



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



In the matter of:)
)
) ISCR Case No. 10-07397
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2013

Decision

NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. Applicant's arrest history and his 1998 entry-level separation from the Navy are mitigated by the passage of time and do not reflect negatively on his current security worthiness. Applicant did not intentionally falsify his March 2010 security clearance application. Clearance is granted.

Statement of the Case

On August 31, 2012, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the criminal conduct and personal conduct guidelines.¹ DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance and

¹ This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing. At the hearing convened on March 14, 2013, I admitted Government's Exhibits (GE) 1 through 9 and Applicant's Exhibits (AE) A through D, without objection. I received the transcript (Tr.) on March 22, 2013.

Findings of Fact

Applicant, 34, a heating, ventilation, and air conditioning (HVAC) specialist has been employed by a federal contractor since March 2010. Married to his second wife in March 2011, Applicant is the father of four children between one-and-a-half and 15 years old. His oldest two children are from his first marriage, which ended in divorce in September 2007, although the couple had been living apart since 2001.²

In November 1996, Applicant, just shy of his eighteenth birthday, was arrested and subsequently indicted by a grand jury on ten charges related to the armed robbery of an occupied home. At trial, Applicant presented evidence that he was in night school at the time the robbery occurred. A jury acquitted Applicant of all charges. Less than a year after the trial, Applicant enlisted in the Navy. He disclosed the 1996 arrest, felony charges, and case disposition on his March 1998 security clearance application. When Applicant entered the Navy at age 19, he was married with a six-month-old child and expecting a second child. In addition, he experienced other stressors related to the declining health and deaths of several close family members. Applicant testified that he applied for and received a hardship discharge from the Navy. At the time he completed his March 2010 security clearance application, he believed that the Navy initially categorized his discharge as general, but upgraded it to honorable six months later.³

According to Applicant's Navy medical records, he experienced work-related and personal stressors that inhibited his ability to acclimate to the Navy. In July 1998, Applicant's medical officer referred him for psychiatric evaluation after Applicant experienced suicidal ideation. The evaluating physician documented the criminal behavior, drug use, and anger control issues Applicant reported during his teenage years. The physician recommended that Applicant be discharged from military service under an entry-level separation (ELS) citing a personality disorder, not otherwise specified. The Navy discharged Applicant in August 1998 after 129 days of service. At the hearing,⁴ Applicant testified that he did not recall receiving a mental health evaluation.

After his discharge, Applicant began working in his father's HVAC business. In his spare time he customized cars. In April 2004, Applicant was arrested and charged

² Tr. 23-25; GE 1.

³ Tr. 44-47, 64-66; GE 1-2, 8.

⁴ Tr. 27-41; GE 4, 7.

with felony possession of a controlled substance. Although Applicant's arrest record corroborates the arrest and case disposition, the record does not contain any police records regarding the case. According to Applicant, the police roused him and an acquaintance from Applicant's car as the two men sat in the parking lot of a restaurant exchanging car stereo equipment. A search of the car yielded a small bag of cocaine, found by the passenger's feet. Both men denied ownership of the drugs and both were charged with possession of a controlled substance. The charge was nolle prossed.⁵

In 2008, Applicant was arrested and charged with three felony counts of possession of marijuana with the intent to distribute. According to the court documents between April and May 2008, the police set up three controlled drug purchases with a drug dealer who was the subject of an ongoing investigation. Before the fourth controlled purchase, the targeted dealer indicated that his supplier would deliver four pounds of marijuana to him in the parking lot of a local restaurant. The police arrested Applicant, his passenger, and the dealer on June 3, 2008, after the dealer pulled his car alongside Applicant's vehicle in the designated parking lot, but before the exchange of any drugs occurred. After arresting Applicant, the police conducted a search of Applicant's bedroom in his parents' home where they discovered a gun. The police also charged Applicant with a felony firearms offense. The day after the arrest, the dealer identified Applicant as his supplier. Based on this information, Applicant was indicted by a grand jury in March 2009. Although not mentioned in the criminal complaints, the certificate of analysis issued by the state-run facility that tested the drugs confiscated in Applicant's vehicle also identified Applicant's passenger as a suspect in the case.⁶

At hearing, Applicant testified that he unwittingly found himself involved in a drug transaction. Applicant has been a barber for 14 years; he cut the hair of many of the boys in his parent's neighborhood. After cutting the hair of a long-time customer, Applicant agreed to give the young man a ride to a local restaurant. Applicant, who had no reason to suspect otherwise, assumed the young man was meeting a friend. On the way to Applicant's vehicle, the young man retrieved a bag he left outside Applicant's parents' house while he was getting his hair cut. Applicant learned when he was arrested that the bag contained marijuana. After his arrest, Applicant was released on a pre-trial supervision program.⁷ Over the next year, Applicant complied with all requirements to meet with a pre-trial supervision officer, submit to drug and alcohol testing, and attend a substance abuse group. The charges were nolle prossed in June 2009.⁸

Between August 2010 and February 2013, Applicant successfully petitioned the court to have his arrest records expunged. In response to questions about his criminal

⁵ Tr. 42, 48-52; GE 6.

⁶ GE 9.

⁷ <http://www.pwcgov.org/government/courts/cjs/Pages/Pretrial-Supervision.aspx> (The pre-trial supervision program is designed to aid the courts, in the initial processing of offenders, reducing jail overcrowding, and upholding public safety through background screening and maintain supervision of offenders awaiting trial.)

⁸ Tr. 52-58.

history on his most recent security clearance application (SCA) completed in March 2010, Applicant disclosed his 2004 and 2008 arrests in response to “Section 22: Police Record Have you EVER been charged with a felony offense?” Applicant testified that he misread the question. Believing that he was only required to report criminal charges that occurred within the last seven years, Applicant did not disclose the 1996 arrest and felony charges.⁹

Since his last arrest in 2008, Applicant has not had any contact with the criminal justice system. Applicant is his family’s sole source of income. He has worked two full-time jobs since 2010: one with the federal contractor, the other with his father’s HVAC business. Applicant admits that he did not have a good head on his shoulders when he was younger. Applicant credits his father for teaching him the trade that his given him stability and the chance to grow into a mature adult. He is also a homeowner. Applicant spends his free time with his family, fixing his car, or playing sports.¹⁰

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.

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.

Analysis

⁹ Tr. 70-76; GE 1; AE A-C.

¹⁰ Tr. 25, 42-43, 58-59, 62-63, 65-66.

Criminal Conduct

Criminal activity calls into question a person's ability or willingness to comply with law, rules, and regulations, as well as a doubts about a person's judgment, reliability, and trustworthiness. Although Applicant's arrest history is cross-alleged under the personal conduct guideline, it is most appropriately discussed under the criminal conduct guideline. In 1996, 2004, and 2008, the police arrested Applicant and he was subsequently charged with multiple counts of felonious criminal conduct. A grand jury indicted Applicant on felony charges after the 1996 and 2008 incidents. These charges regardless of whether or not Applicant was formally prosecuted or convicted are disqualifying under the criminal conduct guideline.¹¹ However, the security concerns raised by Applicant's arrest history are mitigated by the passage of time.¹² It has been five years since Applicant's last contact with the criminal justice system.

Department Counsel argues that the underlying criminal conduct continues to cast doubts on current security worthiness. However, there is insufficient evidence in the record to support a finding that Applicant engaged in the alleged criminal acts. The fact that an applicant has been arrested or otherwise charged with a criminal offense, standing alone, does not constitute proof the applicant engaged in criminal conduct.¹³ Such is the case here. While the disposition of Applicant's criminal cases does not preclude the government from proving an applicant engaged in criminal conduct, there must be some other evidence tending to show that Applicant engaged in the underlying conduct.¹⁴ Here, the record contains no police reports or witness statements (aside from the accusations made by a known drug dealer in the 2008 incident) that are probative of criminal conduct by Applicant. Applicant denies any criminal misconduct. His explanations of the events surrounding his arrests are plausible and have remained consistent throughout the adjudication.¹⁵ Furthermore, the record does not contain evidence of any recent conduct that casts doubts on Applicant's current reliability, trustworthiness, and judgment.

Personal Conduct

An applicant's personal conduct becomes a security concern when he acts in a way that raises questions about his judgment or his ability to protect classified information.¹⁶ Of particular concern is any failure to provide truthful and candid answers during the security clearance process.

¹¹ AG ¶ 31(c).

¹² AG ¶ 32(a).

¹³ See, e.g., ISCR Case No. 98-0424 (July 16, 1999) at p. 4.

¹⁴ See, e.g., ISCR Case No. 98-0419 (April 30, 1999) at p. 7; ISCR Case No. 94-0954 (October 16, 1995) at p. 4.

¹⁵ See ISCR Case No. 00-0713at 3 (App. Bd. Feb 15, 2002); See also, *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985).

¹⁶ AG ¶ 15.

The SOR alleges that Applicant deliberately omitted the 1996 felony charges from his March 2010 security clearance application. An omission of a fact, on its own, is not enough to support a finding of deliberate falsification. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. While an Applicant is bound by the plain language of the questions presented in the security clearance application, a mistake in reading comprehension is not necessarily evidence of intent to withhold or conceal information from the government. The record does not contain any direct or circumstantial evidence of Applicant's intent to falsify his security clearance application. In fact, his disclosures are consistent with his misreading of the question. On each of his two security clearance applications, Applicant disclosed the felony charges he received within seven years of the application date.

The government also alleges that Applicant's 1998 ELS discharge from the Navy and its underlying circumstances raises concerns about Applicant's ability to protect classified information. An ELS is a type of uncharacterized service discharge available to members within the first 180 days of service.¹⁷ The personality disorder diagnosis that formed the basis of the ELS does not reflect on Applicant's current security worthiness. While, the diagnosis may have been appropriate for Applicant 16 years ago as 19-year-old seaman with majors stressors in his personal life, there is no allegation or evidence of ongoing mental health issues.

Whole-Person Concept

I have considered the potentially disqualifying and mitigating condition in light of all the facts and circumstances surrounding this case. In doing so, I have considered the whole-person concept as described in AG ¶ 2(a). While those granted access to classified information are held to a high standard of conduct, they are not held to a standard of perfection. All that is required is that an applicant's past is not indicative of a current inability to properly handle and protect classified information. While his past may be clouded by the stigma of multiple arrests, there is no evidence in the record tending to prove that Applicant committed the underlying offenses. On the contrary, the record shows that in the five years since his last arrest, Applicant's life has changed significantly. He works two full-time jobs. He has married his long-time girlfriend, purchased a home, and has seemingly embraced the role of husband and father to his four children. He is more settled. He has not engaged in any conduct, or maintained any relationships that could raise a security concern.

Formal Findings

¹⁷ MILPERSMAN 1910-308.

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, Criminal Conduct:	FOR APPLICANT
Subparagraphs 1.a - 1.g:	For Applicant
Paragraph 2, Personal Conduct:	FOR APPLICANT
Subparagraphs 2.a – 2.c:	For Applicant

Conclusion

In light of all of the circumstances presented, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

Nichole L. Noel
Administrative Judge