



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



In the matter of:)
)
) ISCR Case No. 14-01845
)
Applicant for Security Clearance)

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: David McDowell, Esq.

03/31/2015

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government’s security concerns under Guideline J, criminal conduct, and Guideline H, drug involvement. Applicant’s eligibility for a security clearance is granted.

Statement of the Case

On August 1, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, criminal conduct, and Guideline H, drug involvement. 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 adjudicative guidelines (AG) effective within the DOD on September 1, 2006.

On September 12, 2014, Applicant answered the SOR and requested a hearing before an administrative judge. The case was assigned to another administrative judge on December 15, 2014. At the request of Applicant, the case was moved to a different

location to accommodate his attorney, so it was reassigned to me on February 2, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 19, 2015. I convened the hearing as scheduled on March 11, 2015. The Government offered exhibits (GE) 1 through 9 that were admitted into evidence without objection. Applicant and one witness testified. Applicant offered Exhibits (AE) A through C, which were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on March 18, 2015.

Findings of Fact

Applicant admitted all of the allegations in the SOR with explanations. I have incorporated his admissions into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 36 years old. He is not married. He has a 16-year-old daughter from a previous relationship. He attended community college from 1999 to 2001 and worked at the same time to support his daughter. He earned a bachelor's degree in 2011 and is enrolled in a master's program. He is working full-time and is taking nine hours of college courses. He has worked for his present employer since August 2013.¹

Applicant grew up without a father. His mother raised him and his two siblings. He stated that he grew up in a tough neighborhood and those with whom he grew up did not usually go to college. He stated that many of them were either dead, in jail, or on the streets and not working. Applicant admitted he had numerous contacts with law enforcement while he was living in his home town. He believes some of his arrests were attributed to being targeted at times.²

Applicant admitted in January 2001 he was arrested and charged with domestic violence. He pled guilty and was fined \$100 and court costs. He testified that he and the mother of his child were arguing because she wanted to move the child out of state. He denied assaulting her, but admitted he was "in her face."³ He was arrested again in November 2001 for domestic violence again due to an incident with his child's mother. They were arguing about where the child was to live. The charge was nolle prossed in April 2002. Applicant is now on good terms with the mother.⁴

In May 2001, Applicant was arrested and charged with criminal mischief. In August 2002 the charge was nolle prossed. Applicant did not remember the specifics of this incident.⁵

¹ Tr. 39-43, 81.

² Tr. 44-45, 86, 106-108.

³ Tr. 94.

⁴ Tr. 45-46, 92-94.

⁵ Tr. 94-96.

In December 2002, Applicant was arrested and charged with driving under the influence of liquor. In June 2003 he was found guilty and sentenced to 60 days in jail that was suspended, a \$1,500 fine, and unsupervised probation for one year. Applicant admitted he made a mistake when he drove after consuming alcohol.⁶

In April 2004, Applicant was arrested and charged with domestic violence, assault, and cocaine possession. Applicant explained his girlfriend at the time claimed he had assaulted her, and he denied he did. She was angry because she had seen another girl's name listed in his phone contacts. She called the police and told them Applicant had illegal drugs in his possession. The charges were nolle prossed.⁷

In September 2005 Applicant was charged with trafficking cocaine. He was acquitted of the charges in April 2007. Applicant was attending college and had moved out of his mother's house. His brother resided there. Applicant's mother called Applicant while he was at school and told him the police were at the house and had arrested his brother. She asked Applicant to come home. When he arrived, he was confronted by the police who asked to search his car. He denied their request. He went into the house. He stated the police were threatening to arrest his mother. At the time, his mother was going through chemotherapy treatment due to a cancer diagnosis. Instead the police arrested Applicant. Both he and his brother were prosecuted. His brother was convicted. Applicant was acquitted. Applicant was not living at the house at the time of the drug arrest and was unaware that his brother had drugs in the house.⁸

In May 2007 Applicant was arrested for domestic violence. He believes his girlfriend was bipolar and called the police. He was trying to leave and she began throwing things. He denied he assaulted her. He stated he had marks on his body where she scratched him. The charges were nolle prossed. He is no longer with this woman.⁹

In December 2008 Applicant was arrested and charged with drugs-conspiracy to commit controlled substance act and obstruct police-obstructing government operations. He was found guilty of both charges at a trial held in March 2011. He was sentenced to 12 years and 3 months in jail (suspended), four years' probation and fines/court costs of \$2,387.¹⁰

With regard to his December 2008 arrest, Applicant denied he was attempting to sell cocaine to Person A. He explained he was at a local restaurant. Person A was employed at the restaurant. Applicant went to high school and played on the same

⁶ Tr. 46-48, 96-97.

⁷ Tr. 97-99; GE 5.

⁸ Tr. 99-104; GE 6.

⁹ Tr. 104-106.

¹⁰ Tr. 58-73; GE 7 and 8.

football team with him. They decided to meet after Person A got off work. They were sitting in Person A's car when the police arrived. The police approached from the rear of the car and were outside of Applicant's view. When Police Officer B opened the car door, Applicant attempted to close it because he did not know who was trying to open his car door. The police then pulled their guns. Drugs were found in Person A's car. The police did not find drugs in Applicant's car. The police found \$2,100 in cash in Applicant's car. He stated he was paying bills and buying Christmas presents at the time. Person A corroborated Applicant's version of the facts at the trial.¹¹

In April 2013, Applicant's conviction for drugs-conspiracy to commit controlled substance act was overturned by the State Supreme Court on the grounds the circumstantial evidence was insufficient to convict Applicant of conspiring to sell drugs, as nothing linked him to the drugs found in the alleged buyer's vehicle, and although the cash that was found in Applicant's car might suggest that he had engaged in some sort of drug-related transaction at some point, the State still did not prove that Applicant conspired to sell drugs. The charge of obstructing governmental operations was not considered in the appeal and was therefore not overturned.¹²

Applicant was arrested on July 11, 2009, and charged with cocaine possession, resisting officer-resisting arrest, and traffic offense-running stop sign. Applicant explained he was sitting in his rental car outside of a club when Police Officer B arrived and began harassing people. Applicant believed this police officer targeted him because of his previous arrest. Police Officer B looked at Applicant's license and told him there was a warrant on him for failing to stop at a stop sign. Police Officer B searched Applicant's rental vehicle and claimed he found cocaine. Applicant denied he was in possession of any drugs. On July 13, 2009, two days after his arrest, Applicant was found guilty of running the stop sign and was sentenced to three days in jail (time served). The remaining charges were nolle prossed.¹³

Applicant admitted that when he was younger he was in a bad environment and associated with the wrong people. He stated the community he lived in was surrounded by people who were uneducated and involved with drugs. He stated if you lived on the wrong side of town you were harassed by the police. His mother impressed on him the importance of getting an education. He tried marijuana when he was in high school. He never used cocaine. His brother smoked marijuana and was sent to jail for drug distribution. He was on the football team for four years. He was selected to be in Who's Who in America when he was in high school.¹⁴

¹¹ Tr. 58-73, 76-77.

¹² Tr. 77-79; GE 8.

¹³ Tr. 74-76, 85-86; GE 9.

¹⁴ Tr. 49-57, 87-92, 107-108.

Applicant completed his bachelor's degree in the rigorous curriculum of electrical engineering. He is pursuing his master's degree in computer science. He moved out of the city where he grew up. When he returns he does not visit friends from the neighborhood. He recognized that the people he was associated with from the town where he grew up with were a bad influence. He has worked hard to move beyond his past. He is trying to be a productive member of society. He participates in a mentoring program sponsored by his employer where he mentors children to show them there is hope and opportunity, and although he made mistakes in his past, he has overcome them. He encourages them to not make the mistake he made. He regrets things he did in his past, but it has made him appreciate his accomplishment and inspires him to be better and push himself harder. He regrets his past conduct. Applicant also volunteers at the food bank where he boxes food for the homeless. He visits his daughter twice a month and is current on his child support payments. He has passed drug tests administered by his employer.¹⁵

Applicant received a certificate of recognition from his employer for his outstanding performance and invaluable contributions toward the successful completion of one of their programs. As a relatively new employee, his performance evaluation noted: "Applicant has grown this year. He has a good attitude, is willing to learn, and communicates well with the team. He is early in his career and is now experiencing a variety of different engineering areas that should broaden his skill base and knowledge of [employer's] products." The evaluation also noted that "his enthusiasm, courtesy toward others and genuine nature are appreciated."¹⁶

A coworker, who worked for the same employer for 38 years and has known Applicant for two years, provided a character letter. He stated Applicant is highly professional and trustworthy. He is impressed by Applicant's strength of character and believes he is reliable and honest and would trust him with sensitive and classified information.¹⁷

A character witness, who worked 34 years for the federal government, held a security clearance, and has been a pastor for 27 years provided testimony on behalf of Applicant. He has known Applicant for 17 years and was aware of his arrests. He stated Applicant worked with the youth of his church for six years before moving to a new city. He is a changed person and no longer associates with the same crowd. He is committed to his educational pursuits. Applicant has redirected his commitment and life and service to Christ. He tithes to his church. The witness acknowledged Applicant made mistakes, and Applicant shares that information with the youth of the church. He is a trusted member of the church. The witness noted that Applicant has modified his behavior, made positive changes, and is a productive member of society. Applicant no

¹⁵ Tr. 49-57, 80-81, 83, 108-121.

¹⁶ AE B.

¹⁷ AE C.

longer associates with people from his old neighborhood. He believes Applicant is trustworthy and recommended him for a security clearance.¹⁸

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 list potentially disqualifying conditions and mitigating conditions, which are 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 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. Likewise, I have not drawn 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

¹⁸ Tr. 26-37.

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

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following two are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested nine times from 2001 to 2009 for misdemeanor and felony offenses. He was convicted of domestic violence once, DUI and the traffic offense of running a stop sign. He was also convicted of the felony offense conspiracy to commit controlled substance act and the misdemeanor of obstructing government operations. The felony conspiracy conviction was overturned on appeal for insufficient evidence. He was acquitted of trafficking cocaine. I find the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following two 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 acknowledged he made mistakes when he was younger and was arrested numerous times. He took responsibility for the domestic violence, DUI,

obstructing the government, and running a stop light offenses for which he was convicted. His brother was convicted of trafficking cocaine. Applicant was acquitted because he did not live in the house where the drugs were found and was unaware they were present. He was attending college at the time and lived elsewhere. In 2008, he was charged with conspiracy to commit controlled substance act. He was accused of selling cocaine. The evidence was insufficient and his conviction was overturned by the State Supreme Court. Applicant denied he was selling drugs. He admitted that after the police opened the car door he shut it because he did not know who was attempting to get in the car.

Applicant acknowledged that he associated with the wrong people and lived in a community where the criminal element was prevalent. He denied he possessed or sold drugs, despite the criminal charges against him. Except for using marijuana in high school, he denied using any other illegal drugs. It has been almost six years since Applicant's last arrest. In that time he has finished his bachelor's degree in electrical engineering. He is currently working on his master's degree. He moved to a new city and away from his former friends. He has been employed since 2013 and his performance evaluations reflect that he is doing relatively well for a new employee. He participates in a mentorship program through his employer helping kids understand the ramification of their choices. He volunteers at a food bank. He no longer associates with people involved in criminal activity.

Applicant's difficulties with the mother of his child appear to be resolved, and they have a good relationship. He is no longer with the girlfriend who accused him of domestic violence. There have been no other alcohol-related incidents since his 2002 DUI.

Through education, Applicant found a way out of a community where there was little hope or expectations for success. He made mistakes along the way, some that were serious. The question is has Applicant truly changed his ways; is he reformed; has he put his criminal past behind him and is he no longer involved in any criminal activity? For the past six years he has worked hard to move past his mistakes. He earns a good salary. He has always responsibly taken care of his child. He is pursuing further education and is giving back to the community by mentoring others. He has become a respectable member of society. I find enough time has passed that criminal behavior is unlikely to recur. There is considerable evidence of successful rehabilitation, including passage of time without recurrence of criminal activity, remorse for his mistakes, completion of his bachelor's degree and working on his master's degree, a good employment record, and constructive community involvement with his church and through a mentorship program sponsored by his employer. AG ¶¶ 32(a) and 32(d) apply.

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under drug involvement AG ¶ 25 and conclude the following has been raised:

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant was arrested in April 2004 for cocaine possession and the charge was nolle prossed in June 2004. He was charged with trafficking cocaine in 2005 and was acquitted of the charge. He was arrested in 2008 of conspiracy to commit controlled substance act. He was found guilty and this charge was overturned by the State Supreme Court for insufficient evidence. He was arrested again in July 2009 for cocaine possession and two days later the charge was nolle prossed. The above disqualifying condition applies.

I have considered all of the mitigating conditions under drug involvement AG ¶ 26. The following is potentially applicable:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

Applicant grew up and lived in a community where the criminal element was prevalent. He takes responsibility for his conduct, but also indicated that he believed he was being targeted. It is noted that he was twice arrested for possession of cocaine and the charges were nolle prossed shortly after his arrest, as were many of the charged offenses. Applicant was not convicted of any drug charges, but a conviction is not necessary for there to be a security concern. There is no evidence Applicant is a current drug abuser, despite his admission he tried marijuana in high school. The same facts and analysis that were applied under the criminal conduct guideline applies under the drug involvement guideline. It has been six years since Applicant's last arrest. He lives

in a different city and no longer associates with former friends from his hometown. He has worked hard to overcome his mistakes and is now a valued employee. Applicant has an education and a good job. His employer conducts drug tests and his results were negative. It is unlikely he will be involved with drugs in the future. I find AG ¶ 26(a) applies.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines J and H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 36-years-old father of a teenage daughter. He earned a bachelor's degree and is working on a master's degree. He is a valued employee who is involved in a mentoring program and has served his church. Applicant's criminal background is noted above. It has been six years since Applicant's last arrest. The question is has he really changed and can he be trusted. He has moved from the town where all of his problems occurred. He has a good job. He is pursuing higher education. Most importantly he acknowledges he made mistakes in the past and is committed to being a productive citizen. Applicant has done what society wants people to do when they get in trouble. In the past six years he has established a track record of being a reliable and trustworthy individual who exercises good judgment. He has matured and is a mentor to at risk children. He is not a perfect man, but he has worked hard to overcome his past. He has earned an opportunity to move beyond his past. He has met his burden of persuasion. Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I

conclude Applicant mitigated the security concerns arising under the criminal conduct and drug involvement guidelines.

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 APPLICANT
Subparagraphs 1.a-1.i:	FOR APPLICANT
Paragraph 2, Guideline H:	FOR APPLICANT
Subparagraph 2.a:	FOR 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 a security clearance. Eligibility for access to classified information is granted.

Carol G. Ricciardello
Administrative Judge