



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 08-01554
)
 Applicant for Security Clearance)

Appearances

For Government: William T. O’Neil, Esq., Department Counsel
For Applicant: *Pro se*

May 11, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct) and E (Personal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 19, 2007. On December 14, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines J and E. DOHA acted 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on December 20, 2010; answered it on January 4, 2011; and requested a hearing before an administrative judge. DOHA received the

request on January 6, 2011. Department Counsel was ready to proceed on February 9, 2011, and the case was assigned to me on February 14, 2011. DOHA issued a notice of hearing on February 15, 2011, scheduling it for March 9, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Department Counsel also submitted the discovery letter dated February 2, 2011, in lieu of a list of exhibits. It is attached to the record as Hearing Exhibit I. (Tr. 25-26.) Applicant testified and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. DOHA received the transcript (Tr.) on March 17, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.d. He denied the allegations in SOR ¶ 1.e, 2.a, and 2.b. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 23-year-old shipfitter employed by a defense contractor. He grew up in a small Southern town and graduated from high school in May 2006, ranking third in his class of 85 students. (AX C.) He was an honor student and an accomplished athlete. During his senior year in high school, he worked as a bagboy and stocker at a grocery store and as a cashier and cook at a fast-food restaurant. (GX 1 at 13.) In August 2006, he moved to another state and began working for his current employer. He completed an apprenticeship as a shipfitter in October 2010 (AX D.) He has never held a security clearance.

Applicant's current supervisor has designated him to be his second-in-charge. He describes Applicant as very intelligent, open-minded, creative, and calm and composed under pressure. (AX A.) A veteran police officer from Applicant's home town, who has known Applicant for 15 years, describes him as respectful, responsible, and trustworthy. (Tr. 95; AX B.)

Applicant testified that when he was in the ninth grade, a group of young men started bullying him because a girl had a "crush" on him. During his first year of high school, three of the bullies attacked him at a party, and he was hospitalized with his injuries. He reported the incident to the police, but no action was taken against his attackers. (Tr. 36-37.)

Applicant testified that during his four years of high school, he sometimes was able to avoid confrontations, but he became accustomed to them. He told his mother each time he was involved in a fight. He and his mother discussed the possibility of him living with his sister, who is a probation officer, but he stayed at home until he began his current employment. (Tr. 67-68.)

While Applicant was working at a grocery store, he was attacked by three members of the same group while he was putting groceries in the car of an elderly customer. He also reported this incident to the police, but no action was taken. (Tr. 37.)

In November 2005, Applicant and a friend were driving home after a football game when another car tried to run him off the road. He pulled into a car wash and the other car followed him. When the occupants of the other car got out at the car wash and approached him, he recognized them as members of the same group of bullies, and he decided to stand his ground. A police officer arrived as Applicant and one of the group were fighting, and both combatants were charged with disorderly conduct. (Tr. 63.) Applicant was fined \$247 plus costs. (Tr. 38-39; GX 3.)

In about February 2006, Applicant was shot in the leg by a brother of one of the bullies. (Tr. 59, 86; GX 2 at 4.) The person who shot him was in jail in April 2006, but Applicant did not know if it was because of this shooting. (Tr. 85.)

At the night of April 8-9, 2006, Applicant was at a party when he was involved in another altercation with two of the same group of bullies. As Applicant was approached by the two young men, who were cursing and threatening him, Applicant threw the first punch, knocking one of them unconscious, and then he attacked the other. After the altercation, Applicant left the party and went home. He testified that the same group went to his home, but his mother called the police, who ordered the group to leave and watched the house all night to avoid further violence. (Tr. 43-44; GX 7 at 9, 33, 75.) At about noon on April 9, 2006, the mother of one of the two men involved in the altercation with Applicant filed a complaint with the local police. The police report was approved by a supervising officer on April 17, 2006, but the record does not reflect whether any formal charges were filed or whether there was any other disposition of the complaint. (GX 4.)

At about 10:00 p.m. on April 9, 2006, Applicant was carrying out trash in connection with his job at the fast-food restaurant when he was approached by a man brandishing a pistol. Another restaurant employee who was helping with the trash heard the other person say, "I got you now," and he heard Applicant say "Oh sh--!" (GX 5 at 2; GX 7 at 74.) Applicant testified that he did not know his assailant, but he later learned that the assailant was the brother of the person who previously shot him in the leg. (Tr. 59; GX 2 at 4.) Applicant retreated behind the trash container but his assailant followed. Applicant testified that he lunged at his assailant, knocking the pistol out of his hand. Applicant picked up the pistol, and when his assailant continued to advance toward him, he pointed the pistol at his assailant and shot him twice. When his assailant ran away, Applicant dropped the pistol and went back into the restaurant. (Tr. 47-50.) His assailant died shortly thereafter.

After the shooting, Applicant's coworker ran back into the restaurant and shouted that Applicant had been shot. (GX 7 at 60.) Then Applicant ran into the restaurant and told the manager, "I shot him." The manager locked the door and called the police. (GX 7 at 6.)

Two witnesses, who were cousins of the assailant, said Applicant fired at least two shots at his fleeing assailant. A police officer stated that Applicant admitted shooting at the assailant as he fled. At the hearing, Applicant denied trying to shoot his fleeing

assailant in the back, denied wanting to kill him, and denied admitting to the police that he shot at his fleeing assailant. He testified he simply wanted his assailant to go away. (Tr. 49-50, 53, 59; GX 5; GX 7 at 23, 28.) He testified that it was dark, he was frightened, he had never fired a weapon before, and he probably closed his eyes when he fired. He thought the shot hit his assailant in the chest. (Tr. 82.) During an interview with a security investigator in June 2007, Applicant told the investigator he shot his assailant in the chest. (GX 2 at 3.)

An autopsy determined that the assailant was shot in the wrist and fatally shot in the left lateral upper back. The fatal shot penetrated the assailant's body from left to right. The trajectory of the bullet was "15 degrees forward slightly upward and to the right." It penetrated the lower lobe of the left lung, grazed the posterior esophagus, perforated the thoracic aorta, penetrated the middle and lower lobes of the right lung, and lodged in the right pectoral muscle. (GX 7 at 47-56.)

Applicant was charged with murder. He was held in jail until April 19, 2006, when he was released on bond, placed on house arrest, allowed to finish high school, and allowed to begin his apprenticeship with his current employer, even though the apprenticeship was in another state. (GX 6 at 28-29; Answer to SOR at 2.) He was indicted for murder in July 2006. (GX 6 at 5.)

On a date not reflected in the record, Applicant was charged with providing false information to the police. The record reflects that he was notified of the murder charge on April 19, 2006 and advised of his right to counsel. (GX 6 at 25.) There is nothing in the record reflecting that he was informed of the charge of providing false information to the police or a charge of assault and battery. On September 6, 2006, a judge found him not guilty of providing false information to the police. (GX 8.) On October 22, 2009, he was tried by jury and found not guilty of the murder charge. (GX 6 at 2-3.)

When Applicant submitted his SCA in March 2007, he was awaiting trial for murder. He answered "No" to question 23a, asking if he had ever been charged with or convicted of any felony offense; question 23b, asking if he had ever been charged with or convicted of a firearms or explosives offense; and question 23f, asking if he had been arrested for, charged with, or convicted of any offenses not listed in the preceding questions during the last seven years. He answered "Yes" to question 23c, asking if there were currently any charges pending against him for any criminal offense, and he explained, "I was attacked at work and the attacker was the one that was injured." He did not mention that he had killed his attacker. He also did not disclose a charge of giving false information to the police or his November 2005 conviction of disorderly conduct.

Applicant testified that he did not disclose the conviction for disorderly conduct because there were so many incidents that he did not recall the November 2005 incident when he completed his SCA. (Tr. 41.) He testified that he was unaware of the charge of providing false information to the police or its disposition. (Tr. 41-42.) His employment records show that he worked full eight-hour days at the site of his

apprenticeship from September 5 through September 12, 2006, indicating that he was not in his former home state when the judge disposed of the charge on September 6, 2006. (AX F at 2.) He testified that he was not aware of the accusation of assault and battery until his lawyer told him about it shortly before his trial date in October 2009. (Tr. 54.)

In June 2008, Applicant was charged with reckless driving by speeding in excess of 80 miles per hour on an interstate highway. He testified that he was speeding because he was on his way to visit his girlfriend, who had become seriously ill. (Tr. 92.) He pleaded guilty and was fined \$250 plus costs. (GX 9.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has 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. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden

of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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 guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving 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).

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). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges Applicant was charged with and convicted of disorderly conduct in November 2005 (¶ 1.a), charged with assault and battery in April 2006 (¶ 1.b), charged with murder and providing false information to the police in April 2006 and found not guilty of both charges (¶ 1.c), and charged with misdemeanor reckless driving in August 2008 (¶ 1.d). Applicant admitted these allegations.

The SOR also alleged that Applicant provided false information during an interview with a security investigator in June 2007 and in response to questions about his criminal record on his SCA (¶ 1.e). Applicant denied these allegations.

The concern raised by criminal conduct is that it “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. Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c).

Applicant’s admissions and the evidence summarized above are sufficient to raise AG ¶¶ 31(a) and (c). Accordingly, the burden shifted to Applicant to refute, explain, extenuate, or mitigate the facts established by the evidence.

Security concerns under this guideline may be mitigated by evidence that “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." AG ¶ 32(a). The first prong of this mitigating condition focuses on whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

The conduct alleged in SOR ¶¶ 1.a-1.c occurred between four and five years ago, when Applicant was a high school student. The conduct was the product of repeated bullying experienced by Applicant, a circumstance that no longer exists. Applicant was culpable in the disorderly conduct alleged in SOR ¶ 1.a because he chose to confront his tormenters rather than avoid the conflict. He was culpable in the assault and battery alleged in SOR ¶ 1.b because he chose to throw the first punch rather than avoid the conflict. With respect to the conduct in SOR ¶ 1.c, he was the victim of an armed assault, and he was acquitted of the murder charge after a full litigation of the facts before a jury. He was acquitted by a judge of providing false information to the police regarding the fatal shooting. Notwithstanding his stressful circumstances in April 2006, he completed high school with honors. He successfully completed a five-year apprenticeship, and is highly regarded by his supervisor. I conclude that the conduct alleged in SOR ¶¶ 1.a-1.c is not recent, that it happened under circumstances making it unlikely to recur, and that it does not cast doubt on the Applicant's reliability, trustworthiness, or good judgment. Accordingly, I conclude that AG ¶ 32(a) is established for SOR ¶¶ 1.a-1.c.

Applicant's reckless driving alleged in SOR ¶ 1.d is more recent, but it was an isolated incident, a minor offense, and it occurred while Applicant was under the stress of a pending trial for murder, had just begun his apprenticeship, and was concerned about the serious illness of his girlfriend. I conclude that AG ¶ 32(a) is established for SOR ¶ 1.d.

SOR ¶¶ 1.e and 2.a allege that Applicant provided deliberately false information to a security investigator when he stated that he shot his assailant in the chest. Applicant's statement was incorrect, as established by the autopsy report. However, I conclude that it was not deliberately false. The autopsy determined that the bullet entered the left lateral upper back and penetrated from both lungs and the aorta, moving from left to right. This trajectory is consistent with the likelihood that the assailant was facing Applicant and then turned to his right as the fatal shot was fired. I am satisfied that Applicant believed that he shot his assailant in the chest, but his recall of the event, clouded by the speed at which it happened and Applicant's fear for his life, was incorrect. Applicant was candid, sincere, and credible at the hearing. I am satisfied that he did not deliberately provide false information to the security investigator. Thus, I conclude that Applicant has refuted the allegation in SOR ¶ 2.a, as cross-alleged in SOR ¶ 1.e.

SOR ¶¶ 1.e and 2.b allege that Applicant falsified his SCA by deliberately failing to fully disclose his criminal history. At the time he submitted his SCA, he had just graduated from high school, and he had no experience with federal employment or the security clearance process. See ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010) (level of education and experience relevant to determining whether failure to disclose information on security clearance application was deliberate). He was pending trial for murder, living away from home for the first time, and starting a new job.

I find that Applicant's explanation for not disclosing the November 2005 disorderly conduct was plausible and credible. In the context of four years of repeated violent confrontations and his stressful environment when he submitted his SCA, a single fistfight would not have been a memorable event.

I likewise find that Applicant's explanations for not disclosing the assault and battery and the charge of providing false information to the police plausible and credible. There is no evidence that the assault and battery complaint resulted in a formal charge and no evidence that Applicant was informed of it. Likewise, there was no evidence that Applicant was informed of the charge of providing false information to the police. He was out of the state when a judge disposed of the charge.

Applicant understated the nature of the offense for which he was pending trial, but he gave enough information to alert security investigators that he was pending trial for a criminal offense and further inquiry was required. I have considered the circumstances in which Applicant completed his SCA, his youth and inexperience at the time, and his candor and sincerity at the hearing. I am satisfied that he did not deliberately falsify his SCA.

Security concerns raised by criminal conduct may be mitigated by "evidence that the person did not commit the offense." AG ¶ 32(c). The evidence discussed above establishes that Applicant was not guilty of murder, providing false information to the police, deliberately giving false information to a security investigator, or intentionally falsifying his security clearance application. I conclude that AG ¶ 32(c) is established for the offenses alleged in SOR ¶¶ 1.c. and 1.e, and I resolve those allegations in his favor.

Security concerns raised by criminal conduct also may be mitigated 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." AG ¶ 32(d). Applicant has moved away from the small town where the offenses in SOR ¶¶ 1.a-1.c occurred. Five years have elapsed with no recurrence of similar offenses. He has completed a rigorous apprenticeship and earned the trust and respect of his supervisor. I conclude that AG ¶ 32(d) is established for the conduct alleged in SOR ¶¶ 1.a-1.c.

The speeding violation was more recent. However, for the reasons set out in the above discussion of AG ¶ 32(a), I conclude that AG ¶ 32(d) also is established for SOR ¶ 1.d.

Guideline E, Personal Conduct

The SOR cross-alleges the conduct alleged in SOR ¶ 1.e under this guideline. The concern under this guideline 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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying conditions under this guideline are: AG 16(a) ("deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire") and AG ¶ 16(b) ("deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative." For the reasons set out in the above discussion of Guideline J, I conclude that neither of these disqualifying conditions is raised.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant 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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a young adult working at his first full-time job. In spite of attending high school in a hostile and stressful environment, he was an honor student and an accomplished athlete. A local police officer who knew him during the time period at issue in this case described him as responsible and trustworthy. Applicant has completed a five-year apprenticeship, earned the trust and respect of his supervisor, and is on his way to more responsible positions. He was well prepared, articulate, candid, sincere, and credible at the hearing. His troubled high-school years are behind him.

After weighing the disqualifying and mitigating conditions under Guidelines J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on criminal conduct and personal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a-1.b:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge