



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



In the matter of:)	
)	
)	ISCR Case No. 09-03690
)	
Applicant for Security Clearance)	

Appearances

For Government: Richard Stevens, Esq., Department Counsel
For Applicant: *Pro se*

July 22, 2011

Decision

LAZZARO, Henry, Administrative Judge

Applicant was charged with murdering his brother-in-law in 1982. He was convicted of voluntary manslaughter in October 1983, and he was sentenced to serve 15 years confinement. He was released from confinement in 1990. He had an illustrious career as an Air Force fighter pilot before his conviction. He earned his doctoral degree while confined in a work release setting, and he has been employed in highly responsible public service positions since he was released from confinement. Applicant mitigated the security concern that arises from his criminal conduct. Clearance is granted.

On October 29, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct). Applicant submitted a response to the SOR that was received by DOHA on December 20, 2010. He admitted all SOR allegations and requested a hearing.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

The case was assigned to another administrative judge on April 20, 2011, and reassigned to me on May 12, 2011, due to Applicant's request that the hearing be held in a region other than where he resided. A notice of hearing was issued on May 26, 2011, scheduling the hearing for June 6, 2011.² The hearing was conducted as scheduled. The government submitted three documentary exhibits that were marked as Government Exhibits (GE) 1-3 and admitted into the record without objection. Applicant testified, called his wife to testify, and submitted four documents that were marked as Applicant Exhibits (AE) 1-4 and admitted into the record without objection. The transcript was received on June 22, 2010.

Procedural Matters

Department Counsel moved to withdraw SOR allegations 1.b, 2.a, and 2.b. That motion was granted without objection.

Findings of Fact

Applicant's admission to the remaining SOR allegation is incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is 68 years old. He was first married in February 1974, and that marriage ended in divorce in about November 1983. He has two adult daughters from this marriage whom he has not seen or heard from since 1984. Applicant has been remarried since December 2010.

Applicant received a bachelor of science degree in management and economics in June 1966. He participated in the Air Force Reserve Officer Training Corps while in college, and he was commissioned as a 2nd lieutenant in the Air Force in October 1966. He served continuously on active duty in the Air Force until he was dropped from the Air Force rolls sometime following his conviction in October 1983.³ Applicant was awarded a master of science degree in engineering systems in June 1976. He was awarded a doctoral degree in educational administration in June 1986.

Applicant completed Air Force flight training in or about May 1968, and was assigned to fly the F-4D fighter aircraft. His first assignment was as a forward air controller in Viet Nam in 1969-70, during which he flew 160 combat missions. Following non-combat assignments, Applicant was once again assigned to fly combat missions in Viet Nam in

² Applicant was traveling away from home and requested through Department Counsel that the hearing be held in the state where he was temporarily staying. The notice of hearing was sent to the address he provided and, on May 27, 2011, Department Counsel sent Applicant an e-mail informing him of the date, time, and location of the hearing (Appellate Exhibit I). After being fully informed of his right to a 15-day notice of the date, time, and place of the hearing, Applicant waived that right on the record. (Tr. 16-18)

³ To be "dropped from the roles" is an administrative action that terminates an officer's military status, in this case, based on Applicant's conviction and confinement in a civilian work release center.

1973, during which he flew 240 combat missions. Applicant accumulated approximately 900 hours of combat flying time during his two deployments to Viet Nam. His aircraft was shot down on one mission as he flew close air support for American and Vietnamese forces who were engaged in combat, literally, at the end of the runway at the base to which Applicant was assigned. He received various awards and decorations for his combat flying, including the Distinguished Flying Cross, Air Medal, and Purple Heart.

Applicant obtained the rank of major in the Air Force. He was selected for promotion to lieutenant colonel when he was dropped from the rolls. He possessed a security clearance during his entire time on active duty, including at levels that provided him access to nuclear weapons and plans for the deployment and use of those weapons. No allegation was ever made that he compromised or risked the compromise of classified information, and no prior action was ever taken to revoke or downgrade his clearance for adverse reasons other than being dropped from the Air Force rolls.

Applicant was involved in a divorce and custody dispute with his then wife in 1982. He had been awarded temporary custody of his two daughters and, in May 1982, a final court hearing was scheduled to resolve the custody issue. Applicant's wife attended the court hearing accompanied by her brother. Following the hearing, Applicant, his wife, and her brother went to Applicant's residence to provide his wife a chance to visit with their daughters. Applicant contends that while at the residence, his brother-in-law attacked him with a knife, and he shot and killed the brother-in-law in self-defense. Applicant was charged with murder, but, after a contested trial, he was convicted of voluntary manslaughter. Applicant was sentenced to serve 15 years in confinement.

Applicant served his sentence of confinement in a work release center. He was confined at all times except when released to work of pursue his doctoral degree. He was employed at a variety of jobs while in confinement that ranged from working in a gas station to working in the admissions and finance offices at the university from which he received his doctoral degree. Applicant served seven and one-half years in confinement before he was released in 1990. He did not have parole or other continuing conditions placed on him once he was released from confinement.

Following his release from confinement, Applicant worked as a senior transportation planner for a municipality, and as a traffic engineer for another municipality. In June 2002, he was hired as an interim airport manager for a municipal airport. From June 2002 until July 2008, Applicant was employed as an airport director or airfield manager by several municipalities, interrupted by brief periods of unemployment. Applicant's last such employment ended when he was abruptly terminated after his manslaughter conviction became a political issue despite the fact that he had disclosed it when he was initially hired. Applicant was hired to serve as a consultant to a defense contractor in September 2008, contingent upon him obtaining a security clearance.

Applicant's employments as airport director or airfield manager required him to be responsible for airport security. In that capacity he was required to pass the stringent security clearance requirements imposed by the Transportation Security Administration (TSA). One of the airports he managed became one of only three airports nationwide to

obtain a satisfactory rating during a TSA transition in security systems. Applicant was also responsible for writing security manuals for the airports he supervised.

Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying and mitigating conditions for each applicable guideline. Each clearance decision must be a fair and impartial decision based upon the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guideline J (criminal conduct) with its disqualifying and mitigating conditions is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁴ The Government has the burden of proving controverted facts.⁵ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁶ although the Government is required to present substantial evidence to meet its burden of proof.⁷ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁸ Once the Government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁹ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰

No one has a right to a security clearance¹¹ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹² Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹³

⁴ ISCR Case No. 96-0277 (July 11, 1997) at 2.

⁵ ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

⁶ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁷ ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

⁸ ISCR Case No. 98-0761 (December 27, 1999) at 2.

⁹ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

¹⁰ ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

¹¹ *Egan*, 484 U.S. at 528, 531.

¹² *Id.* at 531.

¹³ *Egan*, Executive Order 10865, and the Directive.

Analysis

Guideline J, 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 30)

Applicant was charged with the murder of his brother-in-law in 1982. He was convicted of voluntary manslaughter in October 1983, and he was sentenced to serve 15 years confinement. He actually served seven and one-half years in confinement in a work release facility. Disqualifying Conditions (DC) 31(a): *a single serious crime or multiple lesser offenses applies.*¹⁴

Applicant had a stellar 16-year-long military career at the time he was charged with the murder of his brother-in-law. That career included two distinguished combat tours as a fighter pilot during which he earned the Distinguished Flying Cross, Air Medal, and Purple Heart. While incarcerated in a work release center, Applicant maintained steady employment and earned a doctoral degree. During the more than 20 years since his release from confinement, Applicant has been employed in a variety of highly responsible jobs by a number of municipalities.

Applicant held extremely high level security clearances while he was in the Air Force, including clearances that provided him access to nuclear weapons and plans for the employment of those weapons. No allegation was ever made that he compromised or risked the compromise of classified information. His work as a municipal airport director or airfield manager provided him access to TSA security regulations and required him to comply with those regulations. There is no suggestion that he compromised, risked the compromise, or failed to comply with those regulations.

Applicant's manslaughter conviction arose from what was obviously a contentious divorce and child custody battle in which his brother-in-law somehow became involved. While extremely serious, Applicant's voluntary manslaughter conviction was and is an aberration in what has been an otherwise honorable, trustworthy, and commendable life.

The following Mitigating Conditions (MC) apply: MC 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 and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*; and MC 32(c): *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.*

¹⁴ To be "dropped from the rolls" is an administrative termination of military status and is not the equivalent of a dismissal under dishonorable conditions. Accordingly, DC 31(b): *discharge or dismissal from the Armed Forces under dishonorable conditions* does not apply.

Considering all relevant and material facts and circumstances present in this case, the whole-person concept, the factors listed in ¶¶ 6.3.1 through ¶¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant mitigated the criminal conduct security concern. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the national interest to grant Applicant a security clearance. Guideline J is decided for Applicant.

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
Subparagraph 1.b:	Withdrawn
Paragraph 2, Guideline E:	WITHDRAWN
Subparagraphs 2.a and 2.b:	Withdrawn

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 a security clearance for Applicant. Clearance is granted.

Henry Lazzaro
Administrative Judge

