



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-13621
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel Crowley, Esquire, Department Counsel
For Applicant: Pro Se

July 10, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on July 9, 2007. On March 5, 2008, 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 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 April 18, 2008. He answered the SOR in writing and requested a hearing before an Administrative Judge. I received the case assignment on May 20, 2008. DOHA issued a notice of hearing on June 3, 2008, and I convened the hearing on June 20, 2008. The Government offered Exhibits (GE) 1-5, which were received without objection. Applicant testified in his own behalf and presented the testimony of one witness. He did not submit any exhibits. DOHA received

the transcript of the hearing (Tr) on June 30, 2008. Based upon a review of the case file, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated April 21, 2008, Applicant admitted the factual allegations in ¶¶ 1.a-1.b of the SOR. He also admitted the factual allegations in ¶¶ 2.a 2.b of the SOR. Applicant provided additional information to support his request for eligibility for a security clearance.

Applicant is a 22-year-old employee of a defense contractor. He graduated from high school in 2004. After high school, he was accepted into an apprenticeship program with a defense contractor in 2004. He has been employed with his current employer since October 2004 (Tr. 16).

Applicant is single. He has an infant daughter. He plans to wed the mother of his baby daughter. He expects to receive a raise very soon based on the high grades he received during his apprenticeship. He wants to succeed in the company and needs a security clearance to reach his goal.

On March 29, 2005, Applicant was arrested and charged with felony Possession of Burglary Tools, Tampering with Vehicle, and Trespassing. He pleaded guilty and was sentenced to 12 months incarceration with 11 months suspended. He served 15 days of weekend community service. The court fined him \$500 and sentenced him to six months of supervised probation.

Applicant acknowledged that he was hanging out with the wrong crowd at the time of the 2005 incident. He was spending time with some people from his neighborhood. He and another fellow were driving around looking for rims to take from cars. On this particular date, Applicant saw a police car and started to run away. Applicant had several car jacks in his automobile and the police charged him with possession of burglary tools. Applicant spent a night in jail. His mother had a bond posted and retrieved him the next day (GE 5).

In April 2005, Applicant was working in the shipyard. It was his last day and his supervisor was giving him a party. The supervisor ordered pizza for the party early that morning. The pizza was to be delivered around noon (Tr. 19). However, the pizza driver did not arrive until almost 12:25. By that time Applicant only had a few minutes to return to his duty station. Applicant took three pizzas from the delivery man. He was in a hurry to return to work and walked back to the gate and did not pay for the pizzas. He received a message from a detective after work about the stolen pizzas. Applicant called the store owner and told him that he was in a hurry and did not pay at the time of delivery. However, he explained that he would pay for them and asked the owner not to press charges. Applicant paid for the pizzas and he believed that everything was resolved (Tr. 21). Nonetheless, Applicant was found guilty of the charge, sentenced to a

six-month suspended sentence, fined, and required to complete 24 hours of community service (GE 4).

In April 2007, Applicant attended a party at a friend's house. He gave someone a ride home because the person had been drinking. Applicant noticed after he dropped him off that the fellow left a bottle in the car. Applicant did not notice the bottle. Applicant was shortly thereafter stopped for speeding. He was going 12 miles over the speed limit. He was given a ticket for speeding, open container, and obstructed view. Applicant had custom lettering on the back rear-view mirror of his car. Applicant explained that he asked the officer to give him a Breathalyzer test because he knew he had not been drinking. Applicant was found guilty of the open container charge and speeding. He was fined. He was also on probation for speeding tickets until February 2008. Applicant successfully completed his probation period (Tr. 24).

Applicant admitted that he was immature and acted in a stupid manner in the past. He has a good job and he understands that there was no reason for him to be involved in any activity that would jeopardize the job that he loves. He does not maintain any friendships with the fellows from the neighborhood. Applicant believes that now that he is a father and has the responsibility for his family that he would never engage in any behavior that would cause concern. He also acknowledged that he has little free time now that he is working and caring for his infant daughter (Tr. 32).

Applicant's teacher and mentor from the apprenticeship program at work highly recommends Applicant. He has known him since the beginning of the apprenticeship. Applicant has maintained high grades. His teacher rates Applicant as one of the top three in the program. Applicant's teacher has weekly contact with him. He trusts him and took time off from his schedule to testify for Applicant at the hearing. He also knows the security concerns that the Government has with respect to the incidents in Applicant's past and still highly recommends him. The witness has been with the company for 17 years and works with all the apprentices in this particular program (Tr. 40).

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

The security concern relating to the guideline for Criminal Conduct is set out in AG & 30, “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.”

The guideline notes several conditions that could raise security concerns. Under AG & 31(a), an Asingle serious crime or multiple lesser offenses@ may be potentially disqualifying. Similarly under AG & 31(c), Aallegation or admission of criminal conduct, regardless of whether the person was formally charged or convicted@ may raise security concerns. As noted above, Applicant was arrested and charged with a number of

incidents in 2005. He was convicted of possession of burglary tools, tampering with a vehicle, trespassing and larceny. These facts are sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where Aso 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 current reliability, trustworthiness, or good judgment.@ Applicant-s criminal conduct occurred in 2005. His citation for speeding and open container was in 2007. However, Applicant was very young and has not had any more incidents. The repeated incidents do create some doubt about Applicant's judgment. This potentially mitigating condition partially applies in this case.

Under AG & 30(d), it may be mitigating where Athere 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.” As noted above, Applicant has been employed in the apprenticeship program for more than three years. He has high grades and will complete the program this year. His teacher/mentor recommends Applicant for the clearance due to his work skill and attitude. He has no recorded disciplinary actions. He completed his community service and his probation. He is now a father and has a family to provide for. He does not maintain friendships with the people from his old neighborhood. He works and has little free time. I find this potentially mitigating condition applies in this case.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 cooperate with the security clearance process.

AG 16 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(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 untrustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulation, or other characteristics indicating that the person may not properly safeguard protected information;

In March 2005, Applicant was charged with Petit Larceny for stealing the pizzas from the delivery man at the shipyard. He did not wait to pay for the pizzas because he wanted to return to work. He was found guilty, was fined, sentenced to six-months suspended sentence and 24 hours of community service.

(d) credible adverse information that is not explicitly covered under any other guideline and many not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Applicant's speeding ticket in 2007 and driving with an open container relates to poor judgment and falls under 16(d).

The AG ¶ 16 continues:

(e) personal conduct, or concealment of information about one's conduct that creates a vulnerability to exploitation, manipulation or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

This disqualifying condition is a factor for consideration because Applicant was embarrassed about the incidents.

Paragraph 17 lists conditions that could mitigate security concerns. Specifically, AG ¶ 17 states:

(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 judgement.

(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" does apply.

AG 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress is a factor for consideration.

Applicant acknowledged that his behavior was stupid in the past. He was young and was hanging with the wrong crowd. He no longer associates with that group. He is careful not to speed and is aware of the risks associated with speeding. He completed his probation successfully. He works hard and is supporting his family. His employer recommends him. He related his convictions to the investigator and completed his security questionnaire truthfully listing the above referenced convictions and charges. He has mitigated any personal conduct concerns through his recent actions and behavior.

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 common sense 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 is a hard working young man. He has been apprenticed to his employer for more than three years. He has consistently received high grades. He is highly recommended for a clearance. He is a father and is providing for his family. He is a loyal employee. He is enthusiastic about his job. He is stable and concerned about his future. The incidents in 2005 and 2007 occurred when Applicant was immature and younger. He has no other incidents on his record.

Overall, the record evidence and whole person analysis leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his personal conduct and 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

Subparagraph 1.a-b: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a-c: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

NOREEN A. LYNCH
Administrative Judge