

DATE: June 22, 2004

---

In Re:

-----

SSN: -----

Applicant for Security Clearance

---

ISCR Case No. 03-20779

**DECISION OF ADMINISTRATIVE JUDGE**

**JOHN G. METZ, JR.**

**APPEARANCES**

**FOR GOVERNMENT**

Jason Perry, Esquire , Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant's 1993 sentence to four years imprisonment for death by vehicle and willful speed competition requires denial of his clearance under 10 U.S.C. § 986 notwithstanding that Applicant spent no time in prison. Clearance denied.

**STATEMENT OF THE CASE**

Applicant challenges the 2 March 2004 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) [\(1\)](#) recommending denial or revocation of Applicant's clearance. Applicant answered the SOR and requested a decision without hearing on 25 March 2004. He did not respond to the Government's File of Relevant Material (FORM), issued 14 April 2004; the record in this case closed 26 May 2004, the day the response was due at DOHA. The case was assigned to me on 10 June 2004 to decide if clearance should be granted, continued, denied, or revoked.

**FINDINGS OF FACT**

Applicant admitted the allegations of the SOR. Accordingly, I incorporate these admissions as findings of fact.

Applicant--a 33-year-old employee of a defense contractor--seeks access to classified information. He has not previously had a clearance.

On 10 February 1992, Applicant--then 17--was arrested and charged with involuntary manslaughter (felony) and pre-arranged speed competition (class 1 misdemeanor) when he lost control of the car he was driving, ran off the road, and into a tree, killing one of two passengers in his car. Bluntly put, he was engaged in illegal street racing. In March 1992, he was indicted by a grand jury for the two offenses. He avoided a felony conviction by entering into a plea arrangement in August 1992 which permitted him to plead no contest to misdemeanors--death by motor vehicle and willful speed competition--provided he testified against the other driver in the race if necessary.

Applicant pled as required, and in April 1993 was sentenced to two-years imprisonment on each charge (the maximum

for each), to run consecutively. However, the sentence was suspended for three years and Applicant spent no time in jail. He was originally given supervised probation, but that was later amended to unsupervised probation. He completed his probation without incident.

On 21 November 2001, Applicant failed to disclose this felony arrest on his clearance application. He claimed that he did so because he pleaded to two misdemeanor offenses and thus thought he did not have to disclose the arrest. However, the clear language of the question (#21) calls for Applicant to disclose if he was ever charged with a felony, regardless of disposition. Further, Applicant's admitted that he falsified the answer to the question. He also described his guilty reaction when he first read the question on the clearance application. In addition, Applicant's benign explanation of the events that lead to his arrest in his 6 May 2003 sworn statement conflicts with both with the original charges filed against him and the charges he was allowed to plead to as part of his plea deal.

Applicant has no criminal record since the 1992 arrest. He has finished college, gotten a job, and married.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section 6.3. and in Enclosure (2) of the Directive. 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, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*, under an assessment of the whole person.

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

### **CRIMINAL CONDUCT (GUIDELINE J)**

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.2.3. Conviction in a Federal or State court, including a court-martial, of a crime and sentenced to imprisonment for a term exceeding one year. <sup>(2)</sup>

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent.

E2.A10.1.3.2. The crime was an isolated incident.

E2.A10.1.3.6. There is clear evidence of successful rehabilitation.

E2.A10.1.3.7. Potentially disqualifying conditions 3. . . , 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. <sup>(3)</sup>

Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 amended Title 10 U.S. Code to add a new section, § 986 [the Smith Amendment], precluding the initial granting or renewal of a security clearance by the Department of Defense (DoD) under four specific circumstances. On 7 June 2001, the Deputy

Secretary of Defense issued implementing regulations under DoD 5200.2-R; the Director, DOHA issued Operating Instruction 64 (O.I. 64) on 10 July 2001.

### **PERSONAL CONDUCT (GUIDELINE E)**

E2A5.1.1. **The Concern**: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. . .

E2. A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.2. The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ;

E2.A5.1.3. Conditions that could mitigate security concerns include:

None.

### **Burden of Proof**

Initially, the government must prove controverted facts alleged in the SOR. If the government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance. Assessment of an applicant's fitness for access to classified information requires evaluation of the whole person, and consideration of such factors as the recency and frequency of the disqualifying conduct, the likelihood of recurrence, and evidence of rehabilitation.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. Where 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 or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the 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."

### **CONCLUSIONS**

The government has established its case under Guideline J, which cannot be mitigated under 10 U.S.C. § 986. The statute requires that I not grant Applicant's clearance because he was sentenced to four years imprisonment, notwithstanding that he served no prison time and completed his probation without incident. Applicant's criminal conduct was an isolated incident and not recent. While the evidence of clear rehabilitation is thin, the passage of twelve years without further criminal incident might normally result in my finding the criminal conduct mitigated, but for the application of 10 U.S.C. § 986. However, I have some lingering doubt about Applicant's rehabilitation in view of his falsification of his clearance application. Accordingly, I conclude Guideline J against Applicant, but as I do not do so solely because of the requirements of 10 U.S.C. § 986, I make no statement as required under O.I. 64.

The government has established its case under Guideline E. Although Applicant pled to two misdemeanors, he was clearly charged with felony involuntary manslaughter and he was aware of that fact when he completed his clearance application. His description of his visceral reaction to reading the felony question betrays his guilty knowledge and convinces me that his falsification was wilful. I conclude Guideline E against Applicant.

### **FORMAL FINDINGS**

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Paragraph 2. Guideline E: 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.

**John G. Metz, Jr.**

**Administrative Judge**

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6, as amended (Directive).
2. As issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.
3. Disqualifying conditions c. and d. in original as issued by the Deputy Secretary of Defense on 7 June 2001, amending DoD 5200.2-R.