

DATE: July 12, 2001

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 01-03551

DECISION OF ADMINISTRATIVE JUDGE

CLAUDE HEINY

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Department Counsel

FOR APPLICANT

John J. Laduca, Esquire

SYNOPSIS

In November 1999, the Applicant was arrested for a serious misdemeanor--reckless endangerment. Two hunters had trespassed over his land and he fired a shotgun in the air. The Applicant's initial conviction was overturned on appeal and the matter is reset for retrial. The Applicant regrets his actions, understands the mistake he made and feels remorse for his actions. While the incident was serious due to risk of bodily harm posed to the hunters, it was isolated. Clearance is granted.

STATEMENT OF THE CASE

On February 28, 2001, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating DOHA could not make the preliminary affirmative finding⁽¹⁾ it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On March 8, 2001, the Applicant answered the SOR and requested a hearing. The case was assigned to me on March 29, 2001. A Notice of Hearing was issued on April 24, 2001, scheduling the hearing which was held on May 10, 2001. The Government's case consisted of five exhibits (Gov Ex). The Applicant relied on his own testimony and six documents. (App Ex) A transcript (tr) of the hearing was received on May 23, 2001.

FINDINGS OF FACT

The SOR alleges criminal conduct (Guideline J). The Applicant admits the arrest, finding of guilt, and sentence but denies it cast doubt on his judgment, reliability, and trustworthiness.

The Applicant is 37-years-old and has worked for a defense contractor since August 1987. He is seeking to maintain the secret security clearance granted in January 1988. The Applicant is a most capable, hard working professional. He is friendly, courteous, highly motivated, a problem solver, and an important asset. He has received recognition for his outstanding work.

The Applicant and his girlfriend live in a rural area. The Applicant's lot is 245 feet wide and 1800 feet long. (tr 18) In November 2000, the Applicant's girlfriend woke him up and told him there were two hunters on their land. The Applicant's girlfriend was concerned for their horses which are kept on the property. The Applicant quickly dressed and saw two hunters⁽²⁾ dressed in camouflage, carrying bows and arrows. The Applicant's girlfriend had confronted the pair, told them there was no hunting or trespassing⁽³⁾ on their land and advised them to leave the property immediately. The pair responded by telling her they had wounded a deer and believed it had run across the Applicant lot from East to West. They were looking for a "blood line" from the wounded deer. The pair immediately left the Applicant's lot and went into the winter wheat field West of the Applicant's land-- land belonging to another neighbor. The Applicant's girlfriend called the neighbor who owned the land to tell him there were hunters on his land and ask his permission to call the police. The neighbor did not answer the telephone. When the pair crossed the Applicant's land, they were within 240 feet of his house. State law prohibits hunting within 500 feet of a residence or livestock.

The Applicant drove his vehicle to the end of his property and then back to within 60 feet of where the hunters were. He parked, rolled down the window, and tried to get eye contact with the hunters. The hunters did not acknowledge his presence. The Applicant drove back to his house and retrieved his shotgun. He went into his back yard, and put one shell into the gun, and fired a round toward the end of his property to get the attention of the hunters. The gun was not aimed at the hunters, nor did he threaten the hunters with the gun. When he fired the gun, the hunters were between 240 and 300 feet from him. (tr 32)

Approximately 10 minutes later the hunters again crossed the Applicant's lot returning to where their car was parked. The hunters had called the sheriff, who came and arrested the Applicant for reckless endangerment which, under the state criminal code, occurs when a person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person. The Applicant was found guilty of reckless endangerment, fined \$290.00, sentenced to three years probation, a one-year Order of Protection was granted in favor of his neighbors, and he was ordered to have a friend or relative take possession of his two shotguns. In February 2001, the Applicant was discharged from probation. (tr 49) The Applicant's initial conviction has been overturned on appeal and was set for retrial the week following the security clearance hearing.

On the Monday morning following the incident, the Applicant reported the matter to his facility security officer. (tr 25) The Applicant acknowledges he made a poor choice. (tr 32) Following the incident, the Applicant took an adult aggression management training which consisted of a psychiatric evaluation and two anger management classes totaling six hours. The Applicant regrets his actions, feels remorse, had good insight into the incident, is aware of the consequences of his actions.

POLICIES

The Adjudicative Guidelines in the Directive are not a set of inflexible rules of procedure. Instead, they are to be applied by Administrative Judges on a case-by-case basis with an eye toward making determinations that are clearly consistent with the interests of national security. In making overall common sense determinations, Administrative Judges must consider, assess, and analyze the evidence of record, both favorable and unfavorable, not only with respect to the relevant Adjudicative Guidelines, but in the context of factors set forth in section E 2.2.1. of the Directive as well. In that vein, the government not only has the burden of proving any controverted fact(s) alleged in the SOR, but must also demonstrate the facts proven have a nexus to an Applicant's lack of security worthiness.

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. 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.

Considering the evidence as a whole, this Administrative Judge finds the following adjudicative guidelines to be most pertinent to this case:

CRIMINAL CONDUCT (Guideline J) The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1.

Conditions that could raise a security concern and may be disqualifying include:

1. Allegations or admission of criminal conduct, regardless of whether the person was formally charged. (E2.A10.1.2.1.)
2. A single serious crime or multiple lesser offenses. (E2.A10.1.2.2.)

Conditions that could mitigate security concerns include:

2. The crime was an isolated incident. (E2.A10.1.3.2.)

BURDEN OF PROOF

Initially, the Government has the burden of proving any controverted fact(s) alleged in the Statement of Reasons. If the Government meets that burden, the burden of persuasion then shifts to the Applicant who must remove that doubt and establish his security suitability with substantial evidence in explanation, mitigation, extenuation, or refutation, sufficient to demonstrate that despite the existence of guideline conduct, it is clearly consistent with the national interest to grant or continue his security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. Where the 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 he is nonetheless security worthy. As noted by the United States Supreme Court in *Department of 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." As this Administrative Judge understands the Court's rationale, doubts are to be resolved against the applicant.

CONCLUSIONS

The Government has satisfied its initial burden of proof under Guideline J, (Criminal Conduct). Under Guideline J, the security eligibility of an applicant is placed into question when that applicant is shown to have a history or pattern of criminal activity creating doubt about his judgment, reliability, and trustworthiness. In November 1999, the Applicant was charged with a single misdemeanor of a serious nature--reckless endangerment.

Mitigating Condition (MC) # 1⁽⁴⁾ does not apply. Even though the arrest occurred 18 months ago--November 1999-- it is still considered recent. But MC # 2⁽⁵⁾ does apply. The Applicant has been arrested only one time. Although his conduct leading to the arrest was a serious event, reckless endangerment, it is only a misdemeanor under state law. At his first trial the Applicant was fined less than \$300.00 and sentenced to no jail time. His conviction was overturned, the Applicant has appealed and faces a new trial the week following the hearing. To the Applicant's credit, he reported the incident to his facility security officer (tr 25) immediately upon his return to work. He has taken efforts to preclude a recurrence of his inappropriate conduct. He has had a psychiatric evaluation and undergone six hours of anger management. The Applicant acknowledged he made a poor choice of actions. (tr 32) He regrets the incident, feels remorse, has good insight into his conduct, and is aware of the consequences for his actions. I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, listen to his testimony, and watch the interplay between himself and those around him. It is my impression that Applicant's expressions of regret have the ring of truth.

The Applicant is a hard working professional, friendly, courteous, highly motivated, and an important asset who has been recognized for his outstanding work. The incident appears to be an aberration in the Applicant's lifestyle. An isolated incident which has not been repeated. Although recent, he has demonstrated good judgment in taking anger management classes which evidences rehabilitation. I am confident such conduct will not recur. Thus, I conclude that Applicant has, through evidence of extenuation and explanation, successfully mitigated and overcome the Government's *prima facie* case. I find for the Applicant as to SOR subparagraph 1.a.

In reaching my conclusions I have also considered: the nature, extent, and seriousness of the conduct; the Applicant's age and maturity at the time of the conduct; the circumstances surrounding the conduct; the Applicant's voluntary and knowledgeable participation; the motivation for the conduct; the frequency and recency of the conduct; presence or absence of rehabilitation; potential for pressure, coercion, exploitation, or duress; and the probability that the circumstance or conduct will continue or recur in the future.

FORMAL FINDINGS

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

Paragraph 1 Guideline J (Criminal Conduct): FOR THE APPLICANT

Subparagraph 1.a.: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Claude R. Heiny

Administrative Judge

1. Required by Executive Order 10865, as amended and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992 as amended.
2. Following the incident, the Applicant learned the hunters were a father and son who had recently purchased the adjacent lot East of his property.
3. The Applicant's East and West boundaries of the Applicant's land were posted "no hunting/no trespassing." (tr 20)
4. MC 1. The criminal behavior was not recent. (E2.A10.1.3.1.)
5. MC 2. The crime was an isolated incident. (E2.A10.1.3.2.)