DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 09-02752
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: John Bayard Glendon, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

August 25, 2010

Decision on Remand

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines J (Criminal Conduct), arising from Applicant's conviction of carrying a concealed weapon. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on July 30, 2008. On August 20, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline J. DOHA acted 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 adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on August 26, 2009; answered it on August 30, 2009; and requested a hearing before an administrative judge. The hearing was conducted on October 27, 2009, with Applicant appearing *pro se*. At the hearing, the judge raised the issue of collateral estoppel on his own motion after Applicant presented evidence that he was not guilty of the concealed-weapon offense of which he had been convicted. The judge deferred deciding whether collateral estoppel applied and informed the parties that he would allow Applicant to deny guilt but that any testimony from Applicant would be irrelevant if he decided to apply collateral estoppel.

On December 7, 2009, the judge denied Applicant's application for a clearance. In his decision, he determined that collateral estoppel applied. He also concluded that Applicant's testimony denying his guilt was untruthful. In his analysis, he concluded, "An Applicant who provides materially false information at his security clearance hearing raises security concerns that cannot be mitigated."

On April 6, 2010, the Appeal Board reversed the judge's decision. The Appeal Board concluded:

> Under the circumstances, we conclude that Applicant was denied a reasonable opportunity to prepare for the hearing and to present evidence, in that, had he understood what use the Judge would have made of his evidence, he would most likely have presented his case in a substantially different way.

The Appeal Board remanded the case for another hearing, with the following guidance:

> To the extent that issues of collateral estoppel arise in the new hearing, they should be resolved in accordance with ISCR Case No. 04-05712 . . . . Any such ruling shall be administered in accordance with Directive ¶¶ E3.1.8 – E3.1.19, which specify the obligation to conduct proceedings in a fair, timely, and orderly manner and which repeatedly specify the need to provide notice to an applicant. The prior proceeding shall not be considered.

The case was assigned to me on April 16, 2010. Applicant retained counsel, and on April 22, 2010, his counsel requested a conference call to discuss a proposed briefing schedule and the procedures for filing a prehearing motion to determine the applicability of collateral estoppel. (Hearing Exhibit X.) The conference call was held on April 26, 2010.

On April 30, 2010, DOHA issued a notice of hearing, scheduling it for June 8, 2010. On May 19, 2010, Department Counsel filed a motion *in limine*, requesting the application of collateral estoppel, and Applicant's counsel filed a motion *in limine* to preclude application of collateral estoppel (HX I and III.) At the same time, counsel for both sides filed a joint stipulation of facts. (HX II.) On May 24, 2010, I issued an order

granting Department Counsel's motion to apply collateral estoppel, subject to Applicant's agreement to be bound by the joint stipulation of facts. (HX V.)

On June 2, 2010, Applicant requested leave to withdraw his answer to the SOR and requested that Department Counsel be precluded from asking him at the hearing whether he was carrying a concealed weapon during the incident giving rise to his conviction. (HX V.) On June 4, 2010, I denied Applicant's request to withdraw his answer to the SOR, denied the motion to limit cross-examination of Applicant without prejudice, and informed the parties that evidentiary objections would be addressed at the hearing if they arose. (HX VIII.)

The hearing was conducted as scheduled on June 8, 2010. In accordance with the Appeal Board's guidance, I did not read Judge Harvey's decision, the transcript of the previous hearing, or any of the documentary evidence presented during that hearing. At the hearing on remand, Government Exhibits (GX) 1 through 6 were admitted without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H and AX J, which were admitted without objection. I granted Applicant's request to hold the record open until June 15, 2010, to enable him to submit AX I, which was not available at the time of the hearing. He timely submitted AX I, which was admitted without objection. Department Counsel's comments regarding AX I are attached to the record as HX XI. DOHA received the transcript (Tr.) on June 16, 2010.

Findings of Fact

In his answer to the SOR, Applicant admitted that he was arrested and convicted as alleged in the SOR, but he asserted that he was innocent. He denied carrying a concealed weapon, and he stated that during the altercation he identified himself as a former federal agent. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 30-year-old native of Ukraine. He emigrated from Ukraine with his mother in November 1989, and he became a citizen of the United States in May 1998, shortly after his eighteenth birthday. (Tr. 68-69). In May 2002, he obtained a college degree in business administration, with a concentration in information technology. When he came to the United States, he could not speak English, but at the hearing he was articulate, fluent, and accent-free.

Applicant became a federal law enforcement agent in August 2004. He described his initial training as "the most surreal, most fantastic experience, to date" and testified that it completely changed him as a person. (Tr. 73-74.) In his first assignment, he held a security clearance and tried to be assigned to work in the field as a counterterrorism agent. Instead, he found himself working in an office as an analyst. In August 2006, he resigned from his law enforcement position. He was unemployed from August to November 2006, when he was hired by a defense contractor. He continued to hold a security clearance, and his employer worked in support of the same law enforcement agency from which he had resigned. (Tr. 75-79.) His performance appraisal for 2007

rated him as meeting expectations. (AX C.) His performance appraisal for 2008 rated him as exceeding expectations. (AX D.) He was certified as a project management professional in August 2009. (AX E.)

The joint stipulation of fact (HX II) is set out verbatim below:

1. On December 15, 2007, Applicant and two friends were involved in a late-night altercation with an individual who was then unknown (hereafter "GV") and who had directed derogatory, anti-Semitic remarks to them.[1]

2. GV reported to the police that during the altercation Applicant identified himself as a Federal law enforcement officer and that GV observed a Glock 9 mm weapon in the waistband of Applicant's pants.

3. As a result of the police investigation into the altercation, including GV's report and the consented-to retrieval of a Glock 9 mm weapon from Applicant's residence, Applicant was arrested and charged with two misdemeanor offenses -- Impersonating a Law Enforcement Officer and Carrying a Concealed Weapon.

4. Applicant contested the charges and was represented by counsel at a bench trial on April 4, 2008.

5. Applicant, as well as both of his friends who were with him on the evening of the altercation, and a neighbor who witnessed the altercation, testified at the trial [venue of trial redacted].

6. The trial judge found Applicant not guilty of Impersonating a Law Enforcement Officer but guilty of Carrying a Concealed Weapon.

7. Subsequently, Applicant exercised his right to appeal the bench trial conviction of the charge of Carrying a Concealed Weapon and face a *de novo* jury trial.

8. Two weeks before his jury trial and then again on the day of trial, Applicant was offered, but declined, a "no contest plea" of 6 months of unsupervised probation and no fine that would have resulted in the charge of Carrying a Concealed Weapon being dropped upon completion.

9. Applicant was, once again, represented by counsel at the second trial held in August 2008, and he also testified at the trial.

[1] Although not recited in the joint stipulation of fact, the record reflects that Applicant's mother and at least one of his companions on the night of the affray was of Jewish heritage. (Tr. 68; Answer to SOR at 3.)

10. Applicant's counsel also called an expert witness to testify regarding the ability to identify a handgun under the circumstances of the evening of the altercation and how a trained law enforcement officer, as Applicant was two years prior, would never carry a handgun in the manner described by GV, which was alleged to have been in his front waistband without a holster.

11. After deliberating for about one hour, the jury returned a guilty verdict on the charge of Carrying a Concealed Weapon.

12. Applicant desired to appeal the conviction but he had no legal basis to do so.

Applicant was sentenced to a $2,500 fine and ordered to pay court costs of $741. (GX 5.) He paid the fine and court costs in full on April 17, 2009. (AX B.) After his arrest but before his conviction, Applicant was barred from the premises of the law enforcement agency he supported, but his security clearance was not suspended or revoked. (GX 4; Tr. 142.)

Applicant testified that he has always been an aggressive person who tries to tackle every issue head-on, but that his conviction showed him that he needs to "slow down, evaluate, be less forward and less aggressive, and to remain humble and true to [himself]." (Tr. 90.) After his conviction and while he was temporarily unemployed as a result of a company down-sizing, he used his management skills to organize a fundraising program to provide medical care to seriously deformed children. (Tr. 94-96; AX H.) He took the Graduate Management Admission Test (GMAT) in May 2010, and he intends to obtain a master's degree in business administration. (Tr. 101; AX F.)

A friend of Applicant, who has known him for 15 years and was with him on the night of the altercation, describes him as hardworking, diligent, dependable, considerate, and honest. This friend was with Applicant on the evening of the altercation, and he corroborated Applicant's answer to the SOR, in which Applicant stated that he intervened in the altercation only after he saw his other friend being brutally beaten by GV. (AX G.) There is no evidence that Applicant brandished the weapon or threatened to use it.

Another friend, who has known Applicant for 11 years, describes him as a person who is trustworthy, honest, and has a "strong ethical compass." (AX H.) A third friend, who was Applicant's supervisor for two and a half years, regards him as very talented with an outstanding reputation among his peers because of his attitude, attention to detail, good judgment, and overall work ethic. (AX I.)

A colleague and supervisor, who worked with Applicant from about January to July of 2009, holds a high-level clearance, and maintains a social relationship with him, testified that Applicant's conviction and subsequent loss of his security clearance was very humbling for him. He described Applicant as "an intense person, very hard-

working, a perfectionist." He testified that Applicant was very self-confident, and thought he had all the answers, but he now realizes that "sometimes things in life throw you a curve ball." He believes Applicant has become more introspective, has accepted responsibility for his conduct, and has matured as a result of his experience. (Tr. 36-49.)

A college friend who has maintained contact with Applicant for about ten years testified that Applicant's conviction caused him to reevaluate himself and to try to prove that he is trustworthy. He believes that Applicant was trustworthy before his conviction and that the conviction was an anomaly. (Tr. 55-62.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531.

"Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Collateral Estoppel

The doctrine of collateral estoppel generally applies in DOHA hearings and precludes applicants from contending that they did not engage in criminal acts for which they were convicted. ISCR Case No. 95-0817 at 2-3 (App. Bd. Feb. 21, 1997). There are exceptions to this general rule, especially with respect to misdemeanor convictions based on guilty pleas. Relying on federal case law, the Appeal Board has adopted a three-part test to determine the appropriateness of applying collateral estoppel to misdemeanor convictions. First, the applicant must have been afforded a full and fair opportunity to litigate the issue in the criminal trial. Second, the issues presented for collateral estoppel must be the same as those resolved against the applicant in the criminal trial. Third, the application of collateral estoppel must not result in "unfairness," such as where the circumstances indicate lack of incentive to litigate the issues in the original trial. Federal courts recognize that an individual may not have an incentive to fully litigate a misdemeanor offense because there is less at stake or because a plea bargain creates a disincentive to litigate the issues. ISCR Case No. 04-05712, 2006 WL 354122 (App. Bd. Oct. 31, 2006) (citations omitted).

The stipulated facts establish that Applicant twice litigated the specific issue whether he had a weapon concealed on his person. In both trials, he was represented by counsel and had a full and fair opportunity to challenge the prosecution's evidence and present evidence in his defense. He declined to accept a plea bargain, even though it would have given him an opportunity to avoid a criminal conviction. In two fully litigated trials, he was convicted of carrying a concealed weapon. In my pretrial ruling on the motions *in limine*, I concluded that all three prongs of the test promulgated by the Appeal Board were met, and I applied collateral estoppel, thereby precluding Applicant from denying that he was guilty of carrying a concealed weapon.

Guideline J, Criminal Conduct

The security concern relating to this guideline is set out in AG ¶ 30: "The concern raised by criminal conduct is that it "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."

Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses" and "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted." AG ¶¶ 31(a) and (c).

Applicant was charged with two offenses, satisfying the "multiple" element of AG ¶ 31(a). Both offenses were misdemeanors, but that categorization is not dispositive. Applicant's acquittal of the impersonation charge does not necessarily preclude application of AG ¶ 31(c).

I am satisfied that the circumstances under which Applicant carried a concealed weapon make it a "serious" crime within the meaning of AG ¶ 31(a). It was an offense involving a firearm. There was no justification for carrying a concealed weapon while spending the evening socializing with two friends. Applicant was a former law enforcement agent and should have known that his conduct was illegal and dangerous. I conclude that AG ¶¶ 31(a) and (c) are raised, shifting the burden to Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated by evidence that "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." AG ¶ 32(a). The first prong of this mitigating condition focuses on whether the criminal conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the evidence. *See* ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*.

Applicant's offenses occurred two years and eight months ago, which is a "significant period of time." His involvement in charitable fund-raising and his plan to further his education both tend to show rehabilitation. However, I am not satisfied that sufficient time has passed to demonstrate reform or rehabilitation. Applicant's second trial was two years ago, but he has been under pressure to retain his security clearance since the trial. He was a mature adult with a college degree, several years in the workforce, and two years of experience as a federal law enforcement agent when he

committed the offense. The altercation appears to have been provoked by GV and might qualify as occurring under unusual circumstances. Applicant's Jewish heritage likely made him sensitive to GV's anti-Semitic remarks. Nevertheless, Applicant made the decision to carry a concealed weapon before he and his friends encountered GV. His offense was a serious lapse of judgment. I am not satisfied that his aggressive, compulsive, and dangerous behavior will not recur when he is no longer under the pressure of protecting his security clearance. I conclude that AG ¶ 32(a) is not established.

Security concerns under this guideline also may be mitigated by "evidence that the person did not commit the offense." AG ¶ 32(c). Applicant was precluded by collateral estoppel from contesting his guilt of carrying a concealed weapon, but he was not precluded from showing that he did not impersonate a law enforcement officer. His answer to the SOR and his acquittal in his criminal trial indicates that he did not impersonate a law enforcement officer. I conclude that AG ¶ 32(c) applies to the offense of impersonating a law enforcement officer, but it does not apply to the conviction of carrying a concealed weapon.

Finally, security concerns may be mitigated if "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." AG ¶ 32(d). Applicant has accepted the fact that he was convicted, and he has fulfilled the obligations imposed by the court after his conviction. However, he did not express remorse for his conduct until he testified at the hearing. For these reasons and the reasons set out in the above discussion of AG ¶ 32(a), I conclude that this mitigating condition is not established.

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 the applicant's conduct and all the 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. I have incorporated my

comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a remarkable person in many respects. He came to this country unable to speak the language, and by hard work and determination he has obtained a college education, attained a prestigious law enforcement position, and gained the respect of peers and supervisors for his management skills, diligence, dependability, and honesty. Unfortunately, he demonstrated exceptionally bad judgment in December 2007. Notwithstanding his education and law enforcement training, he committed a serious offense involving a firearm. He has not yet established a track record demonstrating the self-control and good judgment required of those who are entrusted with a security clearance.

After weighing the disqualifying and mitigating conditions under Guideline J, evaluating all the evidence in the context of the whole person, and mindful of my obligation to decide close cases in favor of national security, I conclude Applicant has not mitigated the security concerns based on criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge