



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 09-07184
)	
Applicant for Security Clearance)	

Appearances

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

December 15, 2010

Decision

CEFOLA, Richard A., Administrative Judge:

The Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on February 7, 2008. On May 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J for the 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 acknowledged receipt of the SOR on May 19, 2010. He answered the SOR in writing on August 16, 2010, and requested a hearing before an Administrative Judge. DOHA received the request on October 14, 2010, and I received the case assignment that same day. DOHA issued a notice of hearing on October 19, 2010, and I convened the hearing as scheduled on November 3, 2010. The

Government offered Exhibits (GXs) 1 through 3, which were received without objection. The Applicant testified on his own behalf and submitted Exhibits (AppXs) A and B, which were received without objection. DOHA received the transcript of the hearing (TR) on November 12, 2010. I granted the Applicant's request to keep the record open until December 3, 2010, to submit additional matters. He submitted Exhibit C in a timely fashion, which was received without objection. The record closed on December 7, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, the Applicant admitted all the factual allegations in the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Guideline J - Criminal Conduct

The Applicant started to use methamphetamine in December of 1996. (TR at page 43 lines 8~21.) His drug usage continued until "Mother's Day of 2001," when he had an epiphany.

My wife got up that morning, and she told me, my girlfriend at the time, she got up that morning and she says she's going to Church. I said you're going to Church? She said yes, it's Mother's Day. I've been invited to a Church. So, I decided, you know, my thing was, I'm going to be honest with you, I was going to walk her half way there and come back to get high. But walking with her, I walked all the way to the Church. . . and I stayed. . . . I never used drugs again. (TR at page 54 line 15 to page 55 line 14.)

Prior to this epiphany, the Applicant had four arrests, but no convictions, as alleged and admitted to in response to the SOR. In about 1997, a fellow drug abuser needed some money for drugs; and as a result, offered the Applicant a bike for \$45. (TR at page 40 line 10 to page 43 line 6, see *also* page 25 at 19 to page 26 line 13.) As the bike was worth about \$1,200, he admits he should have known that the bike was stolen. (*Id.*) He was arrested for Receive Etc Known Stolen Property, spent 72 hours in jail, but nothing further resulted from this arrest. (TR at page 40 line 10 to page 43 line 6.)

In about 1999, the Applicant had consumed too much alcohol, and got into an argument with the woman who is now wife, when she was his girlfriend. (TR at page 43 line 22 to page 47 line 14.) The argument got physical when the Applicant pushed her. (*Id.*) He was arrested for Inflict Corporal Injury on a Spouse or Co-habitant. (TR at page 43 line 22 to page 47 line 14.) Nothing further resulted as a result of the Applicant's actions, as attested to, not only by the Applicant, but by his wife. (*Id.*, and TR at page 24 line 21 to page 25 line 18.)

In August of 2000, the Applicant was unemployed, but was offered \$2,500 if he would “drive a car back across” the U.S./Mexican border. (TR at page 47 line 15 to page 51 line 24, see *also* page 21 line 14 to page 24 line 20.) He was arrested at the border for Alien Smuggling. (*Id.*) Prosecution was declined, after the Applicant spent about six hours in jail. (TR at page 47 line 15 to page 51 line 24, see *also* page 21 line 14 to page 24 line 20.)

In October of 2000, the Applicant was still unemployed, on drugs, and was offered more money to drive another car back across the border. (TR at page 51 line 25 to page 54 line 5, see *also* page 21 line 14 to page 24 line 20.) He was again arrested at the border for Alien Smuggling. Prosecution was also declined, and this was the last time that the Applicant had any run ins with the law. In fact, he now works in physical security and law enforcement. (*Id.*, TR at page 55 line 19 to page 58 line 7, and AppX A.)

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 commonsense decision. According to AG Paragraph 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. Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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

Paragraph 30 of the adjudicative guidelines sets out the security concern relating 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.

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 31(a) provides that “*a single serious crime or multiple lesser offenses*” may raise security concerns. The Applicant has been arrested four times, the last time in October of 2000. Here, this is clearly countered by the mitigating condition in Subparagraph 32(a) as “*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.*” The Applicant’s arrests were more than ten years ago. He has found religion, as attested to by those that know him at his church (AppXs B and C), and the root cause of his criminality, drug abuse, also ceased nearly ten years ago.

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. Under AG Paragraph 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. The Administrative Judge should also consider the nine adjudicative process factors listed at AG Paragraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of those who know him in his community (AppXs A and B). His Pastor avers, in part, the following:

I have known . . . [the Applicant] for the last six years; he is my Brother-in-Christ, and a real good friend. We have shared many events together and he has always carried himself like a Man of God, . . . [the Applicant] to me is a hardworking, loving family man, and caring person who make (*sic*) every effort to succeed in everything he puts his mind to. He has been a faithful member of . . . [his church] for the last ten years (AppX B.)

The record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his Criminal Conduct, which occurred more than a decade ago.

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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.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.

Richard A. Cefola
Administrative Judge