

DATE: July 17, 2006

In re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-16017

DECISION OF ADMINISTRATIVE JUDGE

MICHAEL J. BRESLIN

APPEARANCES

FOR GOVERNMENT

Robert E. Coacher, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

In 1984, when he was 20 years old, Applicant strangled his 18-year-old girlfriend to death. He was convicted of Voluntary Manslaughter, sentenced to 11 years confinement, and actually served over five years in jail. While in confinement he attended counseling and obtained numerous degrees and certificates of training. After his release from jail in 1991, he amassed an excellent record of duty performance and held a security clearance successfully since 1994, mitigating any security concern arising from his prior criminal conduct. Under 10 U.S.C. § 986, the Department of Defense may not grant or continue a security clearance to one who was convicted of a crime, sentenced to more than one year in jail, and actually served more than one year in confinement. Clearance is denied.

STATEMENT OF THE CASE

On May 12, 2004, Applicant submitted a security clearance application. The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant under Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (the "Directive"). On February 28, 2006, DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision. The SOR alleges security concerns under Guideline J, Criminal Conduct, of the Directive.

Applicant answered the SOR in writing by letter dated March 26, 2006. He elected to have a hearing before an administrative judge.

The case was originally assigned to another judge, but was reassigned to me on May 31, 2006. With the concurrence of Applicant and Department Counsel, I convened the hearing on June 13, 2006. The government introduced Exhibits 1 through 3. Applicant provided Exhibits A through L, and testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on June 28, 2006.

FINDINGS OF FACT

In his Answer to the SOR, dated March 26, 2006, Applicant admitted the factual allegations in the SOR. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact.

Applicant was born in January 1964. (Ex. 1 at 1.) He enlisted in the U.S. Army in October 1982. (Ex. 1 at 2.) In December 1982 he was absent without leave (AWOL), resulting in punishment under Article 15, UCMJ, including forfeiture of pay and restriction. (Ex. 1 at 3, 5.) In February 1983, Applicant went AWOL again. He was convicted by general court-martial and sentenced to 30 day's confinement. (Ex. 1 at 3, 5.) In June 1983, Applicant went AWOL for the third time. (Ex. 1 at 3.) The Army discharged him in July 1983, prior to the expiration of his term of service, with an under other than honorable conditions (UOTHC) discharge. (Ex. 1 at 3, 5.)

After his discharge from the Army, Applicant returned to his hometown and lived with his grandfather and his grandfather's wife. He was 19 years old and unable to find a job. (Tr. at 19.) He began dating a young woman, then 18 years old. She broke off the relationship in early February 1984, causing Applicant emotional turmoil. (Ex. 2 at 12, 27.)

He visited his former girlfriend at her home on February 24, 1984. (Ex. 2 at 28.) At about 4:00 in the morning, the young woman came to Applicant's room and they talked for a while then engaged in sexual intercourse. (Ex. 2 at 29, 33.) After they dressed, they talked for a while. According to Applicant, the victim told him her new boyfriend was better than Applicant. He became angry. (Ex. 2 at 37.) He told her he had something for her and asked her to close her eyes. (Ex. 2 at 32.) When she did so, he choked her neck with his hands and pushed her onto the bed until she was unconscious, and then smothered her with a pillow. (Ex. 2 at 29, 31, 33.) He hid her body in his closet, tying her legs together so they would not fall over. (Ex. 2 at 29.) Later that morning, he took a personal telephone call, and contrived to make it appear to his step-grandmother that the victim was leaving the house. Later, Applicant left the house to visit a friend. When the victim's mother contacted him about the victim's whereabouts, he lied and told her the victim intended to visit a nearby city. (Ex. 2 at 30.)

Applicant returned home. After his grandparents left the house, he dragged the victim's body to the utility room. (Ex. 2 at 30.) He sat the victim's body in a chair, and tied a sheet under her arms to haul the body into the attic. (*Id.*) He was unable to pull her into the attic. Applicant's grandparents came home and found him standing over the victim's body. (Ex. 2 at 7, 30.) Applicant got a large kitchen knife, jumped out the window, and ran down the street. (Ex. 2 at 23, 30.) He put the knife to his chest but could not kill himself. He returned to the house. (*Id.*)

The local police arrested Applicant and questioned him at length. (Ex. 2.) At first, he claimed he found the victim dead outside when he returned home. Later, he confessed to killing her in a rage.

Authorities charged Applicant with Murder and Concealment of Homicidal Death. In June 1984, Applicant pleaded guilty to the reduced charge of Voluntary Manslaughter. (Ex. 3 at 1.) The court sentenced Applicant to 11 years confinement, plus two years supervised release. (*Id.*)

Applicant served a total of five and one-half years in confinement. (Ex. 1 at 5.) While in confinement, Applicant went through some initial counseling sessions. (Tr. at 22.) He continued his formal education, obtaining a certificate in Mechanical Drafting in December 1986 (Ex. B), a certificate in Architectural Drafting in February 1987 (Ex. A), a certificate in Drafting Technology in April 1987 (Ex. C), an Associate's degree in Applied Science in July 1987 (Ex. D), an Associate in Science degree in July 1987 (Ex. F), and an Associate in Arts degree in February 1988 (Ex. E).

Applicant was released from confinement in about June 1989, and spent two years in mandatory supervised release. (Ex. 1 at 5.) Applicant was married in December 1990. (Ex. 1 at 2.) He worked as a draftsman and an assembler for two companies. He completed all the requirements of his sentence in May 1991. (Ex. 1 at 5; Ex. 3 at 6.)

In 1991, Applicant assumed his present position working as a computer-assisted design (CAD) technician for a defense contractor. (Ex. 1 at 1.) He obtained a security clearance in March 1994. (Ex. 1 at 4.) He received accolades for his outstanding contributions at work. (Ex. H.) The president and vice-president of the defense contractor attest that he is a faithful and trustworthy employee, who has served successfully as the company's Information Systems Security Manager for over two years. (Exs. K, L.) His facility security officer praised his work ethic, integrity, and initiative. (Ex. J.)

Applicant was divorced from his first wife in June 1995. (*Id.*) Applicant remarried in June 1997. (Ex. 1 at 2.) He has one son.

Applicant testified at the hearing. (Tr. at 18, *et seq.*) He expressed his deep remorse for the crime, and his belief that the only way to redeem himself is to try to lead a good life and be a contributing member of society. (Tr. at 25.)

POLICIES

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." (*Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." (Exec. Ord. 10865, § 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Under 10 U.S.C. § 986(c)(1) (2004), the Department of Defense is prohibited from granting a security clearance to any applicant who was convicted of an offense in a U.S. court, was sentenced to more than one year in jail, and was incarcerated as a result of that conviction for at least one year. The statute also provides that Secretary of Defense may authorize an exception to the prohibition "[i]n a meritorious case, . . . if there are mitigating factors. Any such waiver may be authorized only in accordance with standards and procedures prescribed by, or under the authority of, an Executive order or other guidance issued by the President." 10 U.S.C. § 986(d) (2004). No such executive order or other guidance has been issued by, or under the authority of, the President. The Appeal Board has concluded that an administrative judge has "no legal authority to make any recommendation, favorable or unfavorable, concerning a waiver under 10 U.S.C. § 986." (ISCR Case No. 03-05804 at 4 (App. Bd. Sep. 9, 2005).)

"The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance." (Directive, ¶ E2.2.1.) An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person. (*Id.*) An administrative judge should consider the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (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. (*Id.*)

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, ¶ E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (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 (App. Bd. Dec. 19, 2002).) "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." (Directive, ¶ E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. 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. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, § 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

CONCLUSIONS

I considered carefully all the facts in evidence and the legal standards discussed above. I reach the following conclusions regarding the allegations in the SOR.

The security concern arising under Guideline J, Criminal Conduct, is that "[a] history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness." (Directive, ¶ E2.A10.1.1.)

Paragraph E2.A10.1.2.1 of the Directive provides that "allegations or admission of criminal conduct" may be disqualifying. Similarly, under ¶ E2.A10.1.2.2 of the Directive, it may be disqualifying where an applicant committed "a single serious crime or multiple lesser offenses." Applicant pled guilty to and was convicted of Voluntary Manslaughter of his 18-year-old former girlfriend, resulting in over five years confinement. The available evidence raises both these potentially disqualifying conditions.

Under the Directive, the security concerns arising from a history of criminal conduct may be mitigated. As noted above, Applicant has the burden of showing that potentially mitigating conditions apply.

Under ¶ E2.A10.1.3.1 of the Directive, it may be mitigating when "the criminal behavior was not recent." The crime occurred in 1984-over 22 years ago-therefore, it was not recent. I find this potentially mitigating condition applies.

Paragraph ¶ E2.A10.1.3.2 of the Directive also provides that it may be mitigating where "the crime was an isolated incident." The conviction for Voluntary Manslaughter was the only violent offense Applicant committed, but it is not the only offense on his criminal record. Applicant also went AWOL on three occasions, resulting in nonjudicial punishment, a general court-martial conviction, and involuntary discharge from the Army. Applicant has not met his burden of demonstrating that this was an isolated incident.

Paragraph E2.A10.1.3.4 of the Directive states it may be mitigating where "the factors leading to the violation are not likely to recur." Similarly, ¶ E2.A10.1.3.6 provides that "clear evidence of successful rehabilitation" may be mitigating. The very serious offense which formed the basis of this action occurred when Applicant was only 20 years old. At that time he was unemployed and deeply troubled by his recently failed relationship. Since then, he attended counseling, completed his sentence to confinement, obtained several degrees from a state university, and compiled a history of excellent work performance. I conclude the available evidence raises these potentially mitigating conditions.

The "Whole Person" Concept

I carefully considered all the facts and circumstances, including the potentially disqualifying and mitigating conditions, in light of the "whole person" concept. Applicant is a mature individual who has held a security clearance since about 1994. (Directive, ¶ E2.2.1.4.) His criminal conduct was an exceptionally heinous crime, although it occurred many years ago. (Directive, ¶ E2.2.1.2; ¶ E2.2.1.3; ¶ E2.2.1.7.) Since then, he attended counseling, served a lengthy sentence to confinement, and amassed an excellent record of duty performance. (Directive, ¶ E2.2.1.6, ¶ E2.2.1.9.) I find little likelihood of a recurrence of a similar offense. (Directive, ¶ E2.2.1.9.) His employers, the individuals in the best position to assess his security worthiness, attest to his dependability and trustworthiness. Although I deplore the terrible crime he committed 22 years ago, it appears he has been rehabilitated such that his previous criminal conduct is not a security concern. I find in favor of Applicant under ¶ 1.a of the SOR.

As noted above, 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 U.S. court to confinement for more than one year and actually served at least one year in confinement. 10 U.S.C. § 986. Applicant is subject to 10 U.S.C. § 986 by virtue of being convicted of a felony offense, sentenced to eleven years in confinement, and serving over five years in jail. Under the statute, I am required to find against Applicant on ¶ 1.b of the SOR.

As noted above, the Appeal Board holds that administrative judges are not authorized to make recommendations regarding a waiver because the President has not established guidelines implementing that portion of the statute. I recognize this limitation, and note that if I had been authorized to make a recommendation, I would not have recommended a waiver under all the circumstances of this case.

FORMAL FINDINGS

My conclusions as to each allegation in the SOR are:

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.

Michael J. Breslin

Administrative Judge