

DATE: October 25, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-14076

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL H. LEONARD

APPEARANCES

FOR GOVERNMENT

Francisco J. Mendez Jr., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In June 2000, Applicant pleaded guilty to the charge of intoxicated (vehicular) manslaughter, a second-degree felony. He was sentenced to serve 30 months in prison and he served all 30 months. He was released from custody in December 2002, and as of April 2005, he continues to consume alcohol on an occasional basis. Applicant failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the criminal conduct security concerns. In addition--based on serving more than one year of imprisonment--he is disqualified from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986(c)(1). Clearance is denied.

STATEMENT OF THE CASE

Applicant is challenging the Defense Department's preliminary decision to deny or revoke his security clearance. Acting under the relevant Executive Order and DoD Directive, [\(1\)](#) on June 26, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) detailing the basis for its decision. The SOR--which is in essence the administrative complaint-- alleges security concerns under Guideline J for criminal conduct. In addition, the SOR alleges that Applicant is disqualified from having a security clearance granted or renewed by the Defense Department under 10 U.S.C. § 986. Applicant replied to the SOR on July 1, 2006, and requested a decision without a hearing.

On July 27, 2006, Department Counsel submitted his written case consisting of all relevant and material information that could be adduced at a hearing. This so-called file of relevant material (FORM) was mailed to Applicant and it was received by him on August 2, 2006. Applicant did not submit any information or objections within the 30-day period after receiving the FORM. The case was assigned to me September 25, 2006.

RULINGS ON PROCEDURE

In the FORM, Department Counsel moved to amend the SOR subparagraph 1.b by deleting the existing language and substituting the following language:

Due to the facts alleged in subparagraph 1.a, 10 U.S.C. § 986 disqualifies you from having a security clearance granted or renewed by the Department of Defense. 10 U.S.C. § 986 also provides that, in a meritorious case, an exception to this prohibition may be granted if there are mitigating factors. Should you choose to do so, your response may include information which would support consideration of such a waiver. A copy of 10 U.S.C. § 986 is attached.

The amendment is necessary to conform the SOR to the amended version of 10 U.S.C. § 986. No objections having been made, the motion is granted.

FINDINGS OF FACT

After considering the record evidence as a whole, I make the following findings of fact.

1. Applicant is a 66-year-old man who has been employed as field data collector since June 2003. He worked for the same company, in a different position, from September 1992 to June 2000. He married in 1975 and divorced in 1991. Two children were born during the marriage, a son in 1979 and a daughter in 1986. Applicant served on active military duty with the U.S. Army from July 1958 to September 1984, about 26 years. He retired at the grade of master sergeant or first sergeant (pay grade E-8).
2. In September 1988, Applicant was arrested for driving while intoxicated (DWI). The basis for his arrest was driving on the wrong side of the highway, an odor of alcohol on his breath, his admission of drinking earlier in the evening, and failed field sobriety tests. Applicant refused to take an intoxilyzer test, but offered to give a blood sample for testing. In October 1988, the local district attorney declined to prosecute the case due to a lack of evidence to support the DWI charge.
3. About 11 years later in August 1999, Applicant drove his car after drinking five or six whiskey and water cocktails within three to four hours. He reportedly fell asleep at the wheel and was involved in a crash that killed another person. He had non-life threatening injuries and was released from the hospital the next day or so. Subsequently, he was indicted for the offense of intoxicated (vehicular) manslaughter, a second-degree felony. In June 2000, Applicant pleaded guilty. The state court sentenced him to: (1) pay court costs of \$211.25; (2) pay \$4,500 in restitution; and (3) serve 30 months in jail. Applicant admits serving the full 30 months of imprisonment, and he made all required payments. He received an unconditional release from custody in December 2002.
4. Applicant was interviewed in April 2005 during a background investigation. Concerning his DWI arrest, he admitted having several drinks before the incident and thought he was intoxicated. In addition, he said he did not consider himself to have any alcohol-related problems. He said his past use of alcohol was normally limited to a Friday or Saturday evening. He considered himself a social drinker and noted that he did not have any alcohol-related incidents while serving in the Army. He said that while in prison he underwent a 26-hour drug and alcohol class, and it was determined that he was not required to undergo any additional counseling or treatment. He said he still drinks alcohol, which he characterized as an occasional bottle of beer.
5. In his response to the SOR, Applicant does not dispute the manslaughter conviction and sentence as alleged in subparagraph 1.a. He points out that he served in the Army for 26 years and held a top-secret security clearance for a great portion of his service. He is thus aware of the requirements and responsibilities that come with access to classified information. He believes he has had many years of productive service in the work force and would like an opportunity to continue working in the defense industry. He believes he has paid his dues for the manslaughter offense and it has forever changed his life.

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 guideline. In addition, each clearance decision must be a fair and impartial commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept. ⁽²⁾ A person granted access to classified information enters into a special relationship with the government. The government must be able to have a

high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.⁽³⁾ Instead, it is a determination that the applicant has not met the strict guidelines the President has established for granting eligibility for a security clearance.

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.⁽⁴⁾ There is no presumption in favor of granting or continuing access to classified information.⁽⁵⁾ The government has the burden of presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.⁽⁶⁾ An applicant is responsible for presenting witnesses and other evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.⁽⁷⁾ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance.⁽⁹⁾ And as noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ 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,⁽¹¹⁾ criminal conduct is a 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 sensitive information.

Here, based on the record evidence as a whole, a security concern is raised under Guideline J. The record evidence shows Applicant has a history of criminal conduct stemming from his manslaughter conviction in 2000. The seriousness of his crime is demonstrated by the 30-month sentence to confinement, which he served in full. Given these facts and circumstances, both DC 1⁽¹²⁾ and DC 2⁽¹³⁾ apply against Applicant. His history of serious criminal conduct creates doubt about his judgment, reliability, and trustworthiness.

I reviewed the MC under the guideline and conclude as follows. First, the fatality occurred in August 1999 (more than seven years ago), he pleaded guilty to the manslaughter charge in June 2000 (more than six years ago), and he was released from custody in December 2002 (nearly four years ago). In light of these circumstances, his criminal conduct can be viewed as not recent under MC 1.⁽¹⁴⁾ Second, his manslaughter conviction cannot be viewed as an isolated incident under MC 2,⁽¹⁵⁾ however, because of his 1988 DWI arrest coupled with his admission that he was intoxicated, notwithstanding the district attorney's decision not to prosecute. Third, given that he continues to drink after having two alcohol-related incidents involving law enforcement, I cannot conclude that Applicant is successfully rehabilitated under MC 6.⁽¹⁶⁾ Finally, I considered the remaining MC and conclude none apply given the facts here.

2. Applicability of 10 U.S.C. § 986

In addition to the normal security concern under Guideline J, the SOR alleges (in subparagraph 1.b) that Applicant is statutorily ineligible for a security clearance based on his felony conviction and sentence in 2000 that resulted in him serving 30 months in state prison. The statute at issue is 10 U.S.C. § 986, the so-called Smith Amendment.⁽¹⁷⁾

In 2000, a federal law was enacted that prohibited the Defense Department from granting or continuing a security clearance for any applicant if that "person has been convicted in any court of the United States of a crime and sentenced to imprisonment for a term exceeding one year."⁽¹⁸⁾ The effect of the legislation was to disqualify a person with a

conviction in state, federal, or military court with a sentence imposed of more than one year regardless of the amount of time actually served, if any.

Congress amended certain parts of the law in 2004. As amended, the prohibition on granting security clearances to applicants who have been convicted in U.S. courts was limited or narrowed. The law now disqualifies an applicant if "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."⁽¹⁹⁾ The effect of the legislation is that an applicant who has been sentenced to more than one year, but instead served probation, or who served less than a year of incarceration, is not--as a matter of law--ineligible to hold a security clearance.

In September 2006, the Director, DOHA, issued a revised operating instruction (OI) for cases subject to 10 U.S.C. § 986.⁽²⁰⁾ In summary, the OI implements the waiver authority granted to the Director by the Under Secretary of Defense (Intelligence) in August 2006. Also, the OI addresses an administrative judge's responsibilities in handling a case. First, the judge is responsible for deciding if the law applies to the facts of the case.⁽²¹⁾ And second:

If an Administrative Judge issues a decision denying or revoking a security clearance solely or in part as a result of 10 U.S.C. § 986, the Administrative Judge shall not opine whether a waiver of 10 U.S.C. § 986 is merited, nor recommend whether to consider the case for a waiver of 10 U.S.C. § 986. However, if an Administrative Judge issues a decision denying or revoking a clearance solely as a result of 10 U.S.C. § 986, the decision shall state this fact and shall identify the specific subparagraph under 10 U.S.C. § 986(c) applicable to the case.⁽²²⁾

Accordingly, an administrative judge's role or authority is limited to determining if the law applies to an applicant. If it does, no waiver recommendation of any kind will be made.

Here, the government seeks to disqualify Applicant asserting he served 30 months in state prison. As noted above, there is no factual dispute about whether Applicant served more than one year of imprisonment. Accordingly, I conclude that 10 U.S.C. § 986 applies, and thus, Applicant is disqualified from having a security clearance granted or renewed by the Defense Department. In particular, Applicant is disqualified under 10 U.S.C. § 986(c)(1).

3. The Whole-Person Concept

I have also considered the available information in light of the whole-person concept. Applicant is a mature man who served 26 years in the Army and held a security clearance for many of those years. He has since worked in the defense industry. When the manslaughter offense took place in August 1999, he was 58 years old, old enough and experienced enough to know better than to drink and drive.⁽²³⁾ Also, he continues to drink alcohol--meaning another alcohol-related incident cannot be ruled out.⁽²⁴⁾ Other than his response to the SOR, he did not present any information showing his efforts in rehabilitation.⁽²⁵⁾ Also of concern is the nature of the crime--the second-degree felony of vehicular manslaughter is a serious offense involving senseless loss of life.⁽²⁶⁾ Considering the record evidence as a whole, I conclude Applicant failed to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns arising under Guideline J. Stated differently, I am not deciding this case against Applicant solely as a result of 10 U.S.C. § 986. And he has not met his ultimate burden of persuasion to obtain a favorable clearance decision.

FORMAL FINDINGS

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

SOR ¶ 1-Guideline J: Against Applicant

Subparagraph a: Against Applicant

Subparagraph b: Against 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. Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended (Directive).
2. Directive, Item E2.2.1.
3. Executive Order 10865, § 7.
4. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
5. ISCR Case No. 02-18663 (March 23, 2004) at p. 5.
6. Directive, Enclosure 3, Item E3.1.14.
7. Directive, Enclosure 3, Item E3.1.15.
8. Directive, Enclosure 3, Item E3.1.15.
9. *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) ("It is likewise plain that there is no 'right' to a security clearance, so that full-scale due process standards do not apply to cases such as Duane's.") (citations omitted).
10. 484 U.S. at 531.
11. Directive, Enclosure 2, Attachment 10.
12. Directive, Item E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged.
13. Directive, Item E2.A10.1.2.2. A single serious crime or multiple lesser offenses.
14. Directive, Item E2.A10.1.3.1. The criminal behavior was not recent.
15. Directive, Item E2.A10.1.3.2. The crime was an isolated incident.
16. Directive, Item E2.A10.1.3.6. There is clear evidence of successful rehabilitation.
17. For background information on the origin of this statutory prohibition, see Attorney Sheldon I. Cohen's publication *Loss of a Security Clearance Because of a Felony Conviction: The Effect of 10 U.S.C. § 986, the "Smith Amendment,"* which can be found at www.sheldoncohen.com/publications.
18. 10 U.S.C. § 986(c)(1) (2001).
19. 10 U.S.C. § 986(c)(1) (2004).
20. DOHA Operating Instruction No. 64, dated September 12, 2006.
21. OI 64, ¶ 2.e.

22. OI 64, ¶ 3.f.

23. Directive, Item E2.2.1.4. The individual's age and maturity at the time of the conduct.

24. Directive, Item E2.2.1.9. The likelihood of continuation or recurrence.

25. Directive, Item E2.2.1.6. The presence or absence of rehabilitation and other pertinent behavioral changes.

26. Directive, Item E2.2.1.1. The nature, extent, and seriousness of the conduct.