

DATE: June 9, 2003

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-06406

DECISION OF ADMINISTRATIVE JUDGE

JOHN G. METZ, JR.

APPEARANCES

FOR GOVERNMENT

Erin C. Hogan, Esquire, Deputy Chief Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant's two firearms offenses in early 1998 are mitigated where the conduct was not as serious as first charged, occurred in a narrow period of time when Applicant had moved to a new state, and has not been repeated, and where Applicant has straightened out his life by getting better technical skills, obtaining a real job, married and started his own family, while taking financial and emotional responsibility for a son he did not know he had until April 2000. Clearance granted.

STATEMENT OF THE CASE

On 5 February 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, stating that DOHA could not make the preliminary affirmative finding⁽¹⁾ that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On 17 arch 2003, Applicant answered the SOR and requested a hearing. The case was assigned to me on 14 April 2003, when I was out of the country; I received the case on 22 April 2003, upon my return to the office. I set the case on 25 April 2003, and on 1 May 2003, issued a notice of hearing for 21 May 2003.

At the hearing, the Government presented five exhibits--admitted without objection--and no witnesses; Applicant presented one exhibit--admitted without objection--and the testimony of two witnesses, including himself. DOHA received the transcript on 30 May 2003.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR. Accordingly, I incorporate those admissions as findings of fact.

Applicant--a 28-year-old employee of a defense contractor--seeks the security clearance required for him to have access to the base where his company employs him. He does not have access to classified information; he fixes telephones in

spaces where classified information is handled by others. He testified during the hearing, and I accept his testimony as credible and true.

In 1998--when Applicant was 23 years old--he had two firearms offenses within six months. He has had no criminal conduct since, except for a speeding ticket.

On 28 January 1998, Applicant was arrested for carrying a concealed firearm, a felony offense under his state's criminal code. (2) He pleaded nolo contendere and adjudication was withheld conditioned on his paying fines, court costs, and attorneys fees, performing of 50 hours community service, and serving 18 months probation. He completed the conditions of his probation. (3)

On 15 June 1998, Applicant was arrested for aggravated assault with a firearm, a felony, discharging a firearm in public, and improper exhibition of a firearm, both misdemeanors. (4) Because this was his second firearms offense, he was placed on supervised probation, given fines, court costs, and community service. Applicant completed these requirements without incident. The charges were "non-filed" in January 2002.

Since June 1998, Applicant moved back to his original state, got a regular job, and chose his friends more carefully. Applicant married in September 2000. In approximately April 2000, Applicant learned he had an almost-five-year-old son from a previous relationship. Applicant took a paternity test to establish his fatherhood, and established a relationship with his son even though he is the non-custodial parent. (5) He and his wife also have a nearly-one-year-old daughter. Applicant has a current state permit to carry a handgun, issued in June 2001; however, he seldom carries a gun now.

Applicant, a high school graduate, has increased his technical skills, and been formally recognized for his work quality (A.E. A). His character references (Answer)--who include his probation officer, supervisor, work associates, and relations by marriage--consider him an honest, trustworthy employee, who has overcome his youthful misconduct to make a good life for himself and his family.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating an individual's security eligibility. The Administrative Judge must take into account the conditions raising or mitigating security concerns in each area applicable to the facts and circumstances presented. Each adjudicative decision must also assess the factors listed in Section 6.3. and in Enclosure (2) of the Directive. Although the presence or absence of a particular condition for or against clearance is not determinative, the specific adjudicative guidelines should be followed whenever a case can be measured against this policy guidance, as the guidelines reflect consideration of those factors of seriousness, recency, motivation, *etc.*

Considering the evidence as a whole, the following adjudication policy factors are most pertinent to this case:

CRIMINAL CONDUCT (GUIDELINE J)

E2.A10.1.1. A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

E2.A10.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A10.1.2.1. Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

E2.A10.1.2.2. A single serious crime or multiple lesser offenses.

E2.A10.1.3. Conditions that could mitigate security concerns include:

E2.A10.1.3.1. The criminal behavior was not recent;

E2.A10.1.3.2. The crime was an isolated event;

E2.A10.1.3.3. . . . the factors leading to the violation are not likely to recur;

E2.A10.1.3.6. There is clear evidence of rehabilitation.

Burden of Proof

Initially, the government must prove controverted facts alleged in the SOR. If the government meets that burden, the burden of persuasion then shifts to the applicant to establish his security suitability through evidence of refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of disqualifying conduct, it is nevertheless clearly consistent with the national interest to grant or continue the security clearance.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. Where facts proven by the government raise doubts about an applicant's judgment, reliability or trustworthiness, the applicant has a heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988), "the clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."

CONCLUSIONS

The government established its case under Guideline J, but I find the conduct to be mitigated. Applicant acknowledged both the criminality and the poor judgment demonstrated by his two firearms offenses in 1998. However, without minimizing the seriousness of the misconduct, the dispositions of both offenses--deferred adjudications with conditions--suggests that the courts did not consider the offenses as serious as they appear on paper. Further, the misconduct occurred over five years ago, when Applicant was single and comparatively young. While two incidents cannot be considered isolated, they occurred during a discrete six-month period, and have not been repeated. In addition, Applicant's evidence of rehabilitation is clear. He moved, acquired some technical training, got a real job, and married. He took responsibility for his out-of-wedlock son, both financially and emotionally, and began his own family with his wife. The probation officer who supervised his probation, his work references, and his extended family all attest to the progress he has made in his life since 1998. Notwithstanding his two firearms arrests, Applicant was issued a handgun permit in June 2001, further indication that the state does not consider the two 1998 incidents especially serious. I conclude that Applicant is unlikely to engage in criminal conduct in the future. Accordingly, I resolve Guideline J for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline J: FOR THE APPLICANT

Subparagraph a: For the Applicant

Subparagraph b: For the Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

John G. Metz, Jr.

Administrative Judge

1. Required by Executive Order 10865, as amended, and Department of Defense Directive 5220.6, dated January 2, 1992--and amended by Change 3 dated 16 February 1996, and by Change 4 dated 20 April 1999 (Directive).

2. Applicant's version of events (G.E. 2, Answer, Tr. 25-40) comports with the police records (G.E. 4) and the disposition of the offense. Applicant had just moved into the state from a bordering state where he had a permit to carry a concealed weapon. Between holiday closings and the state's processing time for a permit, Applicant had not yet obtained a permit to carry a concealed weapon in his new state of residence. However, Applicant lived in a dicey neighborhood and carrying the weapon was second nature to him, so he continued to carry the weapon. He acknowledges that this was poor judgment on his part. On the night of his arrest, Applicant was on a date and they had stopped in a park after the posted opening hours, something Applicant was unaware of having just moved into the state. When the police officer confronted Applicant and his date, Applicant admitted having a weapon, but lied to the officer about having it on his person.

3. Albeit not without some difficulty. Applicant moved back to his original state of residence in December 1998. In accordance with the terms of his sentence, he transferred his probation to his original state. His new probation officer contacted old probation department for information on the remaining conditions to be satisfied by Applicant, and Applicant complied with the financial requirements reported to his new probation officer. However, unknown to Applicant or the probation officer, there was an outstanding balance. A warrant was issued for Applicant in January 2000, but Applicant did not discover that fact until he tried to purchase a shotgun in May/June 2001 in his original state of residence and the computer check turned up the outstanding warrant. Applicant paid the remaining \$179.76 in August 2001, and this case was closed out.

4. Again, Applicant's version of events comports with the police report and the court disposition, allowing for mutual finger pointing between the three individuals involved in the incident: Applicant's housemate became involved in a heated argument with a neighbor over the repayment of a \$10.00 debt by the neighbor. The neighbor wanted to pay the debt with groceries; the housemate wanted his \$10.00 back. When it looked to Applicant like the confrontation was going to lead to violence (the housemate had a knife; the neighbor threatening to kill the housemate with his bare hands, a threat made more credible by his claimed experience in Vietnam), Applicant fired his weapon into the air. The neighbor ran off, but summoned the police, who arrived at Applicant's house as he and his housemate were returning from consulting with other neighbors (retired law enforcement) about what they should do. Again, Applicant acknowledges the illegality of his action, and the poor judgment, but felt his action averted potentially more serious consequences.

5. He also began paying child support and arrears.