



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



In the matter of:)
)
) ISCR Case: 10-09746
)
)
Applicant for Security Clearance)

Appearances

For Government: Pamela Benson, Esquire, Department Counsel
For Applicant: *Pro se*

06/18/2012

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is denied

On May 13, 2010, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On January 18, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under the guideline for Criminal Conduct. The action was taken under 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 effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing on February 9, 2012, and waived his right to a hearing before an administrative judge. On March 7, 2012, he reversed that decision and requested one. On March 15, 2012, DOHA assigned the case to me. DOHA issued a Notice of Hearing on March 23, 2012. The case was heard on April 18, 2012, as scheduled. Department Counsel offered Government Exhibits (GE) 1 through 3 into evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through V into evidence without objection. On May 3, 2012, DOHA received the hearing transcript (Tr.)

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations contained in ¶¶ 1.a through 1.c, and 1.e of the SOR. He denied those contained in ¶ 1.d. Those admissions are incorporated into the following findings of fact:

Applicant is 38 years old and married since April 2009. He and his wife have an eighteen-month-old child. He graduated from high school in 1991. After graduation he worked at a car dealership and attended college part-time, earning some college credits. When he was 18 years old, he began associating with local gang members.

On February 1, 1993, Applicant and two gang members broke into four cars and stole radios and other items. They were arrested and charged with four felony counts of theft. On November 12, 1993, Applicant pleaded guilty to conversion, a misdemeanor, and the felony counts were dismissed. The court sentenced him to one year in jail, suspended, placed him on probation for one year, and ordered him to pay restitution. (Answer.) Applicant was 20 years old. (Tr. 36-37; GE 2.)

On July 31, 1994, Applicant and two gang members broke into a commercial building to steal money and handguns. Applicant was armed and assigned to be the "lookout" man. One man, also armed, shot a security guard. All three men immediately left the building. The security guard died later. (Tr. 44-45.) The following day, Applicant and the two men were arrested and charged with murder. On May 11, 1995, Applicant pleaded guilty to burglary and received a sentence of 20 years in jail. The court dismissed the murder charge. He was on probation for the 1993 offense at the time of the crime. He was 22 years old when convicted. Applicant apologized to the victim's wife during his sentencing. (Tr. 46-48.)

While in prison, Applicant completed the necessary credits for an Associate Degree in Arts in December 1999 and a Bachelor of General Studies in June 2001. (AE A, B.) At the age of 28, Applicant was released from prison in July 2001 after serving seven years. He received a sentence reduction of ten years for good behavior and three years for earning an associate's and bachelor's degree. (Tr. 66.) After leaving prison, he was on parole for two years. His parole terminated three months early because of his good behavior. (Tr. 49-50.)

On September 3, 2003, Applicant attended a bachelor party with other friends from college. After they left a parking lot in early morning, a policeman stopped them and questioned them about criminal damage done to overhead lights in the parking garage. Applicant was unaware of any damage. The driver was charged with operating while intoxicated (OWI). His other friend owned a handgun and had left it in the back of the truck, unbeknownst to Applicant. The friend received a citation for improperly stowing a handgun. Applicant received a citation for criminal mischief. His case was dismissed because the policeman did not appear in court for the trial. (Tr. 53-54.)

In June 2004 Applicant lived in a student complex while attending college. One of his friends had a friend who visited and offered them marijuana. Applicant experimented with it six times that week. He never used it before then, and did not use it after that. (Tr. 54.) Applicant disclosed this illegal substance abuse in his e-QIP. (GE 1.) He no longer associates with people who use illegal drugs. He does not intend to use marijuana or illegal substances in the future. (GE 3 at 112.)

On November 12, 2005, Applicant went to a bar with his brother and a Marine friend where they consumed alcohol over a period of time. After leaving the bar, all three got into his car to go home. He lost control of his vehicle and struck a tree. The car was totaled and his brother was seriously injured. He then left the scene of the accident because he was scared, confused, and intoxicated. He was soon arrested and charged with OWI, OWI involving endangerment, and leaving the scene of an accident. (GE 3.)

In January 2006 Applicant pleaded guilty to OWI involving endangerment. The court suspended his driver's license for 90 days, assessed a fine and court costs, and ordered him to complete an alcohol education course. (Tr. 55-56.) He was placed on one year of probation and order not to use alcohol. (GE 3 at 109.) Applicant successfully completed the alcohol education course in May 2006. He found the course to be an "eye opener" in regard to the potential damage that abusing alcohol could have in his life. He was not diagnosed with an alcohol problem. (Tr. 61-62.) He does not have an alcohol problem and consumes a couple beers once every couple weeks or a month. (Tr. 63.) He has not been intoxicated since November 12, 2005. (GE 3 at 109.)

After leaving prison in 2001, Applicant began a business as a floor installer to support himself. He did that until August 2005 when he obtained a position as a co-operative education engineer with a company that worked within a university. He left that position in January 2006. He then worked at a restaurant for six months. In July 2006 he found a position with his current employer through a staffing agency. During his first year of employment he was a contractor and not an employee. In 2007 or 2008, his employer hired him as an entry level electrical engineer. (GE 1 at 25.) He worked his way through college and in May 2007 earned his second degree, a Bachelor of Science in Electrical Engineering. (Tr. 57; AE C.) He was on the Honors List his last two semesters, having earned an "A" grade in seven of the nine courses he completed. (Answer; AE B.)

Since working for his employer, Applicant has received excellent work performance evaluations. In the 2008 evaluation, his supervisor noted that Applicant “has had an excellent year. . . [He] can handle whatever task is given to him, and is showing excellent leadership skills.” (AE L.) In the 2009 evaluation, his supervisor again stated that Applicant “is doing an excellent work for the company. . . [Applicant] is showing some strong leadership potential as well as his solid technical skill base.” The mid-level manager indicated that Applicant’s team had “requested a long term commitment of [Applicant].” (AE M.) In the 2010 evaluation, Applicant’s supervisor noted that Applicant “is working at a very high level. He has the respect of all of those that work with him. He can think through problems well, and meet customer needs and commitments.” (AE N.) In the 2011 evaluation, Applicant’s supervisor again mentioned his excellent performance. He stated that Applicant “is well liked by his peers. He has a good attitude, and maintains an even keel.” (AE O.)

During his employment as an electrical engineer between 2008 and 2010, Applicant completed four certificate courses, in the area of system design, specific ITT training, and leadership. (AE D-G.) He received four awards for his achievements, team work, excellence, and service. (AE H-K.)

Applicant submitted six letters of recommendation. A colonel in the U.S. Army wrote a letter in June 2009 complimenting Applicant for his work on a project that provided technical and operational support to the troops. He referred to Applicant as “a valued member of the . . . team.” (AE P.) A senior staff engineer, who has worked with Applicant for five years, wrote a letter. He has “grown to trust [Applicant] with more and more responsibility. [Applicant] has proven to be reliable, trustworthy and efficient in the execution of his assignment.” (AE R.) Another senior staff engineer stated that [Applicant] is well respected by his peers and fellow co-workers. He is honest, forthright, and sincere in his interactions with co-workers and is a positive contributor to [the company.]” (AE Q.) A retired engineer for the company, whose position Applicant assumed, has known Applicant for five years and is his friend. He stated that he “had many opportunities to observe [Applicant] in various situations and I have seen that he can be counted on to do the right thing, always.” (AE T.) Applicant’s mother wrote a supportive letter. (AE U.) In a letter dated March 25, 2012, Applicant’s supervisor wrote:

I have no reservations in working with [Applicant], and recommending him for a Secret clearance. He has been open with me on the fact that there has been an ongoing investigation on his clearance eligibility. He has not tried to hide this issue, and I am confident that he is a trustworthy person that has matured, and is solidly moving forward in this next stage of his life. (AE S.)

Applicant stated that his supervisor and colleagues are aware of his incarceration, but not the underlying crime. His family and friends know the circumstances involved. (Tr. 78.)

A government investigator interviewed Applicant between June and August 2010 regarding his criminal past. In his summary of that interview, the investigator noted that Applicant was “deeply remorseful of his past criminal conduct. [Applicant] has no future intention of committing criminal conduct. . . [He] regrets his past actions and has attempted to better himself by earning his degrees and working hard at his jobs.”(GE 3 at 113.) The investigator said Applicant was “completely cooperative.” (*Id.*)

While testifying, Applicant expressed deep remorse over his criminal conduct and indicated that he has not been arrested or charged with any criminal incident since November 2005. (Tr. 33, 82.) He has changed over the last six years and his life now consists of his family and work. The negative factors previously in his life are no longer present and his education has taught him to think differently. (Tr. 64.) In his closing argument, he stated that “I’m not the same person I was when I committed those crimes. I am a dedicated husband and father and want to create a better life for my family.” (Tr. 83.) He has “the courage to speak to either groups of individuals or even individuals one-on-one so they can learn from my mistakes.” (Tr. 83.) He candidly answered questions. He spent time preparing his case and assembling exhibits.

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 (AG) list potentially disqualifying conditions and mitigating conditions, which are useful 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(a) and 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government 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 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.”

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 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

The security concerns regarding criminal conduct are set forth in AG ¶ 30:

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 six conditions that could raise a security concern, four of which may be disqualifying in this case:

- (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;
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and,
- (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.¹

¹ Effective January 1, 2008, The Bond Amendment repealed the Smith Amendment that disqualified all persons working for the DoD from holding a security clearance if they had been incarcerated for one year or more. Under The Bond Amendment, said restriction applies only to applicants seeking clearances that provide access to Special Access Programs (SAP), Restricted Data (RD), or Sensitive Compartmented Information (SCI).

Applicant has a history of criminal conduct. He was convicted of serious crimes in 1994 and 2005, and a lesser offense in 1993. He admitted using marijuana, an illegal substance, in 2004, and being arrested for criminal mischief in 2003. When he was arrested for murder in 1994, he was still on probation for the 1993 offense. He was sentenced to prison for 20 years, and served seven. The Government established the four disqualifying conditions.

After the Government raised disqualifying conditions, the burden shifted to Applicant to provide evidence to rebut or to prove mitigation. 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;
- (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.

The record evidence supports the application of AG ¶ 32(d). In July 1994 Applicant committed a serious crime, resulting in his incarceration for seven years. That crime occurred about 18 years ago. Four and a half years after being released from prison early for good behavior in July 2001, he committed another serious offense, OWI involving endangerment, in November 2005. Since that time Applicant completed his sentence and continued rehabilitating himself. In July 2006 he began working for his employer as a contractor. In May 2007 he finished his second bachelor's degree and received honors his last two semesters. In 2007 or 2008 his employer hired him as a fulltime electrical engineer. In 2009 he married his wife. His 2008, 2009, 2010, and 2011 performance evaluations document his successful employment. Four colleagues attest to his competency. His supervisor considers him to be trustworthy and reliable. The 2003 criminal mischief charge was dismissed. There is no evidence that Applicant has used illegal substances since June 2004.

Applicant is visibly remorseful and embarrassed by his past. He spoke candidly of his criminal conduct and expressed the changes he has made in his personal and professional life. He has new friends, a good job, and focuses on his wife and child.

The evidence does not support the application of the other three mitigating conditions under AG ¶ 32.

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). They include the following:

- (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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must include an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered potentially disqualifying and mitigating conditions in light of all facts and circumstances in this case. Applicant is a 38-year-old man, who has a history of significant criminal conduct. Several mitigating facts weigh in favor of granting Applicant a security clearance. Applicant served seven years on a 20-year sentence for the 1994 murder/burglary. He was released from prison 13 years early as a consequence of good behavior and earning a college degree. He successfully completed his sentence for the 2005 OWI involving endangerment, and has not been involved in any other criminal conduct. There is no other derogatory evidence in the record of alcohol-related offenses, or of illegal-drug-related misconduct since the June 2004 use of marijuana.

Since July 2006, when Applicant began a position with his current employer, he has demonstrated professional growth and personal maturity. He earned a second bachelor's degree that, in all probability, propelled him into his current role as an electrical engineer.

A colonel, who worked with Applicant in 2009, complimented him on his participation and work on a military project. His supervisor gave him excellent performance evaluations for his work as an engineer for the last four years and expressed confidence in his abilities and trustworthiness.

Applicant presented exhibits pertaining to his continued pursuit of education and documenting his accomplishments. His successful employment for the last six years attests to a dedication to his job and overall change in his character. Colleagues positively address his reliability and work ethic. They are aware of his previous incarceration, decreasing the potential for coercion or exploitation. His family and friends are also aware of his criminal history.

Of significance are Applicant's candid remorse and humility regarding his criminal history. He recognizes his mistakes and takes complete responsibility for his behavior. All of his rehabilitative efforts, during prison and since November 2005, make evident his commitment to change.

Substantial evidence, however, weighs against granting Applicant a security clearance. In February 1993 he was arrested for theft and later convicted of property conversion. In July 1994, while on probation, he was arrested for murder and subsequently spent seven years in prison for a reduced charge of burglary. Although he was released early from a 20-year sentence, he remained on parole for about 21 months or until approximately April 2003. In September 2003 he was arrested for a misdemeanor charge that was later dismissed. About a year later, he experimented with marijuana, an illegal substance, for one week in June 2004. In November 2005 he used extremely bad judgment when he decided to drive after becoming intoxicated. He crashed his car and left the scene of the accident and his brother, who was seriously injured in that accident. As a consequence, sometime in early 2006 he was placed on probation for another year, or until sometime in early 2007.

While Applicant's record of rehabilitation and accomplishments continues to be impressive and encouraging, it does not outweigh the seriousness of the 1994 crime and the fact that about four years after leaving prison he consumed alcohol and drove a car, resulting in another serious crime. At this time the length of successful rehabilitative efforts does not outweigh the approximately 14 years that he has spent in the criminal justice system, on and off.

Overall, the record evidence leaves me with questions as to Applicant's eligibility and suitability for a security clearance at this time. For all these reasons, I conclude Applicant did not sufficiently mitigate the security concerns arising under criminal conduct.

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.e:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

SHARI DAM
Administrative Judge