



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



In the matter of: ----- SSN: ----- Applicant for Security Clearance)))))))	ISCR Case No. 09-08252
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Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: *Pro se*

January 12, 2011

Decision

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

On July 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline J (Criminal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

In a July 16, 2010, answer to the SOR, Applicant admitted the sole allegation raised under Guideline J and requested a decision without a hearing. The Government requested that a hearing be held, in part, to “reconcile the information [Applicant] provided in his [a]nswer with the” evidence of record.¹ DOHA assigned the case to me on October 8, 2010. Department Counsel and Applicant agreed to a hearing date of December 16, 2010. A notice of hearing was issued to that effect on November 5,

¹ Tr. 39-40. In closing, Department Counsel noted that the hearing permitted Applicant the opportunity to provide mitigating information not otherwise conveyed in his answer to the SOR.

2010. I convened the hearing as scheduled. Applicant gave testimony and presented one document, accepted without objection as exhibit (Ex.) A. Department Counsel offered three documents, admitted as exhibits (Exs.) 1-3 without objection. The transcript (Tr.) of the proceeding was received on December 29, 2010, and the record was closed. Based on a review of the testimony, submissions, and exhibits, I find Applicant met his burden in mitigating security concerns arising under Guideline J. Clearance is granted.

Findings of Fact

Applicant is a 40-year-old software engineer. He has worked for the same defense contractor since 2005, including an 18-month assignment to another entity. He has earned a bachelor's degree in technology management. Married, Applicant has raised and educated four children.

In the summer of 1989, after completing high school, Applicant and three teenage friends would gather on weekends to socialize. It was their last chance to visit before Applicant joined the military and his friends went to college. Before his friends left for college in early September, one of them brought a mutual acquaintance along. Applicant knew the acquaintance from school, but the two had not socialized together in the past and Applicant did not know the acquaintance's character.² The acquaintance mentioned that he had been in an altercation and that he was concerned those involved would harm him.

The acquaintance went to a friend's house with Applicant. There, the teens were offered guns. The acquaintance took a firearm, so Applicant took a 9-millimeter handgun. Applicant noted, "I had never had a gun before. I don't know why I did it as I think about it now, but I did."³ The teenager took the gun home, thinking it was cool. He knew he should not have a gun. "I had never had a weapon before in my life. I was more fascinated with the fact of having a gun than anything. I had no intention of actually using the gun."⁴ "If my parents had known I had a gun, they would have killed me. They had no idea."⁵

The following weekend, after Applicant's friend had gone to college, the acquaintance visited Applicant's home on September 24, 1989. At the time, Applicant was preparing to enter the military on the following Monday. Applicant drove them to a club, then the acquaintance asked him to drive to a friend's house. Applicant thought they were going to the house where they had gotten guns the week before. Applicant took his gun and the two drove. Instead of going to that house, the acquaintance instructed him to another property.

² Tr. 25.

³ Tr. 18.

⁴ Tr. 23.

⁵ Tr. 25.

There, the acquaintance went into the house alone while Applicant waited outside. The acquaintance then returned and went to the street corner, about two or three houses away, where some other teens and young men were congregated.⁶ Applicant watched as the acquaintance shouted out to the others and ran to join them. Applicant then decided to approach the group. By the time he was about 10 yards from the group, the others were getting on the ground pursuant to the acquaintance's command. Applicant quickly retreated to where he had been previously, outside their destination. Applicant said "No," fearful of what the acquaintance was doing.⁷ Applicant saw the acquaintance's gun's muzzle flash and thought it had been fired into the air.⁸ Applicant was scared and wanted to go home.⁹

The acquaintance ran back to Applicant and said, "let's go."¹⁰ They got into Applicant's car and drove away. Applicant asked the acquaintance why he did what he did, but the acquaintance only laughed. The acquaintance tried to give Applicant money, but Applicant said, "No, I don't want it. . . I want to go home."¹¹ When the gasoline indicator came on, the acquaintance told Applicant to pull into a gas station. The two were arrested at the station.

When Applicant was questioned, he was unaware that anyone had been shot during the acquaintance's exchange with the others. He was then told that the acquaintance had shot at one of the group and been identified as the shooter. Applicant then realized that the others must have been the males with whom the acquaintance had an earlier altercation. At the time, he was unaware that the acquaintance had meant to actively harm or rob anyone.

As an accessory in the incident, Applicant was charged with aggravated assault, robbery, attempted first degree murder, and carrying a concealed weapon. The acquaintance, who knew Applicant had no idea of what the acquaintance had planned to do that night, wrote a statement disclaiming Applicant's knowledge of his plan.¹² Applicant hoped this would help him "to possibly get into a youthful offender program so that [he] could somehow do a diversion program or something. . . ." ¹³ Applicant gave

⁶ Tr. 19.

⁷ Tr. 20.

⁸ *Id.*

⁹ Tr. 21.

¹⁰ *Id.*

¹¹ *Id.*

¹² Tr. 23; Ex. 2 (Interrogatories, dated Feb. 15, 2010) at 6.

¹³ Tr. 23-24.

the statement to the counsel his family had retained on his behalf. That counsel was ineffective, appeared occasionally drunk, and was later disbarred.¹⁴

When Applicant appeared in court, the judge queried why Applicant did not have a lawyer. The judge then “pointed to [a lawyer] and said, ‘You’re his attorney.’”¹⁵ Ultimately, Applicant pled no contest to the charges after his second attorney convinced him he could not “explain away” the fact he was present and had possession of a firearm.¹⁶ Applicant was advised that if he went to trial, he could be sentenced to 27 years, which would mean he would not be released until his mid-40s.¹⁷ Applicant knew he had been wrong for possessing a firearm, hanging out with someone he did not know well, and following him to a strange house. He felt the need to take responsibility for his actions.¹⁸ Consequently, the teen agreed to a no-contest plea. Applicant was sentenced to 13 years incarceration, but was released for good behavior in 1996 after approximately five years. No parole was imposed.

When Applicant went to prison, he was intent on taking responsibility for his actions and seeking rehabilitation. He reconnected with his faith, taking distance learning courses in religion and ultimately receiving licensure in his denomination as a preacher. He enrolled in a business administration program, which led to his receipt of an associates degree. He took other courses to better himself, ranging from real estate to finances. Applicant “stayed away from all the ills and negative things that are in an institution, and [he] focused on making [himself] better so that when [he] got out [he could be] in a better position to try to live a successful life.”¹⁹

After his release, Applicant started his own company, through which he helped others set up their own businesses.²⁰ He then started purchasing real estate for resale at tax deed sales. He was accepted into the local Chamber of Commerce’s entrepreneurship program, which he successfully completed. Applicant pursued an associate’s degree in computer programming, then completed a bachelor’s degree in technology management. Professionally, he worked on developing expertise in certain components of web design. Once he received his programming certifications, he rose till he managed an information technology department, where he bid on government

¹⁴ Answer to the SOR, dated Jul. 16, 2009. Applicant also noted that “a reference to the handling of [his] case was one of the reasons for his disbarment.” See *also* Tr. 36.

¹⁵ Tr. 37.

¹⁶ Tr. 35.

¹⁷ *Id.*

¹⁸ Tr. 36.

¹⁹ Tr. 27-28.

²⁰ Tr. 28.

contracts and represented his employer at trade shows.²¹ He has been successful in his chosen field and since branched out into other areas at higher levels of authority.²²

Applicant has reestablished his relationship with his local church, where he serves in a pastoral capacity. There, he keeps busy with community outreach programs, such as a monthly meal service provided to local homeless people. He regularly visits shut-ins and the infirm. Applicant counsels youth “about not making the same mistakes that [he] made.”²³ In addition, he and his wife have provided a stable home for their four children, the youngest of whom is preparing to enter college while her elder sibling prepares to graduate from college. Applicant has been open about his conviction and incarceration with peers and employers. He uses himself as an example to his children about the importance of choosing one’s associates and taking responsibility for one’s actions.²⁴ Applicant fully detailed the incident on his 2009 security clearance application. He is humble about his post-incarceration accomplishments. His testimony was highly credible and persuasive.²⁵

Since the night in question, Applicant has been remorseful for his role. “There is not a day goes by that I don’t feel horrible for . . . the incident .”²⁶ He credibly stated:

To be involved in something that’s heinous and that looks as horrible as those charges, I mean, words cannot even describe how I feel. Words can’t describe how I feel from the time that it happened even up until now. My life has been effected by it. I have true remorse for not only the young man that was shot, but for every family, every parent that had to go through having that happen to a child. . . .²⁷

Policies

When evaluating an applicant’s suitability for a security clearance, an 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. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these

²¹ Tr. 29.

²² Tr. 30.

²³ Tr. 30.

²⁴ Tr. 34. Applicant emphasizes to them and to those he counsels how “it’s easy to get drawn into something if you’re not careful.”

²⁵ See, e.g., Tr. 39-41.

²⁶ Tr. 24.

²⁷ Tr. 24-25.

guidelines are applied in conjunction with the factors listed in the adjudicative process. The 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 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.

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. . . ." ²⁸ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant. ²⁹

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 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). "The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."³⁰ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.³¹

Based upon consideration of the evidence, Guideline J (Criminal Conduct) is the most pertinent to this case. Conditions pertaining to this adjudicative guideline that

²⁸ See *also* ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

²⁹ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

³⁰ *Id.*

³¹ *Id.*

could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Guideline J – Criminal Conduct

The concern under this guideline is that “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, Applicant admitted that he pled no contest to charges of aggravated assault, robbery, attempted murder, and carrying a concealed handgun stemming from an incident in 1989, and that he served five years of a 13-year sentence. Such incidents are sufficient to raise Criminal Conduct Disqualifying Condition 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). Consequently, it is Applicant’s burden to mitigate the security concerns raised.

The crime for which Applicant pled guilty was clearly grave. However, it occurred in 1989, nearly 22 years ago. At the time, Applicant was still a teen. Today, at 40, the criminal activity at issue occurred over half a life-time ago. Moreover, it has been 15 years since he was released from prison without parole. In the intervening years, he has borne the weight of his crime and actively sought rehabilitation through time served, academic advancement, steady employment, professional success, spiritual growth, familial commitment, and community outreach. Furthermore, his demonstrated commitment to avoiding criminal involvement, as well as his use of himself to inspire others to eschew criminal behavior and unproven friendships, is well demonstrated. Applicant’s expressions of remorse for his past criminal behavior are highly credible and consistent. More importantly, he has remained crime-free and he does not attempt to minimize his past criminal act. Such facts give rise to Criminal Conduct Mitigating Condition 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) 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).

Applicant has accepted responsibility for his possession of a handgun, his association with the acquaintance at issue, and his participation in criminal activity. Therefore, neither 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) nor AG ¶ 32(c) (evidence that the person did not commit the offense) applies. No other mitigating condition applies.

³² AG ¶ 30.

For a crime as grievous as Applicant's, more than time and contrition are needed to mitigate serious criminal conduct security concerns. Here, Applicant's demonstrated commitment to rehabilitation dates back to his decision to plead no-contest to the charges against him. In prison and since, he has actively and successfully endeavored to restore his good name through educational and professional advancement, as well as through his efforts to demonstrate his reliability, trustworthiness, and ability to comport his behavior appropriately. His example serves as a reminder to his children and those he counsels about the repercussions of one's actions. His contrition, rehabilitation, and testimony all are genuine. There is no indication that he will again be involved in criminal conduct or similar activity. Criminal conduct security concerns 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 the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense 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, as well as the "whole-person" factors. Applicant was a highly credible, mature, and candid witness who displayed a forward-looking and positive outlook during his testimony. He was a teenager when he committed the crime at issue; today he is 40 years old. More than half of his lifetime has been spent in successfully seeking rehabilitation. The decisions he made at 19 do not reflect the man he is today, nor do they reflect on his current good judgment, trustworthiness, or reliability. He has actively sought to redeem himself for his crime since he was on trial. In prison, he purposefully avoided conflict, sought higher education, and was prematurely released from his 13-year sentence in five years for good behavior. Upon release, he was neither embittered, dissolute, nor defeated. Instead, he applied his knowledge of business and finances to start a small business. Soon thereafter, he added real estate investment to his professional efforts and continued his studies. After receiving associate's and bachelor's degrees, he applied his work experience with his studies, and started a successful career in information technology. Since that time, he has ascended up the rungs of his profession.

In his free time, Applicant has devoted himself to his family, his faith, and his community. He has raised and educated four children successfully. He has become reattached to his faith, become an integral member of his parish, and been involved in considerable community outreach. In counseling the young, he uses himself as an example of how ill decisions in one's youth can lead to calamitous results. He has comported his behavior within law-abiding standards. He has remained crime-free for 22 years. His contrition for his past criminal activity is as genuine and credible as his rehabilitative efforts. While the crime at issue is of the most grievous nature, Applicant

has successfully rebuilt his reputation. In light of the notable efforts demonstrated, there is no reason to believe Applicant will again lapse into similar criminal behavior. I find that criminal conduct security concerns are mitigated. Clearance is granted.

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

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national interest to grant Applicant a security clearance. Clearance is granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge