



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 10-06195
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: *Pro se*

July 29, 2011

Decision

WHITE, David M., Administrative Judge:

Applicant hit a pedestrian while driving his car, and left the scene without providing his personal information or rendering assistance as required under state law. He was charged with this felony offense, and ultimately convicted of misdemeanor hit and run under a plea bargain. He remains on probation. The evidence is insufficient to mitigate resulting security concerns. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on April 12, 2010¹ On January 21, 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), and Guideline E (Personal Conduct).² The action was taken under

¹Item 4.

²Item 1.

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 for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on February 3, 2011, and requested that his case be decided by an administrative judge on the written record without a hearing.³ Department Counsel submitted the Government's written case on March 7, 2011. A complete copy of the File of Relevant Material (FORM)⁴ was provided to Applicant, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation within 30 days of his receipt of the FORM.

Applicant signed the document acknowledging receipt of his copy of the FORM on March 15, 2011, and returned it to DOHA. He provided no further response to the FORM within the 30-day period, did not request additional time to respond, and expressed no objection to my consideration of the evidence submitted by Department Counsel. I received the case assignment on May 12, 2011.

Findings of Fact

Applicant is a 25-year-old employee of a defense contractor, where he has worked since March 2010. He has no military service, and this is his first application for a security clearance. He has never married, has no children, and lives with his two adult sisters. Both of his parents are deceased. He attended a community college part-time for about six years after graduating from high school, while also working.⁵ In his response to the SOR, he admitted each allegation.⁶ Applicant's admissions, including his responses to DOHA interrogatories,⁷ are incorporated in the following findings.

Applicant was arrested on January 5, 2009, and charged with leaving the scene of an accident resulting in injury to another person; otherwise known as Felony Hit and Run; or Hit and Run, Death or Injury. He was driving home from work when he turned a corner and struck a pedestrian. He claims that he stopped and got out of the car to ask the woman if she was injured, and she replied that she was okay, so he left. The police were waiting for him when he arrived home, and informed him that the woman had been

³Item 3.

⁴The Government submitted seven Items in support of the SOR allegations.

⁵Item 4.

⁶Item 3. He did not directly respond to SOR ¶ 2.b, but admitted SOR ¶ 1.a, which the former allegation just incorporates by reference under a different guideline.

⁷Item 6.

taken to the hospital. Since he had not left any contact information or rendered assistance before leaving the scene, he was arrested and charged.⁸

Applicant's case was delayed and continued for several reasons, until November 23, 2009. On that date, pursuant to a plea agreement, a charge of Misdemeanor Hit and Run (or Hit and Run, Property Damage) was added and Applicant pled *Nolo Contendere* to that lesser offense. He was accordingly found guilty of the misdemeanor, and sentenced to three years of probation, to pay fines and fees totaling \$160, to perform 30 days of community service, and to pay restitution to the victim. At a restitution hearing on May 28, 2010, the court admitted and considered a 116-page document detailing the victim's expenses, medical bills, and medical records. The court then ordered Applicant to pay restitution in the amount of \$46,811 to the victim. On September 24, 2010, Applicant's counsel appeared and stated that Applicant's insurance company would pay the restitution. The court ordered the original terms and conditions of Applicant's probation to remain in full force and effect.⁹

At the time of his offense, Applicant had been working at a state-licensed behavioral health care facility since February 2006. On May 6, 2009, the state's department of social services ordered that he be precluded from contacting clients and excluded from the licensed treatment facility because his felony hit and run offense constituted conduct inimical to the health, morals, welfare or safety of the people of the state. By January 2010, when his court records continued to reflect his unresolved Felony Hit and Run charge, his employer advised him that their policies required that he be terminated for being charged with a felony. There is no evidence in the record to show what, if any, work he performed between his exclusion from the facility in May 2009 and his final termination in January 2010.¹⁰

Applicant submitted no other evidence tending to establish good judgment, trustworthiness, or reliability. I was unable to evaluate his credibility, demeanor, or character in person since he elected to have his case decided without a hearing.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), 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, these guidelines are applied in conjunction with the

⁸Items 5, 6, and 7.

⁹Item 7.

¹⁰Item 6.

factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The DCs supported by the evidence in this case are AG ¶ 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; and
- (d) individual is currently on parole or probation.

Applicant committed the offense of Hit and Run, Death or Injury, which is a felony. By definition, and under the circumstances of this case involving almost \$47,000 in restitution for medical expenses and other damages to the victim; this is a serious crime. It is also a crime that directly implicates his judgment, reliability, trustworthiness, and willingness to comply with laws because he sought to avoid responsibility for his conduct and the resulting injuries to another person. His claim that the victim told him that she was okay is not credible in light of her almost immediate hospitalization and the extent of her medical damages. Applicant remains on probation until late November 2012. These three established DCs shift the burden of mitigation to Applicant.

AG ¶ 32 provides conditions that could mitigate criminal conduct security concerns. These are:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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 offense is too recent to support mitigation under AG ¶ 32(a), especially since it was not shown to have occurred under unusual circumstances. When confronted with a situation calling for personal accountability and responsibility, he left the scene hoping to escape the consequences. As for AG ¶ 32(b), he failed to present any evidence that he was pressured or coerced into committing this offense. He admitted and was convicted of committing the offense, precluding the applicability of AG ¶ 32(c). Applicant offered no evidence of remorse for his conduct, and restitution to the victim was made under court order. The only evidence concerning the quality of his employment record is that he was fired from his last job as a direct result of this misconduct. Evidence of successful rehabilitation, to establish mitigation under AG ¶ 32(d), is accordingly lacking.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 sets forth potentially disqualifying conditions, none of which are independently supported by this record according to their plain meaning. Department Counsel mentioned “whole-person” concerns under AG ¶ 16(c).¹¹ The “whole-person” analysis will be addressed below. Applicant’s criminal offense is both sufficient for an adverse determination (AG ¶ 16(c)), and explicitly covered (AG ¶ 16(d)) under Guideline J. Applicant was fired for “conduct inimical” due to the offense, but the record is devoid of any evidence of a written or recorded condition of employment as required under AG ¶ 16(f). However, to the extent that Appellant’s criminal conduct involves questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, as discussed above, it can also be considered to support security concerns under AG ¶ 15.¹² Applicant offered no evidence that would tend to support any mitigating condition under Guideline E. After careful review of the record, I find that none of them apply.

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.

¹¹FORM at 5.

¹²ISCR Case No. 06-20964 at 4-7 (App. Bd. Apr. 10, 2008).

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 pertinent facts and circumstances surrounding this case. Applicant is a mature, accountable adult who voluntarily left the scene of an accident after hitting a pedestrian with his car and causing her substantial injuries. There was no reason for him to have done so other than to avoid responsibility and accountability for his own conduct. This demonstrates a lack of the integrity and trustworthiness that are fundamental to eligibility for being entrusted with national security information and sensitive duties. Applicant demonstrated neither remorse nor any other indication of rehabilitation. He remains on probation for another year and a half. He offered no other evidence concerning his character that could support a conclusion that he would not attempt to evade personal responsibility in the future, if confronted with potentially adverse consequences.

Overall, the record evidence leaves me with substantial doubt as to Applicant's present eligibility and suitability for a security clearance. He did not meet his burden to mitigate the security concerns arising from his criminal conduct and personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against 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.

DAVID M. WHITE
Administrative Judge