DATE: March 15, 2007

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 06-07574

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Stephanie C. Hess, Esq., Department Counsel

FOR APPLICANT

Sheldon I. Cohen, Esq.

SYNOPSIS

Applicant was convicted of aggravated vehicular homicide in 1983, and he served 18 months in prison. After his release, he progressed from menial jobs to a responsible position with a defense contractor. While working full time, he attended college at night, obtaining a bachelor's degree and a master's degree. He is a devoted father, deeply involved in the community. He has mitigated the security concern based on criminal conduct, but granting him a clearance is prohibited by 10 U.S.C. § 986(c)(1). Solely because of the statutory prohibition, clearance is denied.

STATEMENT OF THE CASE

On August 8, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 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). The SOR alleged security concerns raised under Guideline J (Criminal Conduct) of the Directive.

Applicant answered the SOR in writing on September 27, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on December 21, 2006, and heard on February 8, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on February 21, 2007.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 45-year-old subcontract administrator for a defense contractor. He has worked for his current employer

since January 1996 and held a clearance since May 1996. He was married in August 1997 and has two children, ages 4 and 7.

Applicant graduated from high school in May 1979 and then worked as a fork lift operator in a brick manufacturing plant. He lived with his parents, who were strict, very religious, and disapproved of alcohol consumption (Tr. 33, 57-58, 99).

On February 13, 1983, Applicant, then 21 years old, met a 17-year-old female neighbor and another woman he did not know at a bar. He asked them if he could ride home with them (Tr. 59). The three left the bar together, and Applicant's neighbor asked him to drive, because "he was a guy" and she did not like to drive at night (Government Exhibit (GX) 14). Applicant initially declined because he had consumed four or five drinks (Tr. 58), but he eventually agreed to drive the car, which was owned by his neighbor's father. As they were driving home, Applicant momentarily looked away from the road and drifted over the center line, striking an oncoming car (GX 4; GX 10). Neither Applicant nor his two companions were injured. The occupant of the other car was injured, but Applicant and his companions did not think her injuries were serious (Tr. 63). Because Applicant's neighbor was concerned about her father's reaction and uncertain whether the insurance would cover the vehicle, they decided to tell the police that Applicant's neighbor was driving at the time of the accident (Tr. 64; GX 5; GX 6; GX 7).[(1)]

The next day, Applicant learned from his neighbor that the occupant of the other car had died (Tr. 65). He and his two companions decided to tell the truth about who was driving. Applicant waited a day, told his parents what had happened, and contacted a lawyer. A day or two later, he called the police and told them he wanted to make a statement about the accident. The following day, he told the police he was the driver, but on advice of counsel he refused to answer any questions (Tr. 69-70; GX 13). He was released on his own recognizance (Tr. 70).

At some time in February 1983, Applicant telephoned the husband of the woman who was killed in the accident and apologized. He asked the husband if they could meet personally, and the husband declined (Tr. 73).

On March 28, 1983, Applicant appeared with counsel, was arraigned on a charge of aggravated vehicular homicide, and pleaded guilty (Tr. 71; GX 3). On June 10, 1983, he was sentenced to imprisonment for one to five years (Tr. 71). He was incarcerated on June 14, 1983, served 22 days in maximum custody, and then transferred to a minimum security prison until January 8, 1985, when he was paroled (Tr. 72; GX 2).

Applicant moved to another state and, with the assistance of an uncle, was able to find work and serve his parole at his new home until he was released from parole on June 8, 1988 (Tr. 72). He lived with his uncle for two or three weeks and then began working as a grounds keeper for a sports training facility. He lived and worked at the facility for about 18 months (Tr. 77). He worked for a boat dealer for about three years, handling return and replacement of warranty items on luxury boats (Tr. 78). He voluntarily left the boat business and began working as a shipping and receiving manager for an electronics firm, but he was laid off after about seven months (Tr. 79).

After leaving the electronics firm, he was hired by a defense contractor, where he worked in production control and procurement. After four years he was laid off because of a reduction in force (Tr. 80). He worked for two other defense contractors for short periods, until he was hired by his current employer in January 1996. He worked as a production control facilitator until he was promoted to his current position as a subcontract administrator (Tr. 82-83).

Applicant has received several employee awards. He received an employee of the month award in June 2005 for his performance in negotiating a major contract (Tr. 84; Applicant's Exhibit (AX) F). He received a "director award" in September 2005 for his performance during disaster recovery efforts after Hurricane Katrina (Tr. 85; AX G). He received a "TAP" (Timely Awards Plan) in November 2005 for his part in negotiating a savings of more than $1,000,000 in maintenance costs during disaster recovery (Tr. 86; AX H).

Applicant attended college part-time while working. He received an associate's degree in film and video production in 1992 (AX A), a bachelor's degree in organizational management in May 2003, and a master's degree in business administration in August 2005 (AX C). He was selected for membership in an international honor society in March 2005 (AX D).

Applicant worked as a volunteer camera operator and director at a local cable channel station from about 1991 through 1996 (Tr. 93-94). He is the manager of a little league baseball team (Tr. 94; AX I), and he regularly volunteers to assist at church events (Tr. 95).

On October 12, 2006, Applicant applied for expungement of his record of conviction. On January 10, 2007, the court found that Applicant had been rehabilitated, granted the request for expungement, and ordered the court records sealed (AX K; Tr. 74).

Applicant's emotional reaction to the car accident was very strong at the hearing. He testified he lives with it and asks forgiveness every day. He realizes he changed the lives of his victim's family (Tr. 96-96).

Applicant's uncle, a retired executive director of a state public defender's office with a background in law enforcement, assisted Applicant in obtaining a lawyer after the accident and also assisted him in transferring his parole to another state, and finding employment and lodging after he was released from prison (Tr. 34-36). He testified Applicant is a very good father (Tr. 37). He testified it is difficult for Applicant to talk about the accident, because it is a "terrible burden" that will be with him for the rest of his life (Tr. 39).

A former supervisor who has known Applicant since 1996 characterized him as a "topnotch employee" who was very conscientious and never complained (Tr. 47). He encouraged Applicant to move into the procurement field and to further his education (Tr. 49-50). He considers Applicant very trustworthy (Tr. 52).

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 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. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶¶ 6.3.1 through 6.3.6.

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 persons with access to classified information. However, 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 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 which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). "[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. ISCR Case No. 01-20700 at 3; *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 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations

should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Guideline J (Criminal Conduct)

A history or pattern of criminal activity creates doubt about an applicant's judgment, reliability, and trustworthiness. Directive ¶ E2.A10.1.1. A single serious crime or multiple lesser offenses may also be disqualifying (DC 2). Directive ¶ E2.A10.1.2.2. Applicant's conviction of aggravated vehicular homicide raises DC 2.

Since the government produced substantial evidence to establish DC 2, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Criminal conduct can be mitigated by showing it was not recent (MC 1), it was an isolated incident (MC 2), or there is clear evidence of successful rehabilitation (MC 6). Directive ¶¶ E2.A10.1.3.1, E2.A10.1.3.2, E2.A10.1.3.6. MC 2 is established because the incident is the only criminal offense in Applicant's personal history.

The issue under both MC 1 and MC 6 is whether there has been a significant period of time without any evidence of misconduct, and whether the evidence shows changed circumstances or conduct. The Directive is silent on what constitutes a sufficient period of reform and rehabilitation. The sufficiency of an applicant's period of conduct without recurrence of past misconduct does not turn on any bright-line rules concerning the length of time needed to demonstrate reform and rehabilitation, but rather on a reasoned analysis of the facts and circumstances of an applicant's case based on a careful evaluation of the record. If the evidence shows that a significant period of time has passed without evidence of misconduct by an applicant, then an administrative judge must articulate a rational basis for concluding why that significant period of time does not demonstrate changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

I conclude MC 1 and MC 6 are established. The accident happened more than 24 years ago, when Applicant was 21 years old. The accident was not an intentional criminal act. Applicant expressed remorse almost immediately and continues to feel remorse. He worked hard after his release from prison to find employment, improve his educational level, raise his family, and become a valuable member of his community. He has demonstrated, by a long track record of law-abiding, responsible behavior, that his criminal behavior is not indicative of his current attitude or life style and is not likely to recur. He has established "a track record that shows [he] . . . , through actions and conduct, is willing and able to adhere to a stated intention to refrain from acting in a way that [he] has acted in the past." ISCR Case No. 97-0727, 1998 DOHA LEXIS 302 at *7 (App. Bd. Aug. 3, 1998).

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant'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 ¶¶ E2.2.1.1 through E2.2.1.9. Some of these factors are discussed above, but some merit additional comment.

Applicant committed a serious offense when he was 21 years old. It is the only criminal offense in his personal history. He has held a clearance for more than 10 years without incident. He is now 45 years old, a devoted husband and father, a trusted and respected employee, and a valuable member of his community. His remorse is obvious and continuous. The likelihood of recurrence is nil.

10 U.S.C. § 986 ("Smith Amendment")

Under the provisions of 10 U.S.C. § 986(c)(1), the Department of Defense is prohibited from granting or renewing a security clearance for any person who "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" unless the prohibition is waived by certain designated officials. On its face, it is not entirely clear whether the statute imposes a prohibition or creates a disqualifying condition that cannot be mitigated. Subsection (a) is captioned "*prohibition*," but subsection (c) is captioned, "persons *disqualified* from being granted a security clearance." The waiver authority set out in subsection (d) allows waiver "as an exception to the *prohibition* in subsection (a) . . . "if there are mitigating factors." The reporting requirement in subsection (e) refers to "the *disqualifying* factor in subsection (c) that applied, and the reason for waiver of the *disqualification*." Federal courts have treated the statute as imposing a prohibition. *See Wright V. U.S. Army,* 307 F. Supp. 2d 1065 (D. Ariz. 2004); *Nickelson v. United States*, 284 F. Supp. 2d 387 (E.D. Va., 2003).[(2)]

Based on all the evidence, I conclude 10 U.S.C. § 986 (c)(1) applies to this case. I also conclude that Applicant has mitigated the security concern raised by his criminal conduct. However, I do not have authority to waive the statutory prohibition against granting a clearance. Authority to grant a waiver has been granted to the Director, DOHA. My decision to deny a clearance is based solely on 10 U.S.C. § 986(c)(1).

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 the circumstances of this case, it is clearly consistent with the national interest to grant Applicant a security clearance. However, under the provisions of 18 U.S.C. § 986(c)(1), as amended, Applicant may not be granted a security clearance unless a waiver is granted by the Director, DOHA. Based solely on this statutory prohibition, clearance is denied.

LeRoy F. Foreman

Administrative Judge

1. The government exhibits pertaining to the accident are very difficult to read and some are illegible. Both sides agreed that they were the best copies available. I advised the parties that I would admit the documents but would not speculate about the facts recited in the illegible portions (Tr. 22).

2. The new adjudicative guidelines approved by the President on December 29, 2005, as implemented by the Under Secretary of Defense for Intelligence on August 30, 2006, treat 10 U.S.C. 986(c)(1) and (4) as disqualifying conditions that cannot be mitigated. Adjudicative Guideline J, paragraph 32(e). The new adjudicative guidelines do not apply to this case, because the SOR was issued before the new guidelines were implemented.