



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 09-01673
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

November 9, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline J (criminal conduct). Clearance is denied.

Statement of the Case

On June 30, 2008, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On January 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline J. 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 March 5, 2010, and DOHA received his answer on March 12, 2010. Department Counsel was prepared to proceed on May 21, 2010.

The case was assigned to me on May 28, 2010. On June 2, 2010, DOHA issued a notice of hearing scheduling the case for June 22, 2010. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 5, which were received without objection. The Applicant did not offer any exhibits, but did testify on his own behalf. Applicant also called one witness, his father and work supervisor, to testify on his behalf. DOHA received the hearing transcript (Tr.) on July 7, 2010.

Findings of Fact

Applicant admitted the allegations in SOR ¶ 1.a., and denied the allegations in SOR ¶¶ 1.b. and 1.c. 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 21-year-old general maintenance worker, who has worked for a defense contractor since October 2007. (GE 1, Tr. 15-17.) He seeks a security clearance. It is unclear whether Applicant requires a security clearance as a condition of his continued employment. (Tr. 58-59.)

Applicant graduated from high school in May 2007. He has not pursued any further education beyond high school, but hopes to pursue “art school, something like that.” (GE 1, Tr. 17-18.) Applicant has never married and has no dependents. (GE 1, Tr. 18.)

Criminal Conduct

Between January 2008 and March 2009, Applicant was arrested three times. On New Year’s Day in January 2008, while accompanied by two friends, he was arrested for misdemeanor theft. He was detained by store security as he attempted to leave a department store wearing a coat that he had not paid for. He pled guilty to the charge and was sentenced to a \$375 fine and six months in jail suspended, to be served if he failed to pay the fine. His explanation for his conduct was, “I was just being young and stupid and for some reason thought to steal. It was a bad idea and I will never do it again.” (SOR ¶ 1.a., Response to SOR, GE 2, Tr. 19-23.)

In August 2008, Applicant was charged with two third-degree felony counts of threat/use of a dangerous weapon in fight. Applicant was with several friends and stated they were “mak[ing] a little video about zombies taking over the world . . . [j]ust screwing around.” Applicant and his friends then drove to a park and pointed a toy gun at people and “screamed and sung weird songs from Lady Gaga and stuff like that.” While at the park, Applicant and his friends were confronted by a police officer and ceased their behavior. However, Applicant was later summoned to the police station after a mother, who was at the park, filed a complaint that she “feared for her life” believing Applicant was going to shoot her and her nine-year-old son. In October 2008, Applicant pled guilty to two misdemeanor charges of brandishing a weapon. On November 25, 2008, he was

sentenced to a \$1,000 fine, 365 days in jail suspended for 365 days, 120 hours of community service, and 24 months probation. (SOR ¶ 1.b., Response to SOR, GE 2, GE 4, Tr. 23-32, 52-53.)

In March 2009, Applicant was charged with intoxication and disorderly conduct. He consumed a large amount of alcohol with his girlfriend and another friend at his apartment. His girlfriend and friend became concerned when he passed out and called the police. When the police arrived, they found him unresponsive and in an unconscious state. When they attempted to wake him, he spoke of committing suicide and became combative and uncooperative and the police found it necessary restrain him. The paramedics transported him to the hospital where he received medical treatment. Shortly after this arrest, Applicant was ordered to appear in court. He missed his first court date and a warrant was issued for his arrest. At some point after his intoxication arrest, he was cited for a traffic violation and a second warrant was issued for his arrest for failure to pay his traffic fine. In May 2010, Applicant was stopped for another traffic offense and the police discovered two outstanding arrest warrants. In May or June 2010, Applicant went to court for all pending charges. He pled guilty to underage drinking and the other charges were dropped. He was fined \$375 and ordered to undergo a mental health evaluation. As of his hearing date, Applicant's mental health evaluation was pending. (SOR ¶ 1.c., Response to SOR, GE 5, Tr. 35-51, 53-54, 56.)

Applicant was 18 years old when he committed the first offense and 19 years old when he committed the second and third offenses. He testified he should receive a security clearance "because all those things . . . were kind of mistakes that I did that I don't ever intend on doing again. And I'm trustworthy, despite the fact that I did some really stupid things. And I'm working as hard as I can to try to get everything in order." (Tr. 51-52.) Applicant is living with his parents until he gets his life in order. (Tr. 55.)

Character Evidence

Applicant's father testified on his behalf. He is the site manager of Applicant's place of employment and his direct supervisor. After Applicant turned 18, he "went hog-wild for awhile." He stated, "[h]e's not a bad kid," adding that his son did not do anything out of malice and the things he did were "really stupid stuff." Applicant currently lives with his parents. His father testified that he and his wife are aware of Applicant's problems and are doing everything they can to help him get through his current difficulties. (Tr. 57-68.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG 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

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 list three potentially disqualifying conditions that could raise a security concern and may be disqualifying:

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

The Government established through, Applicant's admissions and evidence presented, that AGs ¶¶ 31(a), 30(c), and 31(d) apply. Additionally, and not alleged, two arrest warrants were issued against Applicant following his third arrest.

AG ¶ 32 provides four conditions that could potentially 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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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.

None of the mitigating conditions apply. Applicant's three skirmishes with the law all occurred between the ages of 18 and 19. It is clear from observing and listening to Applicant that his youth and immaturity were factors that led to him committing these offenses. Nonetheless, I cannot ignore the cumulative gravity of his conduct when considered as a whole. What perhaps started out as pranks later evolved into events with serious consequences.

At 18, Applicant was convicted of attempted shoplifting of a coat. At 19, he was convicted of two separate offenses of brandishing a weapon and intoxication. Even though the weapon was a toy gun, a mother and her young child were terrorized by the event, believing the gun to be real. After his third arrest, he found himself facing two separate arrest warrants. He remains on probation. His willingness to comply with laws, rules, and regulations at the present time falls short of what is expected of those entrusted with a security clearance.

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 three separate criminal arrests or incidents that occurred when he was 18 and 19 years old.

Applicant's desire to behave responsibly is noteworthy. Furthermore, his disassociation from criminal activity and his gainful employment are significant steps towards rehabilitating himself. He is receiving strong parental support and his desire to turn his behavior around is commendable.

However, on balance, the record evidence generates substantial doubts concerning Applicant's present eligibility and suitability for a security clearance. Further time to establish a record of law abiding conduct and rehabilitation is needed. Applicant 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"¹ 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.

¹ 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.c.: Against 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