



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



In the matter of:)
)
-----) ISCR Case No. 08-12058
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: Dan Wilkins, Personal Representative

March 23, 2010

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) dated January 24, 2008. On September 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct). The action was taken under Executive Order (EO) 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.

On September 25, 2009, Applicant responded to the SOR. He admitted the sole allegation raised under each guideline. He also requested a hearing before a DOHA Administrative Judge. I was assigned the case on November 3, 2009. The parties proposed a December 18, 2009, hearing. A Notice of Hearing was issued to that effect on November 13, 2009.

The hearing took place as scheduled. Applicant gave testimony and introduced nine documents accepted into the record without objection as exhibits (Exs.) A-I. Three witnesses and Applicant's personal representative gave testimony on his behalf. Also accepted into the record without objection were five documents from Department Counsel, marked and accepted as Exs. 1-5. Applicant was given through January 7, 2010, to submit any additional materials. The transcript (Tr.) was received on December 28, 2009. Applicant timely submitted seven additional documents. They were forwarded without objection by Department Counsel and accepted into the record as Exs. J-P. The record was closed on January 12, 2010. Based upon a thorough review of the case file, exhibits, and testimony, security clearance is denied.

Findings of Fact

Applicant is a 41-year-old engineering technician who has twice worked for his present employer, his most recent tenure having started in 2005. He has a high school diploma and an associate's degree in science. He is the father of one adult child.

Applicant was born in 1968. In 1987, he and his girlfriend had a baby. In about 1991, he started working for his present employer and was eventually granted a security clearance.¹ His relationship with his girlfriend, the mother of his child, became strained, but he continued to be an important part of his daughter's life. They began living apart, taking turns caring for their child and working on their relationship.² One day in June 1994, when Applicant was about 25 years old, he heard that his girlfriend was seeing another man. The discovery was devastating. He learned that the man was a friend of his who had gone to school with his brother. He told the friend to stay away from his girlfriend.³ After that, he continued working on his relationship, but things did not improve.

On July 29, 1994, Applicant picked up some beer and his gun. He contemplated driving to a reservoir, getting drunk, and killing himself. He saw his mother, however, and she told him to get his daughter's swimming gear from his girlfriend's home. He stopped by his girlfriend's apartment that evening. He found his girlfriend with the same friend he had told to stop interfering with his relationship.⁴ The discovery upset him and a verbal altercation ensued: "I just got really angry basically because the whole time – the whole time I was trying to work things out with her, [his friend] was just kind of telling [her] to leave me and that I'm not a good father, stuff like that."⁵

Applicant and his girlfriend tried to talk about their relationship, but the male friend interrupted. His friend's interference and derogatory comments regarding Applicant made

1 Tr. 20. As a result of Applicant's July 1994 criminal conduct, discussed below, he later lost his security clearance.

2 Tr. 55, 61.

3 Ex. 2 (Police report) at 28.

4 Tr. 59.

5 Tr. 62.

Applicant, an otherwise shy and unassuming man, more upset. Applicant left his girlfriend's apartment bereft and got in his car. His girlfriend, the male friend, and two other friends headed toward another car, where the male friend took the driver's seat. Words were exchanged between the Applicant and his girlfriend, but her companion prepared to drive away. Applicant drove his vehicle into their car. He then got out of his car and fired his gun toward the driver's tinted side window.⁶ Frightened by his outburst, he dropped the gun and fled. Applicant's male friend was shot in the arm and abdomen. No other passengers were injured. After the police arrived, Applicant called his girlfriend to ask how the friend was. "He said he couldn't believe he had done it and he said it was because [her date/his friend] had lied to him."⁷ Applicant told his girlfriend that he was suicidal over what he had done, but she told him to turn himself in.⁸ He was arrested shortly thereafter.

The incident and Applicant's arrest were publicized by the press. He was charged with 1) felony Attempted Murder, 2) two counts Wearing or Carrying a Handgun, 3) two counts Assault with Intent to Maim, 4) four counts Assault, 5) four counts Battery, 6) Concealed Deadly Weapon, 7) two counts Reckless Endangerment, 8) two counts Malicious Destruction of Property, 9) Failure to Stop After Accident, and 10) Reckless Driving. He was found guilty of 1) felony Attempted Murder and 2) one count of Wear/Carry Handgun. The remaining charges, noted as 3-10 above, were *nolle prosequi*. Applicant was sentenced to 30 years imprisonment, but the sentence was reduced to a 15- year term. He was released in June 2005 after 10 years for good behavior. He was ordered to remain on supervised probation until February 15, 2010, but it was changed to unsupervised probation in early 2009.⁹ He was on probation at the time of the hearing.

While incarcerated, Applicant served his time without incident. He underwent mandatory therapy and was administered a psychiatric evaluation by a medical doctor. It was determined that he did not have a condition that could impair his judgment or reliability, particularly in the context of safeguarding classified national security information."¹⁰ The examining physician later confirmed this assessment.¹¹ In the interim, Applicant enrolled in a course of study through the state college system. As a result, he earned an associate's degree in mechanical engineering and received certification in that field. He completed a community re-entry program after his release. Now that he has reentered society, he is determined to adjust well.¹²

6 *Id.* at 3.

7 *Id.* at 22.

8 *Id.* at 22-23.

9 The government argues that more time is needed beyond Applicant's probation to demonstrate his rehabilitation.

10 Tr. 20-21; Ex. A (Medical/Psychiatric).

11 *Id.*

12 *Id.*

Today, Applicant is on cordial terms with both his ex-girlfriend and his friend, to whom she is now married. Since his release from prison, he has become especially close with his daughter, who is now 22 years old and resides with her mother and her mother's husband. Applicant and his daughter visit at least once a week and speak on the telephone several times a week.¹³ She notes, "Talking to him always makes me feel so much better when something is bothering me. Whenever I need advice about something or I'm just plain worried about something he is one of the first people I call."¹⁴ Regarding Applicant's relationship with her mother and her mother's husband, the daughter writes, "The situation between my dad and mom and her family has been really good too. He and my mom have been on friendly terms, which I am so grateful for. I don't feel like there's a lot of tension despite what happened and I really get the sense of things being in the past with them."¹⁵ She concludes by writing, "I don't feel like mom, or [her husband, Applicant's intended victim], or anyone is threatened at all. My dad has really turned his life around. He is a hard worker and very responsible and from what I've seen he is respected and loved by all of his friends, family, and coworkers."¹⁶ Similarly, the child's mother, Applicant's ex-girlfriend, notes, "I have never felt threatened by [Applicant] in any way. . . He has been a responsible, loving father since being released. . . . I have no ill will to him and believe he has none to me. . . . I believe [Applicant] poses no threat to [her husband] as well. . . I believe all is in the past."¹⁷

At work, co-workers and associates who knew Applicant were "shocked" to learn from Applicant or the press that he had been involved in the incident.¹⁸ He did not conceal the truth about the incident. Instead, he was open to questioning about the accuracy of news stories and various rumors regarding the incident, although he kept the details to a minimum while he faced trial and sentencing. His peers' shock and his reticence were consistent with his reputation, which was for being a hard worker who is a "shy young man, but very personable."¹⁹ Some of his co-workers maintained contact with Applicant after he was incarcerated, helping him with his studies and writing him letters. Confidence in Applicant remained solid and he was invited back to his former place of employment as soon as practicable after his release from prison.²⁰ He returned to his employer in July 2005 as a computer-aided drafting (CAD) operator/draftsman a month after his release.

13 Tr. 71.

14 Ex. L (Letter, undated).

15 *Id.*

16 *Id.*

17 Ex. M (Letter, undated).

18 See, e.g., Tr. 29, 42, 76. Regarding his co-workers' feeling of shock, one witness noted that he had "never seen him angry", upset, or out of control. Tr. 76.

19 Tr. 73-74.

20 Tr. 21-22, 30, 35, 42.

Today, he is “very well accepted with everyone, very well liked, very well respected.”²¹ Since returning to work, there have been no concerns regarding Applicant or his performance.²² His representative, who has known him socially and professionally for many years, stated that he would trust Applicant with both his family’s life and with the security of this country.²³ Applicant’s last appraisal was at the highest level that merited a wage increase.²⁴ Within the past few years, he was promoted from draftsman to engineering technician. Based on the company’s confidence in Applicant and his qualities, it recently hired Applicant’s brother.

In his community, Applicant is well regarded and active. He states, “I guess any neighbor needs help, I’m more than happy to help them.”²⁵ A retired law enforcement officer who knows Applicant socially and is fully aware of Applicant’s criminal past writes that Applicant is impressive through “his self-motivating skills, continually distinguishing himself by achieving new things that sets him apart from others. . . . Based on my personal observations, conversations, and knowledge, I recommend without reservation or hesitation [Applicant] for a [security clearance].”²⁶ Applicant spends most of his free time with his family and friends.

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 AG lists potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant’s eligibility for access to classified information. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this 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.”

21 Tr. 30.

22 Tr. 38.

23 Tr. 44.

24 Ex. C (Appraisal, Dec. 2008).

25 Tr. 49.

26 Ex. O (Letter, dated Jan. 2, 2010).

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. The government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”²⁷ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion to obtain a favorable clearance decision is on an applicant.²⁸

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 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 EO 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.” EO 12968, Section 3.1(b), lists multiple prerequisites for access to classified or sensitive information. The Appeal Board has stated that “(t)he clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁹ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.³⁰ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.³¹ It is merely an indication that an applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

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.³² Here, in 1994, Applicant was charged with

²⁷ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁸ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

²⁹ *Id.*

³⁰ *Id.*

³¹ Executive Order 10865 § 7.

³² AG ¶ 30.

felony Attempted Murder and nine related crimes. He was convicted of Attempted Murder and one count of Wear/Carry Handgun. Ordered to serve a probationary period, his probation was set to expire on February 15, 2010. Consequently, Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31(a) (a single serious crime or multiple lesser offenses”) and CC DC AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted), and CC DC AG ¶ 31(d) (individual is currently on parole or probation) apply. With disqualifying conditions raised, consideration must be given to the mitigating conditions enumerated under AG ¶ 32.

Applicant’s relationship with his child’s mother began to fade as she started a liaison with one of his friends. Despite attempts to work on the relationship, the liaison persisted. Applicant was infuriated by his friend’s betrayal and the friend’s belittling treatment of him as both a man and as a father. When he discovered them together one night in the summer of 1994, Applicant, a bereft and near-suicidal young man, shot and wounded his rival in a crime of passion. The incident frightened and repelled him to the extent he contemplated taking his own life. He was arrested, found guilty of Attempted Murder and Wear/Carry Handgun, and sentenced to 15 years in prison. Released for good behavior after serving 10 years, he successfully completed mandatory therapy, a psychiatric exam, and a societal re-entry program. In the interim, he has not only maintained the admiration and trust of his employer and peers, but earned the trust of his daughter and his ex-girlfriend.

Moreover, it is notable that Applicant is a draftsman turned engineer. The availability of a firearm at the time was a matter of happenstance and there is no evidence that its availability was planned as part of an antisocial crime spree. Neither his profession, lifestyle, nor his inclination, is that of one given to the random or regular discharge of firearms. His crimes represent an isolated incident related to a failing romance in his mid-20s. Unlike larceny, extortion, molestation, or drug-related crimes, for example, his crimes are not the result of a compulsion, an inherent disregard of the law, or a fundamental difficulty appreciating the distinction between right and wrong. It was an isolated, aberrational incident, the grievous nature of which he instantly appreciated, continues to lament, and regarding which he has endeavored to make amends to society, his family, and his victim. His life was devoid of violent behavior before the incident and has remained violence-free in the intervening 16 years. Today, both his family and professional peers complement Applicant for his personal, judgment, reliability, and affability. Given these unique circumstances, his general reputation, and his rehabilitative strides in the intervening 16 years, Criminal Conduct Mitigating Condition (CC MC) 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 and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment) applies.

Applicant admits and has taken responsibility for his actions. Therefore, CC MC AG ¶ 32(c) (evidence the person did not commit the act) does not apply. Further, there is no evidence that a third party or any force but passion was involved in his crime, obviating application of CC MC AG ¶ 32(b) (the person was pressured or coerced into committing the act and those pressures are no longer present in the person’s life).

Today, Applicant is in his 40s. His only criminal act occurred when he was 25. For that act, he completed his term of incarceration early for good behavior. While in prison, he completed a college degree, therapy, and a psychological examination. Shortly after his release, he successfully completed a community re-entry program and is now considered a reliable neighbor and friend. He was quickly rehired by his employer, peers from which had encouraged him throughout his confinement. Since returning to work, he has been promoted and appraised as an excellent employee. Applicant's probation was set to expire in February 2010 and, at the time of the hearing, he had completed the vast majority of his probationary period without incident. Significantly, he has regained the trust of his daughter, and made peace with both his ex-girlfriend and his friend, the victim of his crime. As well, Applicant fully acknowledges his criminal behavior and expresses his remorse through both his words and his demeanor. Under these unique circumstances, CC MC 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) applies.

Applicant's criminal conduct demands heightened scrutiny. The crimes for which Applicant was found guilty were exceptionally grave and were committed while he had a security clearance. Few crimes are on the level of severity of attempted murder and the trust breached by that crime goes to the core of this process. The government argues that Applicant requires additional time to demonstrate his rehabilitation. I agree to the extent that additional time is warranted to mitigate all criminal conduct security concerns. The timing of this process has worked against Applicant. The hearing was on December 18, 2009, the record closed on January 12, 2010, and Applicant's probation was poised to expire on February 15, 2010. Consequently, there is no documentary evidence that he has successfully completed his probationary period and any other requirements related to that period. In light of Applicant's impressive efforts, this may seem to be a ceremonial technicality, but the security clearance process requires that any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information. Moreover, a demonstration by Applicant that he is continuing his efforts after his probation's expiration should eliminate any remaining doubts regarding his ability to maintain a security clearance. At present, however, such security concerns remain.

Guideline E - Personal Conduct

Under AG ¶ 15, conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. At issue here are the crimes for which Applicant was found guilty and related charges. They do not involve conduct regarding the security clearance process, an area not already covered by another adjudicative guideline, not involving a violation of a condition of employment, or regarding association with others involved in criminal activity. Other than general security concerns regarding Applicant's personal conduct in terms of his criminal past, which were duly considered under the preceding section regarding Guideline J, only Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(e) (personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation,

manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .) applies, due to his criminal act and incarceration.

Like the disqualifying conditions enumerated under this guideline, the available mitigating conditions are not easily amenable to these facts. This is especially true since the security concerns giving rise to Guideline E are similar to, and more appropriately considered under, Guideline J. This makes consideration under AG ¶ 17 difficult.

Here, there is no evidence that Applicant omitted, concealed, or falsified the truth regarding his part in the shooting. Rather, there is evidence that sufficient press coverage and personal disclosure existed to permit the story to spread on its own. The evidence also shows that when questioned by acquaintances regarding what they had heard or read, he readily corroborated stories regarding the incident. Since that time, his story has been further publicized, he has been open about his crime, and he has made overt attempts to rehabilitate himself. Such facts raise AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress).

Applicant fully admits that he committed his crime. Among Applicant's rehabilitative measures are psychological therapy and a psychological evaluation, which concluded that he did not have a condition that could impair his judgment or reliability, particularly in the context of safeguarding classified national security information. Moreover, anecdotally, Applicant's ex-girlfriend states that her family and Applicant are on amicable terms and that he does not pose a threat to her family. Therefore, PC MC AG ¶ 17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthiness, unreliability, or other inappropriate behavior, and such behavior is unlikely to recur) applies.

Criminal conduct security concerns arise because of questions regarding one's judgment, reliability, trustworthiness, and one's ability to comply with laws, rules, and regulations. Personal Conduct security concerns arise for the same reasons, plus issues involving candor and honesty. There is no evidence that candor or honesty are an issue. Credible testimony and demeanor demonstrated candor and honesty which was bolstered by witness testimony. In light of these considerations, any security concerns regarding Applicant's conduct remaining that are unrelated to Guideline J scrutiny are mitigated.

Whole-Person Concept

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all relevant circumstances. An 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. In reviewing the complete record, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the “whole-person” factors noted above.

In light of the factors enumerated in AG ¶ 2(a), it must be noted that Applicant is a highly credible, optimistic, and soft spoken man who, 16 years ago and in his early to mid-20s, committed a serious crime of passion against a suitor to the mother of his child. He held a security clearance at the time. Although the crime was committed in the heat of the moment, it was exceptionally heinous and resulted in physical injury. At the same time, it was an isolated incident totally inconsistent with his natural character. Since that time, he has been tried and sentenced for Attempted Murder and for Wearing or Carrying a Handgun. While in prison, he underwent therapy to address his conduct and he was successfully examined by a qualified physician regarding his psychiatric state. For good behavior, he was released after only 10 years.

In prison and since his release, he has successfully worked to rehabilitate himself. He completed a college degree and quickly resumed employment, where he has since been promoted and shown himself to be a valued, well-regarded, and well-rated employee. He has maintained the trust in peers who knew him before the incident and has won the trust of those he has since met. In much the same manner that the criminal justice system released him from prison five years early for good behavior, it also determined that he could be entrusted to complete his probation unsupervised. He completed a societal re-entry program and has reintegrated into his community without difficulty. He built a very close bond to his daughter. Neither she, his ex-girlfriend, nor their family considers him to be a threat. He has faced the consequences of his actions resolutely, paid for his crime, is open about his criminal past, and is endeavoring to move on with his life without further incident. Now in his 40s, Applicant devotes his time to his work, being a good friend, and spending time with his child.

But for the lack of evidence that Applicant completed all probation-related requirements and is still continuing to comport his behavior appropriately, criminal conduct security concerns would be adequately addressed. Without such a showing, security concerns regarding his criminal conduct, both in terms of its severity and the fact it took place while he had a security clearance, remain. In light of the clearly-consistent standard, any doubt concerning personnel being considered for access to classified information must be resolved in favor of national security. Security clearance denied.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance denied.

ARTHUR E. MARSHALL, JR.
Administrative Judge