

KEYWORD: Criminal Conduct

DIGEST: On May 27, 2003, when Applicant was 29 years of age, he was driving his vehicle in an intoxicated state and at an excessive speed, and was involved in an accident where his vehicle impacted a light pole and sign post. Applicant was rendered unconscious and two of his passengers were ejected from the vehicle and killed. After appearing before a Grand Jury, he has been indicted on 10 counts, including counts of homicide, and the case is pending trial. Mitigation has not been shown. Clearance is denied.

CASENO: 03-25700.h1

DATE: 02/01/2005

DATE: February 1, 2005

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-25700

DECISION OF ADMINISTRATIVE JUDGE

MARTIN H. MOGUL

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

On May 27, 2003, when Applicant was 29 years of age, he was driving his vehicle in an intoxicated state and at an excessive speed, and was involved in an accident where his vehicle impacted a light pole and sign post. Applicant was rendered unconscious and two of his passengers were ejected from the vehicle and killed. After appearing before a Grand Jury, he has been indicted on 10 counts, including counts of homicide, and the case is pending trial. Mitigation has not been shown. Clearance is denied.

STATEMENT OF THE CASE

On May 20, 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.

In a signed and sworn statement, dated June 6, 2004, Applicant responded to the SOR allegations. He requested that his case be decided on the written record in lieu of a hearing. On November 24, 2004, , Department Counsel submitted the Department's written case, which was prepared on October 6, 2004. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not file a response to the FORM. The case was assigned to this Administrative Judge on November 29, 2004.

In the FORM, Department Counsel offered six documentary exhibits (Exhibits 1- 6), which have been admitted without

objection. Applicant offered no documentary evidence into the record.

FINDINGS OF FACT

The Government opposes Applicant's request for a security clearance, based upon the allegations set forth in the SOR. In the SOR, the Government alleges that a security risk may exist under Adjudicative Guideline J (Criminal Conduct) of the Directive. The SOR contains one allegations 1.a. under Guideline J. In his response to the SOR, Applicant admits all allegations included in 1.a., with some explanation. The admitted allegations are incorporated as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR and the admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 29 years old. He is employed by a defense contractor, and he seeks to retain a DoD security clearance in connection with his employment in the defense sector. No Security Clearance Application was offered into evidence, and since this decision is being based only on the administrative record, I have received extremely limited evidence regarding Applicant's background.

Guideline J (Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal acts. Applicant's conduct that occurred in 2003, and which has been alleged in the SOR as 1.a., is included in this paragraph as criminal conduct.

On May 27, 2003, when Applicant was 28 years of age, he was arrested and charged with (1) Homicide with a Vehicle (two counts), (2) Racing, (3) Reckless Driving, (4) Speeding, and (5) Failure to Maintain Lane. On January 29, 2004, Applicant was indicted before a Grand Jury under 10 counts including the following: Homicide by Vehicle 1st Degree by causing the death of Victims One and Two through Reckless Driving by Speeding and Racing, Homicide by Vehicle 1st Degree by causing the death of Victims One and Two through the Influence of Alcohol while your alcohol concentration was .08 grams or more, Racing by Driving your vehicle in a race, speed competition and contest, and Reckless Driving by driving your vehicle in reckless disregard for the safety of persons and property by exceeding the speed limit and racing.

In a signed, sworn statement made to of the (Defense Security Service (DSS) on November 6, 2003, Applicant admitted

drinking beer on the day of the incident, but he stated that he could not recall how many he consumed. While he stated that he did not believe that he was intoxicated, he did concede that after the accident he was taken to a hospital and his blood was taken for analysis. He was also informed that he had been traveling 53 miles per hour in a zone designated for 35 miles per hour (Exhibit 5).

While the evidence offered by the Government, regarding the accident, has been limited, I have concluded that Applicant, who was driving his vehicle in an intoxicated state and at an excessive speed, was involved in an accident where his vehicle impacted a light pole and sign post. Applicant was rendered unconscious and two of his passengers were ejected from the vehicle and killed. After appearing before a Grand Jury, he has been indicted on 10 counts and the case is pending trial (Exhibits 5 and 6).

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines that must be carefully considered in evaluating an individual's security eligibility and making the overall common sense determination required. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. 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.*

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk.

Each adjudicative decision must also include an assessment of: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, and the extent of knowledgeable participation; (3) how recent and frequent the behavior was; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or

absence of rehabilitation and other pertinent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence (*See* Directive, Section E2.2.1. of Enclosure 2).

BURDEN OF PROOF

Initially, the Government must prove controverted facts alleged in the Statement of Reasons. 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 U.S. Government that is 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

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

Since this matter is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents that are found in the case file. Having considered the evidence of record in light of the appropriate legal precepts and factors, I conclude the following:

(Guideline J -Criminal Conduct)

The Government has established by substantial evidence that Applicant engaged in criminal conduct as recently as 2003. His illegal conduct was the basis for his arrest and indictment for ten criminal offenses. While this matter has not yet been fully litigated through the judicial system, no evidence has been introduced into these proceedings which would lead me to doubt that Applicant did commit the criminal conduct upon which this matter is based. Both Disqualifying Condition (DC) (E2.A10.1.2.1.), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, and DC (E2.A10.1.2.2), a single serious crime or multiple lesser offenses, apply in this

case. Applicant has not offered any evidence to rebut the Government's case regarding his criminal conduct. I find that no Mitigating Conditions apply. Guideline J is found against Applicant.

FORMAL FINDINGS

Formal Findings, as required by Section 3. Paragraph 7 of Enclosure 1 to the Directive, are hereby rendered as follows:

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.

Martin H. Mogul

Administrative Judge

