



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



In the matter of:)
)
) ISCR Case No. 14-00019
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin Howry, Esq., Department Counsel
For Applicant: Danel Dufresne, Esq.

June 25, 2014

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the Criminal Conduct security concerns. Between 1993 and 2005, Applicant was arrested, charged, or cited for multiple criminal offenses and probation violations. While he has abstained from criminal activity since 2005, not enough time has passed to hold that a recurrence is unlikely or that doubts concerning his judgment and reliability are fully resolved. Eligibility for access to classified information is denied.

Statement of the Case

On February 4, 2013, Applicant completed an Electronic Questionnaires for Investigations Processing (e-QIP). On February 4, 2014, the Department of Defense (DOD) 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 after September 1, 2006.

Applicant answered the SOR (Answer) on March 20, 2014. He requested a hearing before an administrative judge, through his attorney, in the letter that forwarded his Answer. The case was assigned to me on April 28, 2014. Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 1, 2014, and the hearing was convened as scheduled on May 19, 2014. The Government offered Exhibits (GE) 1 through 6, which were admitted without objection. The Government also presented Hearing Exhibits (GHE) I and II, which were marked and retained in the file. The Applicant offered Exhibits (AE) A through BB, which were admitted without objection, and a supporting brief that was marked Applicant's Hearing Exhibit (AHE) I. Applicant testified on his own behalf and called six witnesses. Applicant requested that the record be left open for additional documentation until June 2, 2014. On that date, the record closed without any further submission from Applicant. DOHA received the hearing transcript (Tr.) on May 28, 2014.

Procedural Rulings

Request for Administrative Notice

Department Counsel requested that I take administrative notice of sections of the state penal code. Applicant did not object, and I granted the request. The documents containing the code sections were not admitted into evidence, but were included in the record as Hearing Exhibits (GHE) II.¹

Motion to Dismiss Allegations

Applicant, through his attorney, moved to dismiss SOR allegations 1.d and 1.g because the SOR alleged inaccurate specifications. It is not within my authority to dismiss allegations under the Directive.² The SOR allegations properly placed Applicant on notice of the Government's concerns, despite the inaccuracies in the allegations. The motion was denied. (Tr. 89-90.)

Amendment to the SOR

Department Counsel Requested that allegation 1.c be deleted from the SOR. Applicant had no objection to this amendment and the allegation was stricken from the SOR. (Tr. 57-58, 73.)

Department Counsel requested SOR allegation 1.d be amended as follows:

From:

1.d You were arrested on or about June 11, 2003 in [redacted], for [f]ailure to [r]egister as a [s]ex [o]ffender. You pled nolo contendere and were

¹ GHE I is a letter Department Counsel sent Applicant forwarding the adjudicative guidelines (AG) effective after September 1, 2006.

² See, DOHA Case No. 94-0569 at 4 (App. Bd. March 30, 1995). See also, ISCR Case No. 98-0619 at 3 (App. Bd. Sept. 10, 1999).

sentenced to 24 months summary probation, time served (45 days in jail), and you were required to register as a sex offender and carry proof of registration at all times.

To:

1.d You were charged on or about June 2003 in [redacted], for [f]ailure to [r]egister as a [s]ex [o]ffender. You pled nolo contendere and were sentenced to 24 months summary probation, time served (45 days in jail), and you were required to register as a sex offender and carry proof of registration at all times.

Department Counsel also moved to amend SOR allegation 1.g as follow:

From:

1.g You were arrested on or about December 6, 2005 in [redacted] for [p]etty [t]heft (with prior jail).

To:

1.g You were arrested or received on or about December 6, 2005 in [redacted] for [p]etty [t]heft (with prior jail). (Tr. 86.)

Applicant objected to amending SOR allegations 1.d and 1.g. The amendment was granted pursuant to Additional Procedural Guidance ¶ E3.1.17 of the Directive. The Directive provides that an SOR may be amended at the hearing “so as to render it in conformity with the evidence admitted or for other good cause.” Department Counsel requested the SOR be amended to conform with Applicant’s testimony that he was not arrested on the specific dates listed in those allegations. Applicant was offered a continuance to give him time to adequately respond to the amendments, but he chose not to exercise that option. The record was left open for Applicant to supplement the record in lieu of a continuance. (Tr. 73-87.)

Findings of Fact

Applicant is a 40-year-old government contractor. He has worked for his employer since 2008. He married his wife in July 2005. He has a 15-year-old daughter from a prior relationship. (GE 1; GE 3; Tr. 71-72.)

Applicant had a tumultuous childhood. His father was a heroin addict. His mother was on welfare. His earliest memories consisted of watching people overdose on narcotics in his living room. Despite these adversities, Applicant graduated from high school in 1992. (GE 5; Tr. 33-35.)

The Government alleged that Applicant is ineligible for a clearance as a consequence of his history of criminal conduct. Applicant admitted the allegations

contained in SOR subparagraphs 1.a, 1.b, 1.e, 1.f, 1.h, 1.i, and 1.j. He denied SOR allegations 1.c, 1.d, and 1.g. (Answer.) The concerns are set out chronologically, below.

On January 19, 1993, Applicant was arrested and charged with rape by force; sexual penetration with a foreign object; unlawful sexual intercourse with a minor; and conspiracy to commit a crime, as alleged in SOR subparagraph 1.a. On that day, Applicant consumed alcohol with two adult male friends and two female minors. Applicant was 18 years old. He claimed that one of the female minors, a 15-year-old girl, consumed too much alcohol, felt sick, and laid down on a couch to rest. Applicant explained that he tended to the girl's illness until one of his male friends took advantage of the girl by lying on top of her and digitally penetrating her. Applicant claimed he went to the other side of the room and watched television while his friend assaulted the girl. Applicant testified he did not assault the woman but did admit to improperly consuming alcohol with a minor. The Federal Bureau of Investigations (FBI) report reflected Applicant pled guilty to assault with intent to commit rape, a felony, and was sentenced to 365 days in jail and five years of probation. He was released from incarceration after serving approximately six months in prison. He is required to register as a sex offender as a result of this conviction. (GE 4; GE 5; Tr. 48-49, 65.)

In December 1994 Applicant was arrested and charged with possession of marijuana; felony selling marijuana; and felony unlawful taking of a vehicle as alleged in SOR subparagraph 1.b. Applicant claimed he was "set up" on this occasion. He was driving his friend's vehicle across the U.S. border after visiting night clubs in a neighboring foreign country. He was stopped by the U.S. Customs and Border Protection agents at the port of entry. A search of the vehicle disclosed large quantities of marijuana in the trunk of the vehicle. Applicant was arrested and his probation was revoked. The FBI report in evidence reflected Applicant was convicted of taking vehicle without owner's consent. He was sentenced to 32 months incarceration. He served approximately 25 months in prison. (GE 4; GE 5; Tr. 49.)

In approximately June 2002 Applicant entered his ex-girlfriend's house through a bedroom window, took items that he felt belonged to him, and stole change to pay for a taxi. Applicant's ex-girlfriend reported the incident to police and a warrant was issued for Applicant's arrest. The warrant was executed when Applicant was released from jail in February 2004 for a separate theft conviction (as discussed below in SOR allegation 1.e). He was extradited and charged with burglary (as alleged in SOR allegation 1.f). Applicant later pled guilty to "theft with a prior" conviction. (GE 4; GE 5; Tr. 49.)

On or about September 8, 2003, Applicant was charged with a June 11, 2003 failure to register as a sex offender, referred to in SOR subparagraph 1.d. Applicant was transient at the time, and falsely registered at his father's address. Applicant pled no contest and was sentenced to 24 months of summary probation and 45 days of time served. He was required to register as a sex offender and carry proof of registration at all times. (GE 4; GE 5; Tr. 50-51.)

On or about August 23, 2003, Applicant was arrested and charged with petty theft with prior and burglary, as alleged in SOR subparagraph 1.e, after shoplifting a

baseball cap from a sporting goods store. He was convicted of petty theft with prior and sentenced to 290 days in jail, with credit for 270 days in custody; placed on probation for 36 months; and required to pay fines, restitution, and fees. (GE 2; GE 4; GE 5; Tr. 53, 58-59, 64-66.)

In September 2005, while Applicant was on probation for the petty theft alleged in SOR subparagraph 1.e, Applicant's home was searched by probation authorities. Illegal drugs were found on the premises. Applicant was not home at the time of the search. He knew that he would be rearrested and incarcerated after the search, so he hid from police until he had made arrangements for his wife to find a safe place to stay and he gathered enough money to pay an attorney. He appeared in court on this probation violation in November 2005 and was remanded into custody. Applicant's probation was terminated, and he was sentenced to two years of incarceration on the petty theft charge in December 2005. SOR allegations 1.g and 1.h relate to Applicant's resentencing for petty theft as a result of the probation violation and are not separate incidents of theft. Applicant was sentenced to serve two years in state prison, with credit for 290 days in custody; and pay fines and restitution of approximately \$400. His probation was extended until March 8, 2007. (GE 2; GE 4; GE 5; Tr. 53, 58-59, 64-66.)

Applicant was charged with contempt of court in August 2006, as alleged in SOR paragraph 1.i. Applicant was ordered to appear for a child support hearing. He did not appear because he was incarcerated at the time for his petty theft conviction and probation violation. He is now current on his child support obligation. (GE 4; GE 5; Tr. 61.)

Applicant was arrested in March 2008 for violating the terms of his parole as alleged in SOR subparagraph 1.j. A newly assigned parole officer discovered a minor was living at Applicant's residence in violation of a court order that resulted from his 1993 conviction. However, the parole officer withdrew the charge once he consulted with Applicant's prior parole officers and learned Applicant had been granted permission to have his daughter and grandson at his residence. Applicant was discharged from parole in 2009. (GE 5; GE 6; Tr. 66.)

Applicant is currently compliant with the requirement for him to register as a sex offender. He has not used or sold illegal drugs since 2005. He testified he was rehabilitated through religion while in jail and is determined not to commit further criminal conduct. Since his incarceration, he continues to actively participate in his church and uses his past to help others. For instance, Applicant and his wife adopted a homeless man with a substance abuse problem. They took the man off the streets, gave him shelter, and helped him become sober. The man currently resides in Applicant's home. A pastor from his church testified that Applicant is a very active member of his church community, and participates in ministries to feed the hungry, clothe the poor, and rescue widows and orphans. Applicant also leads a small bible study group. Other pastors, who wrote letters of recommendation for Applicant, indicated Applicant is a man of kindness, sincerity, and integrity. (AE W; AE X; Tr. 35-36, 41-43, 69-70, 73, 113-122.)

Applicant is well respected by those who know him, as verified by the testimony of witnesses and letters of recommendation that attest to the high quality of his character. The letters and testimony from supervisors, colleagues, and professional contacts reflect that Applicant performs well on the job and is a highly valued employee. His employee performance reviews reflect that he regularly exceeds the expectations of his rating supervisors. He has received recognition for his exceptional on-the-job efforts in numerous certificates awarded for his work performance including "Employee of the Year" and several safety awards. He is known as an honest, hard-working employee, despite his criminal past. (AE A through AE BB; Tr. 91-113, 123-137.)

Applicant's Facility Security Officer (FSO) also testified on his behalf. She recounted that 20 years ago, she was the victim of an attempted rape and had undergone significant counseling as a result of that incident. Her past initially caused her apprehension in her associations with Applicant. However, after getting to know Applicant, she believes Applicant is a good candidate for a security clearance because he is honest and an outstanding citizen. She testified, "I know that not an extremely long distant period of time has passed but the way he's been going forward, he's almost over compensating. He's extremely responsible." (Tr. 137-141.)

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 AG ¶ 2 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 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 clearance 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

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

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 generate a security concern and may be disqualifying. The conditions potentially raised by the evidence include AG ¶ 31:

(a) a single serious crime or multiple lesser offenses; and

(e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

During the period from 1993 to 2005, Applicant was arrested, charged, and convicted of multiple offenses, including: two separate instances of petty theft with prior jail; failure to register as a sex offender; felony assault with intent to commit rape; and felony unlawful taking of a vehicle. He violated the terms of his probation in 2005. Security concerns under AG ¶¶ 31(a) and 31(e) are raised by the record.

Applicant's 2006 contempt of court charge was beyond his control as he was incarcerated at that time, and he is now current on his child support obligation. His 2008 parole violation charge was withdrawn by his parole officer. Neither of these instances raises significant questions about Applicant's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. These are:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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.

From 1993 to 2005, Applicant was arrested, charged, and convicted of numerous serious crimes. He spent several years of his life incarcerated. He also violated the terms of his probation. Additionally, he engaged in criminal activity, including drug use and narcotics trafficking as recently as 2005, although he was never charged with those offenses. Since his last incarceration he has changed his behavior. All evidence from those who have known him recently attests to his present reliability, trustworthiness, and good judgment. His excellent employment record and extensive volunteer charitable community work further demonstrate his recent efforts to change his life. He testified credibly about his determination that such criminal conduct will not recur. He is well on his way to demonstrating substantial behavioral changes. However, his criminal activity spanned over 12 years and he was discharged from parole only five years ago. Not enough time has passed to hold that Applicant's criminal conduct is unlikely to recur or that his past does not cast doubt on his reliability, trustworthiness, or good judgment. While Applicant is on the right rehabilitative track, is too soon to conclude Applicant has been fully rehabilitated. AG ¶¶ 32(a) and 32(d) have limited application.

Applicant made no showing that he was pressured or coerced into any of his criminal acts, which evidence is necessary to support the application of AG ¶ 32(b). Applicant's March 2008 arrest for violating the terms of his parole was withdrawn by the parole officer, and the record evidence shows that he did not commit a parole violation at that time, despite having been arrested. AG ¶ 32(c) thus provides mitigation in relation to allegation 1.j.

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 pertinent facts and circumstances surrounding this case. Applicant has recently provided exceptional service to the United States during his employment as a government contractor. He is respected by those that know him. Even his FSO, who was a victim of attempted rape herself, recommends Applicant for a clearance. However, Applicant is a mature individual who is accountable for his past decisions and actions. He engaged in a 12-year-long pattern of criminal activity. He served over two years in jail. The potential for exploitation or duress is not fully diminished, and insufficient time has passed since his 2009 discharge from parole to confidently conclude that recurrence is unlikely. Overall, the record evidence creates sufficient doubt as to Applicant's present eligibility and suitability for a security clearance. Although his recent exemplary conduct made this a close case, and continuation of such good behavior may result in a different outcome in the future, the adjudicative guidelines dictate that any doubt must be resolved in favor of national security. Accordingly, he did not meet his burden to mitigate the security concerns arising from his criminal conduct.

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.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	For 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