



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



In the matter of:)
)
) ISCR Case No. 10-04150
)
Applicant for Security Clearance)

Appearances

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

September 30, 2011

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ Applicant's clearance is granted.

On 8 June 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.² Applicant timely answered the SOR, requesting a hearing. DOHA assigned the case to me 29 July 2011, and I convened a hearing 1 September 2011. DOHA received the transcript (Tr.) 12 September 2011.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-11, and Applicant exhibits (AE) A-C.

²DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the criminal conduct allegation. He is a 31-year-old IT professional employed by a defense contractor since October 2009. He has not previously held a security clearance.

In February 2000, then 19 years old, Applicant was charged with breaking and entering, robbery, and using a firearm to commit robbery. The charges arose out of a drug transaction at Applicant's college that turned sour and became an armed robbery. Applicant had entered college the previous fall, which was the first time he had been away from home for any significant time. Applicant did not have the gun, was not aware that one of his co-accuseds had a gun, and was not aware that the co-accused intended to use the gun to commit robbery.

Applicant was expelled from college for his involvement. The charges were originally dismissed by the magistrate in May 2000 because Applicant appeared to be an unwitting accomplice, but the charges were resurrected by grand jury indictment in June 2000—after Applicant had been expelled and returned to his home in another state. Applicant did not learn of a warrant for his arrest until a routine traffic stop in August 2001. He returned to the state where the crimes were committed and in November 2001 pled guilty to the charges under a plea agreement he entered into when it became clear that his two co-accuseds had obtained their own plea deals to testify against Applicant. Applicant was sentenced to 25 years in prison, with all but five years suspended. Applicant served a little more than 54 months, and was released in December 2005. He was also released early from probation. He has had no criminal incidents since his release from prison. He has been continuously employed since leaving prison.

Applicant was a model prisoner and took computer classes while in prison. He also worked on the lawn maintenance team and did a lot of reading. He continued his studies after leaving prison, and obtained his associate's degree in August 2009. He continues to work toward his bachelor's degree, and hopes to attend graduate school.

Applicant and his fiancée bought a house in May 2011, where they live with their year-old twins and her child from an earlier relationship. Applicant works two full-time jobs and one part-time job. One of his full time jobs involves counseling people about avoiding the kind of trouble he got into as a young man. Applicant's work and character references give him high marks for the quality of his work and his integrity. None of them appears aware of his criminal record.

Policies

The AG list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG

¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. Still, specific adjudicative guidelines should be followed when a case can be measured by them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline J (Criminal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.³

Analysis

The Government established a case for disqualification under Guideline J, by showing Applicant's arrest, conviction, and sentencing for three felonies.⁴ However, Applicant mitigated the security concerns.

Applicant satisfies most of the Guideline J mitigating conditions. The crimes occurred over 11 years ago, happened under unusual circumstances when Applicant was young, was away from home for the first time in his life, had no reason to believe one of his co-accuseds had a gun and would use it, and the incident no longer casts doubt on his reliability, trustworthiness, and judgment.⁵ In a sense, there is evidence Applicant did not commit the crimes.⁶ While Applicant clearly intended to be involved in a drug transaction, he was otherwise an unwitting accomplice to the armed robbery, being unaware that one of his co-accuseds had a gun and was prepared to brandish it to commit robbery. Further, there is substantial evidence of successful rehabilitation viewed by the passage of time, satisfactory completion of his sentence, higher

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁴¶31 (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;

⁵¶32 (a) so much time has elapsed, 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;

⁶¶32 (b) the person was pressured or coerced into committing the act . . . ; (c) evidence that the person did not commit the offense;

education, and good employment record. He has expressed remorse for his actions, and is involved in counseling others to avoid similar immature actions.⁷ He and his fiancé have started their life together, and there is no reason to believe that Applicant will engage in any criminal activity in the future. Applicant is no longer that 19-year-old involved in the robbery. He is now a 31-year-old, soon-to-be-married man, the father of twins, a homeowner, and gainfully employed. I resolve Guideline J for Applicant.

Formal Findings

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph a: For Applicant

Conclusion

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 Applicant. Clearance granted.

JOHN GRATTAN METZ, JR
Administrative Judge

⁷¶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;