DATE: August 23, 2005

In re:

SSN: -----------

Applicant for Security Clearance

ISCR Case No. 02-32567

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is unable to successfully mitigate the security concern stemming from his history of criminal conduct. He is also ineligible for access to classified information under 10 U.S.C. § 986 due to a 1962 conviction for voluntary manslaughter resulting in his serving approximately six years of confinement. In addition, Applicant deliberately falsified his security-clearance application by omitting his 1999 conviction for battery in response to a question requiring that specific information. Clearance is denied.

STATEMENT OF THE CASE

On July 22, 2003, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating the reasons why DOHA proposed to deny or revoke access to classified information for Applicant.[(1)] The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline J for criminal conduct and Guideline E for personal conduct. Also, the SOR alleges Applicant is ineligible for access to classified information based on application of 10 U.S.C. § 986, the so-called Smith Amendment. Applicant replied to the SOR on or about August 13, 2003. He admitted the SOR allegations, with explanations, and indicated he preferred a decision without a hearing.

On March 18, 2004, Department Counsel submitted her written case consisting of all relevant and material information that could be adduced at a hearing. This so-called File of Relevant Material (FORM)[(2)] was mailed to Applicant and it was received by him on April 8, 2004. Applicant did not submit any information within the 30-day period after receiving the FORM. The case was assigned to me May 20, 2004. Issuing a decision in this case was delayed due to a moratorium imposed on all cases involving 10 U.S.C. § 986, and that moratorium was lifted or rescinded in August 2005.

RULINGS ON PROCEDURE

In the FORM, Department Counsel included Item 13, which appears to be a two-page extract from a DoD personnel background report of investigation (ROI). Item 13 is described as Applicant's driving history and it consists of a list of numerous traffic violations. In my view, Applicant's driving history is irrelevant to the SOR allegations, and thus, Item 13 is inadmissible. In addition, under the Directive, an ROI is not ordinarily admissible, but may be received into the record evidence with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence.[(3)] But I decline to address this issue given that I have excluded Item 13 on relevancy grounds.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the record, I make the following findings of fact:

Applicant is a 65-year-old man who is a native-born U.S. citizen. Since May 1999, Applicant has worked as a driver for a trucking company. It appears Applicant is seeking to retain a security clearance first granted to him in 1997.

In April 1962, the then 21-year-old Applicant was involved in an altercation that led to the stabbing and death of another man. Applicant was indicted for the offense of voluntary manslaughter. He was represented at trial by the local public defender, he pleaded not guilty to the indictment, and he asserted self-defense via defense of another[(4)] as justification for his actions. In October 1962, after a contested trial, a jury convicted Applicant as charged in the indictment. The jury was polled and each juror indicated their verdict was guilty. Applicant's post-trial motion for a new trial was denied. Likewise, Applicant's petition for probation was denied. In February 1963, the state court awarded Applicant a sentence of three years (minimum) to ten years (maximum) of confinement in the state penitentiary. Applicant served about six years and was released in August 1968.

In January 1982, Applicant was arrested and charged with battery. The charge was dropped when the complaining witness did not appear in court.

In October 1985, Applicant was arrested and charged with battery and criminal trespass. In January 1986, he pleaded guilty to the criminal trespass charge and the battery charge against him was *nolle prossed*. Applicant was sentenced to 14 days in jail with credit for time served. In his answer to the SOR, Applicant explained the incident happened when he confronted some people who had just stolen property from Applicant and his sons.

In July 1987, Applicant was arrested and charged with battery. In September 1987, the charged was ruled SOL (stricken from the record with leave to reinstate). In his answer to the SOR, Applicant indicates he has no memory of this event.

In September 1988, Applicant was arrested and charged with battery. In September 1988, the charged was ruled SOL. In his answer to the SOR, Applicant indicates he has no memory of this event.

In August 1998, Applicant was arrested and charged with battery. In January 1999, Applicant was found guilty and sentenced to a $200.00 fine and 12 months of non-reporting court supervision. In his answer to the SOR, Applicant does not dispute the matter.

In January 2002, a security-clearance bearing Applicant's name and personal information was submitted to the Defense Department (Item 4). In response to Question 21 concerning felony offenses, Applicant revealed his manslaughter conviction. In response to Question 26[(5)] concerning other offenses within the last seven years, Applicant answered in the negative. In an April 2002 sworn statement (Item 5), Applicant stated that he omitted the August 1998 arrest and 1999 conviction for battery because he had forgotten about it then. In his answer to the SOR, Applicant admitted answering Question 26 in the negative, but he explained "[a]s I hate to do paperwork, I probably just ran thru the list and/or ignored it."

The record is silent concerning the character or quality of Applicant's work performance.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's security-clearance eligibility, including disqualifying conditions (DC) and mitigating conditions (MC) for each applicable guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based on 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.

BURDEN OF PROOF

The only 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.(6) There is no presumption in favor of granting or continuing access to classified information.(7) The government has the burden of proving controverted facts.(8) The U.S. Supreme Court has said the burden of proof in a security-clearance case is less than the preponderance of the evidence.(9) The DOHA Appeal Board has followed the Court's reasoning on this issue establishing a substantial-evidence standard.(10) "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."(11) Once the government meets its burden, an applicant has the burden of presenting evidence of refutation, extenuation, or mitigation sufficient to overcome the case against him.(12) In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.(13)

As noted by the Court in *Egan*, "it should be obvious that no one has a 'right' to a security clearance," and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."(14) Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

CONCLUSIONS

1. The Criminal Conduct Security Concern

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.

In addition to Guideline J, under the so-called Smith Amendment, the Defense Department and the military departments may not grant or renew a security clearance for any DoD officer or employee, an employee, officer, or director of a DoD contractor, or a member of the armed forces on active duty or in an active status who falls under any of four statutory categories.(15) The statutory category at issue here is § 986(c)(1). As initially enacted by the U.S. Congress, this subsection of the statute provided as follows: "the person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year." Effective October 28, 2004, subsection 986(c)(1) was legislatively amended to read as follows: "the person 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." In other words, the prohibition was lessened in that a sentence to confinement for more than one year no longer triggers the *per se* disqualification of an applicant for a security clearance. Now the *per se* disqualification applies only if an applicant was confined for more than one year.

The statute also provides that, in a meritorious case, the appropriate authority may authorize an exception to the statutory prohibition for persons in two of the four statutory categories; namely, paragraphs (1) and (4) of § 986(c). The statute does not define, explain, or describe a "meritorious" case. DOHA issued Operating Instruction 64, dated July 10, 2001, which requires, among other things, administrative judges to take the following action concerning waiver recommendations:

If an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. 986, the Administrative Judge shall include without explanation either the statement 'I recommend further consideration of this

case for a waiver of 10 U.S.C. 986' or 'I do not recommend further consideration of this case for a wavier of 10 U.S.C. 986.'

Here, based on the record evidence as a whole, the government established its case under Guideline J. Applicant's stands convicted of voluntary manslaughter; indeed, the taking of a human life is the most serious of crimes. Further aggravating the situation is Applicant's several arrests for battery offenses. Given these circumstances, both DC 1[(16)] and DC 2[(17)] apply against Applicant. The totality of Applicant's criminal conduct creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the six mitigating conditions under Guideline J and conclude none apply. Applicant's history of criminal conduct consists of (1) his 1962 manslaughter conviction, (2) his four arrests for battery offenses during the 1980s, and (3) his recent conviction for battery in 1999. Viewed in this light, the record evidence of reform and rehabilitation is insufficient to mitigate the criminal conduct security concern. Lacking here is strong and clear evidence of successful rehabilitation. Absent such evidence, Guideline J is decided against Applicant.

In addition to these matters, his manslaughter conviction and sentence to confinement, adjudged by a state court, resulting in Applicant serving about six years in confinement falls within the scope of 10 U.S.C. § 986, as amended. Consequently, Applicant is, absent a waiver, ineligible for a security clearance. Because I am deciding this case against Applicant based on Guideline J in general and Guideline E as discussed below--and not solely as a result of 10 U.S.C. § 986--a wavier recommendation is not called for.

2. The Personal Conduct Security Concern

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a security concern. It is deliberate if it is done knowingly and willfully. Omission of a past arrest or past drug use, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the arrest had been expunged from the record and did not need to be reported.

Here, based on the record evidence as a whole, the government established its case under Guideline E. I conclude Applicant deliberately provided a false answer in response to Question 26 of the security-clearance application. In my view, Applicant's explanations for his negative answer to Question 26 do not rebut or explain the falsification. His first explanation was he forgot about the incident when answering the question. His second explanation was he overlooked the question when completing the paperwork. His explanations are inconsistent and do not pass the commonsense test.

Concerning his first explanation, given the recency of the 1999 battery conviction, it is most improbable that Applicant genuinely forgot about it. Concerning his second explanation, it is most improbable that Applicant overlooked the question considering he had disclosed his manslaughter conviction in response to Question 21. Also, both explanations are improbable because a reasonable person in Applicant's position would know or should have known that the 1999 battery conviction might cause a problem in maintaining the security clearance previously granted in 1997 in light of his lengthy criminal record. The most probable scenario is Applicant deliberately omitted the 1999 battery conviction in an effort to protect his security clearance and his job. For all these reasons, I cannot accept Applicant's negative answer to Question 26 was an honest mistake. Given these circumstances, DC 2[(18)] applies against Applicant.

I have reviewed the mitigating conditions under Guideline E and conclude none apply. Falsification of a security-clearance application is a serious matter, not easily mitigated or explained away. Accordingly, Guideline E is decided against Applicant.

In reaching my decision, I have considered the evidence as a whole, both favorable and unfavorable, the whole-person concept, the clearly-consistent standard, and other appropriate factors and guidelines in the Directive.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

SOR ¶ 1-Guideline J: Against the Applicant

Subparagraphs a - g: Against the Applicant

SOR ¶ 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. Clearance is denied.

Michael H. Leonard

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. The FORM includes Items 1 - 14 for consideration. Item 6 of the FORM appears to be a sworn statement of Applicant, dated August 12, 1995. It is largely illegible, but I have considered it to the extent that I can read it.

3. Directive, Enclosure 3, Item E3.1.20.

4. In his answer to the SOR, Applicant maintains he acted in self-defense or defense of another or both. I presume the jury gave this matter full consideration and will not relitigate Applicant's voluntary manslaughter trial here.

5. Question 26 asks "In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed" in Questions 21 - 25 of the security-clearance application.

6. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

7. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.

8. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

9. *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

10. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

11. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

12. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

13. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

14. *Egan*, 484 U.S. at 528, 531.

15. 10 U.S.C. § 986(c)(1) through (c)(4).

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

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

18. E2.A5.1.2.2. The deliberate omission, concealment, of falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.