



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



In the matter of:

-----, -----

SSN: -----

Applicant for Security Clearance

)
)
)
)
)
)

ISCR Case No. 07-08581

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro Se*

April 8, 2009

Decision

WHITE, David M., Administrative Judge:

Applicant pled guilty to manslaughter in juvenile court for a gang-related murder that occurred in 1996, when he was 16. He denied this felony arrest and conviction on his current security application, and falsified the details of the incident and a later traffic conviction in a subsequent interview. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaires for Investigation Processing (e-QIP), on April 4, 2006. On July 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J and E. 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 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 acknowledged receipt of the SOR on August 26, 2008. He answered the SOR in writing (AR) on September 7, 2008, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on October 20, 2008, and the case was assigned to a different administrative judge on the following day. DOHA issued a Notice of Hearing on November 3, 2008, setting the case to be heard on December 2, 2008. On November 12, 2008, Applicant requested to reschedule the hearing because he was leaving the following week to work in another state. On November 18, 2008, DOHA issued a notice cancelling the hearing, and reassigned the case to me. After Applicant's company representative confirmed that he would not be available until mid-January 2009, DOHA issued another Notice of Hearing on December 17, 2008, and I convened the hearing as rescheduled on January 15, 2009. The Government offered exhibits (GE) 1 through 5, which were admitted without objection. The Government also offered HE II, a section of the applicable state criminal code, to support a request that I take administrative notice of the fact that the provision under which Applicant was originally charged was for murder. Applicant had no objection, and administrative notice was taken of this fact. Applicant testified on his own behalf. I granted Applicant's request to leave the record open until January 22, 2009, to permit him to submit additional evidence. On January 21, 2009, Applicant submitted the additional evidence to Department Counsel, who forwarded it without objection to its consideration. This evidence was admitted, marked AE A, and the record was closed. DOHA received the transcript of the hearing (Tr.) on January 26, 2009.

Findings of Fact

In his Answer to the SOR, Applicant denied all of the factual allegations concerning his criminal and personal conduct. Applicant is a 29-year-old employee of a defense contractor. He has worked for his present employer since March 2005. He has not served in the military, and has never held a security clearance except on an interim basis. (GE 1 at 2, 6, 13, 18.)

In 1996, Applicant was involved in a gang-related incident during which a member of his gang shot and killed a member of a different gang after a confrontation. In 1998, two members of Applicant's gang were arrested on related charges, and identified him as a gang member possibly involved in the murder. He was eventually arrested in February 2000, shortly after being identified in a police photo lineup by a member of the other gang, and charged with murder. He spent about ten months in jail awaiting trial. His attorney finally arranged a plea agreement under which he pled guilty to voluntary manslaughter, with gang affiliation and handgun felony enhancements, in juvenile court. He was sentenced to time served, a fine, and probation. He says he no longer hangs out with the gang members, having severed ties with them at age 18. (AR at 2; GE 2; GE 4; GE 5; Tr. at 46, 50, 63.)

When Applicant completed his e-QIP, he answered "No" to question 23.a, that asked whether he had ever been charged with or convicted of a felony. (GE 1 at 16.) His explanation was that he had asked his attorney how to answer a question asking whether he had any felony convictions on a job application for a former employer, and

was told that he did not have to list his manslaughter conviction because it was handled in juvenile court. This explanation is contradicted by Applicant's statement, on page 8 of his e-QIP, that he began working for this same former employer in September 1999, some five months before he was arrested, and by his testimony and statement to an investigator that his arrest took place while he was driving to work for that employer. (AR at 4. Tr. at 72.) He further said that he did not ask this attorney, or anyone else, for advice concerning how to answer the broader question on his security clearance application. He just decided he did not need to report it based on his lawyer's earlier comment. (Tr. at 47, 52-54.)

Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on January 10, 2007. The investigator asked him about the murder charge. According to the investigator's report of investigation, which Applicant confirmed was accurate in his January 8, 2008, sworn interrogatory response, Applicant described his involvement as follows:

Subject related that the incident occurred in 1996. Subject was 16 years old, and he and his cousin [name], had attended a party at a [name] (club that serves no alcohol) in [town]. While at the club, a gunshot was heard and everybody in the club, exited and went home. Approximately two days later, subject was approached by the [town] police department and questioned about the incident. Subject was informed during the questioning that a person had been killed at the [name] club. Subject informed police that he had no knowledge who had committed the crime, and that he had no involvement in the incident. Subject was subsequently released with no further action. Approximately four (4) years later, Subject was driving to work at the [name] company, when he was stopped by the [name] Sheriffs Department. Subject was placed under arrest for the murder at the [name] club which occurred in 1996.

(GE 2 at 3, 6, 7.) In further response to interrogatories, Applicant provided copies of his probation officer's report detailing his June 27, 2000, description of the shooting. In that version, Applicant said the incident began when the other gang members approached and threw gang signs, then sticks and rocks at him and his car as he and a friend sat across the street from the club. He and his friend approached the others "to find out 'what's up'," when they started to run away. Applicant then saw "the other car" chasing them and heard gunshots. He then got back in his car and left. (GE 4 at 5.) This version most closely tracks with what police were told by the surviving members of the other gang. They reported fleeing the initial confrontation when they realized they were outnumbered, and being chased by a car from which multiple shots were fired at them. One of those shots struck the victim in the chest, from which he later died at the hospital. (GE 4 at 4.)

During the hearing, Applicant said he and his cousins were inside the club when some other members of his gang decided to leave. Shortly thereafter, the others called him on the phone to ask him to come to a place where they were going to fight the other

gang members. He and his cousins went to the scene, got out of their car, and the members of the other gang started to flee. As Applicant and his cousins were getting back in their car, they heard several shots. They then returned to the club and continued to party. He gave differing versions of how and when he found out the victim had died. (Tr. at 67-79.)

Applicant concluded his January 10, 2007, interview with the OPM investigator by stating that he had not had any law enforcement issues since the murder incident, and he did not feel that incident could be used to blackmail or coerce him to conduct any illegal act against the United States. (GE 2 at 4.) Subsequent investigation revealed that he had another unreported violation resulting from his failure to stop for a school bus while driving on September 15, 2005. (GE 4 at 1.) He contested the \$500 citation in traffic court, where he was found guilty but his fine was reduced to \$175. (GE 2 at 5.) During the hearing, he offered no valid explanation for not revealing this arrest and conviction to the OPM investigator during the January interview, except that he possibly thought he was being asked about more serious crimes than this offense. (Tr. at 55-63.) He did subsequently admit the incident when re-interviewed about it. (GE 2 at 5.)

Applicant said the birth of his daughter, now age eight, has changed his life and he does nothing that could interfere with his opportunity to provide her financial support and continue parental visits. His aunt also wrote that she considers him to have become much more mature, considerate, and law-abiding after growing out of his rebellious teenage years. (AE A.) Applicant testified that he was very fortunate to have been tried as a juvenile for the murder/manslaughter charge, since he would probably still be in jail had he been tried as an adult. He thought that since God and society had given him this second chance, the Government should also give him the chance to continue his present employment by granting his security clearance. (Tr. at 80, 95.) Applicant's demeanor and testimony during the hearing were not particularly forthright or credible.

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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

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 (DCs). The DC asserted by the Government was, “(a) a single serious crime or multiple lesser offenses.” (Tr. at 83.) As alleged in the SOR, Applicant was arrested in 2000, and charged with a murder that occurred in 1996. Applicant pled guilty to voluntary manslaughter, as a lesser included offense of the murder charge, as well as sentencing enhancements of firearm and gang conditions in the commission of a felony, in juvenile court. He served about ten months of confinement, in addition to probation, and paid a fine as a result. Although the evidence does not indicate that Applicant was the trigger-man, the victim’s death resulted directly from a gang-on-gang confrontation in which he was knowingly and voluntarily participating.

AG ¶ 32 provides conditions that could mitigate security concerns (MCs). Applicant’s termination of gang involvement and recent history of gainful employment

create some mitigation under two of them. 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;” 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.”

For mitigation analysis, Applicant's SOR-listed criminal conduct and his criminal history must be evaluated as a whole, not piece by piece. His 2000 conviction in juvenile court and 2006 traffic court conviction were indicative of poor judgment and a lack of self-control, as well as a willingness to flaunt rules and regulations. Given the recklessness of this conduct, one of which resulted in a death and the other that put school children at risk, Applicant did not establish strong mitigation of the concerns arising from his criminal history. His recent good employment record, job training, and period of abstinence from gang involvement are evidence that support successful rehabilitation. The serious nature of his former criminal activity, however, leads to the conclusion that on balance it is still too soon to be confident that such behavior is unlikely to recur, and no longer casts doubt on his reliability, trustworthiness and judgment.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The Government asserted that Applicant's statements and actions support concerns under two DCs:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant completed his e-QIP personnel security questionnaire in April 2006. On the question that asked whether he had ever been charged with or convicted of any felony offense, he responded "No," and did not report having been arrested for, and charged with murder in a case that resulted in his juvenile court conviction for manslaughter, with firearm and gang conditions in the commission of a felony. He did this because he did not want to reveal this adverse information, and possibly thought he might not have to because it was ultimately handled by a juvenile court. This was a deliberate omission, concealment, and falsification of relevant facts from his e-QIP, establishing security concerns under AG ¶ 16(a), as alleged in SOR ¶ 2.a.

When confronted in January 2007 with the reports of his arrest and conviction for the 1996 homicide, Applicant admitted that occurred, but told the investigator a very minimized version of events in which he was attending a party at a youth club, heard a gunshot, and went home. He made it sound like his attorney convinced him to plead guilty to something concerning which he had no actual criminal involvement. As alleged in SOR ¶ 2.b, he deliberately failed to disclose that the murder was a gang-related shooting from a car. He also completely omitted any information about his voluntary participation in the gang confrontation that led directly to the killing. Finally, during this same interview, he falsely stated that he had no subsequent law enforcement issues when he had been cited for, tried, and convicted of failing to stop for a school bus within the preceding year and a half. His attempted justification for this falsification, as alleged in SOR ¶ 2.c, was that the investigator did not ask him directly about this second incident. These facts establish substantial security concerns under AG ¶ 16(b).

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual

specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and,

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶ 17(a) is not supported by the evidence in this case. Applicant revealed the relevant facts concerning his criminal history only in response to specific confrontation, and even then his attempts to minimize his criminality were more damage control than any good-faith effort to honestly reveal what occurred. He could not even present a consistent version of events during his hearing, and his January 2007 disclosures about his criminal past were in themselves false and misleading.

Even if Applicant's factually impossible explanation (that his attorney told him he did not have to report a juvenile court conviction in response to a job application asking about prior felony convictions he was filling out for a job that he held for many months before he was unexpectedly arrested) were true, it would not provide mitigation under AG ¶ 17(b). That MC requires that improper legal advice contributing to the concealment have been rendered specifically concerning the security clearance process. Applicant denied having asked anyone for such guidance in completing his e-QIP, and offered no justification for falsifying the details of his involvement in the murder and the existence of his 2006 traffic conviction during his January 2007 interview.

Applicant's attempts to minimize and conceal his criminal history were both frequent and recent. Nothing in this record, including Applicant's various versions of events during hearing testimony, indicates that such deceptions would be unlikely to recur, or that they do not cast continuing doubt on his reliability, trustworthiness, and

good judgment. Accordingly, no mitigation was established under AG ¶¶ 17(c) or (d). His consistent and repetitive minimization of his culpability demonstrates his ongoing vulnerability to manipulation or duress by those who could threaten to reveal more damaging information about him and his past, precluding mitigation under AG ¶ 17(e).

The alleged falsifications are fully substantiated by this record, so AG ¶ 17(f) does not apply. Applicant's gang involvement was not alleged as the disqualifying personal conduct, and while those associations have largely ceased, according to him, the former association provides ongoing motivation for the falsifications that raise the personal conduct security concerns. Accordingly, ongoing doubts about his reliability, trustworthiness, judgment, and willingness to comply with rules and regulations preclude a finding of mitigation under AG ¶ 17(g).

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 established by the record evidence. 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. Applicant's conduct of security concern involved a juvenile court homicide conviction for an incident when he was 16 years old, as well as deliberate falsifications about that event and a subsequent serious traffic conviction in connection with the security clearance process. These falsifications occurred in April 2006 and January 2007, during processing of the present clearance request. His participation in each incident of security concern was both knowing and voluntary. His involvement in the homicide was more than 12 years ago when he was a juvenile, but his false descriptions of his criminal history were frequent, recent, and directly connected to the security clearance process. The manslaughter resulted from gang-related peer pressure that Applicant has avoided more recently, but his attempts

to minimize his criminal past demonstrate his ongoing vulnerability to exploitation or duress concerning those matters.

Applicant's motivation and actions to become a good parent and provider are commendable. His disassociation from former gang connections, renewal of extended family ties, and gainful employment are all good steps toward establishing responsibility. He did not, however, demonstrate either respect for or understanding of the need for integrity in the security process, so recurrence of untrustworthy behavior cannot be said to be unlikely.

Overall, the record evidence generates substantial doubts concerning Applicant's present eligibility and suitability for a security clearance. He has not met his burden to mitigate the security concerns arising from his criminal conduct and personal 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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

DAVID M. WHITE
Administrative Judge