



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-04784

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel
For Applicant: Pro se

June 14, 2010

Decision

MOGUL, Martin H., Administrative Judge:

On July 14, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E for Applicant. 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On August 9, 2009, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on September 21, 2009. DOHA issued a notice of hearing on November 16, 2009, and I convened the hearing as scheduled on December 22, 2009. The Government offered Exhibits 1 through 9, which were received without objection. Applicant testified on his own behalf and submitted Exhibit A, which was also admitted without objection. DOHA received the transcript of the hearing (Tr) on January 5, 2010.

Based upon a review of the case file, pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

In his RSOR Applicant admitted SOR allegations 1.b. and 1.c., and he denied 1.a., under Guideline J. He denied allegation 2.b., and did not respond in his RSOR to 2.a., under Guideline E. The admitted allegations are incorporated herein as findings of fact. Department Counsel also moved to amend the SOR to add three additional allegations under Guideline J, and they will be reviewed below, when discussing Guideline J.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 30 years old. He is married, and he has four children. Applicant works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct. The SOR lists two allegations under Adjudicative Guideline J, and they will be discussed in the same order as they were listed in the SOR:

1.a. The SOR alleges that in approximately 2003, Applicant was “arrested for (1) Possession of Less than 1 oz. Marijuana and (2) Possession of Switch-Blade knife.” At the hearing, Applicant testified that on the day of the incident, at the request of a former co-worker, Applicant was driving home this individual, when he was stopped by the police for playing loud music in his car and having something large hanging from his mirror. (Tr at 72.) After he was pulled over, Applicant stated that the police officer found marijuana in Applicant’s vehicle, which, according to Applicant, belonged to his passenger. Applicant claimed that he had not used the marijuana, nor did it belong to him. The police officer thereafter found a switch-blade knife in his trunk. Applicant claimed that the vehicle was one he had recently purchased, the knife was not his, and he was not aware that the knife was in his car. (Tr at 37-43).

Ultimately, Applicant plead guilty to count 2, Possession of Switch-Blade knife, and Count 1, Possession of Less than 1 oz. Marijuana, was dismissed. He was ordered to pay a fine, which he believed to be \$150, and he was also ordered to serve 10 days of public service. (Tr at 43-44.) Exhibit 3 confirms that Applicant was ordered to serve 10 days of community service and pay a fine of \$155. He also served 24 months of probation. Finally, Applicant followed his employer’s requirements by notifying the company of this arrest. (Tr at 90.)

1.b. The SOR alleges that in approximately 2005, Applicant was cited for “(1) Possession of Under 1 oz. Marijuana.” In his testimony, Applicant admitted this allegation. He stated that in 2005, he was stopped by the police for driving his vehicle through a red light, and he was cited for possession of marijuana. He testified that he plead guilty to the possession of marijuana charge, and he was ordered to pay a fine and attend classes. He thought he paid the fine, which he believed to be either \$300 or \$400, but he could not recall if he attended all 24 classes as was ordered by the court. (Tr at 48-54.) Upon cross examination by Department Counsel, Applicant concurred that his fine was \$1,000, and that since he could not afford to pay it at that time, he accepted the alternative punishment of serving time in jail. He was initially sentenced to serve 30 days, but he was released after seven days for good behavior. (Tr at 79.)

Applicant stated that after he got laid off from his work, he was having a difficult time, so he used marijuana, once a day, for approximately three or four weeks, to help him cope with his problems. Applicant testified that he has not used marijuana since that incident in 2005, and he has no intention to use any illegal drug in the future. (Tr at 54-55.)

As stated above, at the hearing Applicant moved to amend the SOR and add three additional allegations, 1.c. through 1.e., under Guideline J. They will be reviewed below:

1.c. This allegation states that in approximately March 1996, Applicant was arrested for “Possession of Narcotic Controlled Substance.” At the hearing, Applicant testified that he was not arrested in 1996 for drug possession, and that this allegation is incorrect. (Tr at 59-60.)

1.d. This allegation states that in approximately December 2007, Applicant was arrested for “Possession of a switchblade knife.” Applicant testified that he was not arrested in 2007 for possession of a switchblade knife, and that this allegation is not correct. (Tr at 60-61.)

1.e. This allegation states that in approximately November 2008, Applicant was arrested for “Possession of Controlled Substance.” Applicant testified that he was not arrested in 2008 for drug possession, and that this allegation is incorrect. (Tr at 61-63.)

The Government based allegations 1.c. through 1.e., on Exhibit 9, which is an FBI criminal report (rap sheet) that allegedly includes all of the criminal activity of Applicant. However, during his testimony, Applicant pointed out several discrepancies with the physical description of the person in Exhibit 9. Exhibit 9 states that the individual is white with brown eyes, six feet tall and weighing 165 pounds. Applicant noted that he is Hispanic with blue eyes, six feet two inches tall and weighing 380 pounds. Exhibit 9 also lists two different social security numbers and states that the individual has a tattoo on his left forearm, while Applicant has tattoos on both arms. Applicant argued that the individual, who is the subject of Exhibit 9, is clearly not him. (Tr at 64-65.) While I did rule at the hearing to allow the SOR to be amended in the manner requested by Department Counsel, adding allegations 1.c. through 1.e., I do not

find that the Government's burden has been met in establishing these allegations. Applicant testified credibly that he was not involved in any of these criminal activities. The Government relied solely on Exhibit 9, which as reviewed above, had many significant errors in identification. Therefore, I do not find Exhibit 9 to be reliable as a sole means to establish these allegations.

Paragraph 2 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

2.a. The SOR alleges that Applicant's conduct, that is the basis for 1.a. and 1.b., above, shows questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

2.b. The SOR alleges that "in approximately 2003, [Applicant] associated with a member of [a street gang.]" Applicant testified that he knew this individual, because they had previously worked together at a department store. Applicant knew this person was a gang member because of his tattoos, but he averred that he had no gang contacts with this individual or with any other person. Also, Applicant never participated in any gang activity, nor was he ever a member of any gang. (Tr at 55-57.) Applicant never saw this individual again after the arrest in 2003. (Tr at 74.)

Mitigation

Applicant submitted 13 very positive character letters from individuals who have known him in his professional or personal capacities. (Exhibit A.) His previous supervisor described him as a "dependable, reliable, hard-working, conscientious, honest, peace-loving, courteous man."

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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 avoided drawing 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, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining 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 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

Regarding the disqualifying conditions under Criminal Conduct Adjudicative Guidelines, I find that AG ¶ 31(a) applies, “a single serious crime or multiple lesser offenses,” because of Appellant’s possession of marijuana in 2005, and his guilty plea to possession of a switchblade knife in 2003. As reviewed above, I do not find that the Government has established that Applicant engaged in the criminal activity, as alleged in 1.c. through 1.e.

Under the mitigating conditions, I find that AG ¶ 32(a) is applicable as “so much time has elapsed since the criminal behavior happened” that “it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgement.” AG ¶ 32(d) is also applicable, as “there is sufficient evidence of successful rehabilitation”; “because of the passage of time without recurrence of criminal activity.” Appellant’s criminal activity has been mitigated. Paragraph 1, Guideline J is found for Applicant

Guideline E - Personal Conduct

With respect to Guideline E, the evidence does not establish that any disqualifying conditions apply in this case. While Applicant's use of marijuana for three or four weeks in 2005 does show questionable judgement, he has averred that he has not used it since that time, nor will he ever use it again. Also, while Applicant was in the company of a gang member in 2003, the evidence establishes that Applicant knew this individual as a fellow employee, and Applicant never associated with him or anyone else in gang related activities.

Applicant's conduct, considered as a whole, does not exhibit questionable judgement, unreliability, or a lack of candor. I resolve Paragraph 2, Guideline E, for Applicant.

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 the 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. Based on all of the reasons cited above as to why the mitigating conditions apply, together with the positive, independent evidence of Applicant's character and good judgement, submitted in Exhibit A, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns.

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
Subparagraph 1.a.-1.e.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.-2.b.:	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 eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge