

DATE: October 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 06-00936

DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Ray T. Blank, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's felonious, criminal conviction for gross vehicular manslaughter and two alcohol-related offenses in July 1988, and his two-year imprisonment sentence disqualify him from holding a security clearance under Title 10 U.S.C. § 986, absent a waiver by the Secretary of Defense as a meritorious case. Applicant exercised extremely poor judgment by drinking to intoxication, then driving his car into a one-car accident causing the death of his passenger. On the other hand, the passage of time and Applicant's persuasive case in rehabilitation justifies a recommendation for waiver of the prohibition against holding a security clearance. Clearance is denied.

STATEMENT OF THE CASE

On May 15, 2006, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6, dated January 2, 1992, as reissued through Change 4 thereto, dated April 20, 1999, issued a Statement of Reasons (SOR) to the 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. DOHA recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied or revoked. In his undated answer that was received by DOHA on May 30, 2006, Applicant requested a hearing before an Administrative Judge.

The case was assigned to me on July 11, 2006. On July 25, 2006, this case was set for hearing on August 8, 2006. The government submitted seven exhibits (GE 1-8), and Applicant submitted four exhibits (AE A-D). Testimony was taken from Applicant and four witnesses. The transcript was received on August 18, 2006.

FINDINGS OF FACT

The SOR alleges criminal conduct. Applicant's admissions to subparagraph 1.a. and 1.b. are incorporated into the following factual findings. Applicant is 41 years old and has worked in computer support at the same defense contractor site since April 2003.

Applicant was 23 years old on July 2, 1988. He and a female friend he had known briefly, decided to meet at a restaurant in the city where they would then decide their destination later that evening. After drinking and dining at the restaurant, they decided to drive to another location although they were too intoxicated to drive. While Applicant recalled that his female friend was driving (Tr. 64), he accepts the jury's judgment in April 1990 that he was the driver of the car involved in the fatal collision on the way to the second location. He lost control of the car trying to avoid another car that had suddenly cut in front of his car. He hit a tree and they both were ejected from the vehicle causing the woman's death. Applicant also suffered serious injuries, including paralysis in one of his arms.

Applicant was arrested on July 2, 1988 (subparagraph 1.a.), and charged with (1) gross vehicular manslaughter while intoxicated, (2) driving while under the influence of alcohol causing bodily injury, a felony, (3) driving while having a blood concentration of .10% or more, causing bodily injury, a felony, and (4) speeding. On April 13, 1990, Applicant was found guilty in a jury trial of the first three counts and sentenced to four years in prison on May 31, 1990 (GE 4). There are no court records establishing how long Applicant was in prison and when he was paroled. However, the information he supplied to question 21 (felony record) of his security form (GE 1) reflects he was incarcerated for two years. In the transcript at page 60, he testified that he served a prison sentence of two years and four months. Applicant has no other criminal or traffic record (AE B).

Shortly after Applicant's arrival in prison to begin his sentence in May 1990, he decided to make the best of a bad situation. He studied and completed his high school equivalency curriculum and exam. He also took several seminary courses and other college courses (Tr. 57).

After he was paroled in 1992 for good behavior, Applicant began his computer career. From 1992 to 1998, he worked in a technical support position for a computer firm in his hometown. From 1998 to 1999, Applicant moved to another technical support job where he focused on network support and sales of computer products. In December 1999, Applicant accepted a marketing/technical support position in the local area. After working as a help desk analyst for the United States Post Office for approximately eight months in 2002 and early 2003, Applicant landed his present position in April 2003 as a network specialist for his current employer.

Applicant has tried to make productive changes in his life since he was paroled in 1992. He stated in a February 2004 sworn statement that:

Sixteen years ago, I did not make the right decision, but now I can make [the] decision right. I have learned many lessons during this time and I have committed to change my life around. For exampl[e], I never drink and drive. Occasionally, I have wine or beer at home with dinner. I am a practicing Christian, married six years with a newborn son. I embrace life and continue to educate myself. I am [a] responsible and contributing adult to my community. With the many responsibilities I hold, I think carefully before I act on my decisions and their impact on my life, my family and others (GE 3).

Four witnesses testified in Applicant's behalf. A coworker in the information department who has known Applicant for four years, recommends him for a position of trust based on his effectiveness in solving computer problems. A representative of Applicant's customer has observed Applicant consistently deliver a qualify work performance in a timely manner. Applicant's paralysis, according to the representative, does not impair his work product. A friend of seven years considers that Applicant's trustworthiness comes from his strong religious beliefs.

Applicant's fourth witness lives in the same apartment complex with him. Based on their frequent social interaction, the friend believes Applicant is a religious person who is also a responsible driver. The fourth witness has observed Applicant consume alcohol on an infrequent basis, and has never seen him abuse alcohol..

Included with the other character statements from friends and coworkers is a statement from Applicant's wife. She married him in 1997, and believes he has always been trustworthy and reliable in carrying out the responsibilities of a husband and father. The tragic incident in 1998 has brought Applicant much closer to his religious beliefs, which in turn has increased the close relationship he has with his family, the community and members of his church.

POLICIES

Enclosure 2 of the Directive sets forth guidelines containing disqualifying conditions (DC) and mitigating conditions (MC) that should be given binding consideration in making security clearance determinations. These conditions must be considered in every case along with the general factors of the whole person concept. However, the conditions are not automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense.

Burden of Proof

Initially, the government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualifies, or may disqualify, the applicant from being eligible for access to classified information. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the Criteria listed therein and an applicant's security suitability." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *See Egan*, 481 U.S. at 531; *see* Directive E2.2.2.

Criminal Conduct (Guideline J)

Criminal conduct is synonymous with poor judgment because an individual who is willing to violate the law may also be willing to violate security regulations when he chooses.

In addition, Title 10 U.S.C. § 986, prohibits the Department of Defense (DoD) from granting or renewing a security clearance to any employee of a DoD contractor who has been convicted of a crime in any court of the United States, was sentenced to imprisonment for a term exceeding one year, and was incarcerated for more than a year. The statute provides that in meritorious cases the Secretary of Defense may authorize a waiver of the prohibition. Since this case was heard before August 30, 2006, the date of implementation of the revised Operating Instruction (OI) 64, I have authority to recommend whether this case should be considered for waiver pursuant to OI 64, dated July 10, 2001.

CONCLUSIONS

The government has established its case under the criminal conduct (CC) guideline as Applicant's conviction for manslaughter and two alcohol-related offenses falls within the scope of CC disqualifying condition (DC) E2.A10.1.2.1. (*a single serious crime or multiple lesser offenses*)

Under the Directive, the security concerns arising from a serious conviction may be mitigated if one or more of the following mitigating conditions apply: CC mitigating condition (MC) E2.A10.1.3.1. (*the behavior was not recent*); CC MC E2.A10.1.3.2. (*the crime was an isolated incident*); and, CC MC E2.A10.1.3.6. (*there is clear evidence of successful rehabilitation*). Even though the Directive does not define the term "recent," the recency of a criminal offense should be determined by considering all the surrounding circumstances, including the applicant's age, his behavior pattern over time, and the number of years that have passed since the offense occurred. The manslaughter and two alcohol-related offenses occurred 18 years ago when Applicant was 23. He had no criminal record before the offense, he has committed no crimes of any nature since the offense. CC E2.A10.1.3.1. applies.

CC MC E2.A10.1.3.2. provides mitigation where the offense was isolated. Having committed one criminal offense 18 years ago, I conclude the crime was an isolated incident under this mitigating condition and the whole person concept.

The two year period Applicant spent in prison was not a pleasant time. However, rather than squander this potentially important period of his life, he took advantage of the institution's educational resources and received his high school diploma while completing several other scholastic courses. Since his discharge in 1992, Applicant quickly found employment with computer firms.

In the 18 year period since his discharge from prison, Applicant has developed strong religious beliefs that he tries to

apply in his professional and family affairs on a daily basis. The character statements and testimony demonstrate how well-respected Applicant is among his professional and social peers. I conclude CC MC E2.A10.1.3.6. applies. Having weighed the entire record, I find that Applicant has overcome the adverse evidence under the CC guideline. Accordingly, subparagraph 1.a. is found in Applicant's favor.

Considering the evidence as a whole and in light of the general factors of the whole person concept, Applicant committed a horrendous crime in 1988. On the other hand, the crime occurred 18 years ago when Applicant was 23 years old. Applicant is now 41 years old and has become a valuable employee, a good father, and a reliable husband. However, as discussed in Policies, 10 U.S.C. § 986 precludes Applicant from holding a security clearance because he served at least two years in prison. Subparagraph 1.b. is found against Applicant. Since this adverse security decision is based solely on 10 U.S.C. § 986, I recommend further consideration of this case for a waiver.

FORMAL FINDINGS

Formal Findings required by Paragraph 25 of Enclosure 3 are:

Paragraph 1 (Criminal Conduct, Guideline J): AGAINST THE APPLICANT.

Subparagraph 1.a. For the Applicant.

Subparagraph 1.b. 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.

Paul J. Mason

Administrative Judge