



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



In the matter of:)	
)	
-----)	ISCR Case No. 10-00247
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

December 20, 2010

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on September 2, 2009. On July 7, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline J. DOHA acted 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on July 9, 2010; answered it on July 12, 2010; and requested a hearing before an administrative judge. DOHA received the request on July

15, 2010. Department Counsel was ready to proceed on August 25, 2010, and the case was assigned to me on August 27, 2010. DOHA issued a notice of hearing on September 2, 2010, scheduling it for September 21, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through L, which were admitted without objection. DOHA received the transcript (Tr.) on October 4, 2010.

Amendment of SOR

Department Counsel moved to amend the last sentence of SOR ¶ 1.c to read, "As a result of your guilty pleas to the above-listed offenses, you were sentenced to incarceration for two years, with 18 months suspended, and you were incarcerated from October 1995 to April 1996." Department Counsel also moved to amend the last sentence of SOR ¶ 1.d to read, "As a result of your guilty plea to the offense alleged in paragraph 1.d(1), you were sentenced to incarceration for four to six years, the charges alleged in paragraphs 1.d(2)-(7) were dismissed, and you were incarcerated for 68 months, followed by five years of supervised probation." Applicant agreed with the amendments, and I granted the motion to amend. (Tr. 21-26.) The amendments are handwritten on the SOR.

Administrative Notice

Department Counsel requested that I take administrative notice of the criminal statutes applicable to the criminal conduct alleged in SOR ¶¶ 1.a-1.f. Without objection from Applicant, I took administrative notice as requested. The relevant statutes are attached to the record as Hearing Exhibit (HX) I.

Bond Amendment

At my direction, Department Counsel submitted a post-hearing brief on the applicability of the Bond Amendment, 50 U.S.C. § 435c. (HX II.) In this decision, I have accepted Department Counsel's analysis and concluded that the Bond Amendment does not apply to this case.

Findings of Fact

In his answer to the SOR, Applicant pointed out factual errors in SOR ¶¶ 1.c and 1.d. After I granted Department Counsel's motion to amend the SOR, Applicant admitted all the allegations as amended. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 35-year-old employee of a defense contractor. He works as a laborer and helper but aspires to become a marine electrical technician after he completes two years in his present position. He has worked for his current employer since August 2009. He has never held a security clearance.

Applicant grew up in a poor neighborhood. He was raised by his mother, who could not control him. His older brother, the only authority figure in the family, joined the U.S. Navy while Applicant was in high school and served on active duty for about ten years. Applicant was placed in an alternative high school because of his disciplinary problems. He dropped out and did not graduate. He and his peers drank alcohol heavily, smoked marijuana, and used cocaine. (Tr. 60-61.)

In August 1993, Applicant was arrested and charged with unlawfully carrying a firearm, disorderly conduct, and unlawfully possessing a firearm. He was 18 years old at the time. The charges arose when he ran away from an approaching police car and a handgun was found in the area. His fingerprints were not on the handgun. The charges were dismissed. (GX 3 at 3-5.)

In September 1993, Applicant was arrested and charged with unlawful distribution of a controlled substance, possession of a controlled substance, and possession of a controlled substance with intent to distribute. The charges arose when he sold cocaine to an undercover police officer. (GX 3 at 6-8; Tr. 59.) He pleaded guilty to distribution of a controlled substance. (GX 1 at 43.) The record does not reflect the sentence imposed, but it apparently did not include incarceration.

Between the ages of 18 and 21, Applicant was involved in numerous burglaries and larcenies. In October 1995, he was charged with unarmed robbery, larceny from the person, intimidating a witness, assault and battery with a dangerous weapon, assault and battery on a police officer, disorderly conduct, daytime breaking and entering (a felony), larceny of property of a value less than \$250, three counts of malicious destruction of property worth more than \$250, two counts of nighttime breaking and entering (a felony), and larceny of property worth more than \$250. In January 1996, he pleaded guilty to all charges and was sentenced to incarceration for two years, with 18 months suspended. He was incarcerated from the time of his arrest in October 1995 until April 1996.

In May 1996, Applicant was arrested for five counts of unarmed burglary, threatening to commit a crime, assault and battery on a police officer, resisting arrest, three counts of malicious injury to real property, three counts of larceny from a building, and a threat to commit murder. (GX 3 at 9-17.) He pleaded guilty to the burglaries, assault and battery on a police officer, and the malicious injuries to real property. In June 1996, he was incarcerated and served 68 months of a sentence to four to six years of incarceration, followed by five years of supervised probation. He completed a six-month alcohol education and counseling program after his release from incarceration. (GX 2 at 7; GX 3 at 25-37; GX 4 at 3.)

While incarcerated, Applicant obtained his high school equivalency diploma. He also completed courses in anger management, emotional awareness, alternatives to violence, "thinking for a change," and a transition planning program provided by the state correctional facility. (AX F through L.)

In November 2003, Applicant was arrested and charged with operating a motor vehicle under the influence of liquor (DUI), leaving the scene of an accident where a person was injured, two counts of leaving the scene of an accident where there was property damage, disorderly conduct, larceny of a motor vehicle, and resisting arrest. The arrest occurred after Applicant, who had been working long hours in a restaurant, fell asleep while driving his girlfriend's car and crashed into the highway median. He was slightly injured, and his girlfriend's car was damaged. He panicked and ran away when the police arrived, because he was still on probation and feared being incarcerated again. (Tr. 45.) He denied that he had been drinking alcohol before the accident. He was charged with DUI because he refused to interrupt his telephone conversation with his girlfriend to take a breathalyzer test. He pleaded guilty to the three counts of leaving the scene of an accident and resisting arrest. The other charges were dismissed. As a result of his violation of probation, he was required to complete a 20-week alcohol counseling program. He successfully completed the program. He has never been diagnosed with alcohol abuse or alcohol dependence. (GX 2 at 7-8.)

In August 2007, Applicant's cousin was involved in a drunken altercation. After he was arrested, he mentioned Applicant's name and Applicant's sister's name, causing the police to believe they were involved in the altercation. The police arrested Applicant and his sister for assault and battery with a dangerous weapon. (GX 3 at 1-2.) Both Applicant and his sister denied being involved in the altercation.

In September 2007, while the August 2007 charges were pending, Applicant was arrested as he was leaving an apartment building at the same time the police were responding to a domestic violence report. The police officer mistakenly believed that Applicant was involved in the domestic violence. The police officer checked for outstanding warrants against Applicant and discovered a warrant for his arrest for the August 2007 altercation. When Applicant appeared for trial in January 2008, the judge dismissed the charges after Applicant's cousin testified that Applicant was not involved in the altercation. (GX 2 at 7.)

Applicant worked at "dead end" jobs and was repeatedly unemployed until he obtained his current job through the efforts of his older brother, who served with the company owners in the Navy and began working for the company after he left the Navy. Applicant has found his employers to be very welcoming, and he considers the company his family. (Tr. 35-38.) At the hearing, he was sincere, remorseful, and enthusiastic about his job.

Applicant has moved to another state and no longer associates with his former friends and peers. (Tr. 40-41.) His new friends are his coworkers. (Tr. 63-64.) He occasionally drinks one or two beers at social events, but he no longer drinks to the point of intoxication, and he is no longer involved in illegal drugs. (GX 2 at 8.) He wants to surround himself with people who are motivated to improve their lives. He looks up to his older brother and sees that his brother's life is much better than his. He wants to "have a life." (Tr. 67-69.)

Applicant's immediate supervisor for the past year describes him as displaying responsible decision-making abilities, trustworthiness, and sound judgment. (AX A.) His department manager considers him reliable, trustworthy, and hardworking. (AX B.) A coworker describes him as "a responsible person who takes his job very serious[ly]." (AX C.) A consulting field engineer for Applicant's employer considers Applicant to be a friend and an honorable person who will accept the responsibility of holding a security clearance "with the seriousness that it deserves." (AX D.) Applicant's cohabitant for the past five years, a mother of three children, who grew up with Applicant as a child, describes him as respectful, caring, patient, and very devoted to her children. (AX E.) He financially supports his cohabitant and her children, and he acts as a father figure for the children. (Tr. 33.)

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant

from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline J, Criminal Conduct

The SOR alleges Applicant’s arrests in August 1993 (SOR ¶ 1.a) and September 1993 (SOR ¶ 1.b). It alleges his conviction in January 1996 (SOR ¶ 1.c), his arrest and conviction in May 1996 (SOR ¶ 1.d), his arrest and conviction in November 2003 (SOR ¶ 1.d), and his arrest in August 2007 (SOR ¶ 1.f). His arrest in September 2007 is not alleged.

The concern raised by criminal conduct is set out in AG ¶ 30: “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.” Applicant’s criminal record establishes four disqualifying conditions under this guideline: AG ¶ 31(a): (“a single serious crime or multiple lesser offenses”); AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”); AG ¶ 31(e) (“violation of parole or probation”)¹; and AG ¶ 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”).

Prior to enactment of the Bond Amendment, 50 U.S.C. § 435c, the Smith Amendment, 50 U.S.C. § 986, provided that disqualifying condition in AG ¶ 31(f) made an applicant ineligible for a security clearance unless a waiver was granted by the Secretary of a military department or an authorized designee. The Bond Amendment repealed the Smith Amendment and limited the statutory disqualification to applicants seeking clearances for Special Access Programs, Restricted Data, and Sensitive Compartmented Information. 50 U.S.C. § 435c(c)(3). The Bond Amendment does not

¹ Violation of probation was not alleged in the SOR, but it is encompassed in the arrests and convictions alleged in SOR ¶¶ 1.d and 1.e and the sentence alleged in SOR ¶ 1.d.

apply to Applicant because he is not seeking access to any of the special programs covered by it. However, the Bond Amendment did not eliminate AG ¶ 31(f) as a disqualifying condition, and security concerns raised by a conviction and lengthy period of incarceration must be mitigated in the same manner as the other enumerated disqualifying conditions.

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 31(a), (c), (e) and (f), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). In this case, the number and seriousness of Applicant's crimes and his lengthy period of incarceration placed a very heavy burden of persuasion on him to show that the security concerns raised by his criminal conduct have been mitigated.

Security concerns under this guideline may be mitigated by evidence that "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." AG ¶ 32(a). The first prong of this mitigating condition focuses on whether the conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

Applicant's arrests in August and September 2007 were unfounded and the charges were dismissed. His last criminal conduct was in September 2003, more than seven years ago, which is a "significant period of time." He has worked for his current employer since August 2009, and he has established a reputation for reliability and trustworthiness. He is in a committed relationship with a woman who has known him since childhood, and she regards him as a kind, responsible, and caring parent for her three children. I conclude that the mitigating condition in AG ¶ 32(a) is established.

Security concerns under this guideline also may be mitigated if "the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life." AG ¶ 32(b). This mitigating condition is not applicable because there is no evidence that Applicant was pressured or coerced into any of his criminal conduct.

Security concerns also may be mitigated by "evidence that the person did not commit the offense." AG ¶ 32(c). This mitigating condition is established for Applicant's arrest in August 2007, alleged in SOR ¶ 1.f.

Finally, security concerns raised by criminal conduct may be mitigated if “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.” AG ¶ 32(d). Applicant completed his high school education while incarcerated, as well as other programs designed to promote responsible behavior. He was remorseful at the hearing. Since August 2009, he has earned a reputation for reliability and responsible behavior. For these reasons as well as the reasons set out in the above discussion of AG ¶ 32(a), I conclude that AG ¶ 32(d) is established.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all the relevant circumstances. An 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 have incorporated my comments under Guideline F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

All but one of Applicant’s crimes occurred when he was between 18 and 21 years old. His lengthy incarceration was the turning point in his life. After his release, he stumbled once in September 2003. His irresponsible and impulsive response to his traffic accident was motivated by his fear of further incarceration. With the exception of his conduct in September 2003, all of his crimes were the product of lack of meaningful employment, lack of motivation, involvement with drugs, and an undesirable circle of friends. Those factors are no longer part of his life.

At the hearing, Applicant did not present himself as the stereotypical convicted felon. To the contrary, he was soft-spoken, candid, sincere, and remorseful. His older brother always has been a role model, but they traveled separate paths. In August 2009, their paths converged. Applicant has compared his life to his brother’s and decided he wants to be more like his brother.

After weighing the disqualifying and mitigating conditions under Guideline F, evaluating all the evidence in the context of the whole person, and mindful of my obligation to decide close cases in favor of national security, I conclude Applicant has mitigated the security concerns based on criminal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.f:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge