



**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. 07-06009

Appearances

For Government: Jeff Nagel, Esquire, Department Counsel

For Applicant: *Pro Se*

January 18, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on December 28, 2005. On August 20, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised 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.

Applicant replied to the SOR (RSOR) in writing on September 5, 2007, and requested a hearing before an Administrative Judge. I received the case assignment on October 9, 2007. DOHA issued a notice of hearing on November 19, 2007, and I convened the hearing as scheduled on December 6, 2007, in Las Vegas, Nevada. The government offered Exhibits (Ex.) 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A and B, without objection. DOHA received the transcript of the hearing (Tr.) on January 2, 2008. Based upon a

review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR, Applicant admitted SOR allegation 1.a., denied 1.b., only as to the place in which he was arrested, and he did not give a response to 1.c. The admitted allegations are incorporated herein as findings of fact.

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

Applicant is 40 years old, and he is a high school graduate. Applicant is divorced, but he still lives with and supports his ex-wife and their two children and his one stepchild.

Applicant is employed as a custodian by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

The Government alleges that Applicant is ineligible for clearance because he has engaged in criminal acts.

1.a. The SOR alleges that Applicant was arrested in March 1987 and charged with False ID to a Specific Police Officer and Assault with a Deadly Weapon on an Officer. The charge of False ID to a Specific Police Officer was dismissed.

Applicant testified that when he was 18, he was driving a vehicle, when he was followed by an unmarked car that appeared to be trying to get him to pull over to the side. Since he was not aware that it was a police vehicle, he did not stop until he was pulled over by an identified police vehicle. He thereafter explained that he had been unaware this unmarked car was a police vehicle. According to Applicant the case was dismissed and he was never required to go to court to resolve the case. At the hearing, Department Counsel confirmed that all charges were dismissed by the court.

1.b. The SOR alleges that Applicant was arrested in March 1988 and charged with Unlawful Use of a Common Facility. He was sentenced to three years of confinement, of which Applicant was incarcerated for a period of just less than two years and placed on probation for one year.

Applicant testified that this incident took place when he was 19 and living in a rented room in another individual's home and in another city, where planned to attend college. He had been in the home approximately 1 ½ months when it was raided by police officers and all the residents of the home, including Applicant, were arrested. Applicant conceded that he knew drugs were being dealt from the home, but he adamantly denied ever taking part in the sale or use of drugs, while in the home or at

any other time in his life. Applicant testified that he was offered a plea bargain through his Public Defender, and because he was made aware that his sentence could have been far more severe if he challenged the case in court and was unsuccessful, he decided to take the deal, even though he was not guilty.

1.c. Since Applicant was sentenced to serve a term in prison of more than one year, and since he actually was incarcerated for more than one year, 10 U.S.C. 986 applies to this case, and Applicant is thus disqualified from receiving a security clearance. For reasons discussed below, I recommend further consideration of this case for a waiver of 10 U.S.C. 986.

Applicant testified that since he was released from jail when he was 22, he has not been involved in any illegal conduct, nor have there been any allegations of illegal activities charged against him.

He submitted an Employee Performance Evaluation from his current employer for the period of May 1, 2006 through April 30, 2007 (Exhibit A). Applicant received an evaluation score of 91.50% out of 100%, and a rating of Outstanding in most categories. He also submitted four character letters (Exhibit B). The letters were extremely positive in describing Applicant as a conscientious, hard working person of integrity and responsibility.

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©, 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

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 raise a security concern and may be disqualifying. The following apply in this case:

(a) a single serious crime or multiple lesser offenses; (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

AG ¶ 32 provides conditions that could mitigate security concerns:

(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; (c) evidence that the person did not commit the offense;

(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; and, (e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

The Government has established its case under Guideline J. Applicant's conduct that is the basis for allegation 1.b. of the SOR is criminal and did result in his receiving a term of three years imprisonment, of which he served almost two years. Based on the following meritorious circumstances, I recommend a waiver in this case. Applicant's age at the time of the criminal incident was 19. No evidence has been introduced of any additional criminal activity by Applicant since 1988. While the case itself can not be relitigated, Applicant did testify credibly that he was not involved in drug use or sale during this incident or at any other time in his life, and there has been no corroborating evidence of any other drug involvement. Finally, based on Applicant's Performance Evaluation and character letters, it appears that Applicant is now a productive member of society. I find that Applicant has overcome the criminal conduct that occurred.

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) 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 factors discussed above, I find that Applicant has overcome the criminal conduct allegations, and he would be eligible for a security clearance under the whole person concept.

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:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied. However, I recommend consideration of this case for a meritorious waiver of 10 U.S.C. 986.

Martin H. Mogul
Administrative Judge