



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



In the matter of:)
)
) ISCR Case No. 11-04502
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

09/07/2012

Decision

RIVERA, Juan J., Administrative Judge:

In 2009, Applicant was convicted of unlawful wounding, a felony. He was released early from probation, and he successfully completed anger management counseling. Between 2004 and 2006, Applicant was found guilty of four separate alcohol-related misdemeanor offenses. He expressed sincere remorse for all of his criminal behavior, and has taken significant steps to rehabilitate himself. On balance, I find that his criminal behavior is not likely to recur, and it does not cast doubt on Applicant's current reliability, trustworthiness, judgment, and on his ability to follow the law. Clearance is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on October 12, 2010. On April 13, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline J

(Criminal Conduct).¹ Applicant answered the SOR on May 4, 2012, and requested a hearing before an administrative judge. The case was assigned to me on June 7, 2012.

DOHA issued a notice of hearing on June 25, 2012, scheduling the hearing for July 25, 2012. At the hearing, the Government offered exhibits (GE) 1 through 12. GE 1 through 10 were admitted without objection. GE 11 and 12 were not admitted, but they were considered for administrative notice purpose. Applicant testified, and submitted exhibits (AE) 1 through 5, which were admitted without objection. DOHA received the hearing transcript (Tr.) on August 2, 2012.

Findings of Fact

Applicant admitted all the factual allegations in the SOR. His admissions are incorporated as findings of fact. After a thorough review of all the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following additional findings of fact.

Applicant is a 37-year-old information technology technical advisor. He was awarded an associate's degree in computer science in November 1999. From March 2003 until July 2009, he worked for a federal contractor providing support to a government agency. He was hired by his current employer, a government contractor, in September 2009. Applicant has never been married; however, he cohabitated on-and-off with his ex-girlfriend for many years. They have three children, ages 17, 8, and 5.

Applicant submitted his first security clearance application (SCA) in October 2010. In his responses to Sections 22 (Police Record), he disclosed that he was charged with two felony offenses - malicious wounding and burglary of an occupied dwelling in 2009, with driving while intoxicated (DWI) in 2007, with carrying a concealed weapon and possession of a controlled substance in 1995, and with carrying a concealed weapon and discharging a firearm in public place in 1994. Applicant also disclosed the above offenses to his current employer when he was hired in September 2009.

Concerning the May 2009 felony offenses, Applicant explained that he came home late one night and he could not unlock the front door. He forced his way into his home and found his then girlfriend with a male friend in the living room. Applicant and the other man were involved in a physical altercation. Applicant found himself on the floor with the other man choking him. Applicant used a pocket knife and cut the other man on his abdomen and hand to force him to let go of Applicant's throat. The other

¹ DOHA acted 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* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

man was not seriously injured, but received some stitches. Applicant claimed his actions were in self-defense, and that he was afraid for his life.

In October 2009, Applicant pled guilty to the lesser offense of unlawful wounding (felony). He was sentenced to three years confinement (suspended), and three years probation. Applicant successfully completed his probation early in March 2011. (GE 4) Prior to his trial, he successfully completed an anger and stress management course in October 2009. (AE 2)

In September 2007, Applicant was charged with DWI. Applicant established in court that he was not driving the vehicle and he was found not guilty of the DWI charge. (GE 6)

In January 1995, Applicant got a ride from two of his high school classmates. The driver was stopped for speeding, and a search of the vehicle revealed a gun and illegal drugs in the backseat of the car. Applicant was charged with carrying a concealed weapon and possession of drugs. Applicant's classmates testified that he was not aware of the weapon or the drugs. After passing a polygraph examination, the charges against Applicant were dismissed.

In 1994, Applicant, then 19, experimented with a weapon by firing it into the air. He was charged with carrying a concealed weapon and discharging a firearm in a public place. He admitted that he was very immature and lacked judgment when this incident occurred. The 1995 and 1994 criminal incidents were not alleged in the SOR.

Applicant's background investigation also revealed that in May 2004, July 2005, and July 2006, he was found guilty of open container (misdemeanor offenses). And, in October 2006, he was found guilty of drinking in public (a misdemeanor offense). Applicant explained that in all of the above occasions, he was consuming alcohol either on the porch or in the backyard of a friend's home. He denied he was consuming alcoholic beverages in a public place. However, he did not contest the charges, and just paid the fines.

Applicant acknowledged that his repeated alcohol-related offenses show immaturity, lack of judgment, and an inability or unwillingness to comply with the law. He explained that he no longer consumes alcoholic beverages in public, and that he has matured. His last alcohol-related offense occurred in October 2006. He is now dedicated to his children and his job. Applicant expressed sincere remorse for his 2009 felony conviction. He believes that he was acting in self-defense. Applicant is no longer in a relationship with the mother of his children. They only communicate about the welfare and care of their children, and to schedule his visits with his children.

Applicant submitted four favorable reference letters from current supervisors and co-workers. He is considered to be a consummate professional and a valued team member. In his supervisor's opinion, Applicant displays the highest level of integrity and dedication. He serves as a mentor and trainer for the company's new hires. Based on

his work performance since September 2009, his references recommend, without reservation, that he receive access to classified information.

Policies

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

Under Guideline J, the Government's concern 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. AG ¶ 30.

In October 2009, Applicant was convicted of unlawful wounding, a felony offense. He was sentenced to three years confinement (suspended), and probation for a period of three years. He was released early from probation, and he successfully completed an anger management treatment program in October 2009. Between 2004 and 2006, Applicant was found guilty of four separate alcohol-related misdemeanor offenses. In 1994, he was convicted of discharging a weapon in a public place.

Applicant's behavior raises security concerns under 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."

AG ¶ 32 lists four conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

- (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.

Considering the evidence as a whole, I find that several of the Guideline J mitigating conditions apply. Applicant's 2009 unlawful wounding felony conviction is a serious offense that normally would disqualify an applicant for eligibility for a security clearance. In this case, however, there are extenuating circumstances. Applicant's light sentence is an indicator of how the court viewed his offense and that it may have

considered that he partially acted in self-defense. Applicant's probation was terminated early for good behavior, and he completed an anger management course on his own.

Applicant expressed sincere remorse for all of his criminal behavior, and has taken significant steps to rehabilitate himself, including the passage of time without recurrence of criminal activity. He has an excellent employment record. He is no longer in a relationship with his ex-girlfriend, who was the cause of the physical altercation. He has not been involved in any alcohol-related offenses since 2006. Considering Applicant's overall behavior, I find that the criminal incidents are not likely to recur and they do not cast doubt on Applicant's current reliability, trustworthiness, judgment, and on his ability to follow the law. AG ¶¶ 32(a), 32(c), and 32(d) apply. The remaining mitigating condition is not applicable.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. (AG ¶ 2(c)) Applicant's immaturity likely led to his four alcohol-related offenses in 2004-2006. Unusual circumstances contributed to his 2009 unlawful wounding felony conviction.

Applicant has matured and learned from his mistakes. He is now dedicated to his children and his job. In light of Applicant's job performance and good behavior since 2009, I find that his criminal conduct does not raise doubts about Applicant's current judgment or his ability to comply with the law and regulations. Applicant modified his behavior and has established permanent lifestyle changes to ensure that his questionable behavior is unlikely to recur.

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.f:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge