



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



In the matter of:)
)
-----) ISCR Case No. 08-03938
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: D. Christopher Russell, Esquire

June 10, 2010

Decision

CURRY, Marc E., Administrative Judge:

From 1982 through 1992, Applicant committed multiple serious crimes including, among other things, burglary, and possession of marijuana. Since his release from prison in 1997, he has been a model citizen, excelling on the job, raising his family, earning a college degree, and volunteering in the community. Applicant has mitigated the Criminal Conduct security concern. Clearance is granted.

Statement of the Case

On April 30, 2009, 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on June 18, 2009, admitting all of the allegations, and requesting a hearing. The case was assigned to another administrative judge, who scheduled it for December 9, 2009. Because of unexpected circumstances, the case was continued, then reassigned to me on December 15, 2010. On January 13, 2010, a notice of hearing was issued rescheduling the case for February 3, 2010. The hearing was conducted as rescheduled. I received five Government exhibits, 18 Applicant exhibits, and the testimony of Applicant and two supporting witnesses. The transcript (Tr.) was received on February 16, 2010.

Findings of Fact

Applicant is a 46-year-old married man with two children, ages five and 14. He has been married since 1998. He and his wife had their first child before they got married.

Applicant had a rough childhood. (Tr. 76) He did not know his father until later in life, and he was an eighth-grade dropout. (Tr. 49, 78) Although Applicant eventually earned a GED, he gravitated toward crime as he reached his late teens.

In 1982, Applicant stole a checkbook from a neighbor and forged a check. Subsequently, he was arrested and charged with forgery. He pleaded guilty, and was ordered to pay restitution, sentenced to three years of probation, and ordered to pay court costs. (Answer)

In 1983, Applicant broke into a used car lot, stole the company's safe, and attempted to break it open. He was arrested, charged with uttering, breaking and entering, safecracking, and burglary. (Answer) He was convicted and sentenced to six to 25 years incarceration. (GE 5 at 14; Tr. 83) He was released after serving two and a half years.

In 1985, the Department of the Army conducted an investigation into allegations that Applicant was selling marijuana to soldiers at a video arcade off base. (GE 1; Tr. 86) As part of the investigation, Applicant sold some marijuana to an undercover military police investigator. (Tr. 86) At the conclusion of the investigation, the Department of the Army referred the case to the local authorities. (GE 1 at 3) There is no record of whether Applicant was charged criminally.

In 1986, Applicant got into a scuffle with an individual after an evening house party. (Tr. 88) The scuffle spilled out of the home and into the street, ending when Applicant was pushed through the door of a neighborhood church. (Tr. 88) Applicant was arrested and charged with criminal trespass and aggravated criminal damage. (Tr. 89) The disposition of this case is unknown from the record.

In October 1986, the police apprehended Applicant while he was attempting to break into a store. (GE 5 at 10) He was arrested and charged with burglary. (Tr. 93) He was convicted and sentenced to 12 months of intensive probation. (Tr. 93) Under the

terms of probation, Applicant was prohibited from going anywhere other than work and home. Applicant violated the terms of the probation, and failed to appear at a status hearing. The court then ordered him to serve the remainder of the term in jail. (Tr. 97, 111)

While in jail, Applicant was charged with promoting prison contraband, a felony.¹ (Tr. 95) He was found guilty and sentenced to serve one additional year in prison. (GE 4 at 3; GE 5 at 20; Tr. 95)

In December 1991, Applicant sold 39 grams of marijuana to an undercover military police investigator. (AE 2 at 2) Approximately two weeks later, he called the investigator and asked if he wanted to purchase some more marijuana. They then met, and Applicant sold him 59 grams of marijuana. (*Id.* at 6) After scientific tests confirmed that the substance Applicant sold the agent was marijuana, the Department of the Army closed the case and referred it to the local police department. (*Id.* at 8)

In April 1992, the police, based upon a tip from an informant that Applicant was “hauling marijuana,” stopped him and asked to search his car. (Tr. 98) He refused, and they brought in a drug sniffing dog that “hit on the smell of marijuana.” (Tr. 99) After a brief struggle with Applicant, the police then searched the car and discovered a quarter ounce of marijuana and some rolling papers. (GE 5 at 9; Tr. 99) Applicant was then arrested and charged with sale of marijuana, possession of marijuana, resisting arrest, aggravated assault of a police officer, and possession of drug paraphernalia.

While these charges were pending, Applicant was charged with wrongful distribution/possession of marijuana related to his selling marijuana to an undercover military investigator in December 1991. (Tr. 101) The court consolidated both cases. (GE 5 at 27)

In September 1992, Applicant was convicted of the sale of marijuana and aggravated assault of a police officer. The court dismissed the other charges. Applicant was released from custody pending sentencing.

Applicant fled the state before the sentencing hearing. (Tr. 102) In 1995, he was extradited to the state where he committed the crimes. The court then sentenced him to 3.75 years incarceration. Ultimately, he served 11 months, from September 1996 to August 1997, in a minimum security drug rehabilitation complex. (AE 3 at 29).

After serving his sentence, Applicant took a job as a hotel proprietor. Late one night, a woman came to the hotel and asked to reserve a room under someone else’s name. (Tr. 70) Applicant refused, and the woman left. Approximately 30 minutes later, the police arrived and told Applicant that the woman had accused him of groping her. Applicant denied the allegation, but was later charged with sexual abuse. (Tr. 72) The

¹ Under the prison regulations where Applicant was incarcerated, inmates were not allowed to have rolls of quarters in excess of \$10. Applicant was caught with rolls of quarters totaling \$100. (Tr. 112)

accuser then moved without providing the prosecutor any forwarding information, prompting him to file a motion for dismissal. (GE 5 at 29) The court granted the motion and dismissed the case. I find Applicant did not commit the crime, as charged.

Applicant has not used any illegal drugs, nor engaged in any other criminal behavior since 1995. (GE 5 at 10) Also, he has “eliminated everybody from [his] past from [his] life.” (Tr. 79)

Applicant earned an associate’s degree in applied science in 2004. (AE Q) One of his professors characterized him as a “motivated, intelligent, hardworking individual; in short, a model student.” (AE C) Applicant earned a bachelor’s of science degree in applied science in 2008. (AE N) His grade point average was a 3.3. (AE P)

Applicant has worked in the information technology field since 2004. In 2006, Applicant began working for a defense contractor as a network administrator on a military base. He is responsible for equipment, network switches, and routers for more than 300 buildings and 700 customers. (AE E) According to his supervisor, he has high morals, and performs all of his duties at or above average. (AE C) He has held an interim security clearance for more than three and a half years.

According to another senior-level administrator, Applicant constantly “strives to better his education.” (AE D) Since 2003, he has earned 22 network administration certifications. (AE O)

One of Applicant’s college professors testified. (Tr. 26) He taught Applicant two routing classes and one ethics class. (Tr. 26) He became increasingly interested in Applicant’s career path after Applicant shared his troubled past with him. Applicant obtained the job on the military base, in part, from following the advice of this professor. (Tr. 32) Having observed Applicant’s academic and professional growth, and evaluated him in his ethics class, the professor considers Applicant to be a trustworthy individual who “deserves a second chance.” (Tr. 35)

Applicant is active in the community. He volunteers for a program in which neighbors clean up debris and trash from local highways. (AE K) As the lead volunteer, he is responsible for distributing orange vests and trash bags to the other volunteers. (*Id.*)

Policies

In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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. 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 for obtaining a favorable security decision.

Analysis

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 ten-year history of criminal behavior including drug dealing and burglary, triggers the application of AG ¶ 31(a), “a single serious or multiple lesser offenses.”

Applicant has not committed a crime in nearly 15 years. Since then, he has completed court-ordered drug rehabilitation, gotten married, and graduated from college with honors. In the process of developing a career as a network analyst, he has obtained multiple training certifications. He has held an interim security clearance for the past three and a half years, without incident, while working on a military base. Also, he is a civic-minded individual who volunteers in his community. AG ¶¶ 32(a), “so much time has elapsed since the criminal behavior happened . . . 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) 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.

For ten years between 1982 and 1992, Applicant violated the law with impunity. I was particularly troubled by his drug dealing on a military base, and his fleeing the state after a 1992 conviction.

Applicant has not committed a crime in more than 15 years. Since then, he has been a model citizen, working hard to advance his career, educating himself, raising his family, and volunteering in the community. Consequently, the serious and repetitive nature of his criminal conduct is outweighed by the presence of rehabilitation, the remoteness of the conduct, and his demonstrated maturity. I conclude that the possibility of recurrence is minimal, and that Applicant has mitigated the security concern. In reaching this conclusion, I found the testimony of his ethics professor to be particularly persuasive.

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.i:	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