



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



In the matter of:

ISCR Case No. 07-08588

Applicant for Security Clearance

Appearances

For Government: Candace Le'i, Esquire, Department Counsel
For Applicant: Lonzer Tynes, Sr., COL (Ret.) USAF,
Personal Representative

December 17, 2009

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's criminal conduct is mitigated by the passage of time and his change of lifestyle. During the last four years he has become a responsible father and good worker. His current behavior shows reliability, judgment, and trustworthiness. Eligibility for access to classified information is granted.

Statement of the Case

On January 2, 2007, Applicant submitted a security clearance application. On May 19, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as modified and

revised.¹ The SOR alleges security concerns under Guideline J (Criminal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and it recommended referral to an administrative judge to determine whether a clearance should be granted, denied or revoked.

On June 9, 2009, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. The case was assigned to me on July 28, 2009. DOHA issued a notice of hearing on August 6, 2009. The hearing was convened as scheduled on August 27, 2009. The government offered Government Exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified on his own behalf, presented one witness, and submitted Applicant Exhibits (AE) 1 and 2, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on September 3, 2009.

Findings of Fact

Applicant admitted all the SOR factual allegations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 24-year-old warehouse clerk II working for a defense contractor. He graduated from high school in 2003. He is engaged to be married to the mother of his three children, ages 4, 3, and 18 months.

In August 2004, at age 19, Applicant pawned a karaoke machine he knew was stolen. He was initially charged with Grand Larceny. He was found guilty of Petit Larceny, and sentenced, in part, to 180 days jail (suspended). In October 2004, Applicant was found guilty and fined for driving his girlfriend's car without a driver's license.

In February 2005, at age 19, Applicant and two of his friends strong-armed a convenience store clerk and stole beer and other merchandise. He was convicted of Petit Larceny and sentenced to 180 days jail (170 days suspended). He served 6 days in jail and paid a fine. In April 2005, Applicant was charged with illegal possession of approximately one ounce of marijuana. He claimed a friend gave him the marijuana to hold for a couple of days. A police officer found the marijuana during a search of Applicant's girlfriend's car and Applicant admitted it was his marijuana. The charge was dismissed pursuant to a first time offender diversion program. Applicant paid a fine, was

¹ On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) directed application of revised Adjudicative Guidelines in all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006.

placed on one-year probation, and was required to complete a drug counseling program.

Since April 2005, Applicant has changed his lifestyle. While on probation, he was required to stay away from the bad influence of his drug-using friends to avoid revocation of his probation. Since then, most of these friends have left the area and he no longer associates with drug users. In September 2008, Applicant was diagnosed with congestive heart failure and has been required to take medications. Because of his diagnosis, Applicant no longer uses illegal drugs or consumes alcoholic beverages.

Applicant became engaged to the mother of his three children in December 2008. He has become a responsible father to his children and a family man. Applicant attends church with his family and believes his participation in church activities keeps him grounded. He has been successfully working for a government contractor since March 2005. He is considered to be a good worker and has been promoted. Applicant believes he will be promoted to a supervisory position if he is granted access to classified information.

Applicant expressed sincere remorse for his past behavior. He promised that his questionable behavior will not happen again. He disclosed all of his questionable behavior on his security clearance application and in a sworn statement to a government investigator. I find he was candid and forthcoming at his hearing.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and

endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

Under Guideline J, the security concern is that 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 ¶ 30.

From August 2004 to April 2005, Applicant committed four offenses, three of which were serious. His behavior raises security concerns under AG ¶ 31(a) “a single serious crime or multiple lesser offenses,” and AG ¶ 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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.

After considering all the mitigating conditions, I find that AG ¶¶ 32 (a) and (d) apply. Applicant's last offense was in February 2005. He successfully completed all the terms of his probation and participated in drug counseling. There is no evidence to show Applicant has been involved in any further questionable behavior.

After February 2005, Applicant changed his lifestyle. He no longer associates with drug-using friends and avoids any bad influence from friends. Furthermore, Applicant no longer uses illegal drugs or consumes alcoholic beverages. Applicant became engaged to the mother of his three children in December 2008. He has become a responsible father and participates in church activities. He has been successful working for a government contractor since March 2005. He is considered to be a good worker and has been promoted. Applicant believes he will be promoted to a supervisory position if he is granted access to classified information.

Applicant expressed remorse for his past behavior. He promised that his questionable behavior will not happen again. He was candid and forthcoming throughout the security clearance process. I find Applicant has learned his lesson and is rehabilitated. The Guideline J security concern is mitigated.

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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a young man who has matured during the last four years. Since April 2005, Applicant has changed his lifestyle. He has been successful working for a defense contractor. He no longer associates with or is influenced by drug users. Furthermore, Applicant no longer uses illegal drugs or consumes alcoholic beverages. Applicant has become a responsible father, and participates in church activities with his family. He has been candid and forthcoming throughout the security clearance process. Applicant expressed remorse for his questionable behavior and is resolute about avoiding similar behavior. These factors show responsibility, good judgment, and reliability. On balance, I conclude that Applicant's favorable evidence is sufficient to mitigate the security concerns arising from his criminal 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: FOR APPLICANT

Subparagraphs 1.a-1.d: For Applicant

Conclusion

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 eligibility for a security clearance for Applicant. Eligibility for a security clearance is granted.

JUAN J. RIVERA
Administrative Judge