



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
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-----) ISCR Case No. 09-04459
)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: *Pro se*

April 29, 2011

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIPS), on July 6, 2006, and May 17, 2009. (Government Exhibits 1 and 2). On July 27, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J for Applicant. 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) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

The Applicant responded to the SOR on September 15, 2010, and he requested a hearing before a DOHA Administrative Judge. This case was assigned to the undersigned on December 14, 2010. A notice of hearing was issued January 3, 2011, and the hearing was scheduled for January 18, 2011. At the hearing the Government presented ten exhibits, referred to as Government Exhibits 1 through 10. The Applicant presented twenty-three exhibits, referred to as Applicant's Exhibits A through W. He also testified on his own behalf. The record remained open until close of business on January 28, 2011, to allow the Applicant the opportunity to submit additional supporting documentation. The Applicant submitted five Post-Hearing Exhibits that were admitted into evidence without objection, and are referred to as Applicant's Post-Hearing Exhibits

A through E. The official transcript (Tr.) was received on January 25, 2011. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

The Applicant is 33 years old. He has one Masters Degree in Aerospace and one in Mechanical Engineering. He is employed by a defense contractor as an Aerospace Engineer, and is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in Criminal Conduct.

The Applicant grew up in a small town with his mother and his stepfather. He was estranged from his biological father. Over the years, a custody battle continued, and the Applicant was the recipient of guilt and strain associated with his parents' relationship. The Applicant was angry, depressed and rebellious. He was very intelligent and became bored in school. As a teenager, he became mischievous, and to get attention, he started hanging around the wrong kids and getting into trouble. In 1991, at the age of fifteen, he and some other boys got a master snowmobile key and went joyriding with the neighbor's snowmobile. The Applicant was subsequently charged with (1) UDAA and (2) Joyriding. He was found guilty to count (2) and was placed on probation and ordered to make restitution.(Government Exhibit 7.) The Applicant's mother felt she could not control him and he was sent to live with his father.

Applicant's pranks and immaturity continued. In 1992, while living with his father, Applicant stole some magazines from a grocery store. A security guard stopped him and he was charged with three counts of Larceny Over \$100.00, Larceny in a Building, and Retail Fraud Second Degree. Applicant pled guilty and was sentenced to serve 15 days in non-secure detention, ordered to complete 60 hours of community service, and placed on nine months probation. (Government Exhibit 8.) Applicant moved back in with his mother.

In 1993, while Applicant was house-sitting a neighbor's home, he drove the car to the grocery store and back. To hold him accountable, his mother reported this violation to the probation officer. Applicant was charged with a violation of probation. He pled guilty and was sentenced to serve 60 days in secure detention, 30 days in non-secure detention, use of electronic tether for 45 days, his probation was extended an additional 24 months and he was ordered to complete an additional 30 hours of community service.

In 1993, Applicant was working at a hotel cleaning rooms. He took a thousand dollars in cash from one of the guests. He was charged with Larceny Over \$100.00 and several other charges. (Government Exhibit 9.)

At this point, Applicant realized that he had caused his mother a significant financial burden, and in his misguided, warped, sense of logic he felt compelled to remedy the problem so he decided to rob a bank to get some money to help with the expenses. He was sixteen years old. He accessed the bank through a window that he had broken, hid in the bathroom, and waited for the teller to arrive. When the teller opened the door, he stuck a gun in her face and told her to open the bank safe. The teller did as directed, and gave him money from the safe. Applicant ran to his car and drove away. He ditched the car in the woods, buried the money ten yards from the car, and ran to his girlfriend's house. Applicant indicates that he had taken the gun when he broke into a store in the nearby town. The teller recognized him, as the town was small, and the Applicant was charged with (1) Armed Robbery, (2) Felony Firearm, (3) Breaking and Entering a Building with Intent, (4) Receiving Stolen Property over \$100.00, (5) Unlawful Driving Away of an Automobile, (6) Larceny in a Building, (7) Uttering and Publishing and (8) Larceny Over \$100.00. (Government Exhibits 3, 4 , 5 and 6.)

Based on his past criminal record, Applicant was tried as an adult. In retrospect, he realizes that he was in desperate need of discipline and guidance. Emotionally, he was angry and suicidal. (Tr. p. 56.) He pled guilty to (1) Armed Robbery and (2) Felony Firearms. The remaining charges were dismissed. He was sentenced to 6 to 25 years for count (1) to be served consecutive to count (2) He was sentenced to 2 years as to count (2) with credit for 323 days served. He was placed on parole for twenty-four months in July 2000. Applicant served six years in the Department of Corrections. His sentences were served concurrently from August 23, 1993, to January 19, 2000. (Government Exhibits 3, 4 , 5 and 6.) Over the course of his prison sentence, he was sent to 12 different prisons which contained hard core adult criminals. (Tr. p. 56.) At one point, he attempted suicide and was sent to the psychiatric hospital for treatment and assessment. He was prescribed Prozac and eventually realized that he had really messed up, that he was not like the other prisoners, and that he wanted much more for himself.

Applicant was a model prisoner during his incarceration. He obtained his GED, and tutored other inmates to help them obtain their GED. He completed an automotive technology program, a construction trade program, several therapy programs, his college entrance exams, and began his college education through independent study programs. Based upon his good behavior, he was released from prison early. Upon his release from prison, Applicant was admitted to, and attended, one of the select higher educational institutions in the country where he graduated with high honors with a Bachelor's Degree in Aerospace. He subsequently completed two Master's degrees from the top-ranked aerospace and mechanical engineering program in the United States. (Applicant's Exhibit U.)

Applicant is extremely remorseful and regrets his actions in the past and has no desire to ever return to a criminal life. His life is completely different now. For the past seventeen years, he has lived a straight and narrow life. He has never hidden his past criminal record from his employers. He established a non-profit organization to help

high school students and at-risk youth through advancements in education. During college, he joined the Navy ROTC to make amends and wanted to become a Naval Officer, to give back to our country, but was denied commission based upon his past record. Without a pardon, many opportunities were not open to him.

On July 4, 2000, the Applicant was erroneously booked in jail on a Warrant for Obstruction of Justice. The warrant was mistakenly issued and he was subsequently released with no action taken. (Applicant's Exhibit A.)

Mitigation.

Two of the Applicant's Managers wrote a letter stating that Applicant's contributions have been essential and that the country will better be served by not limiting his ability to contribute to our country's defense. They recommend Applicant for a position of trust. (Applicant's Exhibit C.)

Applicant's employment performance appraisal for the period from January 2010 through December 2010, reflects that he "meets" or "exceeds" expectations in every category. (Applicant's Post-Hearing Exhibit B.)

A letter from the State Parole and Commutation Board dated February 2, 2011, indicates that the Applicant's Application for Pardon was forwarded to the Governor's office for consideration that same day. (Applicant's Post-Hearing Exhibit E.)

A letter from the Circuit Court Judge who sentenced Applicant in 1994 to prison for Armed Robbery when he was sixteen years old, stated that if any case cries out for a pardon, this one does. The Judge indicates that if the information in the Applicant's letter is verified, he supports a pardon. (Applicant's Exhibit E.)

The prosecuting attorney who prosecuted Applicant for the Armed Robbery and felony firearm conviction, and petitioned to have him tried as an adult, has been communicating with the Applicant since 1995. He indicates that Applicant has kept him updated concerning his progress in prison, counseling, classes, and educational accomplishments. He states that Applicant has consistently shown remorse for his crime and prior juvenile offenses. He believes that Applicant has honestly changed since his juvenile years and has made efforts to further his education toward a promising future. He supports the Applicant's pardon. (Applicant's Exhibit F.)

Letters from other Circuit Court Judges indicate that they believe the Applicant has paid the full measure of his debt to society for his serious misjudgments committed during his youth. He should be given the opportunity to rehabilitate himself because Applicant paid the consequences for his actions, expressed regret, and exerted an effort to make changes. They endorse a pardon for the Applicant. (Applicant's Exhibits D and E.)

A former member of congress wrote a letter in support of the Applicant's pardon. He indicates that he is delighted to learn of Applicant's new accomplishments in his profession of aeronautical engineering and urges the governor for a full pardon on the basis of Applicant's outstanding educational and rehabilitative accomplishments. (Applicant's Exhibit G.)

A retired FBI agent who has known the Applicant for six and a half years wrote a letter describing Applicant as honest, trustworthy, and a loyal American. He recommends the Applicant for a position of trust. (Applicant's Exhibit H.)

Applicant's probation officer from February 17, 2000, to January 2, 2001, indicates that he would not hesitate to recommend Applicant for consideration in any form of leniency which might enable him to pursue a law-abiding and productive life in the future. (Applicant's Exhibit J.)

Applicant's parole agent from July 25, 2000, to July 25, 2002, states in a letter that she has never seen the type of success and accomplishments achieved by the Applicant since his juvenile felony conviction. The parole agent hopes that Applicant will be granted a gubernatorial pardon in order to advance his career. (Applicant's Exhibit I.)

A letter from a retired Air Force Lieutenant Colonel indicates that he supports a recommendation to pardon the Applicant for the felony he committed as a juvenile. (Applicant's Exhibit K.)

A professional associate of the Applicant's who has worked in the field of non-profit organizations for over ten years wrote a letter on Applicant's behalf. He has known Applicant for about a year. Applicant consulted him about non-profit organizations. He attests that Applicant runs a successful non-profit organization and is passionate about helping at-risk youth through advancements in education. (Applicant's Post-Hearing Exhibit D.)

Applicant's coworker, who is also a former State Trooper with twenty-five years experience, describes the Applicant as articulate, intelligent, focused, eager to learn, proactive in offering his assistance, and recommends him as the top candidate. (Applicant's Exhibit L.)

Letters from a number of professional associates and friends recommend Applicant for a gubernatorial pardon. Each of them have known Applicant for many years. They witnessed his transition from a self-destructive teenager, to a mature adult who atoned for his wrongs, and made remarkable accomplishments in self improvement. (Applicant's Exhibits M, N, O and P.)

Letters from the Senior Vice Provost for Academic Affairs, and the Senior Counselor to the President for the Arts, Diversity, and Undergraduate Affairs, from the University the Applicant attended, indicate they have observed the Applicant transition from his mistakes of the past into a productive well-educated citizen. They recommend Applicant for a gubernatorial pardon. (Applicant's Exhibit R.)

A letter from the clinical psychologist who was the prosecutor's expert witness in Applicant's felony criminal trial for armed robbery, felony firearms, breaking and entering, and driving away of a motor vehicle, now recommends the Applicant for a gubernatorial pardon. (Applicant's Exhibit Q.)

A Captain in the United States Army, who possesses a DoD Top Secret security clearance and served in Operation Iraqi Freedom, states he is a friend of Applicant's

and communicates with him regularly. He recommends the Applicant for a security clearance. (Applicant's Exhibit S.)

A Sergeant in the United States Marine Corp wrote a letter in support of Applicant. He holds a DoD Top Secret security clearance and has served combat missions in Operation Enduring Freedom. He describes the Applicant as an individual who personifies moral integrity, devotion to the United States, and upstanding character. He recommends Applicant for a security clearance. (Applicant's Exhibit T.)

In addition to the non-profit organization the Applicant founded to reach out to troubled youth through science, aviation/aerospace and mathematics, the Applicant is involved in a number of other volunteer, charitable and civic activities in the community. He is or has been involved in his company's Light Speed Foundation, World Relief Inc., Tau Beta Pi Academic Mentor, American Red Cross, Habitat For Humanity, Soup Kitchen, and Relay for life. (Applicant's Exhibit W.)

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a 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.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

31.(f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to a imprisonment for a term exceeding one year an incarcerated as a result of that sentence for not less than a year.

Conditions that could mitigate security concerns:

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.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- b. The circumstances surrounding the conduct, to include knowledgeable participation;
- c. The frequency and recency of the conduct;
- d. The individual's age and maturity at the time of the conduct;
- e. The extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavioral changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole-person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, "Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned."

CONCLUSION

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in criminal conduct that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in Criminal Conduct (Guideline J). This evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is normally sufficient to overcome the Government's case under Guideline J of the SOR.

Under Guideline J, Criminal Conduct, Disqualifying Conditions, 31.(a) *a single serious crime or multiple lesser offenses*, 31.(c) *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*, and 31.(f) *conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year* apply. However, given the unique circumstances of this case, Mitigating Conditions 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*, both apply.

I am not limited to the mitigating conditions delineated in the Directive, in deciding if Applicant has demonstrated extenuation and mitigation. Here, those who know the Applicant speak most highly of his character, credibility and trustworthiness. The totality of the Applicant's conduct and circumstances, as set forth at length above, warrants a favorable decision under the whole-person concept.

While many crimes by adolescents mark the beginning of a predictable criminal path, this Applicant is very different. His criminal conduct occurred when he was sixteen years old and will not likely be repeated. Admittedly, Applicant was a very troubled adolescent. He caused much pain and suffering for his parents, himself and society. However, his crimes all occurred within an 18 month period, when Applicant was fifteen and sixteen years old; and were isolated to a period of time in his life when he was most vulnerable, stupid and alone. Applicant has paid the price to society for violating our laws. He spent six years of his life in twelve different prisons. He has experienced things that none of us will ever know or understand. Despite this, he has matured and used his past to become a better person.

After his release from prison, Applicant rehabilitated himself. He worked hard to make significant changes in his life and has become a productive citizen in our society and stands to make even more major contributions to society. He has many outstanding accomplishments and achievements. He obtained an advanced education and is trying to give back to our society. He chose to serve our Government and has demonstrated that he is rehabilitated. He has shown honesty, integrity, trustworthiness and respect.

Given the unique circumstances of this case, it is clear from his past record that he will not return to his juvenile ways. He has everything to lose and nothing to gain. He has worked hard since his criminal conduct occurred to defuse the past and create a new and sincere persona. Based upon his credible testimony, his outstanding accomplishments since prison, the numerous letters of recommendations and his 18 month isolated history of criminal conduct, I find him sufficiently trustworthy to safeguard classified information.

I also considered the “whole-person concept” in evaluating the Applicant’s eligibility for access to classified information. The Applicant is an extraordinary person, one that rarely comes along in life, who has hit rock bottom and experienced the lowest and the worst in life, and has been able to use that experience to turn his life around for the good and rise to the top. He is commended for his hard work, efforts at rehabilitation, and remarkable accomplishments. Under the particular facts of this case, the totality of the conduct set forth above when viewed under all of the guidelines as a whole, support a whole-person assessment of good judgement, trustworthiness, reliability, a willingness to comply with rules and regulations, and/or other characteristics indicating that the person may properly safeguard classified information.

After weighing the disqualifying and mitigating conditions and evaluating all the evidence in the content of the whole person, I conclude the Applicant has mitigated the security concerns based on his Criminal Conduct.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For Applicant.
Subpara. 1.a.: For Applicant.
Subpara. 1.b.: For Applicant.
Subpara. 1.c.: For Applicant.
Subpara. 1.d.: For Applicant.
Subpara. 1.e.: For Applicant.
Subpara. 1.f.: For Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge