



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



In the matter of:

-----

Applicant for Security Clearance

)  
)  
)  
)  
)  
)  
)

ISCR Case No. 15-02765

**Appearances**

For Government: Andrea Corrales, Esq., Department Counsel

For Applicant: *Pro se*

12/09/2016

**Decision**

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant did not mitigate the security concerns regarding his criminal conduct. Clearance is denied.

**Statement of Case**

On November 12, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865 (E.O. 10865), *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by DOD on September 1, 2006.

Applicant responded to the SOR on March 22, 2016, and requested a hearing. The case was assigned to me on June 17, 2016, and scheduled for hearing on August 5,

2016. At the hearing, the Government's case consisted of one exhibit (GE 1). Applicant relied on one witness (himself) and two exhibits (AEs A-B). The transcript (Tr.) was received on August 16, 2016.

### **Summary of Pleadings**

Under Guideline J, Applicant was (a) charged with murder-intentionally causing death, a felony-first degree- by a local police department in approximately July 1994; (b) incarcerated from July 1994 to March 2013 as the result of his murder conviction; and (c) conditionally paroled as a consequence of his conviction from approximately March 2013 to approximately July 2014.

In his response to the SOR, Applicant admitted each of the allegations. He added no explanations or claims.

### **Findings of Fact**

Applicant is a 39-year-old ship buddy of a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted are incorporated herein. Additional findings will follow.

### **Background**

Applicant married in August 2002 while still in prison and has one child from this marriage, age two. (GE 1; Tr. 39) He earned a GED diploma while in prison and claimed no post-high school educational credits or military service.

Applicant has worked for his current employer since June 2014 and was recently promoted to a position of ship buddy. (GE 1; Tr. 24) During his current employment, he has received no reprimands or disciplinary actions. (Tr. 43) Following his release from prison in March 2013, he worked for another firm for about nine months. (Tr. 42) Prior to March 2013, he was unemployed while serving a 20-year prison term from July 1994 to March 2013. (GE 1; Tr. 25) He has never held a security clearance. (GE 1)

### **Criminal murder conviction and sentencing**

At the age of 17, Applicant and a friend were out drinking and consuming cocaine at a local bar and became severely intoxicated. (Tr. 22, 28-30) Both he and his friend became embroiled in an argument with a bar patron that carried over outside of the bar. (Tr. 26-27 ) When the argument intensified, the patron pulled a knife on Applicant and his friend. (Tr. 27) Applicant recalls the patron fleeing on foot and Applicant and his friend giving chase in their vehicle. Applicant struck a fence while operating his vehicle and caused severe injuries to the victim who reportedly died at the local hospital where he was taken. (Tr. 27-30) Applicant and his friend left the scene of the incident without checking on the victim and returned to his home. (Tr. 28)

Applicant pled guilty in court to murder in the first degree and was sentenced to 20 years of incarceration. (GE 1; Tr. 30-31) During his term of incarceration, prison officials moved Applicant several times to different prisons in response to prison fights that involved Applicant. (Tr. 32-33) He served his full sentence (i.e., July 1994 to March 2013). Applicant was released from prison in March 2013 and placed on supervised parole. Before his release, he came up for parole in 2010, but was denied for insufficient time in custody. (Tr. 36) In July 2014, he was released from his parole without any continuing parole conditions. (GE 1; Tr. 37-38)

Following his parole release, Applicant stayed with his parents for several months. (Tr. 38) Since 1994, he has not consumed any alcohol or illegal drugs and has avoided any other criminal incidents. He has been active in his church since his release from prison and started a prison ministry in April 2015. (Tr. 40-41) Applicant recognizes his mistakes and credits himself with growth and maturity to the point where his major focus today is working and supporting his family. (Tr. 22-23)

### **Character References**

Applicant is well-regarded by his depot manager. (AE A) His depot manager described Applicant as a valued employee. He credited Applicant with being a top tier level producer who has been assigned leadership roles and responded well. Applicant exhibited exemplary skills in relaying safety procedures and job safety analyses to keep his fellow co-workers informed of possible hazards. (AE A) His depot manager recommended Applicant for future positions at other facilities, citing Applicant's consistency of performance, honesty, safety-oriented qualities, and demonstrated high production levels. (AE A)

Applicant's pastor expressed a great deal of confidence in Applicant's character. He credited Applicant with being a faithful member and true leader of their church. (AE B) His pastor was notably impressed with Applicant's leadership qualities, citing Applicant's election to a church board member position as treasurer in 2014. (AE B; Tr. 44-45) Applicant's pastor found Applicant to be of good moral character. (AE B)

### **Policies**

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and any of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a

decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c).

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person.

The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk. The following AG ¶ 2(a) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

### **Criminal Conduct**

*The Concern.* 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.

### **Burden of Proof**

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. *See United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the

Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of E. O. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. “[S]ecurity-clearance determinations should err, if they must, on the side of denials.” See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

### **Analysis**

Security concerns are raised over Applicant’s conviction for murder-intentionally causing death, a felony-first degree offense, and his 20-year prison sentence. Under the sentencing terms imposed by the state court, Applicant was incarcerated for 20 years (i.e., from July 1994 to March 2013) and served over a year of parole (i.e., March 2013 to July 2014) before his release with no continuing parole obligations.

Based on the developed record to date, one disqualifying condition (DC) of the criminal conduct guideline (Guideline J) warrants application: DC ¶ 31(a), “a single serious crime or multiple lesser offenses.” Potentially available to security clearance cases falling under special access programs (SAP), restricted date (RD), and special compartmented information (SCI) programs is DC ¶ 31(f), “conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.” Under Smith Amendment prohibitions (10 U.S.C. § 986), Applicant’s sentence and prison time (20 years) served would have subjected him to the Amendment’s *per se* clearance bar. But the Smith Amendment was repealed in January 2008 by the National Defense Authorization Act for fiscal year 2008 and replaced by Sec. 3002 to 50 U.S.C. § 435b (the Bond Amendment), which applies throughout the Federal Government.<sup>1</sup>

Applicant’s first degree murder conviction that resulted in a 20-year prison sentence and two years of ensuing parole limits the availability of any of the mitigating conditions covered by Guideline J. While Applicant’s criminal behavior occurred over 20 years ago and has not been repeated, the incident for which he was convicted and sentenced to 20 years of incarceration involved such a serious offense, with prolonged time in incarceration and parole, that mitigating conditions that assess the elapse of time

---

<sup>1</sup> Sec. 3002(c) of this new Bond Amendment provision continues the requirement for disqualification, absent a meritorious waiver, for persons who were sentenced to and served imprisonment for more than a year. However, this disqualification only applies to prevent clearances that would provide access to SAP, RD, or SCI. As none of these highly restrictive programs are involved here, DC ¶ 31(f) has no application to the facts of Applicant’s case.

since the incident, circumstances surrounding the incident, and recurrence risks cannot be considered and weighed in customary ways. Few analogies are available in DOHA case history to draw any meaningful bright lines for guidance purposes. DOHA Case No. 96-0362, at 2-6 (App. Bd. Feb. 19, 1997) contains some factual similarities, but is mostly distinguishable. In Case No. 96-0362, the applicant served 9 years of his sentence on a murder conviction before being paroled in December 1989. (*id.*) For the ensuing six years following his parole, the applicant compiled an impressive record of rehabilitation with college credits, marriage, raising his two step-sons, and excellent work performance evaluations. (*Id.*)

By contrast, Applicant completed a much longer prison sentence (20 years) and was released from his parole just a little over two years ago. While his work and church activities have produced some impressive recommendations from his depot manager and pastor, his rehabilitation efforts are still relatively fresh and lack the track record necessary to make safe predictions about his ability to avoid recurrent criminal offenses. While Applicant has certainly shown progress in avoiding criminal activity and associations with persons with histories of criminal activity, more time is needed to dispel all reasonable doubts about his ability to avoid criminal conduct in the future. Other mitigating conditions covered by Guideline J are not available to Applicant.

Historically, the Appeal Board has emphasized the importance of a strong rehabilitation program and a seasoned track record in mitigating serious criminal offenses. See ISCR Case No. 95-0622 at 4-5 (App. Bd. April 18, 1997). Holding a security clearance requires a high degree of trust and confidence in the person entrusted with classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980)

Criminal conduct that is very serious weighs heavily against reposing in an applicant the trust and confidence required of persons granted access to classified information. Applicant has met some of these requirements with an impressive post-parole rehabilitative showing of marriage, church activity, and excellent work performance. Because of the gravity of his murder offense, his time spent in incarceration, and his ensuing 16 months of supervised parole, satisfaction of Appeal Board requirements of public confidence and trust requires a much stronger showing of reform and rehabilitation over a significant period of time before safe conclusions can be made that it is clearly consistent with the national interest to grant an applicant a security clearance.

From a whole-person perspective, Applicant has shown considerable growth and maturity in the two-plus years since he has been released from supervised parole. He has accepted personal responsibility in raising his two-year old son in a good-nurturing environment and holds down a gainful job with many notable contributions to his employer and church. He enjoys strong support from his depot manager and church pastor.

With due consideration to Applicant's positive contributions following his parole release in 2014, Applicant fails to overcome the judgment and trust questions raised by

his first degree murder conviction in 1994. His positive endorsements from his depot manager and church pastor merit a good deal of praise and commendation, but are not enough to overcome doubts about his recurrence risks and ability to sustain his current stabilization efforts with his relatively short track record of rehabilitation since his prison release.

Taking into account both Applicant's murder conviction, his time spent in incarceration, and the recency of his release from supervised parole, the encouraging probative evidence of his rehabilitation without parole reporting requirements, the applicable guidelines, and a whole-person assessment of his avoidance of recurrent incidents of criminal conduct in the two-plus years of his release from supervised parole, conclusions are warranted that it is still too soon to conclude that Applicant is absolved of any risks of recurrent criminal offenses. Concerns over his murder conviction and ensuing 20 years of incarceration are not mitigated.

### **Formal Findings**

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT)

AGAINST APPLICANT

Subparagraphs: 1.a-1.c:

Against Applicant

### **Conclusions**

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

---

Roger C. Wesley  
Administrative Judge

