



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 09-05149

Appearances

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

February 16, 2011

Decision

MOGUL, Martin H., Administrative Judge:

On June 15, 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.

On August 10, 2010, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on September 8, 2010. DOHA issued a notice of hearing on November 1, 2010, and I convened the hearing as scheduled on November 22, 2010. The Government offered Exhibits 1 through 3, which were received without objection. Applicant testified on his own behalf and submitted Exhibit A, which was also admitted without objection. At the request of Applicant, the record remained open until December 6, 2010, to allow Applicant to offer post hearing documents. Applicant submitted no additional documents. DOHA received the transcript of the hearing (Tr) on December 7,

2010. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 26 years old. He is not currently married, but he has two children. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline J - Criminal Conduct)

The Government alleges that Applicant is ineligible for clearance because he has engaged in criminal conduct. The SOR lists four allegations under Adjudicative Guideline J, and in his RSOR, Applicant admitted each allegation. The allegations will be discussed in the same order as they were listed in the SOR:

1.a. The SOR alleges that in about July 2004, Applicant was arrested and charged with "Abuse Family." The charge was dismissed with prejudice.

Applicant testified that at the time of this incident, he and his girlfriend were having a verbal argument, when she got very angry and began striking, kicking, and scratching him. He tried to leave, but she continued to attack him. He pushed her away, and he put his mouth on her cheek and made a hickey mark. Later when his girlfriend was at work, either she or one of her employees called the police, who ultimately arrested him. He was bailed out that night, and the next week he appeared in court. He was informed the charges were going to be dismissed without prejudice, so he could be recharged for this incident, but Applicant testified that he was never recharged. (Tr at 25-29.) This contradicts the SOR that alleges the charge was dismissed with prejudice.

1.b. The SOR alleges that in about April 2005, Applicant was arrested and charged with Assault 3rd, two counts. The charge was dismissed with prejudice.

Applicant testified that this incident occurred when he was walking to his vehicle at night when he was confronted by three males, whom he did not know and who appeared to be intoxicated. They approached him in a belligerent manner, and one of the individuals had a knife. As they got closer, Applicant punched one of them, because he did not want to wait to be attacked. During the altercation, he received lacerations on his hand and forearm. He then left the area to seek medical aid for his lacerations, and while on the way to the hospital, he was stopped by the police. He was arrested, but when he appeared in court, the case was dismissed, because a restaurant owner in the area had given a statement that the three individuals had harassed him earlier in the evening. Applicant had no other contact with these three individuals, either before or after this incident. (Tr at 29-35.)

1.c. The SOR alleges that in about April 2007, Applicant was arrested and charged with Assault 3. Applicant entered into a Deferred Acceptance of Nolo Contendere for one year and was ordered to complete an alcohol and drug course, complete an alternative to violence course, and to pay restitution.

Applicant testified that he had been told that a 23 year old male, whom he believed to be a drug dealer, was buying alcohol for his 16 year old sister. This upset Applicant, who considers himself the head of his household, because his mother is deceased and his father does not live near the rest of his family. When Applicant saw this individual at a restaurant, they had a confrontation. Applicant averred that this individual grabbed a knife, and because he felt threatened, Applicant began fighting with the man. The police were called and Applicant was arrested.

Applicant contended that he had never used drugs and had not consumed alcohol in more than two years prior to the incident, but because he said he had used alcohol in the past, he was ordered to attend 26 week drug and alcohol course, two times a week. Applicant stated that he completed the course as required. He also was ordered to attend an additional 26 week course on alternatives to violence and pay a fine for restitution of approximately \$700, which he did. (Tr at 35-43.)

1.d. The SOR alleges that in about August 2007, Applicant was arrested and charged with Failure to Appear. Applicant testified that he had been unaware that he was ordered to be present in court, regarding the conduct that has been reviewed as 1.c., above. When he became aware that he had missed a court appearance and that a warrant had been issued for his arrest, he went to the police station where he posted \$500 bail. The next week, he appeared in court with the proper documentation, the \$500 was refunded to him, and the case was dismissed without prejudice. Applicant did not have documentation from the court showing that the case had been dismissed. The record was kept open to allow him to submit the proper documentation, but none was received. (Tr at 35-47.) Department Counsel did offer in his closing statement that the Government did investigate this charge, and it appears that it has been resolved. (Tr at 59.)

Applicant testified that since 2007, he has had no further contact with law enforcement. He has been coaching several sports teams including high school football. He also stated that he has two younger brothers and two younger sisters, as well as an older half-sister, and since his mother died in 2006, he has taken responsibility for taking care of his family. (Tr at 48-54.)

Mitigation

Applicant submitted five character letters, three from adults and two from children. (Exhibit A.) The three adult character letters were from friends of Applicant. He was described as someone who would do well with any task that required "enthusiasm, hard work and reliability." He also was described as "reliable and dedicated."

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). 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 over-arching adjudicative goal is a fair, impartial and common sense 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 as to 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to 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

I have reviewed all of the evidence with regard to what criminal activity occurred. Applicant, by RSOR and testimony, conceded that all of the incidents that are the subject of SOR subparagraphs 1.a. through 1.d. did occur. However, based on Applicant's uncontroverted testimony, there were extenuating circumstances regarding each event. Applicant's conduct that precipitated allegation 1.a. was based on his coming under attack from his girlfriend at the time; and 1.b., occurred when he was threatened by three males, at least one of whom was armed with a knife. He was not prosecuted for either of these events, so I cannot conclude that he engaged in criminal conduct under allegation 1.a. or 1.b.

Based on Applicant's testimony, the incident that is the subject of 1.c. involved a drug dealer, who was purchasing alcohol for his 16 year old sister. While this conduct did result in his Deferred Acceptance of Nolo Contendere for one year, during which he was ordered to complete an alcohol and drug course, an alternative to violence course, and to pay restitution, Applicant did have provocation for his conduct. Finally, Applicant averred that he failed to appear in court, because he had not been aware of the order for him to appear. Once he became aware of that order, he made the court appearance and the warrant was dismissed. There has been no evidence of any other criminal conduct since 2007.

In reviewing the disqualifying conditions, I find that ¶ 31(a), "a single serious crime or multiple lesser offenses," applies in this case, since there was one incident of criminal activity that occurred in 2007. ¶ 31(c), "allegations or admissions of criminal conduct, regardless of whether the person was formally charged," is also applicable to this case. As reviewed above, I do not find that the Government has established that Applicant engaged in the criminal activity, as alleged in 1.a. and 1.b.

Under the mitigating conditions, I find that AG ¶ 32(a) is applicable as "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 judgement." AG ¶ 32(d) is also applicable, as "there is evidence of successful rehabilitation"; "including the passage of time without recurrence of criminal activity." Appellant's criminal activity has been mitigated. Guideline J is found for Applicant.

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.

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. Based on the letters received from Applicant's friends, and the Mitigating Conditions that apply, including the time that has elapsed since the last allegation of criminal conduct, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns.

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.d.: 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.

Martin H. Mogul
Administrative Judge