



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
.....) ISCR Case No. 07-14396
SSN:)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

April 24, 2009

Decision

CURRY, Marc E., Administrative Judge:

Applicant mitigated the government’s security concerns raised under Guideline J, Criminal Conduct. Clearance is granted.

On December 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct. 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 answered the SOR on December 27, 2008, admitted the allegation, and requested a hearing. The case was assigned to me on March 5, 2009. On March 16, 2009, DOHA issued a Notice of Hearing scheduling the case for April 8, 2009. The hearing was conducted as scheduled. I received three government exhibits and 17

Applicant exhibits. Also, I received the testimony of Applicant and five Applicant witnesses. The transcript was received on April 15, 2009.

Findings of Fact

Applicant is a 37-year-old single man with one daughter, age 19. He lives with his girlfriend, the mother of their daughter. He has a high school diploma. Currently, he performs electrical work for a defense contractor (Tr. 63).

Applicant is from a middle-class, two-parent home. He was a good student in high school. After graduating, he completed a three-year culinary school. By approximately 1992, he was working at an elite restaurant (Tr. 40, 59, 69).

Shortly thereafter, Applicant “got with the wrong crowd,” a group of friends from high school who were dealing drugs (*Id.*). He was 22 years old at the time. Upon noticing their flashy lifestyles, he concluded that drug dealing could provide an opportunity to make significant part-time income (Tr. 74).

Applicant, with his friends’ assistance, then began dealing marijuana. Later, he began dealing cocaine (Tr. 75). By approximately 1994, he was making up to \$1000 per week as part of a cocaine-dealing network, and supervised two people (Tr. 77).¹

In November 1995, federal authorities arrested Applicant, and charged him with conspiracy to distribute cocaine base, possession with intent to distribute cocaine base, and distribution of cocaine base. He did not make bond, and remained incarcerated until his trial in February 1996 (Tr. 82; Exhibit 3 at 1). At trial, he pleaded guilty to Count 1, and was sentenced to 14 years in prison (Answer). After cooperating with the government by disclosing the identities of other people involved in the drug dealing network, Applicant’s sentence was reduced to eight years (Tr. 84).

Applicant was released after serving six years of the sentence. He spent the first three years of the sentence residing with the general prison population (Tr. 91). Because he was a model prisoner, he spent the second half of his sentence residing in a prison camp (Tr. 92). While there, he spent each day performing custodial work outside of the prison in civilian buildings with minimal supervision (Tr. 92).

After Applicant’s release from prison in April 2002, the court placed him on five years of probation (Tr. 85). He was required to report to a probation officer monthly, submit to random urinalyses, get a job, and provide copies of pay stubs to the probation officer at each meeting (Tr. 87).

Applicant complied with his probation requirements as ordered, and it ended in 2007 (Tr. 85) Toward the end of probation, the probation officer told him that he no

¹Applicant referred to them as “runners” (Tr. 77).

longer needed to meet with him, and instructed him simply to report to the office monthly, and slide the pay stubs under his door (*Id.*).

Applicant was deeply remorseful about his decision to sell drugs. Shortly after his incarceration, he told his father that he had “let [him] down” (Tr. 39 - Father’s Testimony). He devoted his prison time to rehabilitation by reading extensively and taking business, real estate, and physical fitness courses. Also, he became a nationally certified personal fitness trainer (Tr. 88).

Applicant remained in close contact with his family throughout his incarceration. Specifically, his brother, a teen during Applicant’s arrest, testified that Applicant repeatedly advised him to make education his top priority, not to “follow the wrong path,” and to learn how to invest wisely (Tr. 25). Applicant’s brother subsequently finished college with a degree in mechanical engineering. He and his wife have designated Applicant to be the legal guardian of their child in the event of their deaths (Exhibit O).

Applicant and his girlfriend remained together during his incarceration. She and their daughter relocated to Applicant’s parent’s home after his incarceration. According to his girlfriend, he focused on their daughter during his incarceration to ensure that she “was going in the right direction” (Tr. 42). He remained closely involved with everyday activities, helping his daughter with homework by phone, and mailing her practice math questions, that she would complete, and return to him (Tr. 44, 101). Upon his release, Applicant continued to be highly involved in his daughter’s life, helping her with various extracurricular activities. Currently, his daughter is attending college, with a combination of financial assistance from her parents, grants, and student loans.

Shortly after Applicant was released from prison, his mother was stricken with breast cancer. For two years while she was incapacitated by chemotherapy treatments, he assisted in caring for her, cleaning the home, helping her up the stairs, and cooking for her, each day after work (Tr. 35). Her cancer has been in remission for approximately five years.

Applicant is active in breast cancer charities, participating in annual fundraisers and walkathons (Tr. 106). He periodically volunteers at a local church, delivering food to its food bank (Tr. 99).

Applicant has worked continuously since his incarceration. He has worked with his current employer for the past 18 months. During this time, he has earned multiple job-related certifications after successfully completing training in several areas including protecting classified information (Exhibits B, C), and information technology (Exhibit K). According to his supervisor, he is a good team player who is exceptionally self-motivated (Exhibits M-N).

Applicant spends his free time with his family. He no longer associates with the people with whom he dealt drugs in the early 1990s.

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 overarching 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."

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.

Analysis

Guideline J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness" (AG ¶ 30). Also, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations" (*Id.*).

Applicant's three-years of drug dealing in the early 1990s, his subsequent arrest, and conviction trigger the application of AG ¶ 31(a), "a single serious or multiple lesser offenses." Applicant served six years in prison where he was a model prisoner. He successfully fulfilled his probation requirements. He has not violated the law since going to prison 13 years ago. Since being released, he has continuously held employment, and is well-respected on the job. While in prison, he took several courses, and earned a fitness training certification. He has earned several certifications since working at his current job. He is active in his community participating in annual breast cancer awareness fundraisers, and occasionally volunteering at a local church's food bank.

AG ¶¶ 32(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, 32(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,” apply.

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.”

Applicant was not a low level drug dealer; he was part of a crime network with two people working underneath him. The severity of the prison sentence further reflects the seriousness of the crime.

Neither Applicant’s age nor social background mitigate the crime. He is from a solid, middle-class, two-parent home. When he began dealing drugs, he had already finished high school, completed a vocational school, and was maintaining a steady job. He made a calculated decision to augment his income through illegal means regardless of the moral and societal consequences.

Nevertheless, the presence of rehabilitation is extraordinary. Upon entering prison, he dedicated himself to self-improvement, taking whatever courses interested him and were available. Realizing the profound mistaken judgment he demonstrated in choosing to deal drugs, he mentored his younger brother not to make the same mistake. He maintained a close relationship with his daughter, who was approximately five years old when he first entered prison, and twelve when he was released. Her testimony regarding his influence on her life was particularly persuasive.

Currently, Applicant spends his time working, where he excels, socializing with his family, and volunteering, on occasion, in the community. He has not associated with any of the individuals involved in the criminal enterprise since he was arrested nearly 15 years ago.

The seriousness of the crime is outweighed by its remoteness, and the presence of rehabilitation, rendering the likelihood of recurrence minimal. Upon considering the

disqualifying and mitigating conditions together with the whole person concept, I conclude Applicant has mitigated the criminal conduct security concern. Clearance is granted.

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: 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.

MARC E. CURRY
Administrative Judge