

DATE: November 1, 2004

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In re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-10385

**ECISION OF ADMINISTRATIVE JUDGE**

**JAMES A. YOUNG**

**APPEARANCES**

**FOR GOVERNMENT**

Francisco J. Mendez, Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant mitigated security concerns raised by his conviction for vehicular assault in 1988. But absent a waiver of 10 U.S.C. § 986 by the Secretary of Defense, the Department of Defense is prohibited from granting Applicant a clearance because of his sentence to more than one year in confinement. Clearance is denied. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

**STATEMENT OF THE CASE**

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On 15 December 2003, DOHA issued a Statement of Reasons<sup>(1)</sup> (SOR) detailing the basis for its decision-security concerns raised under Guideline J (Criminal Conduct) of the Directive. Applicant answered the SOR in writing on 21 January 2004 and elected to have a hearing before an administrative judge. The case was assigned to another judge but transferred to me on 30 June 2004. On 9 September 2004, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the hearing transcript (Tr.) on 17 September 2004.

**FINDINGS OF FACT**

Applicant is a 45-year-old staff systems engineer for a defense contractor. He married in 1996 and has one child. He served with the U.S. Army from 1978-81 and with the Army National Guard from 1981-90. He held a top secret clearance while in the military and a secret clearance from 1993-95. He is well regarded by his superiors for his technical knowledge, his work ethic, and his excellent duty performance.

During his younger days--in 1977 and from 1982-87, Applicant used marijuana 3-4 times a month. From 1983-1986, he used cocaine approximately once a month. He did not use drugs while in the military because he was an aircraft mechanic and knew he would be subject to drug testing by urinalysis. Ex. 3 at 2.

Applicant began drinking when he was 13-14 years old, using money he earned from delivering newspapers to buy beer. After entering military service, he began to drink "fairly heavily." Ex. 3 at 2. After leaving active duty, Applicant continued his heavy drinking, consuming up to 15 beers in an evening. *Id.* During the early 1980s, Applicant was arrested twice for alcohol-related driving incidents. He was convicted once of driving while his ability was impaired (DWA) and once of driving while intoxicated (DWI). After these incidents, Applicant cut back on his drinking and moved to another state. He returned home in 1987 and, while serving his annual training tour with the national Guard, drank about a six-pack of beer each evening.

In August 1987, Applicant was involved in an automobile accident. He had consumed about five beers in a two hour period and had little sleep over the previous three days. On the way home, he fell asleep at the wheel, crossed into the opposing lane of traffic, and struck two other cars. He was indicted for DWI, vehicular assault, and reckless endangerment. He pled guilty to vehicular assault and the other charges were dropped. He was sentenced to one and one-third to four years in jail. He served approximately two years in jail from July 1988 until July 1990. Although he consumed alcoholic beverages between the accident and his sentencing, he has not had any alcohol for over 16 years. He has been diagnosed as alcohol dependent. Exs. 6, 7.

At the time of the accident, Applicant had been attending community college. He took out a student loan to pay for these expenses. While he was in prison he was unable to pay the loan and the loan was defaulted. When he got out of prison and got a job, he set up a schedule to repay the student loan. After making six consecutive payments he was able to get more student aid to help him pay to finish his education. He has made his payments on this loan.

One of the victims of the accident was injured severely. She sued and won a judgment in 1990 for \$711,230. Applicant's insurance company paid approximately \$135,000 of the judgment. Applicant still owes a total of more than \$577,700 on the judgment. Ex. 5. He has taken no action to pay the debt, has no intention of doing so, and intends to apply for remission of the debt after the 20-year statutory period runs. Tr. 16-17.

### POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶

E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

### CONCLUSIONS

In the SOR, DOHA alleged that, on 11 July 1988, Applicant was sentenced to between one and one and one-third and four years in jail as a result of his conviction for vehicular assault (¶ 1.a) and, as a result of that sentence, may not be granted a security clearance absent a waiver of 10 U.S.C. § 986 by the Secretary of Defense (¶ 1.b). A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1.

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a court in the U.S. to confinement for more than one year. 10 U.S.C. § 986. Applicant is subject to 10 U.S.C. § 986 as a result of being sentenced to between one and one-third and four years in confinement for vehicular assault.

The Government established by substantial evidence and Applicant's admissions each of the allegations in the SOR. Applicant admits committing serious criminal conduct. DC E2.A10.1.2.1; DC E2.A10.1.2.2. But the criminal behavior was not recent (MC E2.A10.1.3.1), the crime was an isolated incident (MC E2.A10.1.3.2), and there is clear evidence of successful rehabilitation--his abstinence from alcohol for the past 16 years. MC E2.A10.1.3.6. I find for Applicant on ¶ 1.a. Under the circumstances, I am required to find against Applicant on ¶ 1.b. As I found against Applicant solely because of the mandate of 10 U.S.C. § 986, I am required to include in my decision, *without explanation*, a recommendation for or against further consideration of this case for waiver.

### FORMAL FINDINGS

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

Paragraph 1. Guideline J: AGAINST APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: Against Applicant

### DECISION

In light of all of 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. I do not recommend further consideration of this case for a waiver of 10 U.S.C. § 986.

James A. Young

Administrative Judge

1. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive).