



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 07-13250  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Daniel Crowley, Esquire, Department Counsel  
For Applicant: *Pro Se*

June 9, 2008

**Decision**

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on November 17, 2005. On February 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E for Applicant. 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 March 5, 2008. He answered the SOR in writing and requested a hearing before an Administrative Judge. I received the case assignment on April 8, 2008. DOHA issued a notice of hearing on April 14, 2008, and I convened the hearing on May 7, 2008. The Government offered Exhibits (GE) 1-2, which were received without objection. Applicant testified in his own behalf and presented two witnesses. He submitted Exhibits (AE) A-G, without objection. DOHA

received the transcript of the hearing (Tr) on May 15, 2008. Based upon a review of the case file, eligibility for access to classified information is granted.

### **Findings of Fact**

In his Answer to the SOR, dated March 5, 2008, Applicant admitted the factual allegations in ¶¶ 1.a and 1.b of the SOR. He also admitted the factual allegations in ¶¶ 2.a-c of the SOR with explanation (denying its applicability under Guideline E) but denied allegation ¶ 2.d of the SOR. Applicant provided additional information to support his request for eligibility for a security clearance.

Applicant is a 37-year-old employee of a defense contractor. He graduated from college with highest honors in December 2005 (AE B). His degree is in computer science with a minor in mathematics. His grade point average was 4.0 in his major. He is single. He has worked for his current employer since 2005 (GE 1).

Applicant attended a preparatory school before entering the U.S. Naval Academy in 1989. Just prior to that time his mother died. He was 16 years old. His mother and father had divorced when he was very young. Thus, he experienced some depression (AE D). During his first year at the academy, at the age of 19, he was still grieving his mother's sudden death. He had a stressful first year and experienced pressures. He had trouble with the intensity of the military training. He was not sleeping at night and he felt that he wanted to leave the military setting. He voluntarily spoke to a psychologist on the campus about his difficulties. The military psychologist recommended that Applicant be discharged from the academy due to not being emotionally suited for military service (Tr.85). The psychologist believed that Applicant should go home. Applicant agreed that he was not happy in the academy setting. He decided he wanted to go to a regular college. After Applicant left the academy, he attended a community college for a few years and earned an Associate Degree. He worked while attending the community college.

On May 13, 1992, Applicant shot a man who had raped his girlfriend. His girlfriend told Applicant about the rape and Applicant got a gun and went to the person's house and shot him in the chest. He pled nolo contendere (no jury trial) and on November 13, 1992, he was sentenced to 22 years in prison, probation and restitution on the charge of Attempted First Degree Murder. He was 21 years old. This was his first and only arrest. Applicant spent more than ten years in prison and was released in December 2002 for good behavior. As part of a court requirement upon his release, Applicant underwent a psychological evaluation in early February 2003. He was diagnosed with a non-specific personality disorder with antisocial and narcissistic traits. The diagnosing therapist determined that Applicant did not require any treatment.<sup>1</sup>

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<sup>1</sup>The report was not in the record. Applicant was not given a copy at the time of the evaluation. Thus, there is no information on what testing was done nor the precise basis for the diagnosis. Applicant reported in his SF 86 that he was seen by someone who possesses an MSW (Master of Social Work) for the evaluation in early 2003 after his release. This credential (MSW) is not the same as a licensed clinical psychologist.

During his time in prison, Applicant took many courses (AE A). He received a certificate in Vocational Masonry. He completed a series of self-help courses, including Life Skills, Vital Issues Project, Family Empowerment Enrichment Program and a Transition program.<sup>2</sup> He attended psychiatric counseling. He was a facilitator for a self-help group. He worked in the adult basic education classes to help other prisoners (Tr. 59). He spent 10 years, seven months and sixteen days incarcerated. During that time he did not receive any disciplinary actions.

In 2003, Applicant started his courses at university. He took computer science courses. He was an outstanding student who was in regular contact with his academic advisor. She found him to be an excellent student with good people skills. He was a disciplined student who managed his time very well. He worked while attending college to support himself. Applicant told his academic advisor that he was a convicted felon. She was quite impressed with him and believes he has much to offer his employer and the defense contract world. His academic advisor held a security clearance and recommended him highly. She was adamant that there is no reason to deny a security clearance at this point in time despite his crime. She remarked that Applicant's intelligence, dedication, hard work ethic and knowledge of technology would make him an asset to the U.S. (Tr. 49). She also explained that Applicant is one of the only students she taught to earn a 4.0 as a computer science major.

Applicant's academic advisor specifically asked to testify at the hearing in addition to providing a sworn statement. She recognizes the impact of obtaining a security clearance. She noted in her letter of recommendation for Applicant that "nobody with whom I worked who also had a secret clearance seemed more deserving of this recognition than [Applicant] since I have known him" (AE G).

Applicant lived with his father, stepmother and grandmother while in college. He took a part time job with a swimming pool company. He worked his way up to a management position in the company. He saved money for his education expenses. He also worked part time for the defense contractor that hired him permanently in 2005.

Applicant was hired as a systems analyst initially in 2005. He immediately told his employer that he was a convicted felon. He works independently but is a valued member of a small team. He is reliable. He is an excellent problem solver. He received numerous compliments from clients. He works very hard (Tr. 35-38). During his three years with the company Applicant has received promotions. He has done an excellent job and his evaluations are very good (Tr. 41).

Applicant's manager for operations research hired Applicant three years ago. He has worked closely with him on several projects (Tr. 35). He emphasized that Applicant

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<sup>2</sup>The certificate of achievement notes that these courses are an intensive and carefully structured series of learning experiences dealing with personal planning, goal setting, communications skills, social skills, emotional development, attitude and outlook enhancement. Moreover, the courses involve critical self-appraisal and evaluation which culminate in the development of a personal plan.

works well independently but does not hesitate to ask for assistance when needed. Applicant has assisted the manager in presentations of professional materials. Applicant already has access to some sensitive information such as proprietary data and trade secrets (Tr. 40). His final comment was that Applicant was exceptionally reliable (Tr 41).

Applicant tutors students in college level math, science and computer courses. He does this as a volunteer. He views this as a way to give something back to society. Applicant acknowledges that he very much regrets what he did in 1992 - almost 16 years ago. He hurt someone and destroyed many lives. He threw his whole life off track and hurt the people who cared for him. He does not excuse his behavior. He believed he committed the crime in response to the trauma of his girlfriend's rape. He has learned from this grave mistake (Tr. 57-58).

Applicant pays restitution to his victim and his family as part of his probation. He was ordered to pay restitution to the hospital in the amount of \$41,517 and \$11,855 to the victim. Applicant has 13 more years of probation. However, his understanding is that once he finishes his restitution payments he will not remain on probation. Currently, he pays approximately \$260 a month. (AE C) He has doubled the payments over the past 14 months. The balance is now \$33,608.

Applicant underwent psychological testing on April 18, 2008 by a licensed clinical psychologist. He completed the Minnesota Multiphasic Personality Inventory - Second Edition (MMPI-2). The MMPI-2 is an objective personality assessment designed to help identify personal, social, and behavioral problems (AE D). The testing revealed that he is extroverted, sociable, gregarious, and friendly. The profile was within normal limits. He seems to maintain a healthy balance in his approach to life. His profile indicated that he responded in a forthright manner and may therefore be viewed as a reliable and accurate measurement of his current functioning. He describes himself as being happy, healthy and contented. He does not report any type of emotional distress. He did not clinically elevate scales associated with paranoia, undue suspicion, lack of empathy, current disdain for authority, antisocial problems, depression, anxiety, mania or aggression (AE D). Applicant will seek counseling with this therapist when the need arises or he feels pressures (Tr. 94).

In October 2006, Applicant was interviewed as part of the security clearance process. He explained to the interviewer that he writes to a 70-year-old man in prison who was kind to him when he was in prison. He does not call him or visit him (Tr. 73). At the hearing, he explained his reasons for the pen-pal relationship. It provides value for both men. Applicant provided the name of this gentleman on his security clearance application under Section 12. Since he spent a decade incarcerated, he decided to list this fellow inmate. Applicant believed this would give the investigators an opportunity to speak with him regarding Applicant. At the hearing, Applicant noted that if necessary, he would discontinue his written exchanges with this inmate. However, his friend is in poor health and Applicant enjoys sending him letters to share his progress. He believes his letters give the inmate hope.

On cross examination, Applicant related that he at first thought of suicide when his girl friend was raped. He tried to explain his feelings at the time of the crime. He did not want the man who raped his friend to be free and walking around (Tr. 75). He also explained that he cannot justify what he did. He knows this was irrational behavior (AE E). His girl friend did not report the rape to the police and he related that he just exploded. He also explained that the judge sentenced him to the maximum time in prison.

Applicant's probation officer now requires him to phone in several times a month. The senior probation officer does not require Applicant to physically present himself to the office anymore. This reduction in level of supervision is due to Applicant's continued compliance and no violation of rules in his probation (Tr. 100). His probation officer noted that even with the relaxed terms of supervision, Applicant has continued to maintain compliance (AE F).

Applicant presented many letters of recommendation from professors, colleagues, friends, family and a senior associate from his current employment. The senior associate commended Applicant on his dedication during his past three years of employment. Applicant works nights and weekends to complete a project. He is a talented and respected computer professional (AE G). Each letter attests to Applicant's candor, honesty, and willingness to comply with rules and regulations.

### **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, 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.

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* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for Criminal Conduct is set out in AG & 30, “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.”

The guideline notes several conditions that could raise security concerns. Under AG & 31(a), an Asingle serious crime or multiple lesser offenses<sup>@</sup> may be potentially disqualifying. Similarly under AG & 31(d), A an individual who is currently on parole or probation<sup>@</sup> may raise security concerns. As noted above, Applicant admits he committed a felony crime in May 1992. He was sentenced to prison (22 years) for the charge of Attempted First Degree Murder. He served almost 11 years in prison. He is on probation and he is still paying his court-ordered restitution. These facts are sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where Aso 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 current reliability, trustworthiness, or good judgment.<sup>@</sup> Applicant-s criminal conduct occurred almost 16 years ago when he was 21

years old. He said he reacted to the rape of his girlfriend. He was released from prison almost six years ago (for good behavior) and is on supervised probation. This potentially mitigating condition is a factor for consideration in this case.

Under AG & 30(d), it may be mitigating where A 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.” As noted above, Applicant was released from prison for good behavior after serving more than ten years of his sentence. He has completed his college education. He has a very good position with his company. His supervisor highly recommends him. He volunteers in the community. He has undergone psychological testing. He is making restitution for his crime to his victim and the hospital. He deeply regrets his irrational reaction to the rape of his girlfriend. He acknowledges that he harmed many lives. I find this potentially mitigating condition applies in this case.

### **Guideline E, Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(c):

credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant was administratively discharged from the U.S. Naval Academy in 1989. He was a midshipman fourth class. He volunteered to see a psychologist because he felt depressed, was grieving his mother's death and could not handle the strain of the military setting. He did not display unbecoming conduct. He agreed with the psychologist that he was not emotionally suited to the military setting at that time. I do not find that this raises a disqualifying condition under this section.

Similarly, under AG ¶ 16(d):

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior....

Applicant shot a man with a gun for which he spent time in prison. Thus, AG ¶ 16(d) applies because this shows unreliability and poor judgment. After his crime and his time in prison, Applicant was court-ordered to receive a psychological evaluation upon his immediate release. Applicant did not see a copy of the report of that evaluation. The alleged diagnosis is somewhat diminished because the basis for the diagnosis and testing is no known nor is it in the record evidence. Applicant met with the psychologist several times and discussed his past along with the prison experience and his transition to society. Applicant was not determined to need treatment after his release in December 2002. It is now almost six years later and his licensed clinical psychologist finds his profile, based on the MMPI-2, within normal limits. He did not clinically elevate scales associated with antisocial problems or aggression.

Applicant writes to an inmate in the prison where he spent more than ten years of his life. He does not visit him nor call him. He believes that his letters encourage the man and give him hope. The man is 70 years old and in poor health.

AG ¶ 16(e) “personal conduct, or concealment of information about one’s conduct that creates a vulnerability to exploitation, manipulation or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing.” This disqualifying condition is not a factor for consideration because Applicant has told his employer and others about the crime and his time in prison. He has taken the positive steps of disclosure, eliminating his vulnerability to exploitation, manipulation or duress. I do not believe he would compromise national security to avoid public disclosure of his crime or conduct.

Paragraph 17 lists conditions that could mitigate security concerns. Specifically, AG ¶ 17(c) “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgement” is a factor for consideration in this case. Moreover, AG ¶17(d) “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is



unlikely to recur” does apply. Applicant’s emotional status in 1989 and his evaluation in 2003 do not reflect inappropriate behavior or poor judgment. Applicant has rehabilitated himself and has acknowledged his crime and is paying restitution to the victim. His recent psychological evaluation underscores the positive steps he has taken to ensure that criminal conduct does not occur again. Moreover, since the 2002 release from prison Applicant has not had any behavioral problems. He has been gainfully employed and has a better perception of how to avoid future problematic situations. Thus, AG 17(e) “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress” is a factor for consideration. He has mitigated any personal conduct concerns through his recent actions and behavior.

### **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) 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 eligibility for 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. Applicant committed a grave crime in 1992 when he was 21 years old. He intentionally got a gun and shot the man who he says raped his girlfriend. He was convicted of Attempted First Degree Murder. He served more than ten years of his 22 year sentence. Applicant does not excuse his crime. He was diagnosed in early 2003 (just after his release in December 2002) with a non-specific personality disorder with antisocial and narcissistic traits.

However, Applicant received counseling during his years in prison. He also availed himself of many self help programs. He tutored other inmates. He facilitated groups. He did not receive any disciplinary infractions while in prison. He was released on probation in 2002 for good behavior.

Applicant returned to college after his early release for good behavior. He received the highest honors upon graduation in 2005. He completed his computer science major and earned a 4.0 grade average. He worked to pay for his education. He was hired in 2005 by a defense contractor. He has received promotions and earned the respect of his supervisors and colleagues as well. Applicant tutors other students.

Applicant is paying restitution to the victim and is paying the hospital bills. He has doubled his payment during the past 14 months. He reports to his probation officer by phone. He has not violated any conditions of his probation during the past five years. Applicant was recently evaluated by a clinical psychologist. He presented in a healthy manner and did not show signs of paranoia, disdain for authority, antisocial problems or aggression. He has met his burden of proof in this case to overcome the government's case.

Applicant's parents divorced when he was young. His mother died when he was sixteen. Applicant's depression and difficulties during his time at the Naval Academy are related to her death. He was not emotionally suited to the military setting in 1989 when he was a young man. He has received psychological counseling and evaluations as required. His most recent psychological evaluation confirms that he is now coping with stress and is living a healthy life.

In addition, Applicant began his education by attending a navy preparatory school and followed that by enlisting in the Navy. He earned admission to the U.S. Naval Academy. He wanted to serve his country.

On January 28, 2008, the President signed into law Public Law 110-181, the National Defense Authorization Act for Fiscal Year 2008, Section 1072 which repealed 10 U.S.C. Section 986, formerly known as the Smith Amendment. In doing so, Congress lifted the automatic ban to those who had been convicted of a crime and served more than one year of incarceration. Originally, 10 U.S.C. Section 986 barred anyone from holding a security clearance if convicted of an offense and sentenced to at least a year regardless of whether they were allowed to serve community service and never spent a day in jail. The effect was to cause numerous long-standing excellent employees to lose their clearances, and thus their jobs, even if convicted of an offense many years before.<sup>3</sup>

Congress has grappled with this weighty issue over the years. Recognizing the injustice of this law, it has been changed. The intent is to decide on a case by case analysis if an Applicant has overcome the past criminal record and is rehabilitated. Having considered the "whole person" concept in evaluating Applicant's risk vulnerability in protecting our national interest, I find Applicant has made sufficient progress to mitigate the criminal and personal conduct security concerns.

Overall, the record evidence leaves me without questions and 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 personal conduct and criminal conduct.

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<sup>3</sup>See Attorney Sheldon I. Cohen's 2008 article on the repeal of the Smith Amendment at [www.sheldoncohen.com/publications](http://www.sheldoncohen.com/publications).

### **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-b: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a-d: 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.

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NOREEN A. LYNCH  
Administrative Judge