



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



In the matter of:)
)
) ISCR Case No. 10-01916
)
Applicant for Security Clearance)

Appearances

For Government: Candace Le'i Garcia, Esq., Department Counsel
For Applicant: *Pro se*

July 25, 2011

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant rebutted personal conduct security concerns, but he has not mitigated criminal conduct concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 24, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, criminal conduct. The action was taken under Executive Order (EO) 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 answered the SOR on April 8, 2011, and requested a hearing before an administrative judge. DOHA amended the SOR on May 3, 2011, adding three allegations under Guideline E, personal conduct. Applicant responded to the amended SOR on May 9, 2011. The case was assigned to me on May 16, 2011. DOHA issued a

notice of hearing on June 16, 2011, and the hearing was convened as scheduled on July 12, 2011. The Government offered Exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified and submitted Exhibits (AE) A and B, which were admitted without objection. DOHA received the hearing transcript (Tr.) on July 20, 2011.

Findings of Fact

Applicant is a 37-year-old employee of a defense contractor. He is applying for a security clearance for the first time. He attended college for a period but did not obtain a degree. He has never been married. He has a ten-year-old child.¹

Applicant was involved in criminal activities as a young man. He was drinking heavily and was transporting drugs. In October 1993, Applicant lost a quantity of drugs while transporting them. He felt that his life was in danger from the individual who owned the drugs. He decided to rob a bank in order to repay the drug owner. He stole a truck and entered a bank wearing a ski mask and carrying a loaded shotgun. He brandished the shotgun, but the employees ran. He jumped on a counter and attempted unsuccessfully to get money out of a drawer. He fled the bank. Applicant was contemplating robbing a convenience store when the police pulled up to the stolen truck. Applicant was arrested after a car chase.²

Applicant was charged in state court with aggravated robbery and unauthorized use of a motor vehicle. He was separately charged in federal court with attempted bank robbery. Applicant pleaded guilty to the state charges and was sentenced to ten years in the state department of corrections. He also pleaded guilty to the federal charge and was sentenced to 51 months confinement in a federal penitentiary, followed by a five-year term of supervised release. The federal time was to be served upon his release from the state department of corrections.³

Applicant was confined in the state department of corrections until 1998, when he was released. He served about two months in the federal penitentiary before he was released under supervision of the U.S. Probation Office in December 1998. His supervised release was originally scheduled to expire in December 2003.⁴ His federal probation officer reported:

From December 10, 1998 until about December 2002, [Applicant] did not present any supervision problems. He reported as instructed and followed the instructions of his probation officer. He submitted his written monthly report form as directed and provided all requested financial information. He attended substance abuse counseling as required and submitted urine

¹ Tr. at 20, 64-65; GE 1.

² GE 2, 3, 5, 6.

³ Tr. at 42; Applicant's response to SOR; GE 3, 5, 6.

⁴ Tr. at 41-44; Applicant's response to SOR; GE 3, 5, 6.

samples when instructed. While under supervision he did not submit a positive urine specimen. He was gainfully employed and maintained a stable residence. Additionally, he satisfied all special conditions.⁵

In November 2002, Applicant received a \$200 city check in the mail payable to a former resident. Applicant's friend forged the signature on the check, and Applicant deposited the check in his credit union account. In January 2003, Applicant was arrested for forgery of a financial instrument. Applicant fled to another state before trial. State and federal warrants were issued for his arrest. Applicant stated that he panicked because his lawyer told him that he would likely have to serve extensive time in the federal penitentiary for his probation violation.⁶

In April 2005, Applicant was a passenger in a car that was stopped by the police for a traffic violation. He was arrested after the police discovered his warrants. He was extradited to the state where he committed his crimes. In June 2005, he pleaded guilty in state court to forgery, a felony. He was sentenced to six months in jail, with 88 days credit for time served. His federal case was revoked in June 2005, "with no supervision to follow." It is unclear how much time he served in federal custody for his probation violation. He was released from incarceration in late 2005.⁷

Applicant worked for a defense contractor from February 2008 to September 2009. He worked in Iraq for about 20 months without the need for a security clearance. He was hired by his current employer in September 2009.⁸

Applicant submitted a questionnaire for national security positions (SF 86) in October 2009. He listed a number of delinquent debts under the pertinent financial questions. Under the question asking about felony charges, he listed his conviction for forgery. The question asked for the date of offense, not the date of arrest or the date of conviction. He listed the date of offense as "11/02 (estimated)." He wrote in the comments section "I have made some bad choices in my youth. And I made a bigger on[e] by cashing a bad c[heck] for a friend."⁹

Applicant did not list his state and federal convictions or that he was arrested in 2005 pursuant to his arrest warrants. Applicant credibly testified that he did not intentionally falsify the SF 86. He stated that he misread the felony and firearms questions, and thought he was only required to report offenses from the last seven years. He also did not think the robbery charge constituted a "firearms offense." He thought he was reporting his 2005 arrest when he reported the forgery charge. He stated that he felt it would have been pointless to intentionally omit the information

⁵ AE B.

⁶ Tr. at 25-26, 36-37, 44-45; GE 3, 5, 6.

⁷ Tr. at 36, 39, 45; Applicant's response to SOR; GE 3, 5, 6; AE B.

⁸ Tr. at 26; GE 1, 2, 4.

⁹ GE 1.

because the Government had instant access to the information.¹⁰ After considering all the evidence, including Applicant's testimony and the derogatory information he listed under different questions, I find that Applicant did not intentionally falsify his SF 86.

Applicant was granted an interim security clearance. He worked in Afghanistan for about six months and had access to classified information without any security violations. He submitted a number of documents attesting to his superior service in Iraq and Afghanistan. He has passed examinations and received certifications qualifying him in his trade. Applicant sustained traumatic brain injury (TBI) in November 2010, when the vehicle he was driving struck an improvised explosive device (IED). He has for the most part recovered from his injuries, but still has some memory issues and other recurring problems.¹¹

Applicant stated that he has learned painful lessons from his criminal conduct and time spent incarcerated. He stated that he is committed to being a law-abiding citizen. He would like a security clearance so that he can return to Afghanistan. He feels that he was able to give something back to this country by his service in Iraq and Afghanistan, and he hopes that it makes up, in some part, for his criminal conduct.¹²

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines 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.

¹⁰ Tr. at 23-24, 27, 30-35, 45-56, 59-60; GE 1; AE A.

¹¹ Tr. at 20, 22, 27-29; GE 4.

¹² Tr. at 23, 27-30; GE 4.

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 the applicant or proven by Department Counsel.” The applicant has the ultimate burden of persuasion to obtain 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 EO 10865 provides that adverse 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

The security concern for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (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
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant’s multiple arrests, convictions, and probation violations are sufficient to raise the above disqualifying conditions.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following are potentially applicable:

(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

(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.

Applicant's criminal conduct was significant and serious. He stole a truck and attempted to rob a bank with a loaded shotgun. He was contemplating robbing a convenience store when the police saw him in the stolen truck. He fled the scene before he was arrested. His motive for robbing the bank was that he was transporting illegal drugs, he lost a shipment, and he was afraid of the owner of the drugs. He cashed a forged check in 2002 while on federal probation. He fled the state rather than face state charges and federal incarceration for his probation violation. He was captured in 2005 in another state. I considered Applicant's employment, his work in Iraq and Afghanistan, and his injury while supporting the U.S. mission. His remorse was candid and sincere. I find there is some evidence of successful rehabilitation. However, despite a clean record since 2005, Applicant's criminal record is so extensive and occurred over such an extended period that it continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 32(a) is not applicable. AG ¶ 32(d) is partially applicable. I find that criminal conduct security concerns remain despite the presence of some mitigation.

Guideline E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying condition is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Applicant provided incomplete and inaccurate information on his SF 86, but it was not intentionally false. AG ¶ 16(a) is not applicable. SOR ¶¶ 2.a, 2.b, and 2.c are concluded 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 relevant 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. I have incorporated my comments under Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

I believe Applicant is sincere in his desire to make amends for his criminal past. He risked his life and was seriously injured in Afghanistan while supporting the U.S. mission. However, his criminal record is extensive, and he was a fugitive from justice from 2003 to 2005, when he was arrested during a routine traffic stop. I have lingering doubts about Applicant, and I am required to resolve any doubts in favor of national security.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has rebutted personal conduct security concerns, but he has not mitigated criminal conduct 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:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.c:	For 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.

Edward W. Loughran
Administrative Judge