

KEYWORD: Criminal Conduct

DIGEST: While traveling to work in February 1997, Applicant fell asleep at the wheel of his car, triggering an accident that resulted in the deaths of two people. Subsequently, he was convicted of two counts of reckless driving and one count of hit and run with personal injury. He was sentenced, in part, to seven years imprisonment with two years suspended, and actually served three years and four months in prison. Although Applicant mitigated the criminal conduct security concerns under Guideline J, 10 U.S.C. § 986, as revised, disqualifies him from eligibility for a security clearance. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. §986 is recommended.

CASENO: 03-23638.h1

DATE: 05/09/2006

DATE: May 9, 2006

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-23638

**DECISION OF ADMINISTRATIVE JUDGE**

**MARC E. CURRY**

**APPEARANCES**

**FOR GOVERNMENT**

Jason Perry, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

While traveling to work in February 1997, Applicant fell asleep at the wheel of his car, triggering an accident that resulted in the deaths of two people. Subsequently, he was convicted of two counts of reckless driving and one count of hit and run with personal injury. He was sentenced, in part, to seven years imprisonment with two years suspended, and actually served three years and four months in prison. Although Applicant mitigated the criminal conduct security concerns under Guideline J, 10 U.S.C. § 986, as revised, disqualifies him from eligibility for a security clearance. Clearance is denied. Further consideration of this case for a waiver of 10 U.S.C. §986 is recommended.

**STATEMENT OF THE CASE**

On December 9, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it was clearly consistent with the national interest to grant or continue a security clearance. <sup>(1)</sup> The SOR, which is in essence the administrative complaint, alleged security concerns under Guideline J, criminal conduct.

Applicant answered the SOR on December 21, 2004, admitting all of the allegations and electing to have the case decided on the written record.

Department Counsel mailed the government's file of relevant material (FORM) to Applicant on August 15, 2005. He received it on August 22, 2005. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant neither objected to any of the FORM submissions, nor filed any additional evidence to be considered. The case was assigned to me on October 11, 2005.

## **FINDINGS OF FACT**

Applicant has admitted the factual allegation (subparagraph 1.a.) and the conclusory allegation (subparagraph 1.b.) pertaining to criminal conduct under Guideline J. These admissions are incorporated herein as findings of fact. In addition, after a thorough review of the pleadings, exhibits, and statements, I make the following findings of fact:

Applicant is a 44-year-old man who graduated from college in 1984 with a degree in electrical engineering. For the past five years, he has worked for his employer as a senior systems development specialist. Applicant is married and has a 13-year-old son.

On February 25, 1997, while driving to work, Applicant fell asleep and drifted across the double yellow line into oncoming traffic. In swerving abruptly to avoid Applicant's car, an oncoming driver lost control of his vehicle and collided head-on with a vehicle that had been traveling behind Applicant's car before Applicant had fallen asleep and drifted into the wrong lane. Both a passenger in the car that swerved to avoid Applicant's car, and the driver of the car that had been traveling behind Applicant's car died as a result of the accident.

A few days later, Applicant was charged with two counts of vehicular manslaughter and felony hit and run.<sup>(2)</sup> In June 1997, Applicant pleaded guilty to the hit and run charge, and two charges of reckless driving.<sup>(3)</sup> He was sentenced to seven years imprisonment with two years suspended.<sup>(4)</sup> Also, his driver's license was revoked. Applicant was released from prison after serving approximately three years, and four months, and placed on supervised probation. He completed supervised probation in October 2002, and successfully petitioned the court for the reinstatement of his driver's license in December 2003.

This was Applicant's only criminal infraction. He has asserted throughout the security clearance adjudication process, including in his signed, sworn statement, that he did not stop after nearly colliding with the car in the oncoming lane because he was unaware an accident subsequently occurred. Neither drugs nor alcohol was a factor. He was overcome with depression as a result of the accident and began receiving counseling in 1997 while the charges were pending. He continued counseling while incarcerated.

## **POLICIES**

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into those that may be considered in deciding whether to deny or revoke an individual's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to grant an individual's eligibility for access to classified information (Mitigating Conditions).

An administrative judge need not view the adjudicative guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines, when applied in conjunction with the factors set forth in the Adjudicative Process provision in Section E2.2., Enclosure 2, of the Directive, are intended to assist the administrative judge in reaching fair and impartial common sense decisions.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," all available reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. The Adjudicative Process factors which an administrative judge should consider are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

**Criminal Conduct - Guideline J: 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, as well as those which could mitigate security concerns, pertaining to this adjudicative guideline are set forth and discussed in the conclusions below.

On June 7, 2001, the Deputy Secretary of Defense issued a Memorandum, *Implementation of Restrictions on the Granting or Renewal of Security Clearances as Mandated by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001*. The memorandum provided policy guidance for the implementation of Section 1071 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, which amended Title 10, United States Code, to add a new section (10 U.S.C. §986) that precluded the initial granting or renewal of a security clearance by the Department of Defense under specific circumstances. The situation described above involves one of those specific circumstances.

The statutory mandate applies to any DoD officer or employee, officer, director, or employee of a DoD contractor, or member of the Army, Navy, Air Force, or Marine Corps on active duty or in an active status, who is under consideration for the issuance or continuation of eligibility for access to classified information and who falls under one or more of the following provisions of the statute:

(1) has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year;

(2) is an unlawful user of, or is addicted to, a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. §802));

(3) is mentally incompetent, as determined by a mental health professional approved by the Department of Defense; or

(4) had been discharged or dismissed from the Armed Forces under dishonorable conditions.

The statute also "provides that the Secretary of Defense and the Secretary of the Military Departments concerned may authorize a waiver of the prohibitions concerning convictions, dismissals and dishonorable discharges from the armed forces in meritorious cases." Implementing guidance attached to the memorandum indicated that provision 1, described above, "disqualifies persons with convictions in both State and Federal courts, including UCMJ offenses, with sentences imposed of *more than* one year, regardless of the amount of time actually served."

On October 9, 2004, Section 1062 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 was approved and adopted, amending portions of Subsection (c)(1) of 10 U.S.C. §986, thereby altering it to read as follows:

(1) has been convicted in any court of the United States of a crime, was sentenced to imprisonment for a term exceeding one year, *and was incarcerated as a result of that sentence for not less than one year* (Emphasis of change supplied).

Since the protection of the national security is the paramount consideration, the final decision in each case must be

arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security," <sup>(5)</sup> or "clearly consistent with the national interest." For the purposes herein, despite the different language in each, I have concluded both standards are one and the same. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the burden of producing evidence initially falls on the government to establish a case which demonstrates, in accordance with the Directive, it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. If the government meets its burden, the heavy burden of persuasion then falls upon the applicant to present evidence in refutation, explanation, extenuation, or mitigation sufficient to overcome the doubts raised by the government's case, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship the government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

One additional comment is worthy of note. Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. Nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied decision as to Applicant's allegiance, loyalty, or patriotism.

## 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. 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.

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant's criminally negligent driving resulted in the death of two people. He was convicted of two counts of reckless driving, in

addition to one count of hit and run with personal injury, and consequently served more than three years in prison. Criminal Conduct Disqualifying Condition (CC DC) E2.A10.1.2.1 (*Allegations or admission of criminal conduct, regardless of whether the person was formally charged*), and CC DC E2.A10.1.2.2 (*A single serious crime or multiple lesser offenses*), apply.

Applicant asserted consistently throughout the security clearance adjudication process, including in a signed, sworn statement, that he did not stop after nearly colliding with the automobile because he was unaware of the subsequent accident. This assertion is not inconsistent with the fact he was convicted of hit and run.<sup>(6)</sup> The jurisdiction where the accident occurred does not require a specific intent on the defendant's part to leave the scene of an accident in order to sustain a conviction for hit and run. Therefore, I conclude his contention is credible, and the conduct was unintentional.

Also, the incident occurred more than eight years ago. Applicant served his prison sentence, completed probation, received counseling, and successfully petitioned the court for the reinstatement of his driver's license. Criminal Conduct Mitigating Condition (CC MC) E2.A10.1.3.1 (*The criminal behavior was not recent*), CC MC E2.A10.1.3.2 (*The crime was an isolated incident*), CC MC E2.A10.1.3.2 (*The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur*), and CC MC E2.A10.1.3.6 (*There is clear evidence of successful rehabilitation*), apply.

Applicant has mitigated the Guideline J security concern. Because he served more than one year in jail as a result of the conviction, however, 10 U.S.C. §986 applies. Therefore, Applicant is disqualified from eligibility for a security clearance. In this instance, I recommend further consideration of this case for a waiver of 10 U.S.C. § 986 pertaining to the allegations in Paragraph 1.a. of the SOR.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1. Guideline J: AGAINST THE APPLICANT

Subparagraph 1.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. Clearance is denied.

Marc E. Curry

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. Item 6 (Applicant's Signed, Sworn Statement, dated March 5, 2003) at 2.
3. *Id.* Applicant did not hit either of the automobiles involved in the crash. Under the law of the jurisdiction the accident occurred, one can be guilty of hit and run simply by being negligent in a manner which causes others to have an accident.
4. Item 7 (Conviction and Sentencing Order, dated June 30, 1997) at 5.
5. The Directive, as amended by Change 4, dated April 20, 1999, uses both "clearly consistent with the national interest" (Sec. 2.3.; Sec. 2.5.3.; Sec. 3.2; and Sec. 4.2.; Enclosure 3, Sec. E3.1.1.; Sec. E3.1.2.; Sec. E3.1.25.; Sec. E3.1.26.; and Sec. E3.1.27.), and "clearly consistent with the interests of national security" (Enclosure 2, Sec. E2.2.3.) and "clearly consistent with national security" (Enclosure 2, Sec. E2.2.2.).
6. *See* n. 3., *supra*.