



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



In the matter of:)	
)	
XXXXXX, XXXXXXXX XXXXXXXX, XXX)	ISCR Case No. 11-04828
)	
Applicant for Security Clearance)	

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: Leslie McAdoo Gordon, Esquire

05/07/2012

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ I grant Applicant's clearance.

On 7 December 2011 the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct).² Applicant timely answered, requesting a hearing. DOHA assigned the case to me 2 March 2012, and I convened a hearing 19 April 2012. DOHA received the transcript 27 April 2012.

¹Consisting of the transcript (Tr.), Government Exhibits (GE) 1-5, and Applicant Exhibits (AE) A-F.

²DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted March 2010 charges of assault and reckless endangerment (SOR 1.a and 2.c). He denied being terminated from a job in October 2003 (SOR 2.a) and falsifying an October 2010 clearance application (SOR 2.b). He is a 52-year-old senior engineer employed by a defense contractor since April 2005. He seeks to retain the clearance he has held since at least April 2004.

From March to October 2003, Applicant worked a series of temporary jobs for a Government contractor (GE 1). During that time, he was nominated to work on a contract that required him to have some level of clearance and access at a non-DoD Government agency. Applicant completed the required application.³ At some point in the ensuing background investigation, evidence surfaced regarding a 1988 or 1989 criminal incident involving Applicant. Applicant's request for unescorted access was denied. The record is silent on whether Applicant was given his required due-process rights. He was taken off the contract, but not fired by his employer. He remains eligible for rehire (AE A).

Applicant obtained full-time work with another defense contractor in December 2003, and applied for another security clearance in April 2004 (GE 2). He fully disclosed that he had left a job for other reasons under unfavorable circumstances in October 2003 (question 20) as well as the fact that he had an adverse access decision (question 32, 43). Applicant stated at the time that he had misunderstood the question and consequently answered it incorrectly (GE 2, 3). Applicant's clearance was later favorably adjudicated.

In March 2010, Applicant was charged with first degree assault, second degree assault, and reckless endangerment (GE 4). A large, unleashed dog attacked Applicant's smaller dog in his mother's yard. Applicant went into his mother's house to find something he could use as a club to separate the two dogs, and emerged from the house with an unloaded Civil War-era rifle. However, when he emerged from the house, the other dog's owner had arrived and separated the two dogs. Applicant returned the gun to the house, and thought the incident resolved.⁴ However, he was later charged as above. Applicant accepted a plea agreement to plead guilty to second degree assault in exchange for probation before judgment—conditioned on his completing an anger management course, spending 30 days in home detention, and completing 18 months of supervised probation (AE C). Applicant satisfied the conditions as required, and was released from probation in March 2012 (AE C).

³Government records do not show what form Applicant was required to complete, of the several that were in use at the time, so it is impossible to state the scope of any questions regarding past criminal conduct.

⁴The only description of the incident is contained in Applicant's clearance application (GE 1) and the recorded summaries of his subject interviews in October 2010 and March 2011.

When Applicant completed his most recent clearance application in October 2010 as part of a periodic reinvestigation, he disclosed the March 2010 arrest and the September 2010 disposition. He did not disclose the 2003 employment incident again because he believed it occurred over seven years before—and thus outside the scope of the question.

Applicant has an excellent employment record (AE D). His work and character references consider him honest and trustworthy (AE E). He has received work commendations and completed ongoing management and security training (AE F).

Policies

The adjudicative guidelines (AG) list factors to be considered in evaluating an Applicant's suitability for access to classified information. Administrative judges must assess both disqualifying and mitigating conditions under each issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in AG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against applicant. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guideline J (Criminal Conduct) and Guideline E (Personal Conduct).

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, it establishes a valid case against access to classified information. Applicant must then refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests 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.⁵

⁵See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

Analysis

The Government established a case for disqualification under Guideline J, by showing Applicant's criminal conduct in March 2010.⁶ However, Applicant mitigated the criminal conduct security concerns. Although the incident is fairly recent, it still occurred over two years ago. It also occurred under extremely peculiar circumstances, and given Applicant's right to protect his dog from attack by an unleashed dog, he cannot be said to have acted unreasonably by grabbing an antique rifle to separate the animals. Nor did he act unreasonably in retreating once the owner of the other dog reestablished control over his animal. Applicant might well have not been charged on these facts, but once he was charged, he faced the choice between going to trial with a strong defense that might nevertheless fail or accept a plea agreement that would ensure that the charges were dismissed if he met the probation conditions. Applicant acted reasonably in choosing the latter.⁷ He had no difficulty satisfying the conditions of his probation. Thus, the evidence of successful rehabilitation is very strong. I resolve Guideline J for Applicant.

The Government did not establish a case for disqualification under Guideline E. The criminal conduct allegation cross-referenced in SOR 2.c raises no security concern not fully addressed by Guideline J. Further, the evidence does not establish deliberate falsification of a clearance application [16. (a)], both because Applicant thought the employment incident was more than seven years ago (and thus he lacked the necessary intent to falsify) and because he had previously fully disclosed and discussed the information alleged to have been deliberately withheld.

The employment incident itself lacks security significance for several reasons. First, Applicant misunderstood the question he was alleged to have falsified in October 2003, and therefore lacked the necessary intent. Second, even if the criminal conduct question allegedly falsified asked for criminal conduct without date limitation, a 1988-1989 arrest arguably lacked relevance over 14 years later. Third, it does not appear that Applicant was given his required due-process rights to contest the agency's action in October 2003. Fourth, Applicant was not terminated from his employment in October 2003, but merely removed from the particular contract he was working on, and in any event fully disclosed the details of that incident in April 2004 when he completed a new clearance application. Finally, the Government favorably adjudicated that incident in 2004, and while the Government is not precluded from revisiting the conduct, there is nothing in that conduct either independently or in conjunction with the 2010 assault charge that warrants revocation of Applicant's clearance. Applicant's employment

⁶¶31.(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;

⁷¶32.(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 judgment; (c) evidence that the person did not commit the offense; (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, . . . good employment record . . .

references are solid and he has an established record of safely handling classified information. I resolve Guideline E for Applicant.

Formal Findings

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph a: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraphs a-c: For Applicant

Conclusion

Under the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

JOHN GRATTAN METZ, JR
Administrative Judge