



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



In the matter of:)	
)	
)	ISCR Case No. 08-03620
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Ray A. Blank, Esq. Department Counsel
For Applicant: *Pro se*

February 23, 2009

Decision

MASON, Paul J., Administrative Judge:

Applicant submitted his Security Clearance Application (SCA) on November 8, 2004. On August 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under criminal conduct (Guideline H). The action was taken pursuant to 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 made effective within the Department of Defense for SORs issued on or after September 1, 2006.

Applicant submitted his notarized response to the SOR on August 30, 2008. DOHA issued a notice of hearing on November 5, 2008, and the hearing was held on November 20, 2008. At the hearing, five exhibits (GE 1 through GE 5) were admitted in evidence without objection to support the government's case. Five witnesses and Applicant testified. Applicant also submitted seven exhibits (AE A through AE G) in evidence without objection. AE A through AE F contain numerous character statements.

AE G contains a performance evaluation from March to October 1993, and an award for meritorious, military service from February 1987 to February 1997. DOHA received a copy of the transcript on December 8, 2008. After a thorough review of the pleadings, exhibits, and testimony, Applicant's eligibility for access to classified information is granted.

Findings of Fact

The SOR contains one allegation under the criminal conduct guideline. Applicant admitted SOR 1.a. with an explanation. His explanation is that he was serving too many employers and he neglected some of his responsibilities.

Applicant, 54 years old, has been married to his wife for 31 years. He has three children. According to his security clearance form (GE 1), from September 1973 to January 1977, Applicant was in the United States Army (USA) Active Reserves. In January 1977, he went on active duty in the USA. He reached the rank of lieutenant colonel when he was honorably discharged in February 1997.

Regarding Applicant's educational background, after receiving his Bachelor's degree in 1976, and a graduate degree in management, he enrolled in a university in September 1988 and graduated in June 1992 with a Ph.D. in Psychology (AE A3, vitae).

In 1992, Applicant was in the USA assigned to provide psychological assessments to soldiers who wanted to enter the special operations section of the USA. The five witnesses that testified, and the numerous character statements in AE B through AE F, describe Applicant's favorable professional impact on supervisors and other officers within the military chain of command. The exhibits also contain observations from present and former coworkers and supervisors in Applicant's civilian employment, and also individuals who received counseling from Applicant over the years.

In February 1997, Applicant was honorably discharged from his counseling position in the USA. By September 2001, he was working as an independent contractor (as a psychologist) for three different companies. In 1997, Applicant began working for a life care company performing services at nursing homes in state X. Applicant provided the counseling services to senior citizens and billed company who billed the federal Medicare or Medicaid program (GE 2).

In 1998, Applicant was hired by witness C, president of a company primarily tasked with conducting the same psychological assessments he had been making in the military. Shortly after September 11, 2001, Applicant started working for his third employer, a disability determination service for state X (Tr. 94). Applicant explained that as an independent contractor, he contracted with the three employers because he never knew how long the contracts would last (AE A).

Applicant was unable to manage the administrative requirements (paperwork) of three employers, primarily the Medicare paperwork for the nursing homes (Tr. 96-99). He tried to correct mistakes he discovered, but the paperwork overwhelmed him (GE 2; Tr. 97). He first determined there were billing errors, i.e. for services not rendered, in December 2001 (Tr. 113), but never asked for help or advice (Tr. 114). The administrative problems took a toll on Applicant's health as well. He incurred a very serious bladder and eye condition in 2000, leading to surgery in November 2002, and time off from work for a period of time beginning in December 2002 (GE 2). He had a stroke in February 2006, and he currently suffers from a degenerative spine and joint condition disorder (AE A1).

He testified that as a result of the federal investigation into the billing errors between 2000 and February 2004 (Tr. 99, 112), he was indicted and pled guilty to felony health care fraud (SOR 1.a.). Though he claimed it was never his intent to falsify claims (Tr. 108), he admitted that he made false statements and was guilty of fraud against the federal government (Tr. 110; GE 2). Applicant estimated he made 62 billing errors to Medicare, and should have sought a settlement much earlier in the criminal proceedings, but did not want to plead to a felony offense (AE A1).

GE 5 (federal criminal docket of health fraud case from indictment to disposition) reflects that Applicant was indicted for health care fraud (18 U.S.C. § 1347) on December 9, 2005. On August 28, 2006, a superceding indictment was filed adding 46 counts to the existing indictment. On January 16, 2007, Applicant entered a plea to the original indictment. The remaining charges in the superceding indictment appear to have been dismissed (*Id.*). On April 17, 2007, Applicant was sentenced to 5 months federal custody; followed by three years supervised release to probation, including five months home detention; restitution totaling \$63,332.14 to Medicare; and, a special assessment fine of \$100.00. Applicant satisfied all conditions except the remaining fine balance, and the remaining period of probation.

Five witnesses testified in Applicant's behalf. Witness A, who has become the chief of special operations for 28,000 USA troops in state Y, has known Applicant since 1992 when Applicant was conducting psychological assessments for two USA units. Witness A also provided a character statement (AE D1). According to witness A, conducting assessments essentially means predicting whether an applicant will succeed in special operations in the USA (Tr. 24). Witness A has watched Applicant over the years keep in contact with the family of fallen soldiers. He described a volunteer program Applicant began sometime after a major conflict in northern Africa in October 1993 aimed at helping the grieving wives of fallen soldiers (Tr. 26-27). Applicant is still spending time with the program and those families, and subsequent participants of the program (AE A, AE B). See *also*, AE F containing the character statements of witness E (AE F2) and her son (AE F1). Witness E's testimony is addressed below.

Though witness A has no first hand knowledge of Applicant's health care fraud, he acknowledged that Applicant was prone to immerse himself so deeply in a project that he would forget about other tasks (Tr. 29). Witness A recommends that Applicant's

security clearance be restored. In describing the importance of experience in the special operation services, he stated:

Because in our business, in the Special Operations business, we have an equation that we like to use, it's capability is a function of training and experience. Experience has an exponent, and the more experience that you have in our community that in and of itself cannot be replaced easily. We have a saying that Special Operations forces cannot be created overnight or after an emergency occurs (Tr. 31).

Later in witness A's testimony, he described Applicant's importance to the overall mission of psychological assessments. He stated:

Applicant has all of [the experience and productivity]. He has a tremendous amount of experience. He can come in and do more in one day than a brand new psychologist can do in a month. He has that understanding, so he is absolutely invaluable to us to continue with us in that capacity.

That's why - - I'm here more because I want to see our organization enhanced by the tremendous experience that he brings to it. I am also here because I am a friend of his. But if I had to balance the equation, I am doing it for my organization, because I know what he brings to use and how important he is to it (Tr. 32).

Witness B, currently working as an administrator for witness C's company (psychological assessments) who also employs Applicant, has known him since approximately 1996 when Applicant was conducting assessments for the USA. Witness B indicated that Applicant is a good psychologist (Tr. 45) who has always been disorganized administratively (Tr. 44).

Witness C, the president of Applicant's employer (psychological assessments), worked with Applicant in the 1990s conducting assessments. In 1998, Applicant joined witness C's company and still is employed there. Witness C sees in Applicant a very thorough psychologist who is among the best (Tr. 56), but who has a weakness in organization (Tr. 57). When asked whether Applicant has modified his responsibilities since the criminal conviction, witness C said he had no personal knowledge (Tr. 68-69) since without a security clearance, Applicant has not been able to work for him. They did talk about the need to reduce work, and witness C believes Applicant understands (*Id.*). Unlike his employment situation between 2000 and 2004, Applicant currently works for one employer (Tr. 116-118), a juvenile facility for troubled teenagers, and is not in a position where he has to answer to several bosses at the same time (AE A).

Witness C provided a statement concerning Applicant (AE D6). He does not believe Applicant is dishonest. Rather, witness C believes that Applicant's significant involvement in his work and volunteer services, e.g., counseling services for families of

fallen soldiers, counseling for law enforcement and community organizations, culminated in a stress-filled situation he could not manage (*Id.*).

Applicant and witness D, a former coworker, met in 1990. They worked together on psychological assessments from 2004 until disposition of the criminal case in April 2007. Witness D considers Applicant to be very competent because he made the right calls (Tr. 73) on psychological ratings of applicants who wanted special operation assignments. Though witness D has no personal knowledge of the criminal fraud case, Applicant's tendency toward brevity in keeping records has enabled witness D to understand why Applicant would not keep adequate records (Tr. 75-76).

Witness E's husband was killed in a Middle Eastern conflict in 1991. Applicant has provided grief counseling for her since 1992. She lives in the same town in state X as Applicant. Witness E and her son (who has also received counseling for the last 10 years) also wrote character statements appearing at AE F1 and AE F2. The reason why she came to the hearing was to help Applicant regain his clearance. She believes he is an excellent counselor because his training and experience make his counseling more effective for the families of fallen and current soldiers who are assigned to special operations (Tr. 85-87). In pages 90 through 93 of the transcript, witness E testified eloquently that the military needs more counselors like Applicant who possess a better methodology to improve healing during the grieving process for families of fallen soldiers.

Character Evidence

AE A3, Applicant's vitae, indicates he received 28 awards and certificates while in the military. See *also*, AE G.

The character statements, identifying professional and/or social contact with Applicant from a short time up to 25 years, uniformly praise Applicant's work as an assessor for special operations, but are aware of his lack of administrative organization. For example, the first character statements in AE B and AE B1 confirm Applicant's qualifications in his work and commitment to the families of fallen soldiers, but noted his mismanagement was aggravated by his ballooning caseload. A chaplain, who worked with Applicant from 2004 to 2007 on several psychological acceptance boards, believes Applicant to be one of the most compassionate persons in developing lifelong relationships with families of soldiers who passed away in 1993 (AE D3).

Applicant has a long-standing commitment to the military as demonstrated by his ongoing dedication to the families of fallen victims. He has continued to serve the families on a voluntary basis because there always will be a need to counsel the families through their grief (AE A). Applicant continues to volunteer his psychological services for law enforcement in his area, and has organized and sponsored 14 musical concerts for children, besides being a motivational speaker in the juvenile court system (GE 2, AE F11, F 16). He also provided several valuable voluntary services to the nursing homes such as entertainment, transportation, and athletic activities (AE A, AE

F7). Applicant's psychology licenses for state X (where he lives and works) were reinstated in November 2007, along with his liability insurance (GE 2; Tr. 118).

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 flexible rules of law. Recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's ultimate adjudicative goal is a fair, impartial and common sense decision. According to the AG, the entire process is a careful, thorough evaluation 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. If residual doubts remain concerning personnel being considered for access to classified information, those doubts 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 is not restricted to normal duty hours. Rather, the relationship is an-around-the-clock responsibility between an applicant and the federal government. 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.

Analysis

Criminal conduct (CC)

30. *The Concern.* “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.”

CC disqualifying condition (DC) 31.a. (*a single serious crime or multiple lesser offenses*) applies in Applicant’s case. As a result of an investigation regarding Applicant’s billing errors to Medicare, he pled guilty to health care fraud in January 2007 because he was guilty. CC DC 31.d. (*individual is currently on parole or probation*) also applies as Applicant is still on probation.

Three of the five mitigating conditions (MC) do apply in this case. CC mitigating condition (MC) 32.a. (*so much time has passed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment*) clearly applies to this case. Applicant’s fraudulent activity ended in February 2004, (along with his employment at the life care agency and disability agency) more than four years ago. Applicant no longer is employed in circumstances that contributed to his fraudulent activity. Applicant’s criminal conduct does not cast doubt on his current reliability, trustworthiness and good judgment.

CC MC 32.b. (*the person was pressured or coerced into committing the act and those pressures are no longer present in his life*) provides some mitigation and extenuation as Applicant could not manage the administrative paperwork. The stress and pressure no longer exists as his work in the juvenile facility does not require handling the same kind of paperwork that he was handling with Medicare.

CC MC 32.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 development*) provides substantial mitigation based on the persuasive character evidence from past and present coworkers who are intimately familiar with Applicant’s unswerving reputation for honesty, and who also know that he has trouble with administrative tasks. The passage of more than four years weighs in Applicant’s favor.

Applicant’s remorse is genuine. He has admitted that he made false statements and committed fraud. In confessing his guilt to the criminal fraud offense, I am satisfied that Applicant is contrite. His good employment record and community involvement, i.e. his continuing contributions throughout the criminal case to the families of fallen comrades, constitutes convincing evidence that enables Applicant to overcome the fact that he violated the law for about four years, and he will be on probation until April 2011. Accordingly, the CC guideline is resolved in Applicant’s favor.

Whole Person Concept (WPC)

The AG indicates the ultimate determination of whether to grant a security clearance must be an overall common sense judgment based upon careful consideration of the whole person concept. Nine general policy factors define the WPC. They are: (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 the participation is voluntary; (6) the presence or absence of rehabilitation; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and, (9) the likelihood of continuation or recurrence.

Applicant was approximately 46 years old in 2000 when he began billing the government (Medicare) for services not rendered. He did not end the criminal activity until February 2004. Though he showed some reticence during the hearing in accepting the full scope of his illegal conduct, he admitted he committed fraud against the government. Having listened closely to his testimony and watched him listen as his witnesses testified about his virtues as well as his weaknesses, I firmly believe he understands he cannot handle the administrative tasks necessary for the Medicare claims. I believe he also understands that working for three employers contemporaneously was creating stress that was too difficult to manage. The totality of the circumstances informs me that Applicant has learned a painful lesson that has also resulted in serious health problems. After weighing the unfavorable information relating to the fraudulent activity against Applicant's long history of outstanding accomplishments over the years in his professional career, both in the military and in private practice, I conclude the chances for recurrence of his criminal conduct are nonexistent. Accordingly, the CC guideline is resolved in Applicant's favor.

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 (Criminal conduct, Guideline J):	FOR APPLICANT
Subparagraph 1.a.	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Paul J. Mason
Administrative Judge