



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-02668
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esq.
For Applicant: *Pro Se*

August 3, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated Guideline J (Criminal Conduct) security concerns. Eligibility for access to classified information is granted.

Statement of the Case

On March 23, 2007, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP). On November 20, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleges security concerns under Guideline J (Criminal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or

continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On December 3, 2008, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on February 10, 2009. On February 11, 2009, the case was assigned to me. On March 12, 2009, DOHA issued a hearing notice.

The hearing was held on April 8, 2009. Department Counsel offered Government Exhibits (GE) 1-4, which were received without objection. Applicant offered Applicant Exhibits (AE) A-Y, which were received without objection. He testified and called eight witnesses to testify on his behalf. I held the record open until April 17, 2009, to afford Applicant the opportunity to submit additional evidence. Applicant timely submitted AE Z-II, which were received without objection. DOHA received the hearing transcript (Tr.) on April 15, 2009.

Findings of Fact¹

In his SOR response, Applicant admitted the sole SOR allegation with explanations. His admission is accepted as a finding of fact.

Applicant is a 54-year-old senior engineering laboratory technician employed by a defense contractor since November 1982. Tr. 15, 19. He graduated from high school in June 1973. Tr. 19-20. He served in the U.S. Air Force from May 1974 to May 1980, and was honorably discharged as a staff sergeant (pay grade E-5). Tr. 17-18. Shortly after his discharge, he began working for his current employer.

He attended community college while working full time from approximately September 1982 to May 1986, and was awarded an associate's degree in physics. GE 1, Tr. 20. He has successfully held a secret security clearance since he enlisted in the Air Force, a period of 35 years. Tr. 21-22.

Applicant was married from July 1981 to December 1995, and that marriage ended by divorce. He has four children, three daughters, ages 26, 24 and 20, and a son, age 23. Applicant's three daughters live independently, and his son lives with him. GE 1, Tr. 15-17.

Criminal conduct

On March 26, 2007, Applicant was convicted of two misdemeanor counts of cruelty to animals pursuant to his guilty pleas for an offense that occurred on July 9, 2006. At the time of the offense, Applicant's youngest daughter was intermittently living

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

with him. His daughter came to live with him because, “[s]he had become pregnant and her mother kicked her out of the house.” Tr. 25.

Against Applicant’s wishes, his daughter brought a dog into the house “around June of 2006.” He opposed her bringing a dog into his home because of his busy schedule; he did not have time to train a dog; and he liked to “pick [his] dogs very carefully.” He described himself as a dog and animal lover. Tr. 30. Applicant stated that once the dog was in the house, his daughter would leave for days at a time and leave the care of the dog to him. The dog was not house broken, not obedient, difficult to train, and destructive. Tr. 31-32. Tension over the dog built up, and on July 9, 2008, Applicant discovered the dog had torn his freshly-laundered clothes off the clothes line and destroyed his only pair of dress pants. Tr. 33-34.

After the dog tore his clothes off the line, he decided to put the dog down. Applicant added, “[u]nfortunately it was a bad decision.” Tr. 34. He explained that he grew up on a family farm, and, as the oldest child, when an animal became a problem, it was his responsibility to put it down. Tr. 34-35. He described the process of putting a problem animal down as “just sort of a natural thing.” Tr. 34. Applicant used a butcher knife to put the dog down. Believing the dog was dead, he began to clean up the blood. He apparently was unsuccessful in putting the dog down, and the bleeding dog jumped over his fence into his neighbor’s yard. Tr. 36-42. The neighbors called the police and Applicant was subsequently charged with two counts of cruel mistreatment of an animal. Applicant acknowledged he used poor judgment in trying to put the dog down in the manner he did, and if he had to do it over again, he would take the dog to the pound. GE 4, Tr. 42-43.

There were a number of components included in Applicant’s pre-trial agreement and subsequent sentence. GE 4. They are:

(1) To serve three years supervised probation with no early termination. His probation officer submitted a letter dated April 9, 2009, stating that Applicant is complying with all conditions of probation and has completed all classes as directed. His probation officer added that he is current on his payments to the court and is currently being supervised at the lowest level of supervision. AE II. Applicant last spoke to his probation officer by telephone on January 2, 2009. Tr. 60-61;

(2) To pay a \$500 fine to the animal cruelty task force (see subparagraph (1) supra;

(3) To undergo a psychiatric evaluation. The psychiatric evaluation was completed on March 14, 2007, shortly before Applicant appeared at his sentencing hearing on March 26, 2007. The evidence does not reflect any adverse information regarding Applicant’s psychological condition. Tr. 62-63;

(4) To have no care, custody or control of any animal while on probation. Tr. 63;

(5) To serve thirty (30) days in the county jail. Applicant served in a work release program and was allowed to go to work during the week, but spent nights and weekends in jail. Tr. 63-65;

(6) Before probation completion, to attend the Humane Society's class in the proper care and training of pets. Applicant submitted a Humane Society Certificate of Completion of Animal Cruelty Education Class dated July 14, 2007. Tr. 65, AE BB; and

(7) To pay restitution to the county Animal Care Center for the treatment, impoundment, and board of the dog he tried to kill. The cost for such care was \$6,700. As noted by his probation officer, Applicant is current on his payments and he expects to have this debt paid by December 2009. Tr. 66, AE II, AE GG.

Eight character witnesses testified on behalf of Applicant. Three were work-related - a supervisory lead engineer, a supervisory laboratory manager and an engineer. Three other witnesses were from his church – a retired Air Force master sergeant and school district purchasing agent, a supervisor of state corrections department background investigations, and a pharmaceutical sales representative. Two of his four children testified on his behalf, his oldest daughter and son. All work-related witnesses were long-term employees with security clearances, and they interact with the Applicant on a daily basis. His church witnesses were associated with Applicant primarily when he served as Director of Children's Ministries and was responsible for the religious education of 120 children. The collective sense gleaned from the witnesses is that Applicant is dependable, trustworthy, reliable, and honest. His son described him as a "good man." All of the witnesses favorably endorsed reinstatement of Applicant's clearance. Tr. 74-132.

Applicant submitted 25 reference letters. The authors of the letters covered a full spectrum – work supervisors, co-workers, friends from church, and friends from his community (a police officer, the senior pastor of his church, senior managers from work, fellow church members, members of the community, and two of his daughters). The vast majority of those submitting letters have known Applicant for a lengthy period of time. All character references provided very favorable information about the Applicant consistent with the witnesses who testified. AE A-Y.

Additionally, many Sunday School parents spoke of Applicant's admirable performance as Director of Children's Ministries and his years of selfless service in that capacity.

After the hearing, Applicant submitted a character reference letter from his youngest daughter – the daughter who introduced the dog into the household. The letter was sent to Applicant while he was serving his jail sentence and conveyed her support

for him. AE AA. Applicant submitted a certificate dated August 30, 2007, stating he had completed a cognitive skills program offered by the probation department. AE CC. His work performance evaluations for the last three years document sustained superior performance and his contribution to the defense industry. AE DD-FF.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 an applicant’s 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 and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense 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 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.

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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). 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). "[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline J (criminal conduct) 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 or multiple lesser offenses," and ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

Applicant admitted and the evidence established that he was convicted of two misdemeanor counts of animal cruelty for an offense committed on July 9, 2006, warranting application of AG ¶¶ 31(a) and 31(b).

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(a) is applicable given the two misdemeanor offenses for which Applicant was convicted occurred three years ago. The record is void of any criminal involvement of any nature other than the incident in question. Although not an excuse or exoneration for what happened, the animal cruelty offenses appear to have occurred during a difficult transition period between Applicant and his youngest daughter. Applicant has expressed sincere remorse for his lack of judgment. His actions were clearly contrary to his otherwise above-board behavior and reputation in the community and at work.

AG¶¶ 32(b) and 32(c) do not apply. He admitted the two misdemeanor charges of animal cruelty and he was not pressured to commit such acts.

AG ¶ partially applies. Applicant has complied with most of the terms of his probation. He is current on payment of fines and restitution; he underwent a psychiatric evaluation; he does not have care, custody or control of any animal; he served 30 days in the county jail, which was under a work-release program; and he completed the humane society's class in the proper care and training of pets. His probation officer confirmed Applicant's compliance with probation and noted Applicant is being supervised at the lowest level of supervision. There is also significant and substantial evidence of his good employment record and community involvement. He repeatedly expressed remorse throughout his hearing and recognizes what he did was inappropriate and constituted unacceptable conduct regardless of his upbringing on a farm.

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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept. I have incorporated my comments

under Guideline J in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

There is some evidence supporting continued revocation of Applicant's clearance. He was a mature adult when he was convicted of two counts of misdemeanor animal cruelty. Although he was challenged by the unruly behavior of an ill-behaved dog and the failure of his daughter to exercise proper care and supervision of her dog, his attempt to put the dog down in the manner he did demonstrated very poor judgment. He was sufficiently mature to be fully responsible for his conduct.

The evidence supporting approval of Applicant's clearance is more substantial. He pled guilty to two misdemeanor counts of animal cruelty and admitted his lack of judgment. He was sentenced and complied with most terms of his probation. Applicant's three years of probation will be completed in March 2010. As noted by his probation officer, Applicant is being supervised at the lowest level of supervision. In addition to what was required by the terms of probation, Applicant took the extra step of completing a cognitive skills program offered by his probation department.

He has not been involved in any further misconduct or questionable behavior since July 2006, a period of three years. He frankly and candidly accepted responsibility for his acts. He informed his employer, church members, community members, and family members; and they showed substantial and collective support for him in spite of his conduct.

Applicant has a 35-year flawless record and history of contributing to the national defense through his Air Force and government contractor employment. Concomitant with that service was his successfully holding a security clearance during that 35-year period. There is no evidence of any other disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. His character and superb work performance show he is responsible, dependable and trustworthy. 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 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 and 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.:	For Applicant

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. Eligibility for a security clearance is granted.

ROBERT J. TUIDER
Administrative Judge