



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 07-18352
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esq., Department Counsel
For Applicant: Alicia Z. Aguirre, Esq.

June 22, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under Guideline E (personal conduct), but failed to mitigate security concerns under Guideline J (criminal conduct). Clearance is denied.

Statement of the Case

On July 17, 2007, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On May 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on May 21, 2009. He answered the SOR on June 8, 2009, and DOHA received his answer on June 10, 2009. Department Counsel was prepared to proceed on July 31, 2009. The case was previously assigned to two other administrative judges on August 5, 2009 and September 18, 2009, respectively, before it was assigned to me on September 25, 2009. On October 20, 2009, DOHA issued a notice of hearing scheduling the case for November 17, 2009. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 10, which were received without objection. Applicant offered Applicant Exhibits (AE) A through F, which were received without objection, and he testified on his own behalf. Applicant also called seven witnesses to testify on his behalf. DOHA received the hearing transcript (Tr.) on November 24, 2009. The record closed on November 24, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 40-year-old engineer technician, who has worked for his defense contractor employer since July 2007. (GE 1, Tr. 31.) He seeks a security clearance, which is a requirement for his continued employment. (Tr. 81-82.)

Applicant was awarded his GED in 1988. He also attended a vocational welding program while he was in prison, but was paroled before he was awarded his welder's certificate, discussed *infra*. He participated in company-related training offered through his previous employer. He enrolled in an online network engineering college program "for about a year" in approximately 2007. (GE 1, Tr. 22, 25-26, 52, 82-83.)

Applicant married in October 1996 and has two children from his marriage – a 12-year-old daughter and an 8-year-old son. (GE 1, Tr. 23.) Before Applicant's wife became a stay-at-home mother, she was employed for ten years as a legal assistant in her state attorney general's office in the child and family protection division. (Tr. 36.)

Applicant has a significant criminal past marked by five arrests. In 1988, he was convicted of driving under the influence (DUI) and public intoxication and was sentenced to a \$1,200 fine and three years probation. A condition of his probation was to abstain from consuming alcohol. He was unable to pay the fine, which he satisfied by participating in a work furlough program. (SOR ¶ 1.a.) (Tr. 50-63.)

In December 1989, Applicant was arrested and charged with murder and accessory to a felony. Applicant, who had been drinking, was involved in an altercation with the former husband of his then girlfriend. Applicant and several friends brutally beat this individual and someone in the group stabbed him resulting in his death. The authorities were unable to determine who did the actual stabbing. Pursuant to Applicant's guilty plea in March 1990, he was convicted of involuntary manslaughter and

sentenced to four years in prison and a \$5,000 fine.¹ He was released from prison in 1992 after serving two years and two months, and placed on parole for four years. During cross-examination, Applicant admitted using marijuana and cocaine in 1989. He also admitted to using methamphetamine in 1995 before his last DUI arrest, discussed *infra*. (SOR ¶ 1.b.) (GE 4, GE 7, GE 10, Tr. 53-63.)

In 1992, after being released from prison and while on parole, Applicant was convicted of his second DUI. He was sentenced to probation. Applicant testified he took this arrest seriously because he “needed to clean up [his] act and stop drinking” because he did not want to go back to prison. He stopped drinking and driving “[a] couple of years” and attended Alcoholics Anonymous meetings “maybe six months to a year.” He began drinking again in 1993. (GE 9, Tr. 64-67.)

In 1993, Applicant was arrested for vehicle theft and receiving stolen property. Pursuant to his no contest plea, he was convicted of receiving stolen property and sentenced to 365 days in jail and probation. He testified that he subsequently learned after his friend was speeding and involved in an accident that he was driving a stolen car. Applicant served “about nine months” in jail and was told to “continue on [his] parole.” He added, “I did get a parole violation for that (receiving stolen property) also which I received a year of parole violation time which ran concurrent with [his] year in the county jail, so they ran concurrent.” He admitted to being intoxicated at the time he was arrested. (SOR ¶ 1.d.) (GE 5, Tr. 67-70.)

In 1995, Applicant was arrested for evading a police officer, resisting arrest, DUI, and driving on a suspended license. Applicant testified that he had been driving on a

¹ The following comments of the sentencing judge are provided:

Well, one thing that this case involves, and it's obvious from the recitation of the facts in the report, is that this was a brutal attack on a person who certainly was not without fault, but certainly that any fault to which he may have, that did not invite the brutal beating he got and his subsequent death. And certainly [Applicant], was an integral part of the vicious assault and the brutal beating because, of course, he was to be the original combatant and when he, as he indicates in his statement, determined that others started getting involved, he didn't back off, as he should have. He struck the victim five or six times while the victim was down, and the victim really wasn't down until everybody got involved. And that certainly is inexcusable.

And the most significant aspect of this entire matter is not as far as aggravating circumstances because I cannot under the law aggravate for the corpus of the crime, but [victim's] dead. And [Applicant] who contributed to his death is here. And certainly the facts indicate the scenario to which the plea was made, in other words, the crime to which the plea was made and I have no quarrel with that, but, [Applicant], if you had learned some lessons from court proceedings previously, and if you had obeyed the terms of probation, which were imposed by the courts previously, specifically not to use alcohol, then it's unlikely you have been partying at this place in the first place and you would not have been drinking and your good senses wouldn't have been impaired and very likely and hopefully you wouldn't have done or helped instigate this. So you are a person very responsible for the death of [victim]. There's no two ways about it. (GE 10 (pgs. 145-146)).

suspended license since 1992. Also at the time of this DUI arrest, he had used methamphetamine, discussed *supra*. Applicant was still on parole at the time he was arrested for DUI. Also, at the time of this arrest, the police found marijuana and a handgun in the car. Applicant testified that the handgun belonged to his friend and the marijuana belonged to him. Pursuant to his plea, he was convicted of evading a police officer and DUI. He was sentenced to 365 days in jail and four years probation. He completed his four-year probation sentence in 2000. (SOR ¶ 1.e.) (GE 6 (p. 59), Tr. 70-76.)

After serving his jail sentence, Applicant moved to another state to change his environment. He initially found a job landscaping and later found a job with a cardboard manufacturer where he worked from July 1996 to March 2007, approximately 11 years. During his tenure with this employer, he started as a bail room operator, received several promotions, and was a corrugator supervisor at the time he was fired for unsatisfactory performance. Applicant explained the reason he was fired, “was a conversation me and my superintendent had one day where we had a sort of conflict of interest where I was in charge of [the corrugator] department and this machine and producing --” Applicant’s superintendent informed him his department was not producing enough to which Applicant replied that “we need to get some things fixed in order to produce more.” Applicant’s stated his company failed to provide the necessary equipment needed to produce more. He challenged his termination unsuccessfully. (SOR ¶ 2.a.) (GE 1, Tr. 24-31.)

After moving to a new state in 1996, Applicant’s children were born, he began attending church, he and his wife had their marriage blessed in their church, he bought a home, and has focused on “being a positive role model for [his] children.” Since he was released from jail in 1996, he was only stopped once for speeding. He testified that he drinks responsibly and has not used any drugs since 1995. (Tr. 76-80).

In addition to Applicant’s testimony, he called seven witnesses to testify on his behalf – a deputy sheriff and seven-year neighbor, an attorney in private practice and former assistant attorney general and ten-year friend, two work-related supervisors, his wife, and two minor children. The witnesses established that Applicant has made a significant turnaround in life since his most recent release from jail in 1996. They further established that Applicant is a responsible and productive member of the community, an excellent worker, and a model husband and father. Applicant’s two minor children referred to him in very supportive terms and their affection for him was very sincere. (Tr. 85-144.)

Applicant submitted five exhibits – two work-related awards; a work-related screening clearing him for arms, ammunition, and explosives; a letter from Applicant, and two work-related reference letters. (AE A – AE E.) The latter three exhibits were previously submitted in his Response to SOR. The collective sense of these documents reflects that Applicant is well regarded by his employer.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 commonsense 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." 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 for 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 (DCs). The DC asserted by the Government was, “(a) a single serious crime or multiple lesser offenses.” (Tr. 149-150.)

AG ¶ 32 provides conditions that could mitigate security concerns (MCs). Applicant's turnaround following his fifth arrest and third incarceration 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 criminal past was not an isolated incident event nor did it consist of a few minor skirmishes with the law. It spanned a seven-year period with the most serious offense occurring in 1989 with his conviction for involuntary manslaughter. As the trial judge noted before sentencing Applicant to prison, had he obeyed the terms of his 1988 probation not to drink alcohol, his senses would not have been impaired and he would not “very likely and hopefully” been involved with an incident that resulted in the senseless death of another individual. After being released from prison for this offense, he had three subsequent arrests, two of which involved alcohol. His last four arrests involved a parole or probation violation.

Applicant's recent good employment record, job training, and period of abstinence from criminal activity are evidence that support successful rehabilitation. Given the serious and repetitive nature of his former criminal activity, I cannot conclude such behavior is unlikely to recur, and no longer casts doubt on his reliability, trustworthiness and judgment. In conclusion, I cannot with confidence state that I have “no doubt” about granting Applicant access to classified information given his track record.

Guideline E (Personal Conduct)

Under Adjudicative Guideline ¶ 15, the Government's concern is:

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.

AG ¶ 16 sets out seven personal conduct-related conditions that could raise security concerns and may be disqualifying in this case. One of those conditions is potentially applicable:

(d) credible adverse information that is not explicitly covered under any other guideline and may 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. This includes but is not limited to consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent, or other inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violations;
- (4) evidence of significant misuse of Government or other employer's time or resources.

The Government established, through Applicant's admissions and evidence presented, that he was terminated from his employment in March 2007 for unsatisfactory performance. The foregoing warrants application of AG ¶ 16(d).

Potential mitigating conditions listed under AG ¶ 17 are:

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

Applicant worked for his previous employer approximately 11 years before being terminated in March 2007. His 11-year tenure with this employer was marked by several promotions. Shortly after being terminated, he began working for his current employer in July 2007. His current employment record is superb, and the behavior is not repetitive. He was unemployed for a relatively short period of time between jobs. The facts taken as a whole warrant full application of AG ¶¶ 16(c) and 16(e).

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 involves five arrests spanning a seven-year period and three periods of incarceration. The most serious arrest resulted in his conviction for involuntary manslaughter for the needless and senseless death of his former girlfriend's ex-husband.

Applicant's motivation and actions to become a good parent and provider are commendable. His disassociation from criminal activity and gainful employment are all significant and noteworthy steps toward establishing rehabilitation and responsibility. Applicant's turnaround is noteworthy and for that he should be commended.

However, on balance, 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.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"² and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

² See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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
Subparagraphs 1.a. – 1.e.:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge