DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 10-05370
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

August 10, 2011

Decision

HEINY, Claude R., Administrative Judge:

In 2007, Applicant pleaded guilty to Aggravated Assault with Serious Bodily Injury, a felony. He received deferred adjudication and was placed on community supervision for 10 years. His community service continues until October 2017, unless terminated earlier by court order. Applicant has failed to rebut or mitigate the security concerns under criminal conduct. Clearance is denied.

Statement of the Case

Applicant contests the Department of Defense's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,[1] the Defense Office of Hearings and Appeals (DOHA) issued

[1] Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security*

a Statement of Reasons (SOR) on February 22, 2011, detailing security concerns under Guideline Guideline J, Criminal Conduct.

On March 10, 2011, Applicant answered the SOR and requested a hearing. On April 28, 2011, I was assigned the case. On June 3, 2011, DOHA issued a Notice of Hearing for the hearing held on June 29, 2011.

The Government offered exhibits (Ex.) 1 through 4, which were admitted into evidence without objection. Applicant testified and submitted Exhibit A, which was admitted into evidence without objection. His father also testified. The record was held open to allow Applicant to submit additional information. On July 10 and 12, 2011, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Exs. B through H. On July 9, 2011, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted the factual allegation in the SOR, and his admission is incorporated herein. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 30-year-old design engineer who has worked for a defense contractor since January 2009, and seeks to obtain a security clearance. He obtained his bachelor's degree in electrical engineering in 2003 and his master's degree in computer engineering in August 2006. (Tr. 41, 42) In August 2004 as an intern, he received an award for outstanding contributions for his work performance. (Ex. F) He designs and supports a system his company is contracted to produce and install. Assembly and testing takes place at various military installations outside of the state.

Applicant's family and girlfriend know of his 2006 arrest and 2007 deferred adjudication. (Tr. 27) His girlfriend of the last two-and-a-half years believes him to be highly motivated, optimistic, honest, giving, supportive, selfless, and a good person. (Ex. G, Tr. 20)

The conduct giving rise to the SOR occurred between Applicant and a woman he met at a birthday party on February 10, 2006. He was a student and his roommate invited him to the party. The woman was also a student at a state university in a nearby town. The woman planned to spend the night at the female friend's apartment. The two females decided to go to the birthday party of another female friend. During the course of the evening, the woman became intoxicated having drank two or three glasses of wine and several beers.

Clearance Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

Applicant was attracted to the woman who he described as “a really nice girl.” Throughout the party, Applicant and the woman seemed to get along well, kissing through out the night. During the party they took a number of walks away from the party during which they would kiss and “make out.” (Tr. 31) The police report indicates the woman said she “accepted his advances,” but told Applicant she did not want to go too far with him. (Ex. B) It was during her menstrual period, but she did not relate this to Applicant. However, Applicant became aware of the situation when he felt the tampon’s string. She told him nothing below the waist was to happen.

The two intoxicated women accepted Applicant’s roommate’s offer to drive them home. (Tr. 32) When they arrived, the woman he met that evening invited him into the residence. (Ex. 2) Applicant’s roommate knew the other female and drove them back to the apartment. At the apartment, his roommate and the other female went to the bedroom and were not seen again until the next morning. (Tr. 32)

Applicant and the woman continued to kiss and “make out.” (Ex. 2, Tr. 32) She again reminded Applicant that she did not want to have sexual intercourse. He agreed and they continued to “make out.” Applicant agreed because he did not have a condom and had earlier had a scare concerning a sexually transmitted disease. (Tr. 32) The woman changed her clothes, removing her bra, putting on boxer shorts and leg warmers. At approximately 4 a.m., Applicant and the woman fell asleep on the couch with him lying on top of her. (Tr. 48) Both were in states of undress, but neither completely undressed. (Tr. 32) He was wearing a shirt. (Tr. 46) While asleep, Applicant had a nocturnal ejaculation.

Early the next morning, Applicant woke and found his roommate in the bathroom. His roommate was anxious to leave, but Applicant wanted to stay because he thought the meeting of the new acquaintance might develop into some type of relationship. Applicant assumed this since: both were students, she did not live very far away, he liked her, and they appeared to get along well at the party. (Tr. 33)

For the previous couple of years, Applicant had dated another woman who was paranoid about getting pregnant. This previous girlfriend had been a fanatic about birth control and the possibility of pregnancy, always insisting on two forms of protection. (Tr. 33) Some of the paranoia rubbed off on him. When the woman woke, he told her about his ejaculation, asked her about birth control, and suggested she take the morning after pill. He acknowledges that was a stupid thing to say. (Tr. 34) She asked what he had done to her, and he told her he did not do anything. (Tr. 34) He attempted to explain what had happened, but she did not want to hear it.

The woman went to the bathroom and discovered her tampon was so far into her body that it was difficult to retrieve. The woman concluded Applicant’s penis had pushed it into her. (Ex. B) The woman drove to a hospital, and after discussing the matter at the

hospital called the police. The police arrived and a sexual assault nurse examination (SANE exam) was conducted at the hospital. (Ex. B)

Later in the day, Applicant called the woman. The woman had given him her telephone number during the party the previous evening. He again told her nothing had happened. (Tr. 34) At this point, he had hopes of asking her on a date. She did not want to talk with him. The following day, he again called, the woman would not come to the phone, and her friend told him the woman would call him if she wanted to talk with him. She never called.

A police investigator called Applicant to discuss the incident. On advice of counsel, Applicant declined to talk with the investigator. On July 19, 2006, five months after the incident, a warrant was issued and he was charged with sexual assault, a second degree felony.

In August 2007, Applicant underwent a forensic evaluation and a risk assessment was made. He took the Sexual Violence Risk 20 (SVR-20) assessment, which placed him in the "low risk range" meaning he was a low risk for engaging in future acts of sexual violence or sexually abusive behavior. (Ex. A) For testing, the assessment assumes the criminal allegations to be true. The only factor applying to Applicant was:

> He "severely minimizes his offense behavior (*if allegation is true – he denies that he engage in sexual activity with [victim] without her consent and while she was passed out on her couch*) (Ex. A, Tr. 29)

The Hare Psychopathy Checklist – Revised: Second Edition (PCL-R). Applicant scored a zero out of a possible score of forty, which indicates he is not a psychopath. (Ex. A) Applicant "does not appear to be the type of person who is inclined to engage in chronic, severe criminal behavior." (Ex. A) He has a low risk for lifetime criminality or serious chronic offending. (Tr. 29)

In October 2007, Applicant attempted to plead no contest to the offense. (Tr. 53) However, the district attorney would not accept such a plea if community supervision[2] was to be granted. He then pleaded guilty to the reduced charge of aggravated assault with seriously bodily injury, a second degree felony. Applicant received deferred adjudication for ten years and was placed on ten years of community supervision. He is required to check in monthly with a community supervision officer. Because his job involves visiting military installations in various states, he must receive approval before leaving the state. (Tr. 38, Tr. 68) He has never had a problem receiving approval. (Tr.

[2] Under state law the terms "probation" and "Probation Officer" were changed to "community supervision" and "Community Supervision Officer." The name "adult Probation Department" was changed to "community Supervision and Corrections Department."

39) Leaving a voice mail has been sufficient notification when traveling within the state. (Tr. 65, 67) Additionally, he had to perform 400 hours of community service. (Ex. 4) In March 2008, the 400 hours of community service was converted to a payment of $10 per hour for a total due of $4,000. (Ex. E, Tr. 62) As of May 2011, he has paid $1,798 of his converted community service, which he pays at a rate of $40 monthly. (Ex. H) He has paid $2,640 of his $7,200 community supervision fee, for which he pays $60 monthly. (Tr. 36)

Applicant completed counseling, treatment, and classes as ordered. In April 2008, Applicant completed the cognitive program with the county community supervision and correctional department. (Ex. C, Tr. 27) The class met once a week for 14 weeks. (Tr. 36) The class involved videos and class discussions. He did not miss a single class from January 23, 2008 through April 2, 2008. (Ex. D)

In May 2010, Applicant made a motion to have his community supervision discharged, which was denied. (Ex. 4, Tr. 20) The judge told him if his good behavior continued, his community supervision would end in October 2012, having served half of the ten-year term. (Tr. 35)

When Applicant completed his March 2010 Electronic Questionnaires for Investigations Processing (e-QIP), he listed his arrest and offense. (Ex. 1, Tr. 26) He has never been involved in any other criminal conduct. (Tr. 64)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these 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. According to AG ¶ 2(c), the entire 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 interests of 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (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." *See also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to 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 ¶ 31 describes three conditions that could raise a security concern and may be disqualifying:

(a) a single serious crime or multiple lesser offenses;

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and

(d) individual is currently on parole or probation.

In February 2006, Applicant was involved in an incident that resulted in him pleading guilty to aggravated assault with serious bodily injury, a 2nd degree felony, in October 2007. He was placed on community supervision for ten years, ordered to pay $60 monthly supervision fees, participate in cognitive classes, and complete 400 hours of community service. The disqualifying conditions listed in AG 31(a), 31(c), and 31(d) apply.

AG ¶ 32 provides two conditions that could mitigate security concerns:

> (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,
>
> (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 initially attempted to plead no contest to the offense, which the district attorney found unacceptable if deferred adjudication with the accompanying community supervision was to be given. He pleaded guilty to the offense. During Applicant's providence inquiry he allocated facts to establish an aggravated assault with serious bodily injury. However, he did provided facts and circumstances placing the conduct in context.

From all the facts and circumstances, it appears Applicant's conduct, though extremely serious, was a single incident. The incident occurred in February 2006, more than five years ago. The evaluations of Applicant conclude the conduct is unlikely to recur. Since the incident, he has obtained his master's degree and has a good employment record. There has been no recurrence of criminal activity. If Applicant were not currently on court ordered community supervision, these factors would have been sufficient for a favorable finding.

However, Applicant remains on community supervision, which is the state's term for probation, and will remain so for some time, which impacts my ability to grant him a clearance. He anticipates that he maybe released from community supervision early, but that time has not yet arrived. Without court intervention, he will remain on community supervision until October 2017.

In May 2010, the judge denied Applicant's motion to be discharged from community supervision because not enough time had passed since his guilty plea and sentencing. The judge told him that he will grant his motion once he completed half the 10-year term, which will occur in October 2012. Provided his good behavior continues,

his request for early termination of his community supervision will again be considered and probably granted. The fact the court that accepted his guilty plea, sentenced him, and has not seen fit to release him from community supervision is evidence that would, to a reasonable mind, significantly undercut Applicant's claim of successful reform and rehabilitation.

Nothing in the Directive indicates that an applicant's current probationary status is a *per se* bar to a favorable security decision. However his probation/community supervision must be given some weight. See DISCR Case No. 90-1115 at 3 (Oct. 6, 1992) at p.3. ("In evaluating Applicant's behavior since the 1988 criminal charges, the Judge, as trier of fact, may properly note Applicant can be expected to exhibit good behavior while on probation.") There appears to be little change in Applicant's life and life style. His life style before the incident and now are similar. The criminal conduct appears to be an aberration in his life. But the state court, who would be keenly aware of the facts and circumstances surrounding the incident, has decided that it is still too soon for the community service to end.

Since Applicant remains on community service, and is still being supervised, it is premature to grant a clearance.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have considered Applicant's age at the time of the offense, the facts and circumstances surrounding the offense, the singular nature of his criminal conduct, the favorable evaluations he has received, his

work performance, and that recurrence of such conduct is unlikely. All of these factors weigh in his favor.

It is the continuing nature of his court ordered supervision and the nature of the offense, an aggravated assault, which leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal conduct.

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, Criminal Conduct: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is denied.

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CLAUDE R. HEINY II
Administrative Judge