



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



In the matter of:)
)
) ISCR Case No. 10-06777
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: Dana D. Jacobson, Esq.

November 30, 2011

Decision

HEINY, Claude R., Administrative Judge:

In March 2010, Applicant inadvertently left a firearm in his backpack when he went through airport security resulting in his arrest for possession of a weapon in a prohibited place, a third degree felony. Applicant has rebutted or mitigated the criminal conduct security concerns. Clearance is granted.

Statement of the Case

Applicant contests the Department of Defense's (DoD) intent to deny or revoke his eligibility for an industrial security clearance. Acting under the relevant Executive Order and DoD Directive,¹ the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) on April 11, 2011, detailing security concerns under Guideline J, criminal conduct.

¹ 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 September 1, 2006.

On April 29, 2011, Applicant answered the SOR and requested a hearing. On August 1, 2011, I was assigned the case. On August 12, 2011, DOHA issued a Notice of Hearing for the hearing held on August 29, 2011.

The Government offered exhibits (Ex.) 1 through 5, which were admitted into evidence without objection. Applicant testified and submitted Exhibits A through J, which were admitted into evidence without objection. On September 7, 2011, DOHA received the hearing transcript (Tr.).

Findings of Fact

In Applicant's Answer to the SOR, he admitted the factual allegation in the SOR, and his admission is incorporated herein. After a thorough review of the pleadings and exhibits, I make the following findings of fact.

Applicant is a 44-year-old manager who has worked for a defense contractor since June 1990, and seeks to maintain a secret security clearance. (Tr. 54, 61)

Applicant called no witnesses other than himself. He provided numerous certificates of completion and achievement. (Ex. B) Applicant is active in the community donating his time to the local school (Ex. D) and works extensively with the Boy Scouts (Ex. E). He is the father of Eagle Scouts. (Tr. 65) He has received certificates of appreciation from the United Way (Ex. F), been a blood donor since 2007 (Ex. G), and has received numerous work-related awards (Ex. H). Coworkers, associates, and friends refer to him as a role model possessing high levels of integrity, honesty, and industriousness. They indicate he is thoughtful, reliable, trustworthy, professional, mature, and responsible. (SOR Answer, Tr. 27) In August 2010, he earned his Master's degree in management of technology. (Tr. 54)

Applicant has a state concealed weapons permit allowing him to carry a gun. (Tr. 56) He routinely carries a gun when he is making long road trips. (Tr. 70) He carries his pistol in his backpack, which he uses daily. (Tr. 56, 71) In March 2010, when his uncle was hospitalized, he made a number of five-and-a-half-hour trips from his home to his uncle's home. He had failed to remove the gun from his backpack when he returned from the visits to his uncle. A week after returning from visiting his uncle, he used the backpack when he was going on a business trip. (Tr. 71) At that time, he was making more than 20 business trips a year. (Tr. 69) The pistol was discovered at the airport when his backpack was screened as part of the airline boarding procedure.

Applicant was arrested for possession of a weapon in a prohibited place. (Ex. 3) The following day, he notified his company security manager about his arrest. (Ex. 4, Tr. 63) In January 2011, after court proceedings and having incurred more than \$10,000 in

legal fees² to contest the charge, the case was dismissed by the District Attorney (DA). (Ex. 5, Tr. 35, 78) The matter is closed. (Tr. 42)

Applicant's attorney in the criminal matter testified at the hearing. (Tr. 29 – 52) His attorney had ten-and-a-half years experience working for the Office of the United States Attorney in the state where the conduct occurred. (Tr. 32) The crime as charged requires the scienter elements of intentionally, knowingly, or recklessly possessing the weapon. (Tr. 19, 33) Applicant's actions did not involve scienter, but were merely a mistake.

The conduct is unlikely to recur. Applicant no longer carries a gun in his backpack. (Tr. 78) If he is going on a road trip with a gun, he takes the gun directly to the car and removes it promptly from the vehicle. (Tr. 78) He was aware of the airline procedure to ship guns because he did so in the past. (Tr. 82) Had he wanted to ship a gun the day of his arrest he could have declared it, properly packaged it, and surrendered it to airline personnel for shipment to his destination. However, he had no intention of shipping the gun or having it with him that day. He did not know he had it with him when he went to the airport.

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 must be considered 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 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 interests of 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.

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

² This is the amount of legal fees incurred related to the arrest. The amount of additional legal fees incurred related to this security matter is unknown.

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 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 Executive Order (EO) 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

Adjudicative Guideline (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:

- (a) a single serious crime or multiple lesser offenses, and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

In March 2010, Applicant had a gun in his backpack when he went through airport security. Disqualifying Conditions AG ¶ 31(a) and AG ¶ 31(c) apply.

AG ¶ 32 provides conditions that could mitigate security concerns:

- (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.

When Applicant traveled to see his uncle, he put a gun in his backpack. He has a state concealed gun permit which permits him to do this. When he returned from the trip he failed to remove the gun from the backpack. A week later, when he took the backpack with him as he was going through airport security for a business trip, the gun was discovered. Applicant had forgotten the gun was in his backpack. Had he wanted to take the gun on the trip he could have followed airline procedures that allow him to ship the gun as checked luggage on the aircraft. He was aware of this procedure having previously done so.

When the gun was discovered, Applicant was arrested. The following day he informed his security officer of his arrest and the incident. A year later, have incurred more than \$10,000 in legal fees, the charge was dismissed. The DA was in a position to know the full facts and circumstances surrounding the incident and the DA chose to dismiss the action. From all evidence concerning Applicant's character, this incident was the result of his inadvertent failure to promptly remove the gun from his backpack when the trip ended. There was no intention to take this gun onto the aircraft.

The mitigating conditions set forth in AG ¶ 32(a) apply. The event happened under unusual circumstances unlikely to recur. The mistake, though serious, does not cast doubt on Applicant's reliability, trustworthiness, or good judgment. Additionally, AG ¶ 32(d) applies because there is a good employment record, extensive community involvement, remorse, and he had obtained his Master's degree since the incident. This is the only incident of a criminal nature in Applicant's past. There has been no recurrence of criminal activity.

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. Applicant made a single though serious mistake when he failed to remove the gun from his backpack at the conclusion of his road trip to visit his uncle. There is no evidence he was intentionally attempting to take the gun on the aircraft. He forgot it was in his backpack. Had he remembered it was there before going to the airport, he would have saved himself more than \$10,000 in legal fees related to the arrest, other legal fees related to the security hearing resulting from that arrest, and a year-and-a-half of anguish caused by this incident.

Applicant's mistake in failing to remove the gun from the backpack was simply a mistake. It was not conduct that showed poor self-control, lack of judgment, or unwillingness to abide by rules and regulations. Overall, the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from the criminal conduct.

Formal Findings

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

Paragraph 1, Criminal Conduct: FOR APPLICANT

Subparagraph 1.a: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant a security clearance. Eligibility for access to classified information is granted.

CLAUDE R. HEINY II
Administrative Judge