



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 07-14261  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Robert E. Coacher, Department Counsel  
For Applicant: *Pro Se*

September 29, 2008

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**Decision**

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TESTAN, Joseph, Administrative Judge:

On May 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guideline 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 May 23, 2008, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on June 26, 2008. Applicant did not file a response to the FORM. The case was assigned to me on September 15, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

## Findings of Fact

Applicant is 52 years of age.

In 1999, applicant was indicted on the following charges: (1) Aggravated Assault, Deadly Weapon/Dangerous Instrument, a felony, (2) Aggravated Assault, Serious Physical Injury, a felony, and (3) Attempted First Degree Murder, a felony. He pleaded guilty to the amended charge of Attempted Aggravated Assault, Deadly Weapon/Dangerous Instrument, a felony. He was sentenced to six years in prison and ordered to pay \$30,936.53 in restitution. He was incarcerated from April 2000 to December 2004.

According to applicant, the incident that led to the aforementioned charges occurred as follows: He was a bounty hunter who went to the residence of a man he intended to arrest on a number of outstanding warrants. When he knocked on the front door, a woman (who just happened to be applicant's former girlfriend) answered the door. When applicant announced he was there to arrest the man, the man came to the door, an argument ensued, applicant pulled out a handgun, the man tried to grab the handgun, the handgun discharged, and the man was hit by a bullet. The man was critically injured but survived.

In the Pre-Sentence report (Exhibit 10), the following is reported under the heading "Defendant's Statement":

The defendant disagreed with the information contained in the statement of offense. He did not express remorse and stated, "I don't feel anything for the guy. He grabbed the gun and he got shot." He said for six months he was having negative dealings with the victim and the witness. The witness was a former girlfriend who lived with him prior to moving into the victim's residence. He said he told her to leave his residence because she was smoking crack and dealing drugs out of his home. The victim and the witness had stolen property from his home. He reported several attempts to get officers or deputies to arrest the victim because he was a fugitive from the jail and had several outstanding warrants. He was unsatisfied with the deputies' response so he went to arrest the victim himself. "I felt it was my turn. A couple of deputies told me before, you are a bounty hunter you get him. There should have been no reason to shoot the guy, but when I said I wanted to make a citizen's arrest he tried to take my gun from me." He took the gun to the residence because he believed the victim was dangerous.

Applicant was not a licensed bounty hunter, and he had no "bounty" on the man. Viewing the evidence as a whole, it is obvious there was a lot more to this incident than an accidental shooting during an honest attempt to make a citizen's arrest.

## **Policies**

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.” (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President 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. Ord. 10865, Section 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph 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).) “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” (Directive, Paragraph E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, Section 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

## **Analysis**

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

The security concern for criminal conduct is set forth in Paragraph 30 of the AG, and is as follows:

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.

Paragraph 31 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 31.a., “a single serious crime or multiple lesser

offenses” may be disqualifying. Applicant’s felony conviction raises this disqualifying condition.

Paragraph 32 of the AG sets forth conditions that could mitigate security concerns. Under Paragraph 32.a., it may be mitigating if “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.” Under Paragraph 32.d., it may be mitigating if “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.” Although applicant’s criminal conviction occurred about eight years ago, his lack of remorse, and failure to offer any positive evidence of reform and rehabilitation from independent sources who know him well (e.g., family, friends, coworkers, supervisors) preclude application of either mitigating condition.

### **“Whole Person” Analysis**

Under the whole person concept, the AJ must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph 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 Paragraph 2c, 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. Applicant was a mature man when he engaged in the criminal conduct. Even if it is assumed that the gun was accidentally discharged as applicant claims, he exercised incredibly poor judgment by arming himself and attempting to make a citizen’s arrest on a man he knew was dangerous and with whom he had been feuding. Although this was an isolated incident that occurred over eight years ago, applicant’s failure to accept responsibility for his reckless conduct and poor judgment, and failure to offer any credible independent evidence that suggests he is unlikely to exercise such poor judgment in the future, leaves me no choice but to conclude he failed to mitigate the security concerns arising under Guideline J.

## **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: AGAINST APPLICANT

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

JOSEPH TESTAN  
Administrative Judge