



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



In the matter of:)	
)	
)	ISCR Case No. 12-08599
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esquire, Department Counsel
For Applicant: *Pro se*

02/02/2016

Decision

DAM, Shari, Administrative Judge:

In 1998 Applicant was arrested and charged with a serious felony. He was sentenced to two years of incarceration, followed by eight years of probation. Resulting criminal conduct security concerns were not mitigated. Based on a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Statement of the Case

On June 16, 2015, 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 effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR on July 14, 2014 (Answer), and requested that his case be decided by an administrative judge on the written record without a hearing. (Item 2.) On September 9, 2015, Department Counsel submitted the Government's written case. A complete copy of the File of Relevant Material (FORM), containing six Items, was mailed to Applicant on July 20, 2015, and was received by him on July 23, 2015. The FORM notified Applicant that he had an opportunity to file objections and submit additional material in refutation, extenuation, or mitigation within 30 days of receipt of the FORM. He timely replied to the FORM, and did not object to the Government's documents identified as Items 1 through 6 in the FORM. He submitted an exhibit that I marked as Applicant Exhibit (AE) A, to which the Government had no objection. All Items and Applicant's exhibit are admitted into evidence. DOHA assigned the case to me on October 19, 2015.

Findings of Fact

Applicant is a 59-year-old employee of a defense contractor. He was married to his first wife from 1982 to 1995. He had two children born of this marriage, one born in 1983 and the other in 1985. The oldest child was killed in Iraq while serving in the Marines. He married his current wife in 2010. (Item 3.)

Since November 1975 Applicant has worked for his current employer. He was 19 years old when he was hired. He held a confidential clearance through another Federal department until 1999. On April 16, 2012, Applicant submitted a security clearance application (SF 86) through his employer. (Items 2, 3, 4.)

On December 11, 1998, Applicant was arrested and charged with possession of cocaine with the intent to deliver, a felony. The cocaine was valued at \$8,000. He was convicted in June 1999 and sentenced to 10 years in jail, with 2 years to be served in jail, and 8 years to be suspended. He was incarcerated from June 1999 to July 2000 and then placed on parole until June 2001. Thereafter, he was on probation until June 2009. While serving his first year in the correctional system, he was admitted into a 50-week work release program. (Items 4, 5, 6.) He was 43 years old at the time of the conviction and had been working as a supervisor for 15 years for his current employer. (Items 2, 4.) In June 1999 his confidential clearance was revoked as a result of his arrest. (Item 5.) In his Answer, Applicant said that he committed the crime for financial gain because at the time he was divorced, supporting two households, and paying child support. (Item 2 at 3.)

Applicant worked for his current employer while in the work release program for 50 weeks, and continued to work there through his sentence, and subsequent to it. To date, he has worked there for about 40 years and received promotions throughout his employment. In 2014 he became a planner specialist and is now interested in entering the management team. He expressed gratitude to his employer, who has been supportive throughout the years, especially subsequent to his conviction. (Item 2.)

Applicant submitted four letters of recommendation from people who have known and worked with him for many years. All of them attest to Applicant's competency, leadership abilities, reliability, and trustworthiness. They discuss his volunteer work in the community and compliment his mentoring skills. The authors of the letters state that Applicant accepted full responsibility for his conduct, successfully completed his sentence, and is a respectable citizen. They do not believe he poses a security risk. (Item 2.)

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 (AG) 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2(a) describing 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 applicable guidelines in the context 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 the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

According to Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for access to classified information seeks to enter 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 Executive Order 10865 provides that an adverse decision shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, reads in pertinent part:

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 a condition that could raise a security concern and may be disqualifying in this case:

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

In December 1998 Applicant was arrested and charged with possessing cocaine with the intent to deliver, a felony and serious crime. The evidence raises the above security concern, thereby shifting the burden to Applicant to rebut, extenuate, or mitigate those concerns.

AG ¶ 32 provides two conditions that could mitigate the security concerns raised under this guideline:

(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 has not been involved in criminal behavior since 1998, about 17 years ago. That fact is sufficient to establish some mitigation under AG ¶ 32(a). In addition to the passage of time without the recurrence of criminal activity, Applicant expressed

remorse for his crime, and presented evidence of a good employment record over the years through letters from four colleagues and friends. Applicant provided some evidence of mitigation under AG ¶ 32(d).

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.

According to 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 pertinent facts and circumstances surrounding this case. Applicant is a 59-year-old adult, who is responsible for his choices and conduct that underlie the security concerns alleged in the SOR. In 1998, at the age of 42, he made a decision exhibiting very poor judgment, which resulted in his involvement in the criminal justice system for more than 10 years. He committed a felony because he was having financial problems. Since completing criminal probation in 2009, Applicant has continued to rehabilitate himself and has gained the support of four colleagues and friends. Although he presented some impressive evidence of mitigation from his colleagues, it is insufficient to overcome the seriousness of the felony conviction and subsequent long sentence. Overall, the record evidence leaves me with doubts as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his criminal conduct.

