



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



In the matter of:)
)
-----) ISCR Case No. 06-20123
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government:
Jennifer I. Goldstein, Esquire, Department Counsel

For Applicant:
Kenneth M. Roberts, Esquire
Dempsey, Roberts & Smith, Ltd.

June 20, 2008

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on May 10, 2005 (Government Exhibit 4). On August 31, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J concerning the Applicant. 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on October 23, 2007, and requested a hearing before an Administrative Judge. Department Counsel was prepared to

proceed on January 14, 2008. I received the case assignment on January 25, 2008. DOHA issued a notice of hearing on February 11, 2008, setting the hearing for March 18, 2008. Due to a medical emergency involving the Applicant a continuance was granted. A new notice of hearing was issued on March 18, 2008, and I convened the hearing as scheduled on April 8, 2008. The Government offered Government Exhibits 1 through 7, which were received without objection. Applicant testified on his own behalf, called four additional witnesses, and submitted Applicant's Exhibits A through T and V, without objection.¹ DOHA received the transcript of the hearing, and the record closed, on April 17, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 43, divorced but has a long-term partner. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment.

Guideline J - Criminal Conduct

The Applicant has had three criminal incidents in 25 years. The first criminal incident happened in February 1983. On that occasion the Applicant was cited with Possession of Less than One Ounce of Marijuana. He pled guilty and worked four days of community service in lieu of paying a fine of \$100.00. The Applicant was 18 years old at the time. (Government Exhibit 3 at 2-3; Transcript at 85-86, 121-126.)

The Applicant's next criminal incident happened a month later, in March 1983. He was still only 18 years old at the time. On this occasion the Applicant and a friend broke into a house and stole various items. He was quickly arrested for this incident. The Applicant subsequently went to court, was found guilty, and sentenced to a year formal probation, he served eight months and 20 days in jail of a 365 day sentence, and was fined \$2,000.00. At the end of his probation period the Court entered an order deeming the offense to be a misdemeanor, probation was terminated, the guilty plea set aside and the case was dismissed. (Government Exhibits 1, 2 and 3; Applicant's Exhibit T; Transcript at 86-89.)

The Applicant's copy of his probation requirements, found at Applicant's Exhibit T, does not show a restriction on the possession of firearms. The Applicant had a good faith belief that, because of this document, and the fact his case had been ordered deemed a misdemeanor, he did not have any restrictions on his possessing firearms. (Transcript at 88-89, 136-139.) As set forth further below, in that he was mistaken.

Subsequent to his incarceration, the Applicant turned his life around and began being a successful and law-biding citizen. After several menial jobs, he began work in

¹Applicant's Exhibit U for Identification is a document prepared by Applicant's Counsel entitled "Summary and Mitigating Conditions." This exhibit was not entered into evidence.

the Defense industry in October 1988. This was with a predecessor company to his current employer. Over the next 18 years the Applicant worked hard and was given several promotions.² He and his wife divorced in 2000, but he has lived with a long-term partner and her four children since that time. His natural son died tragically at the age of 18 in 2005.

The Applicant's last arrest occurred on August 11, 2006. On that day, the then 11 year old son of his partner got in an argument with a playground monitor and threatened to "blow up the school." In a surplus of caution the police were called and brought the boy to the Applicant's home. They asked for permission to search the boy's room. In the room the police found a target rifle and ammunition that were stored there in preparation for the Applicant taking the youngster and his older brother out target shooting. As stated earlier, the Applicant had a good faith belief that there were no restrictions on his possessing firearms. He and his partner were arrested and charged with Child Endangerment. In addition, he was also charged with four counts of Possessing a Firearm while a Felon, and two counts of Unlawfully Possessing a Firearm. He plead guilty to one count of Unlawfully Possessing a Firearm and was sentenced to three years formal probation, \$200.00 fine, two days in jail (with credit for time served) and not associate with the minor children of his partner, who lost custody of her minor children because of the offense. Both the Applicant and his partner freely admit that the decision to store the weapons in the boys' room, even temporarily, did not show good judgment. The Applicant testified at length about how he would instruct the boys in weapons safety. (Government Exhibits 5 and 6; Applicant's Exhibit P; Transcript at 64-69, 74-80, 98-107, 112-119, 136-139.)

Mitigation

Numerous letters of recommendation, job related documents, and the testimony of several co-workers, show that the Applicant is a highly respected person and co-worker. (Applicant's Exhibits C through S.) All of the witnesses and correspondents have considerable experience in the Defense industry and have held security clearances for many years. All of them have known the Applicant for more than 8 years as a co-worker and friend, some for almost 20 years. Those that testified indicated that they had specific knowledge of the incidents referred to in the SOR.

The co-worker who first hired the Applicant in 1988, and was his supervisor for six years from 1988 to 1994, testified and submitted a statement. (Applicant's Exhibit C.) He stated, "[The Applicant] has always been one of the most responsible people I have ever known. . . . He has always been very reliable on the job." (Transcript at 30.) The witness further stated that the Applicant "was without a doubt one of the best workers I ever had." (Transcript at 31.)

The Applicant's supervisor from 2000 to 2002 also testified and submitted a statement. (Applicant's Exhibit E.) He has known the Applicant since 1998. The witness discussed the importance of the Applicant's job and how well he performed it.

²More information is set forth in "Mitigation," below.

(Transcript at 55-52.) He describes the Applicant as “a trustworthy individual.”
(Transcript at 54.)

A Branch Supervisor who has worked with the Applicant for 10 years, and known him almost 20, submitted a statement. (Applicant’s Exhibit F.) He states, “Of the things that set [the Applicant] above any other individual with whom I have had the privilege of working is he always conducts himself in a professional manner and is always looking to improve and refine his skills.”

A person who supervised the Applicant from 1998-2001 and from 2007 to date also submitted a statement. (Applicant’s Exhibit I.) He describes the Applicant as “an honest, upright and conscientious individual.”

Applicant’s Exhibit L was submitted by a close friend and co-worker of the Applicant, who has known him for almost 20 years. The witness states, “[The Applicant] is honest with those in his life, both on a personal and professional basis; he is reliable, trustworthy, respected by his peers, responsible at work, exercises good judgment, and is an overall good citizen.”³

Policies

Security clearance decisions are not made in a vacuum. 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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

³Applicant’s Exhibits D and J are also from former supervisors. Applicant’s Exhibits G, H, J, K, M, N, Q and V are from work associates. The tenor of these letters is the same as those already quoted. See also Transcript at 39-46 for the testimony of the person who submitted Applicant’s Exhibit V.

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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, “Any determination under this order . . . shall be a determination 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

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubts 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 Applicant was involved in criminal incidents twice in 1983 and once in 2006. AG ¶ 31(a) applies to this case, stating that a disqualifying condition is “a single serious crime or multiple lesser offenses.” In addition, the Applicant is “currently on parole,” thereby bringing AG ¶ 31(d) into effect.

The first two incidents happened when the Applicant was quite young and, by his own admission, foolish. The last occurred because the son of the Applicant’s partner made a threat at school, which had to be taken seriously in today’s environment. The

Applicant submitted compelling evidence that he had a good-faith, but mistaken, impression that he could possess firearms. He could not. When the weapons were found in his house, the Applicant violated the law, with or without his knowledge. He admits that. He also admits that it was poor judgment to have the weapons in the child's room.

The Applicant's credible testimonial evidence is that he has learned his lesson from these incidents. He showed a mature grasp of what happened here, and why, and how to avoid it in the future.

Under the particular facts of this case, several of the mitigating conditions also apply and justify a finding for the Applicant as to this Guideline. They are 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(b), "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."

The Applicant submitted compelling evidence from no less than 14 co-workers who support the Applicant's desire to retain a security clearance. With knowledge of the offenses, these people discussed their years long relationship with the Applicant, some of upwards of 20 years. He is described as a trustworthy co-worker and a man who is eminently eligible for a security clearance.

Based on the available evidence, the most recent offense was one of ignorance, but which was nevertheless criminal. However, it occurred under unusual circumstances which are not going to recur and do not cast doubt on the Applicant's reliability, trustworthiness or good judgment. In addition, he is an outstanding worker and has been very forthcoming about this offense. All of the evidence leads me to the conclusion that this incident was an aberration after 20 plus years of blemish free life.

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) 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. The Applicant is a hard-working, respected, professional person who has overcome his criminal acts. As described at length above, the first two incidents happened when he was a very young man. He did not realize that one of those early incidents could follow him throughout his life and lead to the arrest and conviction in 2006. However, the Applicant is someone with an extensive DoD work history which shows that he is not someone who ordinarily uses poor judgment or is a career criminal.

The Applicant well understands what happened and why, and has expressed a credible intent not to allow such errors to occur in the future. Accordingly, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Finally, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that the likelihood of recurrence is close to nil (AG ¶2(a)(9)).

Overall, the record evidence leaves me without questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has mitigated the security concerns arising from his criminal conduct.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusory allegations expressed in Paragraph 1 of the Government's Statement of Reasons.

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 THE APPLICANT
Subparagraph 1.a:	For the Applicant
Subparagraph 1.b:	For the Applicant
Subparagraph 1.c:	For the 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 eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge