



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



In the matter of:)
)
) ISCR Case No. 11-02171
)
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn E. Hoffman, Esq., Department Counsel
For Applicant: *Pro se*

January 9, 2012

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline J, Criminal Conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On July 13, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, Criminal Conduct. DOHA acted 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 (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on August 8, 2011, and requested a hearing before an administrative judge. The case was assigned to me on October 4, 2011. DOHA

issued a notice of hearing on October 31, 2011, and the hearing was scheduled for November 17, 2011. A second hearing notice was issued on November 10, 2011, rescheduling the hearing for November 16, 2011, with the consent of Applicant. The hearing was held as rescheduled. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. The Government's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified, offered one witness, and presented exhibits (AE) A-G. DOHA received the hearing transcript (Tr.) on November 29, 2011.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegation. I have incorporated that admission into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 31 years old. He is single and has no children. Since June 2005, he has worked as an engineer for a defense contractor. He has a master's degree. He has held a security clearance since 2005.¹

Applicant's conduct raised in the SOR included being arrested on April 17, 2010, on two counts of aggravated assault and one count of resisting arrest, all felonies. In a plea agreement, he pled no contest to one count of aggravated assault and the remaining charges were dropped. He was sentenced to 18 months probation, community service, counseling, and restitution. Upon successful completion of probation, his felony charge would revert to a misdemeanor.²

On April 17, 2010, a Saturday, Applicant started the morning by participating in a community-sponsored 10K run. To participate in the run, he took out his driver's license from his wallet to use as identification for the event. After participating in the event, he forgot to replace his driver's license back in his wallet. Later that day, he and his girlfriend attended a community festival. Alcohol was served at the festival. To gain entry, participants needed to show proper identification (insuring that the person was 21 years old) at the entry point of the festival to secure a wristband, which allowed them access to alcohol. When Applicant reached the entry point he realized he did not have his identification. He spoke to the attendant and described why he did not have his identification. The attendant opined that Applicant looked over 21 years old and gave him a wristband. He and his girlfriend entered the festival area.³

During the course of the afternoon, Applicant testified that he consumed two beers between 2:00 p.m. and 3:00 p.m. at the festival. At about 7:00 p.m., he and his girlfriend entered a wine tasting area. They ordered some wine and then they were

¹ Tr. at 5, 28; GE 1.

² GE 3.

³ Tr. at 29-30; GE 2

approached by an individual who turned out to be a plainclothes police officer (PO-1). Applicant described the officer as a “shady looking, poorly dressed” person. According to Applicant, PO-1 did not immediately identify himself, but did ask Applicant and his girlfriend to produce identification. His girlfriend corroborates his testimony on this point. Applicant asked PO-1 who he was. PO-1 made some motion toward his belt, but Applicant did not see a badge. Applicant was asked to produce identification two more times and then was grabbed by a second plainclothes police officer (PO-2). Applicant claims he flinched and then was thrown to the ground by one of the officers. While on the ground, Applicant described having his face pushed into the stomach of one of the officers. He felt panicked and bit the officer producing blood and leaving teeth impressions. The whole incident happened in about one minute’s time. He was picked up and handcuffed. Applicant claims this was the first time the police officers identified themselves during the encounter. He was taken away and booked in the local jail. His girlfriend bailed him out of jail.⁴

Applicant entered into the plea agreement described above because even though he and his attorney believed he had a good case to defend, there was a risk of a felony conviction that Applicant did not want to take. By entering the plea agreement and satisfying all his probationary terms, he was assured that the felony conviction would be removed from his record. Applicant has not had any further criminal involvement since this incident and has complied with all his probation requirements. His probation status was reduced from supervised probation to unsupervised probation in September 2011. His probation is scheduled to end in April 2011.⁵

Applicant is supported by character letters from friends attesting to his trustworthiness and high character. They view the Applicant’s criminal arrest as an aberration based upon a misunderstanding. He had no other criminal allegations in his past. Applicant also immediately notified his security manager about the arrest.⁶

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 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching

⁴ Tr. at 30-39, 57, 61; GE 3.

⁵ Tr. at 44-45; AE B, C.

⁶ Tr. at 47; AE E-G.

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, 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, and 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 that an applicant may deliberately or inadvertently fail to 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 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).

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 in this case. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (d) individual is currently on parole or probation.

Applicant pled no contest to aggravated assault and he remains on probation for that offense. I find that both the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and found the following relevant:

- (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's arrest for aggravated assault was over 18 months ago. Besides this incident, he has never been negatively involved with law enforcement. The circumstances of his arrest in April 2010 were a one-of-a-kind event. There is nothing in his background to indicate he is predisposed to this kind of criminal behavior. Therefore, Applicant has produced sufficient mitigating evidence to establish that sufficient time has passed since the criminal behavior, that it happened under such unusual circumstances that make it unlikely to recur, and that it does not cast doubt on his reliability, trustworthiness, or good judgment. AG ¶ 32(a) applies. Additionally, Applicant produced sufficient mitigating evidence of successful rehabilitation (reduction in his probation status, compliance with all other probation requirements, and no recurrence of criminal activity) for AG ¶ 32(b) to fully apply as well.

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 the 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 considered Applicant's age, education, his probationary status, and his character references. Applicant found himself in an unexpected situation and panicked when confronted by undercover police officers. He accepted responsibility for his actions and has complied with all his probation requirements. His probationary status has been reduced to unsupervised. Applicant presented mitigating evidence of successful rehabilitation.

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 under Guideline J, 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:	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 national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge