



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 07-06361
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro Se*

April 1, 2009

Decision

CREAN, Thomas M., Administrative Judge:

Applicant has held a security clearance since 1987. He submitted his latest security clearance application on June 3, 2004, and his access to classified information was continued. He was involved in a serious criminal incident in 2006. Based on this incident, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns for Applicant for criminal conduct under Guideline J on August 13, 2008. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on August 19, 2008.

Applicant answered the SOR in writing on September 2, 2008. He admitted three and denied two factual allegations as alleged in the SOR under Guideline J. He provided a detailed explanation of his actions which led to the 2006 criminal incident. He requested a hearing before an administrative judge. Department Counsel was

prepared to proceed on February 10, 2009. The case was assigned to me on February 23, 2009. DOHA issued a notice of hearing on February 24, 2009, for a hearing on March 19, 2009. I convened the hearing as scheduled. The government offered six government exhibits marked (Gov. Ex.) 1 through 6 which were received without objection. Applicant submitted six Applicant Exhibits marked (App. Ex.) A through F which were received without objection. Applicant and one witness testified on his behalf. DOHA received the transcript of the hearing (Tr.) on March 26, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

Applicant is a 63 year old operating engineer who has worked for a defense contractor at an Air Force base since 1987. He is a high school graduate who also has a certificate as a boilermaker and welder. He served briefly in the Army and received an Honorable Discharge based on hardship. He has been married twice with both marriages ending in divorce. He married his first wife in 1966. She left him and he divorced her in 1973. He has three grown children from his first marriage. He was granted custody of the children and his grandmother helped him raise the children (Tr. 11-12, 16-19; Gov. Ex. 1, Security Clearance Application, dated June 3, 2004; Applicant's Additional Response to SOR, dated September 2, 2008).

Applicant admitted that he was arrested for having an open container of beer in 1975. He paid a \$22 fine (SOR 1.a). He denied that he was arrested for the same offense in 1976 (SOR 1.b). Applicant noted an arrest for Open Container in approximately 1976 on his first security clearance application submitted on June 19, 1987 (Gov. Ex. 4, Personnel Security Questionnaire, dated June 19, 1987). On his second security clearance application submitted in 1989, Applicant listed an Open Container offense in 1975 (Gov. Ex. 5, Personnel Security Questionnaire, dated July 26, 1989). Applicant again listed an Open Container offense in 1975 on his third security clearance application submitted in 1994 (Gov. Ex. 6, National Agency Questionnaire, dated February 14, 1994). Applicant submitted a letter from the Clerk of the county court which stated that court records do not list charges for Open Container in either 1975 or 1976 (See Response to SOR, dated September 2, 2008, Circuit Court Clerk Letter, dated August 27, 2008). Since Applicant admitted to an arrest for Open container in 1975, I find that he did commit the offense in 1975 and paid a fine. I further find that he provided a different date for the Open container offense on his 1987 security clearance application leading to confusion as to whether there were two offenses, one in 1975 and the other in 1976. I find that the Open Container offense happened in 1975, and there is insufficient evidence to establish an Open Container offense in 1976.

Applicant denied that he had been arrested for trespassing in 1979. Applicant noted on two of his prior security clearance applications an arrest for trespassing in 1980 and that the charges were either dropped or he paid a fine (Gov. Ex. 5, Personnel Security Questionnaire, dated July 26, 1989; Gov. Ex. 6, National Agency Questionnaire, dated February 14, 1994). The police records from the jurisdiction

where the offense allegedly took place do not show an arrest for trespassing (See Response to SOR, dated September 2, 2008, Police Letter, dated August 29, 2008). Based on Applicant's admission in the security clearance applications, I find that the trespassing arrest took place. Since the charges were probably dropped, it is not surprising that the police do not have a record of the arrest.

Applicant admitted that he was charged with aggravated assault in 1983. He was living with the woman who would be his second wife when they had an argument about her not coming home. They shoved each other but he did not strike her. She filed a complaint with the police. After they reconciled, his former wife told the police she did not want to press charges, and charges were dropped in February 1984 after costs were paid (See Response to SOR, dated September 2, 2008 at 1).

Applicant lived with his second wife from 1982 until they married in 1999. She had an affair with another man so Applicant divorced her in 2003. His second wife married this other man. Applicant was being verbally harassed, tormented, and publicly humiliated at work by a fellow employee about his former wife's affair and why they divorced. Applicant told his tormentor to stop but the harassment and humiliation continued. Applicant went to their supervisor asking for his tormentor to be moved. However, the supervisor refused to stop the harassment.

In 2005, Applicant became very ill. He continued to have medical problems until doctors discovered the cause of the medical problem and started appropriate treatment. However, he was still feeling ill and the harassment by his co-worker continued. In February 2006, Applicant went to his human resource office and reported the harassment. Human resource personnel promised to start an investigation. However, Applicant and his tormentor had a verbal altercation and the tormentor filed a complaint against Applicant. Applicant did not feel that the situation was being resolved so he asked the senior supervisor to relocate the tormentor. The senior supervisor refused to reassign the tormentor and told Applicant just to stay away from the individual. Applicant felt that no one would take action to assist him. He felt he was alone in resolving the issue. He was still ill and was unstable because of his divorce. He was also mentally distraught.

On the night of March 10, 2006, Applicant went home and took an anti-anxiety medication prescribed by his physician. After about an hour, he did not feel the medicine was working so he took another dose. He also started drinking beer. The warning label on the medicine stated that taking alcohol in conjunction with the medication may have an adverse effect. Applicant is not a heavy drinker and had never taken alcohol in conjunction with the anti-anxiety medicine in the past. He does not recall much that happened after taking the medicine and drinking beer.

The local police were called by Applicant's former wife's husband about 7 am on the morning of March 11, 2006, about a man with a gun at their back door. His former wife and her husband never left their house and did not confront the individual. The police arrived to find Applicant in the back yard with a loaded pistol and more

ammunition in his pocket. He was arrested and taken to jail. Applicant only remembers seeing a police officer pointing a gun at him. Applicant was charged with aggravated assault, criminal trespass, reckless endangerment, and public intoxication (Tr. 16-46; Gov. Ex. 3, Police Report and Indictment, dated March 11, 2006, and July 2006).

Applicant was placed in a pre-trial diversion program in lieu of a trial on September 12, 2006, for two years, required to perform public service, pay a fine and court cost, and stay away from his former wife and her husband (Gov. Ex. 3, Agreed Order, dated September 12, 2006, at 19). Applicant completed his public service by December 2006, paid the fine and court cost, and completed his pretrial diversion program in September 2008 (App. Ex. F, Order of Expungement and Dismissal, dated September 16, 2008). He has not seen his former wife or her husband since the incident. In addition, he changed his shift at work to the day shift so he is no longer on the same shift as his tormentor.

At the time of the incident, Applicant's employer had him evaluated by a mental health counselor. He informed the counselor about his problems at work, his former wife leaving him for another man, his illness, and the resulting mental condition. The counselor noted that Applicant's personality was more introverted than extroverted, that he experienced a high degree of anxiety, and has a hard time with social skills. He lets his hurt turn to anger, broods over relationship failures, and has moderate to high depressed feelings. His arrest and the resulting charges were uncharacteristic. The counselor determined that Applicant did not pose a threat to himself or others, and was insecure but a decent person. He could benefit from some support from his supervisors (App. Ex. A, Report, dated March 31, 2006). A counselor who saw him for about eight sessions from April 17, 2006, until July 6, 2006, noted he presented with symptoms of depression and anxiety. He was cooperative and willing to be responsible for his behavior. He was honest and true, hardworking, and willing to make adjustments. He exhibited determination to do right (App. Ex. B, Letter, dated December 12, 2008).

Applicant's son testified that he works for the same company at the same location as his father. His father is a good person who raised him and his sisters as a single parent with help from his grandmother. His father's 2006 actions were out of character and caused by the stress at work combined with the medicine and alcohol. His father is not a drinker and only occasionally has a beer or two. He is well liked by everyone. His co-workers and supervisors think highly of him. His father's tormentor has a reputation at work of being an agitator who stirs up conflicts and troubles (Tr. 46-49).

Applicant's supervisor stated that Applicant was always good to work with and cooperative with supervisors and fellow workers. His only problem was the one he had with his tormentor. He had a good working relationship with Applicant before and after Applicant's problems with the tormentor. Applicant continues to be a good worker (App. Ex. C, Letter, undated). Applicant latest evaluation report shows he is a good employee with a middle evaluation score (App. Ex. D, Evaluation, dated September 19, 2007).

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature it calls into question a person's ability or willingness to comply with laws, rules, and regulations (AG ¶ 30). Appellant admitted that he was

arrested for having an open alcohol container in 1975, for trespassing in 1979, and for assault in 1983. He admits he was arrested and charged with aggravated assault, criminal trespass, reckless endangerment, unlawful possession of a weapon, and public intoxication in 2006. The government must establish by substantial evidence controverted facts alleged in the SOR. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record (See, directive ¶ E3.1.14, ISCR Case No. 04-11463 (App. Bd. Aug 4, 2006)). 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)). The government, based on Applicant's admissions and the fact that he was arrested and charged with criminal offenses, has established by substantial evidence four of the criminal offenses alleged in the SOR. They did not establish the offense of possession of an open container in 1976. The facts admitted by Applicant raise Criminal Conduct Disqualifying Conditions (CC DC) ¶ 31(a) "a single serious crime or multiple lesser offenses", and CD DC ¶ 31(c) "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted". The alleged offenses are serious. Even though charges may not have been prosecuted, or findings of not guilty entered, or charges dismissed, they are still allegations of criminal conduct that raise a security concern.

The government produced substantial evidence to establish the disqualifying conditions in AG ¶¶ 31(a) and (c). The burden shifts to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the illegal drug use (Directive ¶ E3.1.15). An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden of disproving it never shifts to the government (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005)).

Appellant has raised by his testimony Criminal Conduct Mitigating Conditions (CC MC) ¶ 32 (a) "so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment"; CC MC ¶ 32(b) "the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life"; and CC MC ¶ 32(d) "there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse, or restitution, job training or higher education, good employment record, or constructive community involvement". The 1975 open container arrest, the 1979 trespassing arrest, and 1983 assault charge occurred 26 to 34 years ago. The extensive passage of time since the offenses were committed is sufficient to show that the acts are unlikely to recur and no longer cast doubt on his reliability and trustworthiness.

The 2006 offenses of aggravated assault, unlawful possession of a weapon, criminal trespass, and public intoxication, even though they arose from one incident are serious. The offenses were committed three years ago and Applicant has not been involved in any further criminal offenses. Psychological evaluations of Applicant done contemporaneously with the 2006 offense show that his actions were not characteristic

for him and are not likely to recur. There were outside pressures. His divorce and the anxiety caused by continued ridicule and torment at work, led to the offenses. There is evidence of successful rehabilitation. Applicant removed himself from those pressures by changing his shift at work so he does not encounter his tormentor. He has seen mental health professionals who have provided him with coping skills to understand his divorce. He completed all of his court ordered probation and community service. He continues to work hard and is productive at work. He leads a quiet life with is family. Applicant established he is successfully rehabilitated by his quiet life style, the passage of time, and his ability to understand and manage the stresses in his life. AG ¶¶ 32(a), 32(b), and 32(d) all apply. Applicant has mitigated the criminal conduct security concerns alleged under Guideline J.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (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 extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that three of the four offenses happened over 26 years ago and are not likely to recur. I considered one alleged offense was not established. I considered Applicant mitigated the remaining offense by establishing that the offense was out of character for him, and there was successful rehabilitation by completion of his pre-trial diversion and community service. Sufficient time has passed to show the actions are not likely to recur. Overall, on balance the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his criminal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge