



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-03897  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Alison O’Connell, Esquire, Department Counsel  
For Applicant: *Pro Se*

March 27, 2009

**Decision**

ABLARD, Charles D., Administrative Judge:

Applicant mitigated security concerns regarding Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). Eligibility for access to classified information is granted.

**Statement of the Case**

Applicant submitted an electronic Questionnaire for Investigations Processing (eQIP), on June 13, 2007. On October 3, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns for Applicant under Guidelines J, and E. 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 October 25, 2008 and requested a hearing before an administrative judge. I received the case assignment on January 30, 2009. DOHA issued a notice of hearing on February 3, 2009, for a hearing on February 19, 2009. The hearing was held on that date.

At the hearing, the government offered three exhibits (Exhs 1-3) that were admitted in evidence without objection. Applicant submitted no exhibits. He testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on February 26, 2009. I granted Applicant's request to keep the record open until March 3, 2009, to submit additional evidence. One set of documents (Exhs. A items 1-3) was received within that time and admitted in evidence without objection.

### **Findings of Fact**

Applicant is a 46-year-old employee of a government contractor for the Department of Defense. He has been employed as a heavy equipment operator on a military base since June 2007. He worked as a driver for several other employers before his current employment. He held a secret clearance while on active duty in the Air Force, but has not held one since his discharge. The circumstances that gave rise to this matter occurred 22 years ago in 1987 when he was a 24-year-old Air Force security policeman with the rank of sergeant (E-4). In the SOR, the government alleged that he was tried and convicted in 1987 by a general court-martial under the Uniform Code of Military Justice (UCMJ) larceny of a motorcycle, and sentenced to two years confinement, forfeiture of \$1,000 and reduction in rank to airman basic (SOR ¶ 1.a.). The SOR also alleged that he falsified material on his e-QIP when he answered Question 23 in the negative as to whether he had ever been convicted of a felony offense including one under the UCMJ (SOR ¶ 2.a.).

In his Answer, Applicant admitted the court martial and the sentence under the criminal conduct allegation. He denied the personal conduct allegation for failure to report the court martial conviction as a felony stating he did not know that the conviction was for a felony.

Applicant was on active duty in the Air Force between 1981 and 1991. In 1987 he owned a motorcycle that needed some extra parts. An acquaintance on the base where he was stationed mentioned that there was a motorcycle of the same make that appeared to have been abandoned near one of the base gates but outside the fence on military property (Tr. 19 and 60). He and several friends tried to see who owned the motorcycle from the license plate and other identification (Tr. 21). They were unable to find a record owner so they took the motorcycle away in Applicant's jeep, dismantled it for the parts he needed, and put the remainder in a remote field on the base. The unused parts of the motorcycle were discovered several weeks later and traced to an owner who worked on the base (Tr. 40).

Applicant was investigated, charged with larceny, and tried by a general court-martial, found guilty of larceny in violation of 10 U.S.C.S. § 921, sentenced to a bad-

conduct discharge, confinement for two years, forfeiture of \$100 pay per month for ten months, and reduction to the lowest enlisted grade. The conviction was affirmed by the Court of Military Review and appealed to the Court of Military Appeals (COMA), which reversed the decision in 1989. He had served 13 months in confinement at the time of the COMA decision. The findings of guilty and the sentence were set aside because of prejudicial errors made during the investigative phase of the case (29 M.J. 259, 1989), and Exh. 3). He then was restored to his old rank and given some military duties but later placed on administrative leave when he worked as an ironworker for several months. One of the men who helped him take the motorcycle was also tried by court martial and acquitted.

The record of the case was returned by COMA to The Judge Advocate General for a possible re-hearing. A new trial was ordered and he was tried again in 1990. At that trial Applicant again was found guilty and sentenced to ten months confinement, but credited for the time already served. He was reduced in grade to airman basic. He was honorably discharged in 1991 (Exh. A item 1, and Tr. 43-47).

While the testimony at the hearing and the statements made in the investigation (Exhs. 2 and 3) differ on some of the issues involved in this matter, the outcome of the two trials and the appeals decisions are undisputed. Applicant has had no encounters with the criminal justice system except for a few traffic tickets for the past 22 years. He has a high school equivalency and has been employed primarily as a truck driver since his discharge. He is remorseful about the event and realizes that it was a very stupid act on his part that has continued to cause him difficulty. However, it was largely behind him until this matter arose (Tr. 71). He is now unemployed while he awaits medical clearance from a recent surgery to return to work if his security clearance is restored (Tr. 55). Applicant's supervisor attests to his work skills and that he is a trusted asset to his employer (Exh. A Item 2).

### **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(c), 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 if 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 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 for an applicant. One of them that may be a disqualifying condition (DC) is a single serious crime or multiple lesser offenses (AG ¶ 31 (a)). The allegation in SOR ¶ 1.a. relates to the court martial in 1987 and the security concern has been properly raised.

Mitigating factors under the guideline that could be applicable are that so much time has elapsed since the criminal behavior happened that it does not cast doubt on the individual’s reliability, trustworthiness, or good judgment (AG ¶ 32 (a)), or there is

evidence of successful rehabilitation including, but not limited to passage of time without recurrence of criminal activity, remorse, and a good employment record (AG ¶ 32 (d)). The second mitigating factor raises the issue of rehabilitation. The offense for which he was prosecuted by court martial is the only criminal offense that he has committed. Applicant's conduct during the past 22 years has been without incident. The allegation in SOR ¶ 1.a. is mitigated by the passage of time and evidence of rehabilitation.

### **Guideline E Personal Conduct**

The security concern about personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, and unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information (AG ¶ 15).

Applicant's failure to report the court martial conviction as a felony conviction at Question 23 on his SF 86, prompted security concerns under Guideline E (Personal Conduct). Conditions that could raise a security concern and be disqualifying include the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire (AG ¶ 16 (a)).

The requirement of the guideline is that the omission be deliberately false. I conclude that it was not in view of the circumstances surrounding the history of the two court martial trials and appeals in his case. The likelihood of confusion as to the level of conviction supports his claim that he was unaware that he had been actually convicted of a felony.

### **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 presented testimony and evidence concerning his court martial in 1987 and the subsequent one in 1990 including the differences in the penalties imposed, and his preparation of the answers on his e-QIP. His work record has been steady and continuous for almost 20 years since he left active military service. He has had no further law enforcement problems in the past 22 years since his first trial. He has strong recommendations from his supervisors for his work, conduct, and reputation.

### **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.: For Applicant

Paragraph 2, Guideline J: FOR APPLICANT

Subparagraph 2.a.: 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. Access to classified information is granted.

CHARLES D. ABLARD  
Administrative Judge