



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



In the matter of:)
)
) ISCR Case No. 12-07641
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin Howry, Esq., Department Counsel
For Applicant: *Pro se*

December 14, 2012

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

From 2006 through 2009 Applicant committed a series of criminal and traffic offenses, including assault and battery; driving without insurance; driving while in possession of marijuana; possession or sale of methamphetamine; disturbing the peace; grand theft; and three instances of exceeding the speed limit. His criminal conduct raises security concerns under Guideline J, which were not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On August 21, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct. The action was taken under Executive Order (EO) 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 adjudicative guidelines (AG) effective for cases after September 1, 2006.

Applicant answered the SOR on October 1, 2012, and requested a hearing before an administrative judge. The case was assigned to me on November 7, 2012. DOHA issued a notice of hearing on November 8, 2012, scheduling the hearing for November 29, 2012. The hearing was convened as scheduled. The Government offered Exhibits (GE) 1 through 5, which were admitted without objection. Applicant offered Exhibits (AE) A through D, which were admitted without objection. Applicant called one witness, and testified on his own behalf. The record was left open for Applicant to submit additional exhibits. On December 3, 2012, Applicant presented AE E through AE G. Department Counsel had no objections to AE E through AE G, and they were admitted. DOHA received the transcript of the hearing (Tr.) on December 7, 2012.

Procedural Ruling

At the hearing on November 29, 2012, Department Counsel made a motion to amend the SOR, in order to conform to the evidence pursuant to Directive ¶ E3.1.17, by deleting ¶ 1.g because it duplicated allegations contained in ¶ 1.f. Applicant had no objection to the amendment and previously denied the duplicated allegation in his answer to the SOR. The motion to amend was granted. (Tr. 44.)

Findings of Fact

Applicant admitted to SOR allegations ¶¶ 1.a, 1.b, 1.c, 1.d, 1.e, 1.f, 1.h, and 1.i. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 23-year-old employee of a defense contractor. His first rotation with the defense contractor was in June 2012. He has completed three assignments for the contractor. From 2009 to June 2012, he was unable to find permanent employment due to his criminal history. He is single and has no children. (GE 1; Tr. 25, 58-59.)

Applicant was charged with assault and battery with a deadly weapon (baseball bat) in May 2006. Applicant testified that he was being harassed by a group of people that followed him home. He grabbed a baseball bat from his home and returned to where the individuals gathered. He recalled no other details of the incident. Applicant was a juvenile at the time of this offense. He was sent to a “boot camp” as the penalty for his criminal conduct. (GE 3; Tr. 27-29, 45.)

In April 2008 Applicant was driving without automobile insurance when he caused an accident. He testified that he had been late mailing in his insurance payment and his insurance company refused to extend coverage to the accident. A civil judgment was entered against him for \$18,428. The judgment is still outstanding. Applicant has not held a stable job and cannot afford to make payments on this debt. On October 13, 2010, Applicant’s driver’s license was suspended until 2013, as a result of the accident and lack of insurance. (GE 3; Tr. 45-48.)

Applicant has been convicted of two drug-related charges. The first drug-related offense occurred on September 22, 2008, when Applicant was cited for driving while in

possession of marijuana or an open container. He testified that he was not using the marijuana at the time of the arrest, but that it was discovered during a search of his vehicle. On October 10, 2008, Applicant pled guilty to this offense. He participated in a diversion program and the charge was dismissed after he satisfactorily completed the program. The diversion program consisted of an eight-hour class that emphasized the negative impacts drugs have on people's lives. (GE 3; GE 5; Tr. 30-31, 48-50.)

The second drug-related offense occurred on April 10, 2009, when Applicant was charged with possession or sale of methamphetamine and disturbing the peace. Applicant testified that he was employed as a caregiver to a woman, who had a prescription of Xanax. He claimed she dropped a few pills on the floor of his car. He discovered the pills and put them in his cup holder, intending to return them to her. An officer discovered the pills during a search of his car after Applicant was stopped for disturbing the peace. On May 21, 2009, Applicant pled guilty to both offenses. Sentencing was deferred to allow Applicant time to complete an 18-month diversion program. After proof of completion was provided to the court, the judge dismissed the possession or sale of methamphetamine charge. Applicant paid a \$300 fine for disturbing the peace. He testified that he was not using Xanax at that time, but did try Xanax without a prescription on a later date. (GE 3; GE 5; Tr. 35, 50-51)

Applicant has also been convicted of misdemeanor grand theft. From September 2008 through March 2009 Applicant was employed as a sales associate at a department store. Prior to his resignation, he stole approximately \$2,000 worth of hand tools from the department store. On March 12, 2009, Applicant was arrested and charged with misdemeanor grand theft. On September 21, 2009, he pled guilty to this offense. He was sentenced to 60 days in jail, required to pay restitution, and placed on probation. Applicant was released from jail after approximately 50 days due to good behavior. His restitution was paid in full and probation was terminated on June 14, 2011. (GE 2; AE E; Tr. 36-40, 51-55.)

Applicant has also been cited for speeding on multiple occasions including: April 7, 2008, June 25, 2008, and August 18, 2009. He pled guilty to each of these separate offenses. He attended traffic school as a result of these charges. (GE 2; GE 5; Tr. 29-30, 37-38.)

Applicant testified that he has not been cited for a violation of any law since August 2009. However, he acknowledged that he is a medical marijuana user in his state for arthritis and sleeping disorders. He acknowledged it is a violation of Federal criminal law to use marijuana, regardless of state laws permitting medical use of marijuana. He testified that if his marijuana use was a concern to the Federal government, he would stop using it. He last used marijuana on October 4, 2012. He holds a medical marijuana card that he renewed that same day. The card is good for one year. Previously, he indicated during his personal subject interview that he had voluntarily stopped using marijuana in January 2011 because he knew it was "wrong to use illegal marijuana in the past." (GE 2; Tr. 61-69.)

Applicant's sister testified on his behalf. She indicated her brother was loving, respectful, and mature. She testified he has matured since his criminal incidents. (Tr. 72-81.) Applicant submitted complimentary letters of support from other family members. (AE G.) The woman that Applicant assisted as a caretaker also wrote a letter on Applicant's behalf. She indicated Applicant would be "an asset for any organization." (AE F.) Applicant has been awarded a number of certificates of appreciation for his work with the government contractor. (AE A; AE B; AE C; AE D.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines 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 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 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 the 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 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 EO 10865 provides that adverse 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

The security concern relating to the guideline for 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

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

From May 2006 and August 2009, Applicant was convicted of a series of criminal and traffic offenses including assault and battery; driving without insurance; driving while in possession of marijuana; possession or sale of methamphetamine; disturbing the peace; grand theft; and three instances of exceeding the speed limit. The above disqualifying condition has been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

(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’s crimes are diverse and demonstrate a pattern of disregard for authority. Whether Applicant was upset with his employer or feeling harassed by people on the street, Applicant chose to engage in misconduct rather than address his problems with authorities. His poor judgment led him to commit grand theft and assault. Applicant indicated that he has learned from his mistakes since those criminal incidents. He testified that the most recent criminal activity occurred in 2009. He testified that he is rehabilitated and his criminal violations are unlikely to recur. However, he has not met

his burden to establish mitigation. While his most recent conviction was in 2009, he continues to violate Federal criminal laws by using marijuana. He has neither demonstrated that he currently exercises good judgment, nor displayed the reliability and trustworthiness necessary to hold a security clearance. AG ¶¶ 32(a) and 32(d) do not 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(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 facts and circumstances surrounding this case. I have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is respected by his family and the woman for whom he was a caretaker. However, he failed to demonstrate that he no longer engages in criminal activities. He continues to violate federal law by using marijuana. Although he stated during his personal subject interview that he stopped using marijuana, he failed to do so, as noted by his admission that he used it two months prior to this hearing. He failed to present sufficient persuasive evidence of rehabilitation, which would indicate that similar illegal drug use or other criminal misconduct will not occur in the future.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the Criminal Conduct security concern.

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:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Jennifer I. Goldstein
Administrative Judge