



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



In the matter of:	)	
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SSN: -----	)	ISCR Case No. 08-04592
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Richard Stevens, Esquire, Department Counsel  
For Applicant: Phillip Stackhouse, Esquire

September 9, 2009

**Decision**

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and transcript, Applicant's request for a security clearance is granted.

On December 13, 2005, Applicant submitted a Security Clearance Application (SF 86) to renew a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a set of interrogatories<sup>1</sup> regarding information in his background. Based on the results of the background investigation and his response to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding<sup>2</sup> that it is clearly consistent with the national interest to continue Applicant's access to classified information.

<sup>1</sup> Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

<sup>2</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

Subsequently, DOHA issued to Applicant an undated Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the revised Adjudicative Guidelines (AG)<sup>3</sup> under Guideline J (criminal conduct).

On January 2, 2009, Applicant responded to the SOR and requested a hearing. The case was assigned to me on May 7, 2009. I convened a hearing on June 9, 2009, at which the parties appeared as scheduled. The government presented seven exhibits (Gx. 1 - 7), which were admitted without objection. Applicant testified and presented one witness. DOHA received the transcript of hearing (Tr.) on June 25, 2009.

### **Findings of Fact**

Under Guideline J, the government alleged Applicant was arrested on July 23, 2003, and charged with Assault on a Law Enforcement Officer, a felony, for his conduct on July 5, 2003. It further alleged Applicant eventually pleaded guilty to disorderly conduct, a misdemeanor, but served no jail time. (SOR ¶ 1.a) The government also alleged under this guideline that Applicant was investigated by the U.S. Army for possibly having received stolen goods, but that there was insufficient information on which to prosecute Applicant for that crime. (SOR ¶ 1.b) Applicant denied both SOR allegations. After reviewing the pleadings, the transcript, and exhibits, I have made the following findings of relevant fact.

Applicant is 46 years old. He served in the U.S. Navy from August 1980 until August 1985. Part of his Navy service included training as a Navy Seal, which he did not complete. However, after his first marriage ended in divorce, in part, due to the demands of his military service, Applicant enlisted in the U.S. Army. He served as a Special Forces Combat Medic from January 1986 until his retirement under honorable conditions in September 2003. (Gx. 1; Tr. 45)

Applicant's military service was exemplary. His decorations included the Bronze Star, two Meritorious Service Medals, two Army Commendation Medals, two Army Achievement Medals, one Joint Services Achievement Medal, and six Army Good Conduct Medals. In May 2004, Applicant went to work for his current employer in support of U.S. Department of State contracts in Central and South America utilizing his Army Special Forces experience. (Gx. 1; Gx. 3; Tr. 70 - 71, 78)

In 2004 and 2005, Applicant worked in a foreign country and was responsible, in part, for ensuring his company's helicopter pilots were qualified to carry out their mission as required by his company's contract. This included having on hand a sufficient inventory of small arms ammunition, flares, and other mission-essential supplies. Because those materials were hard to obtain through normal channels at his work location, Applicant arranged with a U.S. military counterpart a transfer of excess ammunition from a different organization. Applicant never actually took possession of

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<sup>3</sup> The revised Adjudicative Guidelines were approved by the President on December 29, 2005, and were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, these guidelines take precedence over the guidelines currently included in Enclosure 2 of the Directive.

the ammunition. However, in May 2005, Applicant was interviewed by an Army Criminal Investigations Division (CID) investigator about his activities in this regard. The investigation was prompted by apparently illegal activities by the person with whom he was working to get the ammunition. In part, the investigation tried to determine if Applicant had violated laws against receiving stolen property. Applicant cooperated fully with the investigation, which did not produce any evidence of criminal conduct by the Applicant. It is unknown if his counterpart was prosecuted. (Gx. 2; Tr. 70 - 77, 81 - 85)

Applicant re-married in June 1986. He and his wife have an adult daughter and a 17-year-old autistic son who has required a great deal of care throughout his life. In May 2000, they separated because Applicant's wife was having an affair with another man. Applicant originally intended to retire from the Army in October 2001. After the September 11, 2001, terrorist attacks, he pulled his retirement request and deployed to Afghanistan for four months in 2002. After he returned, and while training to deploy to Iraq, Applicant was injured and could not perform his duties. He did not go to Iraq. Thereafter, in addition to his marital problems, Applicant became depressed about his physical condition, the impact it was having on his career, and about what he perceived as the Army's reluctance to surgically correct his injury. In addition to painkillers, he was prescribed anti-depressants that may also have caused suicidal thoughts. (Gx. 3; Tr. 47 - 54, 100 - 102)

On July 4, 2003, Applicant visited his wife and family at the marital residence. He and his wife argued through much of the afternoon and evening. At one point, Applicant left to return to a cabin where he had been living. He called his wife after leaving, but she hung up on him and he returned to their house. After midnight, their argument escalated to the point Applicant's wife had her daughter call the police. Before they arrived, Applicant went to the basement and retrieved a handgun. Available information suggests that Applicant contemplated provoking the police to shoot him.<sup>4</sup> When Applicant appeared with a handgun on the rear deck of his house, there were four police officers assembled there. One of the officers subsequently shot Applicant. Applicant and his wife testified that he had his hands raised with the gun in one hand, the safety, on and his finger off the trigger. They also testified that he was shot in the back. (Gx. 7; Tr. 25 - 26, 33 - 38, 56 - 64)

On July 23, 2003, a local grand jury returned a true bill of indictment against Applicant. He was charged with Assault on a Law Enforcement Officer with a Firearm. Trial was delayed at least three times because the police officer listed on the complaint failed to appear. Applicant eventually pleaded no contest to disorderly conduct, but was not sentenced to jail and only had to pay court costs. The charge was held in abeyance for three years and was ultimately dismissed. (Tr. 98 - 100; Gx. 6; Gx. 7) Applicant and his wife reconciled after he was shot. Their marriage appears again to be sound. (Tr. 29)

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<sup>4</sup> Also known as "suicide by cop."

## Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>5</sup> for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>6</sup> and consideration of the pertinent criteria and adjudication policies in the revised Adjudicative Guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the “whole person” concept, those factors 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) 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.

The presence or absence of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under AG ¶ 30 (Guideline J - Criminal Conduct).

The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the government's case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.<sup>7</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, the government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>8</sup>

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<sup>5</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>6</sup> Directive. 6.3.

<sup>7</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>8</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

## Analysis

### Criminal Conduct

The security concern raised by the allegations in SOR ¶¶ 1.a and 1.b is that “[c]riminal 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 ¶ 30)

As to SOR ¶ 1.b, available information is insufficient to show that Applicant committed any crime. The allegation itself cites a possible charge of receiving stolen property, but nowhere in the government’s information is that charge specified. Further, Applicant never actually received anything from his counterpart and he was not prosecuted for whatever transpired. He has denied any wrongdoing in this instance, and available information does not show there was an allegation or admission of criminal conduct, much less an actual offense, serious or otherwise, committed by Applicant. I conclude SOR ¶ 1.b for the Applicant.

The government’s information is sufficient to show, as alleged in SOR ¶ 1.a, that Applicant was charged through a grand jury indictment with the felony of Assault with a Firearm on a Law Enforcement Officer. The information also shows that the Applicant eventually pleaded no contest to misdemeanor Disorderly Conduct, and that he served no jail time. The only evidence presented at this hearing about what actually happened the night Applicant was shot by police officers came from Applicant himself. He and his wife testified that he had his hands raised and did not threaten the police with the weapon. However, by virtue of the indictment presented, I conclude that the grand jury was presented with sufficient information to support a charge that Applicant aimed his weapon at the officers. The fact that he was not fully prosecuted on that charge does not negate the seriousness of his conduct in determining his suitability to hold a security clearance.

As to SOR ¶ 1.a, the record requires application of the disqualifying conditions listed at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). By contrast, the conduct in question is isolated, occurred about six years before the hearing, and was likely the culmination of a distinct period of significant personal and professional stress. Applicant has not been involved in any other criminal conduct, he and his wife have reconciled, and he is resolving his physical problems. Available information supports application of the mitigating conditions at AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s reliability, trustworthiness, or good judgment*) and AG ¶ 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 involvement.*) On balance, I conclude available information is sufficient to mitigate the security concerns about his criminal conduct.

## **Whole Person Concept**

I have evaluated the facts presented and applied the appropriate adjudicative factors under Guideline J. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 46 years old. Aside from a concentrated period of unusual stress brought on through circumstances largely beyond his control, Applicant has been a mature, responsible adult. He devoted most of his adult life to military service in which he excelled, often under arduous circumstances. Applicant's Army requirements further strained a marriage already burdened by needs of his autistic child. Such circumstances resulted in stressors that do not appear to present anymore. He is clearly remorseful for the conduct that led to his arrest, the only documented adverse event in his background. A fair and commonsense assessment<sup>9</sup> of all available information bearing on Applicant's lone instance of criminal conduct shows he is unlikely to engage in any such adverse activity. Applicant has mitigated the security concerns raised by the government's information.

### **Formal Findings**

Formal findings 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 - 1.b:           For Applicant

### **Conclusion**

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is granted.

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MATTHEW E. MALONE  
Administrative Judge

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<sup>9</sup> See footnote 6 *supra*.