served less than one year in jail. His credit for 402 days was based on 268 days in custody and 134 days good time/work time (Exhibit 6).

2. Although applicant was arrested in 1992, no charges were filed against him. The arrest, standing alone, does not constitute credible proof that applicant engaged in the criminal conduct for which he was arrested.
3. In light of the fact that 10 U.S.C. 986 was amended in October 2004 by adding a requirement of at least one year of incarceration, it no longer bars applicant from receiving a security clearance.