



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



In the matter of:)	
)	
-----)	ISCR Case No. 11-01695
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: Erik B. Wallin, Esq.

03/15/2012

Decision

MARSHALL, Jr., Arthur E., Administrative Judge:

On September 16, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant enumerating security concerns arising under Guideline J (Criminal Conduct). The action was taken under 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) implemented by the DOD on September 1, 2006.

In an October 10, 2011, response, Applicant admitted three allegations and denied in part one allegation raised under Guideline J. He also requested a hearing before a DOHA administrative judge. DOHA assigned the case to me on December 14, 2011. The parties agreed to a hearing date of January 31, 2012, and a notice to that effect was issued on January 6, 2012. I convened the hearing as scheduled.

Applicant testified, introduced two witnesses, and presented five documents for consideration, which were accepted without objection as exhibits (Exs.) A-E. Department Counsel offered four documents, which were admitted as exhibits (Exs.) 1-4 without objection. The transcript (Tr.) of the proceeding was received on February 8,

2012, and the record was closed. Based on a review of the testimony, submissions, and exhibits, I find Applicant met his burden of mitigating the security concerns raised. Clearance is granted.

Findings of Fact

Applicant is a 25-year-old engineer who was hired as a full-time employee in June 2010, after an intensive, two-year, internship. He currently earns \$60,000 a year. Applicant has a bachelor of science in computer engineering. He is single and has no children. He currently lives with his parents.

In December 2005, when he was 19 years old, Applicant was invited to visit a friend at a local college. Applicant went to the school and his friend took him back to his dormitory. Later, security officers arrived after someone complained about noise from the dorm.¹ The school officers detained Applicant and some other individuals because they were not registered visitors. Applicant was unaware that visitors were supposed to register with security when visiting campus. He noted that the “round up” of students to discern who was not a student may have been an effort to highlight to enrolled students the need to register their guests. Applicant pled *nolo contendere* to the charge of wilful trespass in a school building, was fined, and ordered to pay costs.

In October 2006, at age 20, Applicant was visiting a friend in a rural area in another state. They had some alcoholic beverages, then went to an “18-plus” club. Applicant’s friend advised him that the local police force “didn’t really like people” from his home region.² As they returned from the club to the friend’s apartment, some locals assaulted Applicant and a fight ensued. The police intervened. Applicant was charged with underage consumption of alcohol and disorderly conduct. He paid a fine and the charges were dismissed.

One night in April 2009, when he was 22 years old, Applicant and some friends had been to a bar. They left in Applicant’s Jeep. Applicant was not aware one of his three friends had taken two pictures from the bar. Applicant was pulled over by police officers while driving. He refused to submit to a breathalyzer test. Applicant was charged with driving under the influence/drugs/1st offense, receiving stolen goods, roadway lane violations, and refusal of a preliminary breath/chemical test. He was found guilty of refusing to take the breath test, a civil infraction. He was sentenced to six months license suspension, community service, and ordered to pay a fine plus other costs. All other charges were dismissed.³

¹ The dormitory was boisterous; no party was in progress. Applicant believes the noise that raised the complaint came from his friend’s hallway. Tr. 44.

² Tr. 42.

³ In completing his security clearance application (SCA), found at Ex. 1, Applicant disclosed the fact he was found guilty of the breath test refusal, but not the other charges. In explanation, Applicant credibly stated that he thought they were all related and that the breath test charge was the main charge of interest. Regardless, his disclosure of the date, jurisdiction, and charge were sufficient to provide investigators notice of the incident. See Tr. 49.

Between April 2009 and May 2009, Applicant lost his state-issued identity card, which he had been using for identification since his driver's license had been suspended. He seldom has use for the card and did not notice it was missing.⁴ Around June 9, 2009, Applicant received a summons in the mail that indicated in late May 2009, he had rented a hotel room, destroyed it, and left without paying for it. He was charged with malicious destruction of property. Applicant denied having perpetrated the crimes enumerated after using his identity card at check-in. The hotel was within a few miles of Applicant's home. The hotel clerk did not identify him as the culprit. Applicant went to the hotel and met with the manager. Applicant offered to pay \$250 toward the damages for his association with the crime, specifically, his failure to control custody of the identity card used to rent the room. He wanted the charge against him to be over and put in his past.⁵ There is no evidence a credit card belonging to Applicant was used in the renting of the room. The charge was dismissed.

During Applicant's internship with his present employer (2008-2010), he was given increasingly more complex projects requiring much independence. As his responsibilities grew, Applicant began focusing more on his career potential and less on the typical socializing of a young man in his early 20s. This included relying less on the companionship of local friends who were not fellow collegians or who were unemployed. He reduced his alcohol consumption to its current level, which Applicant describes as "very casual."⁶ Around the time he graduated college in May 2010, he became a full-time employee with his current employer. Applicant threw himself into his work, giving it his full attention and making it his top priority. He appreciates both his job, the opportunities and work it offers, and his present salary. He has no intention of jeopardizing his employment or career goals.⁷

Applicant has not been involved in any questionable activity since April 2009, nearly three years ago. At work, Applicant's supervisor noted Applicant's personal growth in the past couple of years, and his ability to work with a high level of independence. He also noted that Applicant has been known to work 50-60 hours per week in order to keep customers happy. The supervisor stated that Applicant receives excellent appraisals and "for a young engineer he . . . rolls with things a lot more than you would expect him to"⁸ The supervisor has only witnessed Applicant imbibe alcohol in moderation.⁹ In discussing Applicant maturation over the past two years, the supervisor's superior, who is aware of the conduct at issue, noted that since Applicant

⁴ Applicant now wonders whether he lost it at a campus party. Tr. 32.

⁵ Tr. 49-50 (" . . . my father owns a business. . . I understand the frustration. . . . I felt the urge to do something, just because of - - because it was my fault that I lost my ID that this happened to his place. That's the main reason we decided to pay")

⁶ Tr. 28. In addition, Applicant no longer drinks to intoxication when he uses alcohol. Tr. 48.

⁷ Tr. 29.

⁸ Tr. 59.

⁹ Tr. 57.

was hired as a full-time employee, he had “seen nothing from him that indicates that he is other than a mature engineer, and he is a trustworthy individual as well.”¹⁰ Other than modifying his lifestyle and devoting himself to work, Applicant is currently mentoring his brother, who is in college studying engineering. Applicant also attends his church.

Policies

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions. 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. Under AG ¶ 2©, this process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”¹¹ The burden of proof is something less than a preponderance of evidence. The ultimate burden of persuasion is on the applicant.¹²

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 about potential, rather than actual, risk of compromise of classified information.

¹⁰ Tr. 70.

¹¹ See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

¹² ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

Section 7 of Executive Order 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). “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹³ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.¹⁴

Based upon consideration of the evidence, Guideline J (Criminal Conduct) is the most pertinent to this case. Conditions pertaining to this AG that could raise a security concern and may be disqualifying, as well as those which would mitigate such concerns, are set forth and discussed below.

Analysis

Guideline J – Criminal Conduct

The concern under this guideline is that “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.”¹⁵ In this case, Applicant admitted he was thrice arrested and subject to a summons on one occasion between 2005 and 2009. Such facts are sufficient to raise both Criminal Conduct Disqualifying Condition AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Consequently, it is Applicant’s burden to mitigate the security concerns raised.

While Applicant’s entry into his friend’s college dormitory in 2005 can be easily attributable to teenage oversight, especially absent evidence Applicant knew the school had a policy for registering guests, the 2006 and two 2009 incidents involve serious criminal issues. Applicant admits that he was underage drinking with friends during a college trip in 2006. Alcohol may have also played a part in his April 2009 arrest. There is no evidence that Applicant was legally intoxicated, and there is no evidence of an admission or a failed field sobriety examination. Applicant’s choice to refuse a breath test was a legally permissible option, but not one without consequences. Here, he faced those consequences, was found guilty of refusal to submit to a breath test, and satisfied his sentence. There is no evidence that Applicant otherwise has an alcohol dependence or has since recklessly used alcohol. Rather, the evidence shows that his use of alcohol has diminished and is now within socially accepted norms. As to these three arrests, Applicant has freely participated in the legal process and complied with any court orders. The only other incident at issue is the June 2009 charge regarding destruction of property. Here, there was no evidence placing Applicant at the scene and

¹³ *Id.*

¹⁴ *Id.*

¹⁵ AG ¶ 30.

no other evidence – *i.e.*, a credit card for the room on check-in, room charges, etc. - linking him to the motel except an identity card, which Applicant credibly testified he had lost.

In light of the above chronology, it appears that Applicant has not been involved in any criminal or questionable activity since April 2009, three years ago. While three years may not seem to be a long period of time, it is a significant period in the life of a 25-year-old man. Since that time, he has graduated from college, been promoted from intern to full-time employee, refocused his life, moderated his use of alcohol, changed his circle of friends, and consciously or unconsciously made considerable strides in maturation. He is a highly regarded employee, who is praised for working at a level far beyond his years. Applicant recognizes how fortunate he is to have his job, which he truly enjoys and which has proved to be quite lucrative. He is not prone to doing anything that might jeopardize his position or career. Applicant is attentive to his family and church, and credibly regrets his past criminal activity. Given the passage of time since his criminal activity, genuine remorse, successful attempts to rehabilitate himself, and his subsequent achievements, I find that Criminal Conduct Mitigating Condition AG ¶ 32(a) (*so much time has elapsed since the criminal behavior happened, 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*) and AG ¶ 32(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 service*) apply. None of the other mitigating conditions apply.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of an applicant's conduct and all the circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based on 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, as well as the whole-person factors. Applicant is a credible and forthright 25-year-old man who capably parlayed a challenging two-year internship into a full-time position he truly values. While in college, he was involved in a trespass incident at a local college in 2006 and in two alcohol-related crimes, in 2006 and 2009, respectively. In 2009, he was also summoned as a potential suspect in malicious destruction of property case that was later dismissed. The former poses negligible concern. As for the alcohol-related incidents, he pled guilty to one and was only found guilty of refusing to submit to a breath test, an act that was within his right but not without legal repercussions. He is genuinely contrite about his past behavior.

Since his 2010 college graduation, Applicant has grown considerably. Both his work superiors and Applicant, himself, have noted his maturation in the past few years. Applicant has not been involved in any dubious activities in three years. He is now a social drinker, a fact also noted by his supervisor. He devotes a considerable amount of time to work, as opposed to leading the social-oriented lifestyle enjoyed by many in his age range. Applicant is known as a reliable and superior employee. He avoids trouble and is intent upon living a professional life befitting his career-path. Applicant values both his job and his integrity to such a degree that there is no doubt that he will jeopardize either in the future. In light of these considerations and the facts of record, I conclude that Applicant met his burden in mitigating criminal conduct security concerns. Clearance is granted.

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

Subparagraphs 1.a-1.d: 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 a security clearance. Clearance is granted.

ARTHUR E. MARSHALL, JR.
Administrative Judge