



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



In the matter of:)
)
-----) ISCR Case No. 18-02174
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esquire, Department Counsel
For Applicant: *Pro se*

08/09/2019

Decision

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

Statement of the Case

On September 17, 2018, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J (Criminal Conduct). The action was taken under Executive Order 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 (AG) effective within the DOD on or after June 8, 2017. On October 27, 2018, Applicant timely submitted a response in which he requested a hearing based on the written record. The Government converted the case from an administrative determination to a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

On April 4, 2019, I was assigned the case. DOHA issued a notice of hearing on May 30, 2019, setting the hearing for June 26, 2019. The hearing was convened as scheduled. The Government offered three documents, accepted without objection as exhibits (Exs.) 1-3. Applicant offered testimony and three documents, accepted without objection as Exs. A-C. The transcript (Tr.) was received on July 8, 2019. Applicant was given through July 27, 2019, to submit any additional materials. On July 27, 2019, Applicant submitted one additional document, which was forwarded to me by the

Government on June 30, 2019. Noting no objection from Department Counsel, the item was accepted as Ex. D. The record was then closed. Based on the exhibits, testimony, and record as a whole, I find Applicant mitigated criminal conduct security concerns.

Findings of Fact

Applicant is a 23-year-old construction worker who previously worked in the area of security. He hopes to return to that field. Applicant earned a diploma from high school and attended some college. He is single and the father of a toddler. In early 2014, Applicant was away from home attending college. Although he had filed to change his address for mail purposes, some correspondence got misrouted. Unreceived mail included notices regarding his computerized highway toll-pass balances which, being neglected because of Applicant's inability to receive them, were mounting. Because of the balances owed on the pass, Applicant's state suspended his driver's license.

During June 2014, Applicant was cited for possession of marijuana and operating a motor vehicle on a suspended license. The next day, he addressed the issue regarding the toll-pass balance owed and the suspended-license. (Tr. 19) The marijuana charge was later dropped and one of his passengers was charged with possession of the marijuana at issue. Applicant pled guilty to the suspended license charge in November 2014, and was sentenced to probation before judgment. He successfully completed a one-year period of unsupervised probation in November 2015.

In late April 2015, Applicant was playing basketball at a neighborhood park. The game was "intense," and "all of a sudden shots had broke out, and nobody really had knew what happened." (Tr. 22) Upon hearing gunshots, Applicant fled and got a ride with a friend, who then called the police. It was later determined that two of the players Applicant did not know were involved in an altercation giving rise to the gunshots which injured one individual. (Tr. 22) During the investigation, the names of all participants were collected by investigators.

As part of the group at the scene, Applicant and others were ultimately indicted. Applicant was indicted with two felonies, acting as an accessory after the fact to first- and second-degree murder, and three misdemeanors: unlawfully wearing, carrying, and transporting a firearm; possession of a regulated firearm by a person under 21; and possession of a dangerous weapon on school property. A film of the incident corroborated his version of what happened. (Tr. 27-28) Later, Applicant and some other players reached a plea deal that put the matter on the inactive docket for a year, after which the matter was poised to be dropped. (Tr. 28-29) Applicant accepted this process as his best way to move the matter along and not jeopardize his job or his pursuit of work in the security industry. His record was expunged in 2017.

In early 2018, Applicant began dating his former girlfriend. Their relationship lasted a few months, during which time he became the father of his now-toddler child with another woman. During their period of intimacy, however, she saw some things on his cell phone which caused her to "put on all lies just to get" him in trouble. (Tr. 31) In

April 2018, she reported to the authorities that Applicant had entered into her home, assaulted her, and took her cell phone. (Tr. 31) She also reported that he has assaulted her on other occasions. (Tr. 32) Applicant ended the relationship because of “her lying and everything like that, and me having this kind of job, and wanting to do better for myself I couldn’t associate myself with such a female like that.” (Tr. 31)

Applicant was ultimately charged in May 2018 with two felonies, robbery and third-degree burglary, and two misdemeanors, second-degree assault and theft of property valued between \$100 and under \$1,500. The ex-girlfriend later recanted her tale. After the hearing, she wrote a letter denying any assault had ever occurred and noted that she was not in fear of Applicant. (Ex. D) Without a witness, the state permitted the matter to be put on the inactive docket for a year, after which the matter will be dropped. (Ex. 4.d; Tr. 36-37) The matter should be dropped by September 2019 assuming Applicant has no further criminal issues.

Today, Applicant lives a quiet life. He visits with his toddler son in another state on weekends. He has changed his focus from old friends and his teenage acquaintances to working extra hours and family time. He spends his free time in a local gym rather than at a neighborhood park. He now associates with a more responsible crowd. He timely pays \$425 a month in child support for his toddler. Other than the issues noted above, he has had no brushes with the law. Applicant noted that these incidents have provided life lessons and “now I make sure I change the whole way that I move.” (Tr. 40) He is presently seeking to find a career path in which to learn and progress professionally. He provided two positive recommendation letters. (Exs. A-B) He is seeking a security clearance in order to work as a security guard or specialist.

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 are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. They 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 the AG, 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 in making a decision.

The protection of the national security is the paramount consideration. The AG requires that any 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 the Directive, the Government must present evidence to establish controverted facts alleged in the SOR. In addition, 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 and 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. The Government reposes a high degree of trust and confidence in those granted access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard such information. Decisions shall be in terms of the national interest and do not question the loyalty of an applicant.

Analysis

The concern raised by criminal conduct is set out in AG ¶ 30:

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.

The three documented incidents at issue in the SOR are sufficient to give rise to the following disqualifying conditions:

AG ¶ 31(a): a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in 6 combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

AG ¶ 31(b): evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

The security concerns raised under this guideline have been mitigated by the following applicable factors:

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, restitution, compliance with the terms of parole or probation, job training or

higher education, good employment record, or constructive community involvement.

Now in his mid-20s, Applicant is a more mature individual who is in search of a professional career in security. He no longer associates with his former neighborhood and school peers, or hangs out at neighborhood parks for pick-up games of basketball with neighbors and strangers. As a new father, he spends his weekends out of state with his toddler. He is timely on his child support. Applicant works overtime and has been diligent in his pursuit of a security clearance and work in the security field. He socializes with a more mature and responsible crowd. He has developed a favorable reputation at work. His brushes with the law are limited to the three incidents at issue, with only the driving on a suspended license charge from over five years resulting in a conviction. In light of these considerations, I find AG ¶ 32(a) and AG ¶ 32(d) apply.

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(d):

(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 incorporated my comments under the applicable guideline in my whole-person analysis. I also considered Applicant's credible testimony, demeanor at the hearing, age, maturation, behavioral changes, and family situation.

The three incidents at issue occurred between the time Applicant was a teen and age 21. In the first incident, he was incorrectly ascribed to have been in possession of marijuana, a charge later determined to be inaccurate. When he discovered his driver's license had been suspended due to incidents of which he had been unaware, he expeditiously took care of that issue on his own initiative. The record shows he was not part of the basketball fracas and gunfight from which he fled.

As for the charges regarding assault against Applicant's ex-girlfriend, the facts tend to favor Applicant inasmuch as the accusations appear to have been recklessly made by a jealous or scorned girlfriend, a situation further inflamed by her discovery of personal information on his cell phone and the upcoming birth of his child with another woman. The ex-girlfriend recanted her story to the police at the time, and has more recently written a post-hearing letter continuing to recant her tale of abuse. In light of these indicators, I find the allegations raised against him to be highly inflated, if not totally fabricated. Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. I conclude criminal conduct security concerns are mitigated.

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
Subparagraphs 1.a-1.c:	For Applicant

Conclusion

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

Arthur E. Marshall, Jr.
Administrative Judge