



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 08-11927 |
| |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Stephanie C. Hess, Esquire, Department Counsel
For Applicant: *Pro se*

October 29, 2010

Decision

HEINY, Claude R., Administrative Judge:

When in high school, Applicant was charged with battery and was convicted the summer after graduation from high school. Also during the summer after high school graduation, he was charged with terroristic threatening for telephone calls to his girlfriend, which was *nolle prosequi*. In 2007, he drove a car while intoxicated. Two unpaid medical bills, which total \$700, are listed in his credit report. Applicant has rebutted or mitigated the security concerns under criminal conduct and financial considerations. Clearance is granted.

Statement of the Case

Applicant contests the Defense Department's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a

¹ Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security*

Statement of Reasons (SOR) on February 17, 2010, detailing security concerns under criminal conduct and financial considerations.

On April 5, 2010, Applicant answered the SOR and requested a hearing. On July 13, 2010, I was assigned the case. On July 30, 2010, DOHA issued a Notice of Hearing for the hearing held on August 19, 2010.

The Government offered Exhibits (Ex.) 1 through 8, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through D, which were admitted into evidence without objection. The record was held open to allow additional information from Applicant. On September 9, 2010, additional material was submitted. Department Counsel had no objection to the material, which was admitted into the record as Exs. E and F. On August 27 2010, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he denied the factual allegations in SOR ¶¶ 2.b and 2.c. He admitted the factual allegations, with explanations, for the remaining SOR allegations. I incorporate Applicant's admissions to the SOR allegations herein. After a thorough review of the record, pleadings, exhibits, and testimony, I make the following additional findings of fact:

Applicant is a 25-year-old material-control assistant, working in production planning and material control, who has worked for a defense contractor since June 2008, and is seeking to obtain a security clearance. Applicant's department chief says Applicant is self motivated, needs very little supervision, and is a valuable team member. (Ex. F) Applicant's production manager states Applicant has done an outstanding job, is honest, and driven by a "strong desire to achieve in his career and community involvement." (Ex. E) Honesty and integrity are Applicant's strongest attributes. (Ex. E) Applicant's production scheduler states Applicant has high character and integrity, is a valued team member, and has a positive attitude and work ethic. (Ex. E)

Applicant's performance assessments indicate Applicant is a major contributor, a quick learner, has a good attitude, and never complains. The assessments also indicate Applicant works hard and has exceeded expectations. (Ex. F)

In August 2003, at the beginning of Applicant's senior year, he stopped at a convenience store on his way to school. Applicant was 17 years old. (Ex. 4) Two friends were with him when another individual, who had previously been a childhood friend, began yelling at him. An argument ensued. The other individual had earlier shown Applicant a pistol, which Applicant believed that person carried in his car. The other individual had earlier threatened to shoot Applicant. (Ex. 4, page 10 of 24) The yelling

Clearance Review Program (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

escalated to punching and kicking. During the fight, the other individual's ankle was broken.

Applicant was arrested and charged with battery in the second degree, a felony. In August 2004, he was sentenced to five years probation and ordered to perform 400 hours of community service. In August 2009, Applicant's probation ended. (Ex. 2) Applicant was ordered to pay \$11,854 restitution. In May 2006, Applicant started making payments on this debt. In August 2009, the debt was satisfied. (Ex. A, Tr. 34) The community service was performed at local parks following Hurricane Katrina, at the American Red Cross, and at the Salvation Army. (Tr. 64)

Since the incident, Applicant has talked to the other individual a few times. Their relationship is civil, they talk, and have shaken hands, but their relationship will never be that of friends. (Tr. 71) Applicant has been informed his felony conviction could be expunged. Applicant has not been able to afford hiring an attorney to initiate the expungement. (Tr. 49)

Six years ago, in July 2004, Applicant got into a fight with his girlfriend. He had dated her since he was age 14. (Tr. 28) Applicant—then age 18—discovered another man's telephone number on his girlfriend's cell phone. (Ex. 5, page 3 of 6) Applicant was upset, called his girlfriend's home phone early in the morning, and left some threats on the answering machine. The following day, the two made up. (Ex. 2) In August 2004, Applicant was arrested for terroristic threatening, a felony. His girlfriend came with him to his court appearances for moral support. (Ex. 2, Tr. 16) When Applicant pleaded guilty to the 2004 battery charge, the terroristic threatening charge was *nolle prosequi*. (Ex. 5) Applicant and the woman have two children and are still together. (Tr. 30) His first son was born in March 2006 and his second son in 2009. (Tr. 40)

In September 2007, Applicant was arrested and charged with driving while intoxicated (DWI). He and two of his friends were visiting his parents. He had a few beers while watching TV. He was the driver when he and his friends left to go to a party. He was stopped by police for not having his lights on. (Tr. 36) A breath test revealed .080% blood alcohol content (BAC), which was the legal limit for DWI. After pleading guilty, he was fined \$1,000, required to pay \$305 court costs, and his driver's license was restricted for four months. (Ex. 2, 6) Applicant was on probation when arrested for DWI. A condition of probation was to abstain from alcohol consumption. (Tr. 37) He informed his probation officer of the incident. (Tr. 47)

Applicant's January 2010 credit bureau report (CBR) lists two unpaid medical bills in the amounts of \$167 (SOR ¶ 2.b) and \$543 (SOR ¶ 2.c). (Ex. 8) The CBR gives very limited information about the debts and does not provide the creditor's name. Applicant denies owing these debts. He has not seen a doctor, received medical treatment, or gone to an emergency room. (Tr. 38) He never saw the bills and believes he does not owe the money. (Tr. 17) Applicant had health insurance from his employer. (Tr. 17) However, Applicant's young sons, ages one and four, have had medical

treatment. He will continue to investigate these two medical accounts in an attempt to locate the creditor. (Tr. 73)

In May 2004, Applicant was his high school class valedictorian. (Tr. 33) He received an academic scholarship for college. (Tr. 34) In May 2008, he graduated *cum laude* with a Bachelor of Science degree in industrial technology. (Ex. C) Beginning in the spring of 2009, he returned to university and received his Master's degree in May 2010. (Ex. D, E)

Applicant asserts he has learned from his mistakes and is moving forward. (Tr. 27) From the incidents, he learned he has to control his anger and that one should avoid bad situations when possible. (Tr. 35) He has since matured. He takes responsibility for his actions. (Tr. 44) Applicant now lives a straightforward life and sees no possibility of criminal conduct recurring. (Tr. 55) He is remorseful about his conduct.

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 must 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. 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.

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 to obtain 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 of 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

Criminal Conduct

Under the Criminal Conduct Guideline, the security eligibility of an applicant is placed into question when an applicant is shown to have a history or pattern of criminal activity which creates doubt about his 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:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was guilty of battery and DWI. An additional felony charge of terroristic threatening was *nolle prosequi* when he pleaded guilty to the battery charge. These events involve serious criminal conduct. The disqualifying conditions listed in AG ¶ 31(a) and (c) apply.

AG ¶ 32 provides conditions that could mitigate security concerns:

- (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; and,

The conduct was serious. However, it has been more than seven years since the battery and six years since the threats. The DWI occurred more recently, having occurred three years ago, but there is no indication that alcohol use is a continuing problem. As a 17-year-old, he should have avoided the fight at the convenience store. He should not have called his girlfriend and left threats on her answering machine. These are acts of immaturity.

This conduct did occur under circumstances that are not likely to repeat themselves. Additionally, the battery occurred when Applicant was in high school and the threat occurred two months after graduating from high school. Actions of a high school student or those of a recent high school graduate are not likely to be the same as the conduct of an individual seven years older. He is now 25, is more mature, and is unlikely to become involved in such conduct in the future. Applicant is no longer that 18 year old he was when he called his girlfriend in 2004. He and his girlfriend currently live together, have two children, and are not experiencing problems.

His DWI did not occur under unusual circumstances. He had been drinking with friends when stopped for failing to have his lights on. His BAC was .08 percent. This conduct is more recent, having occurred three years ago, but alcohol-related misconduct is infrequent in Applicant's life. The mitigating conditions in AG ¶ 32 (a) partially apply.

There is evidence of successful rehabilitation. This includes the passage of time without recurrence of criminal activity. The last criminal activity occurred more than three years ago. Applicant has expressed remorse about his conduct. He has paid the court-ordered restitution. He has learned from his mistakes, learned to control his anger, and is moving forward. He is more mature and takes responsibility for his actions. It is unlikely the criminal conduct would recur. Applicant has acknowledged his guilt, acknowledged his behavior was inappropriate, and taken positive steps to eliminate the inappropriate behavior from recurring.

Since the battery, Applicant was his high school class valedictorian. In May 2008, he received a Bachelor of Science degree in industrial technology, graduating *cum laude*. In May 2010, he obtained his master's degree. He obtained his current job just after finishing his undergraduate degree. Applicant's supervisors describe Applicant's duty performance in glowing terms. His duty performance is outstanding. The mitigating conditions in AG ¶ 32 (d) apply.

Guideline F, Financial Considerations

Adjudicative Guideline (AG) ¶ 18 articulates the security concerns relating to financial problems:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

An individual who is financially irresponsible may also be irresponsible, unconcerned, negligent, or careless in properly handling and safeguarding classified information. Behaving responsibly or irresponsibly in one aspect of life provides an indication of how a person may behave in other aspects of life.

A person's relationship with his creditors is a private matter until evidence is uncovered demonstrating an inability or unwillingness to repay debts as agreed. Absent substantial evidence of extenuating or mitigating circumstances, an applicant with a history of serious or recurring financial difficulties is in a position of risk that is inconsistent with holding a security clearance. An applicant is not required to be debt free, but is required to manage his finances to meet his financial obligations.

Applicant had an \$11,854 restitution debt, which he satisfied in August 2009. His CBR lists two additional unpaid accounts that together total approximately \$700. Disqualifying Conditions AG ¶ 19(a), "inability or unwillingness to satisfy debts" and AG ¶ 19(c), "a history of not meeting financial obligations," apply.

The following mitigating conditions AG ¶ 20 are potentially applicable:

(a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control; and

(d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

The court-ordered restitution related to the fight has been paid. The fight occurred six years ago, when Applicant was 17 years old. Applicant is remorseful about his conduct, is more mature, and has learned to control his anger. It is unlikely he will again incur financial problems resulting from a fight. The mitigating conditions listed in AG ¶ 20(a) apply.

Applicant paid the restitution and does not recognize the other two bills. These two bills are the only adverse, derogatory financial information listed in his CBR. He does not appear to have financial problems. He is living within his means and paying his debts as agreed. The mitigating conditions listed in AG ¶ 20(c) apply.

Of the three debts, Applicant has paid the largest. He knows the remaining two debts were not for his medical care, but is investigating the debts, which may be for his sons' care. His employer's medical insurance should have paid any medical bills. Based on an assessment of Applicant, on his educational achievements, and work performance, I find it is likely he will pay the two medical bills, if they are his debts. The mitigating conditions listed in AG ¶ 20(d) apply.

Even without proof of payment, these two debts total less than \$700 and are sufficiently small so as not to raise security concerns about his current reliability, trustworthiness, or good judgment.

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.

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. The first two criminal acts were those of a high school student or occurred the summer after high school graduation. The DWI is more recent having occurred three years ago. Applicant performed well in high school, undergraduate school, and in graduate school. His work performance has also been outstanding. I believe Applicant when he expressed remorse for his actions and stated such behavior would not recur.

The two remaining unpaid debts were not the type that indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Money was not

spent frivolously. The remaining debts were not incurred on luxuries, but are listed as medical treatment. Of course, the issue is not simply whether all his debts are paid—it is whether his financial circumstances raise concerns about his fitness to hold a security clearance. (See AG ¶ 2(a)(1).) These two remaining debts, which total \$700, do not raise a security concern. There is no other adverse financial information about Applicant.

Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. Overall, the record evidence leaves me without questions or doubts about Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his criminal conduct and financial considerations.

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, Criminal Conduct: FOR APPLICANT

 Subparagraphs 1.a—1.c: For Applicant

Paragraph 2, Financial Considerations: FOR APPLICANT

 Subparagraphs 2.a—2.c: 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.

CLAUDE R. HEINY II
Administrative Judge