



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 06-01680
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

January 28, 2008

Decision

RIVERA, Juan J., Administrative Judge:

Applicant submitted his Security Clearance Application (eQIP)¹ on August 8, 2005. On August 22, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the Government’s security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct).²

Applicant answered the SOR on September 17, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on November 13, 2007. On November 14, 2007, Department Counsel telephonically contacted Applicant at his place of work in Australia to propose hearing dates. On that day, Applicant requested

¹ Electronic Questionnaires for Investigations Processing.

² The action was taken 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

his hearing be conducted via video teleconference (VTC) and agreed to a hearing date of December 12, 2007 (Tr. 14-16). DOHA issued a notice of hearing on December 12, 2007. I convened the hearing at 4:00 P.M., on December 12, 2007, Eastern Standard Time (8:00 A.M. on December 13, 2007, Australia time). The government offered exhibits (GE) 1 through 19, which were received without objection.

Applicant testified on his own behalf and submitted exhibits (AE) 1 and 2 post-hearing, which were received without objection. I granted Applicant's request to keep the record open until January 10, 2008, to submit additional matters. DOHA received the transcript of the hearing (Tr.) on January 4, 2008. The record closed on January 10, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural and Evidentiary Rulings

Notice

On November 14, 2007, Applicant agreed to a hearing via VTC on December 12, 2007. Because of the uncertainty concerning the availability of the VTC facility in Australia, and confusion due to the time difference, the hearing notice was not issued until December 12, 2007. At the hearing, I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant stated he was ready to proceed, that he had sufficient time to prepare for his hearing, and affirmatively waived his right to 15 days notice. (Tr. 14-16.)

Findings of Fact

In his Answer to the SOR, dated September 17, 2007, Applicant admitted all SOR allegations with explanations. His admissions are incorporated herein as findings of fact. After a thorough review of all evidence of record, including his demeanor and testimony, I make the following findings of fact.

Applicant is a 33-year-old systems engineer. In December 1996, he completed his first bachelor's degree in creative writing. In May 2002, he completed his second bachelor's degree in aerospace engineering. He completed a master's degree in systems engineering in December 2005 (Tr. 5). He has never been married, and has no children.

In June 2002, Applicant began working for a defense contractor, and shortly thereafter, he was granted access to classified information at the secret level. He has held access to classified information since then (Tr. 6). In 2005, he submitted a security clearance application requesting an upgrade of his access to classified information to the top secret level. He has worked for his current employer for approximately one year (Tr. 32). There is no evidence that Applicant has ever compromised classified information or that he has failed to comply with rules and regulations concerning the protection of classified information.

The Government's security concerns in this case arose out of Applicant's 1994 conviction for reckless homicide and seven speeding tickets he has accumulated since then. In November 1993, Applicant and his girlfriend were riding a motorcycle on his college campus. He was speeding, driving recklessly, and his brakes failed at a four-way stop. They were involved in a motorcycle accident and Applicant's girlfriend died as a result of the accident. He was charged with Reckless Homicide, Involuntary Manslaughter, and Criminal Recklessness Resulting in Serious Bodily Injury. The last two charges were dismissed by the prosecutor, apparently as a result of a pre-trial agreement.

In May 1994, Applicant was convicted of Reckless Homicide, a Class C felony in his state (GE 7). On June 29, 1994, Applicant was sentenced to "the county jail, with the recommendation of work release, for a period of two years, with good time credit, to be followed by two years of supervised probation on condition that he serve two years of home detention" (GE 8).³ The Court gave Applicant a credit of one day for time spent in pre-trial confinement while the charges were pending (GE 8).

On Wednesday, July 6, 1994, Applicant reported to the county jail and began serving his sentence in the Work Release Program (GE 8, Tr. 36). While on work release, Applicant was allowed to leave the county jail only to attend work and school. Applicant was required to sign in and out of the jail; he was subject to random searches, drug testing, and his whereabouts in and out of jail were constantly monitored by jail personnel to ensure his compliance with the terms of the program. When Applicant was not attending authorized work or school, he was required to be in the county jail (Tr. 36-44).

Applicant contended he was released from the Work Release Program on July 3, 1995, that he was given two days credit for time spent in jail in pre-trial confinement, and that his home detention should not be considered confinement for purposes of AG ¶ 31(f) (10 U.S.C. 986). Applicant believed he served less than 365 days in confinement.

The Government contended Applicant served on work release from July 6, 1994 to at least August 18, 1995. In support of her position, Department Counsel relied primarily on Applicant's Petition for Extension of Time in Which to Return to Work Release Program (GE 11) and the Court Order granting the petition (GE 12), both of which show Applicant was required to return to the county jail on April 18, 1995, to complete the work release portion of his sentence.⁴

³ The Court considered as aggravating factors that Applicant had a prior conviction for conversion, was convicted in September 1993 for operating a motorcycle 40 m.p.h. in a 20 m.p.h. zone, and that he failed to stop and yield to a police officer and disregarded multiple traffic signs during the Reckless Homicide offense (GE 8).

⁴ Applicant's Petition for Modification of Sentence (GE 14) also indicates Applicant served at least one year on work release.

After careful consideration of all the evidence, I find Applicant was released from the Work Release Program on July 3, 1995. The "Adult Probation Data" document enclosed in AE 1 shows Applicant was released from the Work Release Program on July 3, 1995. This finding is corroborated by the counselor's comments journal for July 6, 1995, indicating: "Released from WR completing 362 days" (enclosed in AE 1). Additionally, two other documents support this finding: (1) a July 6, 1995, letter from the Work Release Director to the Court indicating Applicant had successfully completed 362 days on the program as of July 3, 1995 (GE 10); and, (2) a Court order, apparently prepared by Applicant's attorney for the Court's approval/signature, and attached to Applicant's Petition for Permission to Travel (AE 2).⁵ Paragraph 1 of the Court Order states: "Applicant will complete the work release portion of his sentence . . . on July 3, 1995."

To summarize my findings, Applicant began serving his sentence in the Work Release Program on Wednesday, July 6, 1994, and he was released on Monday, July 3, 1995. Applicant was incarcerated for a total of 364 days – which include the 363 days served on work release, plus one day of credit he received for time spent in pre-trial confinement.

Applicant began serving home detention on August 23, 1995. The Court released him from home detention on April 25, 1996, but kept him on supervised probation (GE 13, 14, 16). While on home detention, Applicant was confined to his home at all times, except when specifically authorized by the Court to attend activities such as work, school, and religious services (GE 8). I find Applicant's home detention was not tantamount to incarceration because he was not institutionalized and the only condition on his liberty was that he had to remain in his home.

Applicant has been convicted for speeding seven times since his 1993 accident, to wit: July 1996, February 1997, August 1998, October 2000, September 2002, May 2003, and July 2004. On the last three occasions his speed exceeded the speed limit by at least 10 miles per hour (GE 19). Applicant explained these last three violations occurred on highways with speed limits of 65 miles per hour, and that his speed did not exceed the limit by more than 10 miles per hour (Tr. 68).

At his hearing, Applicant expressed sincere remorse for his 1993 accident. He noted he was young and immature (19 years old) at the time, but that there were no drugs or alcohol involved. He disclosed his 1994 conviction on his 2002 and 2005 security clearance applications. He has had access to classified information since 2002 with no security violations or breach of trust. He averred that except for his speeding tickets, he has maintained a clean record since 1994.

⁵ Applicant presented only the first page of the Court Order; however, other documents (GE 11 and 12) show the Court granted the petition to travel.

Applicant testified he has had an impeccable record working for defense contractors providing support to the military in high visibility projects. There is no evidence to dispute he is a valued employee with good work performance.

Policies

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.⁶

When evaluating an Applicant's suitability for a security clearance, the 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, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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 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."⁷ In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 as to obtaining 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

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁷ *Egan, supra*, at 528, 531.

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).

Analysis

Guideline J, Criminal Conduct

Under Guideline J, the security concern 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. AG ¶ 30.

Applicant was convicted in 1994 for reckless homicide, he was sentenced to jail for a period of two years, albeit with a recommendation of work release, and he actually served his incarceration on a work release program for a period of 364 days. While on work release, he was subject to significant conditions on liberty equivalent to confinement, i.e., he was not allowed to leave jail unless specifically authorized to do so to attend work or school, he remained in jail at night and during the weekends, and he was subject to constant monitoring, in and out of jail, as well as unannounced searches and drug testing. His time on work release is considered imprisonment for purposes of calculating the length of his incarceration.⁸

Disqualifying Condition (DC) ¶ 31(a): “a single serious crime or multiple lesser offenses” applies. 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,” does not apply because Applicant was incarcerated for less than a year.

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31(a). After considering all the mitigating conditions (MC), I find that AG 32(a) and AG 32(d) partially apply – his criminal behavior is temporally remote and there is no evidence of additional criminal activity, he completed college and advance education, and he has been employed since 2002 by defense contractors

⁸ See *U.S. v. Ruffin*, 40 F.3d 1296 (D.C. Cir. 1994) (a sentence to imprisonment for one year with work release, where appellant was imprisoned on weekends from 6:00 p.m. to 6:00 a.m. daily, is a sentence of incarceration); and *U.S. v. Timbrook*, 290 F.3d 957 (7th Cir. 2002) (a sentence of work release in a county jail was a sentence of imprisonment for purposes of the U.S. Sentencing Guidelines where the appellant had been sentenced to probation with a condition work release with incarceration in the country jail when he was not at work).

having access to classified information without evidence of any security violation. Additionally, Applicant is now a mature 33-year-old man with substantial responsibilities at work. Notwithstanding, Applicant's seven speeding violations since his 1993 fatal traffic accident cast serious doubts about his judgment, reliability, and willingness to comply with laws, rules and regulations. Furthermore, his speeding violations show Applicant has not learned from his mistakes, that his questionable behavior is likely to recur, and such behavior cast doubts on his rehabilitation.

Guideline E, Personal Conduct

Under Guideline E, the security concern is that conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. AG ¶ 15.

Since the 1993 fatal traffic accident, Applicant has accumulated seven speeding violations. His speeding, when considered in conjunction with the circumstances that caused his 1993 accident (speeding and reckless driving), cast serious doubt about his judgment, reliability, and willingness to comply with laws, rules and regulations. His behavior triggers the applicability of AG ¶ 16(d): "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rules violations."

AG ¶ 17 lists seven conditions that could mitigate the personal conduct security concerns. After considering all the mitigating conditions, I find none of the mitigating conditions apply to this case. I specifically considered AG ¶ 17(c), and find it partially applies since the traffic violations are not serious offenses. However, his seven speeding violations since his 1994 conviction forms a pattern of frequent behavior that is likely to recur, shows he has not learned from his past mistake, and casts doubts on his reliability, good judgment, and ability to comply with laws, rules and regulations. AG ¶ 17(d) is not applicable because Applicant has failed to change the behavior that contributed to his 1994 conviction. His seven speeding violations show he has failed to take positive steps to prevent recurrence of his past behavior. They also show Applicant's inability or unwillingness to learn from his mistakes, and demonstrate his poor judgment.

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 the 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. Applicant is a mature, well educated man. Since 1994, he has been successful as a student and at work. He has held access to classified information at the secret level for approximately 4 years. There is no evidence to show Applicant has ever compromised or caused others to compromise classified information.

Considering the totality of the circumstances in his case, Applicant’s 1994 conviction, coupled with his seven speeding violations create doubts as to his judgment, reliability, and ability to comply with laws, rules and regulations. I find Applicant’s recent speeding tickets undercut his claims of successful rehabilitation.

Overall, the record evidence fails to convince me of Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his criminal conduct and personal conduct security concerns.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a-1.g:	Against Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge