



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



In the matter of:)
)
) ISCR Case No. 11-00088
)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esq., Department Counsel
For Applicant: Benita Williams, Personal Representative

June 4, 2012

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant mitigated the security concerns that arose out of his criminal activities during the period of 1990 through 2007. He has not committed any criminal offenses since 2007. He also mitigated the Personal Conduct concerns that arose out of his incorrect answers on his Electronic Questionnaires for Investigations Processing (e-QIP), his criminal conduct, and his discharge from the Army. Eligibility for access to classified information is granted.

Statement of the Case

On October 19, 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). The action was taken under Executive Order (EO) 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 (AG) effective after September 1, 2006.

Applicant answered the SOR on February 6, 2012, and requested a hearing before an administrative judge. The case was assigned to me on March 22, 2012. DOHA issued a notice of hearing on March 28, 2012, and the hearing was convened as scheduled on April 25, 2012. The Government offered Exhibits (GE) 1 through 7, which were admitted without objection. Applicant testified on his own behalf and offered Exhibits (AE) A through G, which were admitted without objection. The record was left open until close of business May 25, 2012, for receipt of additional documentation. On May 23, 2012, Applicant submitted one additional document marked AE H. Department Counsel had no objection to AE H, and it was admitted. DOHA received the transcript of the hearing (Tr.) on May 3, 2012.

Procedural Ruling

At the hearing on April 25, 2012, Department Counsel made a motion to amend the SOR, in order to conform to the evidence, by adding ¶ 2.e, pursuant to Directive ¶ E3.1.17. Applicant had no objections to the amendment and admitted the allegation. (Tr. 11-12.) The SOR is amended to include the following:

2.e You were discharged from the United States Army on November 6, 1972, under Other Than Honorable conditions.

Findings of Fact

Applicant is a 58-year-old employee of a defense contractor since 2010. He possesses a General Education Development (GED) certificate. He is married and has an adult daughter. (GE 1; Tr. 42-45.)

In the SOR, the Government alleged that Applicant was arrested four times between 1990 and 2000. In addition, he remained on probation until July 2007 for probation violations. His criminal record is as follows.

In August 1990 Applicant was arrested and charged with Unlawful Possession of a Controlled Substance. Federal Bureau of Investigations (FBI) criminal records indicate this charge was dismissed. Applicant testified that he was traveling in a vehicle with a friend who possessed marijuana. Their vehicle was stopped for a traffic violation and the marijuana was discovered by the police. He explained that this charge was dismissed because he was not the one in possession of the marijuana. (GE 2; Tr. 61.)

In December 1993 Applicant was arrested and charged with Burglary 2nd Degree and Grand Theft Property, both felonies. Applicant testified that he was arrested after he stole goods from a home improvement store. He was convicted of both charges, and sentenced to 180 days in jail and 36 months of probation. He served his jail sentence and was released on probation. However, he was subsequently arrested on warrants for probation violations and/or failure to appear twice in January 1999, in February 2000, in November 2005, and twice in July 2007. In total, he served 279 days in jail as a result of his initial conviction and subsequent probation violations. In August 2007, Appellant's

probation was terminated and he was released, as documented in court records provided by Applicant. (GE 2; AE H; TR. 45-46, 62.)

Applicant was arrested in March 1999 and charged with Battery on Person. He testified that this incident involved a verbal altercation between him and a female roommate, after he discovered she was cheating on her husband. This charge was dismissed as indicated in the FBI report. (GE 2; Tr. 65.)

Applicant was arrested in January 2000 and charged with Vandalism. He testified that this incident involved a verbal altercation between himself and his daughter. Applicant "hit a door" after his daughter cursed at him. He was convicted and sentenced to 30 days in jail and three years of probation. (GE 2; Tr. 45, 65.)

On July 21, 2010, Applicant completed an e-QIP. Under Section 22 of this form he was asked, in part:

Section 22: Police Record

For this item, report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the record, or the charge was dismissed. You need not report convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. Be sure to include all incidents whether occurring in the U.S. or abroad.

For Questions a. and b., respond for the timeframe of the last 7 years (if an SSBI go back 10 years). Exclude any fines of less than \$300 for traffic offenses that do not involve alcohol or drugs.

- b. Have you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?
- c. Have you EVER been charged with any felony offenses?
- e. Have you EVER been charged with any offense(s) related to alcohol or drugs?

Applicant answered 22.b., 22.c., and 22.e., "No." He testified that he felt overwhelmed by the paperwork and asked his wife to help him complete it. His wife filled it out for him, and he provided details to her when she had questions. They have only been married three years and she was not aware, at that time, of his criminal record. Further, Applicant credibly testified he has difficulties with long-term memory. (GE 1; Tr. 56-57, 71.)

In February 2011 Applicant was sent interrogatories inquiring, in part, into the above noted criminal arrests. For all but the Burglary 2nd Degree/Grand Theft charges,

he indicated “not me,” because he did not recall being arrested in the specific locations identified in the allegations. However, after submitting his answers to the interrogatories, Applicant and his wife took the initiative and had a “finger-print scan” performed in order to acquire access to his complete criminal record. In June 2011, on his own volition, Applicant provided a second, corrected Answer to Interrogatories. He provided information on each arrest listed from the information that he obtained from the “finger-print scan.” He also corrected the locations of the incidents that had confused him in his initial Answers to the Interrogatories. (GE 3; GE 6; Tr. 74-89.)

On November 6, 1972, Applicant was discharged from the United States Army, under Other Than Honorable (OTH) conditions. Applicant testified with much remorse about his discharge. He joined the Army at age 17, during the Vietnam conflict. After completing basic and advanced training, he was sent to a state-side base instead of Vietnam, because his brother was already serving in Vietnam. Upset that he was not deployed with the rest of the soldiers he trained with, he failed to return from leave and was considered absent without leave (AWOL). He was discharged under OTH conditions in June 1972. He testified that he was immature and selfish at the time, and did not understand the ramifications of his actions. (GE 7; Tr. 50-52.)

Applicant is well respected by his manager, pastor, co-workers, and friends. He is known as a “self-starter” with “a work ethic beyond reproach.” He is considered to be a valuable employee and is active in his church’s ministries. (AE A-G.)

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 and mitigating conditions, 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, administrative judges apply the guidelines 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 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.

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 clearance 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 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.

Section 7 of EO 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant’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 following are potentially applicable:

- (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
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant has a history of criminal offenses that occurred between 1990 and 2007 including: Unlawful Possession of a Controlled Substance; Burglary 2nd Degree and Grand Theft Property; Battery on Person; Vandalism; and six probation

violations/failure to appear charges. These offenses give rise to concerns about Applicant's judgment and reliability both because of the nature of the offenses and the quantity of criminal offenses. The aforementioned disqualifying conditions have been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 are potentially applicable:

- (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.

Applicant has a history of criminal behavior. However, his offenses occurred when he was less mature. Five years have passed since his last offense, a probation violation. During that time, he has married, become an active member of his church, and found meaningful employment with a government contractor. His manager, pastor, co-workers, and friends support Applicant's application and speak highly of Applicant. Due to the recent, positive changes in Applicant's life, criminal conduct is unlikely to recur. He has demonstrated that he has successfully rehabilitated himself. His past criminal behavior does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(d) apply.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment

qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

The evidence shows that Applicant has a history of criminal conduct and that he failed to disclose his criminal conduct to the Government in his July 2010 e-QIP. Further, he received an OTH discharge from the Army in 1972.

With respect to the allegations concerning falsification of his July 2010 e-QIP, however, I find that the omissions were not deliberate. Applicant did not intentionally submit his e-QIP with false answers. Instead, he relied on his wife to complete the form and she was unaware of the arrests at that time. His credibility was further supported by his subsequent efforts to acquire his own copy of his criminal history and provide the information he obtained to DOHA in order to correct his earlier misstatements. Applicant has demonstrated that he had no intent to deceive the Government through the inadvertent errors on his e-QIP. AG ¶¶ 16(a) and 16(b) are not disqualifying.

Applicant's OTH discharge and criminal history, however, do raise concerns regarding his personal conduct. The Government has established sufficient concerns under AG ¶¶ 16(c) and 16(e) to disqualify Applicant from possessing a clearance.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is

unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

The evidence supports the application of AG ¶¶ 17(c), 17(d), and 17(e). Applicant acknowledged his wrongful behavior in both his criminal conduct and his OTH discharge. His OTH discharge occurred when he was 18 years old. While his criminal conduct spanned a long period from 1990 to 2007, he has made substantial changes since 2007 as noted above. He finally was discharged from probation in August 2007, and has not violated any criminal laws in almost five years. It is unlikely, given Applicant's positive behavior and influences in the past five years, that criminal conduct will recur. Applicant spoke with remorse about his past choices. He has taken steps in his life to move past the criminal activities and become a productive and responsible member of society.

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. I have incorporated my comments under Guidelines J and E in my whole-person analysis.

Applicant is trusted by those who know him best. The majority of his criminal conduct took place when he was much younger. Although his probation violations carried on until 2007, Applicant has not had any violations in almost five years and is no longer on probation. He is now happily married and is actively involved in his church's ministries. He voluntarily took steps to change his life and demonstrate maturity. Further, he has shown, through the submission of his second Answer to the Interrogatories, that he intends to be truthful with the Government, despite any embarrassment with respect to his Criminal Conduct. Applicant has demonstrated that there is little potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence overcomes the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from the cited adjudicative guidelines.

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:	FOR APPLICANT
Subparagraph 1.a~1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a~2.e:	For Applicant

Conclusion

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

Jennifer I. Goldstein
Administrative Judge