



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



In the matter of:)	
)	
)	ISCR Case No. 07-12698
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: *Pro Se*

May 21, 2008

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns arising under Guideline J (Criminal Conduct). Clearance is granted.

Statement of the Case

Applicant submitted his Security Clearance Application (e-QIP), on June 14, 2007. On November 26, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines J. 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 answered the SOR in writing on January 4, 2008, and requested a hearing before an Administrative Judge. DOHA received the response on January 9, 2008. Department Counsel was prepared to proceed on February 5, 2008, and I received the case assignment on February 14, 2008. DOHA issued a notice of hearing on February 21, 2008, scheduling the hearing for March 13, 2008. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 3, which were received without objection. Applicant offered Applicant Exhibits (AE) A through M, which were received without objection, and he testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on March 21 2008.

Procedural Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR by withdrawing ¶ 1.c., which alleged an allegation under 10 U.S.C. § 986. Without objection from Applicant, I granted Department Counsel's motion to withdraw ¶ 1.c. Tr. 7-8.

Findings of Fact

As to the SOR's factual allegations, Applicant admitted in his response to the SOR all of the SOR's allegations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 53 years old. He graduated from high school in June 1974, and estimates he has completed 95 credit hours towards his bachelor's degree. Tr. 17, GE A. He married his spouse in August 1975. He and his wife have two adult daughters, ages 31 and 26. Applicant has been working for his current defense contractor employer since June 2007, where he is employed as a facilities manager for information technology (IT) services. As such he is responsible for overseeing IT services for 26 company offices throughout the U.S. Tr. 17, 43. His present company purchased his former company where was employed from June 2004 to June 2007 as the senior manager of administrative services. Tr. 17, 44-45, GE 1.

Applicant previously held a security clearance from 1980 to 1994, which was initially granted as a secret clearance and upgraded to a top secret clearance. During that time-frame, he was employed as his company's facility security officer from 1986-1992. He seeks a security clearance in conjunction with his current duties as a facilities manager for IT services. Tr. 46-48.

After getting married in 1975, Applicant went to work for the Post Office as a mail carrier. Tr. 34. At the time he was arrested, discussed below, he was on disability after sustaining a back injury. Tr. 34-35.

In November 1977, Applicant was arrested and charged with attempted robbery, which was later changed to assault with intent to rob. He was convicted of this charge pursuant to his guilty plea in December 1978, and sentenced to eight years confinement, of which five years was suspended. (SOR ¶ 1.a.)

In December 1977, Applicant was arrested and charged with felony abduction and indecent exposure. He was convicted of these charges pursuant to his guilty pleas in April 1978. He was sentenced to eight years confinement for the felony abduction charge, of which five years was suspended, and sentenced to twelve months confinement for the indecent exposure charge. The sentences for all of these charges ran concurrently. He was incarcerated approximately two years as a result of these sentences. (SOR ¶ 1.b.) GE 2, GE 3.

At the time he was arrested, Applicant was 22 years old, on a reduced salary as a result of being on disability, and was taking medication for back pain. In November 1977, he had entered several apartments looking for valuables and was caught by an occupant as he attempted to steal a purse. In the course of trying to escape, he threw the occupant down and forgot to take the purse in the process. Tr. 37-38. The next month in December 1977, he attempted to grab a woman from behind as she was getting off an elevator. As noted above, these offenses resulted in two separate arrests.

Describing his time in prison, Applicant stated:

Well, being away from my family I think was perhaps the most difficult thing I've ever faced. If a person, when they go to prison – I think you have to make a choice, and you have to make a choice that you're either going to turn yourself around, or you're going to continue to go down the path of what you were put there for. And nothing is more eye-opening than a reality check of being locked in a cell, being deprived of your rights, being deprived of holding your children, holding your wife, or being with the people you love.

I swore to myself that I would never go back to jail. That I would totally turn my life around, which I think I have. And that I would make a difference. Just because you go to jail doesn't mean that – pardon the phrase – that you're the scum of the earth. People do change. Not everybody who goes to prison does, but I made a decision that when I got out that I would be different and that I would make it up to my family by being the best that I possible could, for myself and for them. Tr. 24-25.

While in prison, Applicant was detailed to housekeeping duties and maintaining the grounds. He sometimes worked in the fields harvesting peas and sweet potatoes, and fed pigs. Toward the end of his confinement, he was a trustee performing janitorial duties and painting the jail. Tr. 42.

To demonstrate his commitment to being the best that he could be, he became a model employee, and a committed family man. He was an active member of his local

Parent Teacher Association, of which he was president for four years, was active in his daughters' Girl Scout Troops for 17 years where he served as a Troop Leader and Service Unit Manager, and was involved in a number of community activities such as school fund raisers. Tr. 14, 30, 54. Applicant's wife worked for her state's department of motor vehicle office for 19 years, and resigned about 18 months ago to provide full-time care for her aunt who was disabled and recently passed away. Tr. 51-52. Applicant and his wife are in the process of purchasing their third home.

Applicant's older daughter graduated from college and was employed as a social worker until she became a stay-at-home mother where she takes care of her two young children. Applicant's younger daughter is attending college full-time and is studying to become a teacher. Tr. 50-51.

Applicant submitted four work-related letters of reference, which described Applicant as an "exceptional employee," "performance . . . characterized by capability, punctuality, efficiency, thoroughness, and the ability to work with other people who may have different priorities," "hard work," "dedication and commitment," "very honest and straight forward," and [b]eing of the highest integrity." AE B, AE J, AE K, AE L. Applicant submitted one personal letter of reference from a former girl scout service unit manager who described Applicant as "a loyal and capable worker" whose "commitment never wavered." AE M. Applicant submitted three work performance evaluations from past and present employers reflecting above average performance. AE D, AE G, AE I. He also submitted 12 certificates of training for various courses he attended spanning his working career. AE C, AE E, AE F, AE H.

Appellant emphasized that he has learned from his mistake, and has previously held a clearance for 14 years with no other incidents. Because the personnel close to him are aware of the incident, it could not be used to coerce or improperly influence him.

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.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by “substantial evidence,”¹ demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant’s access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).²

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.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* Executive Order 12968 (Aug. 2, 1995), Section 3.

¹ See Directive ¶ E3.1.14. “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.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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).

² “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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 ¶ 31 describes two conditions that could raise a security concern and may be disqualifying, ¶ 31(a), “a single serious crime,” and ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” Pursuant to his guilty pleas, Applicant was convicted of assault with intent to rob, felony abduction, and indecent exposure, and served approximately two years in prison. These offenses warrant application of AG ¶¶ 31(a) and 31(c).

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and,

(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.

AG ¶¶ 32(b) and 31(c) do not apply. Applicant guilty pleas and acceptance of responsibility for committing these crimes precludes application of these mitigating factors.

However, a review of the facts and available evidence warrants application of AG ¶¶ 32(a) and 32(d). For the last 28 years since Applicant was released from prison, he has been a model citizen. His words of saying he has been successfully rehabilitated have been substantiated by action. He has been a model employee, husband, and

father. He and his wife have successfully raised two responsible adult daughters, who are productive members of society. His employment record supports the notion that he has earned the trust and confidence of his employers. Applicant has been placed in trusted management positions and earned favorable reviews. Notably, he was successfully vetted for a security clearance in 1980. He was granted a clearance initially at the secret level, which was later upgraded to the top secret level. He held that clearance for 14 years without any reported security violations.

Applicant successfully integrated into his community. He served 17 years with his daughters' Girl Scout Troops in leadership capacities, volunteered in the Parent Teacher Association where he served as President, and was involved in other community activities. He and his wife are in the process of purchasing their third home. He is a responsible and productive member of society as documented by his letters of reference, work performance evaluations, and testimonial evidence.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The 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) 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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

The evidence weighing against Applicant is the conviction of three serious crimes discussed above in 1978. However, since his release from prison 28 years ago, Applicant has made every effort to overcome his past record.

Applicant earned approximately 95 college semester hours. He has been gainfully employed since his release from prison 28 years, and has held several successful management positions, the most recent being facilities manager for IT services. His record of good employment weighs in his favor. This shows responsibility, rehabilitation, and mitigation. He has proven himself as a husband, father, and member of the community. Applicant also has a 14-year proven track record of having successfully held a security clearance without incident.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the security concerns pertaining to criminal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”³ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the government’s case. For the reasons stated, I conclude he is eligible for access to classified information.

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
Subparagraphs 1.a. - 1.b.:	For Applicant
Subparagraph 1.c.:	Withdrawn

Conclusion

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 eligibility for a security clearance for Applicant. Clearance is granted.

Robert J. Tuider
Administrative Judge

³See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).