



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



In the matter of:

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ISCR Case No. 11-13912

Applicant for Security Clearance

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro se*

03/05/2014

Decision

WHITE, David M., Administrative Judge:

Applicant was caught committing two minor theft-related offenses shortly after he turned 18 years old. He pled guilty and fulfilled all resulting sentence requirements. He then obtained and has excelled at his present employment without further misconduct for almost four years. The evidence is sufficient to mitigate security concerns. Based upon a review of the pleadings, testimony, and exhibits, eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on July 19, 2011. On September 11, 2013, the Department of Defense issued a Statement of Reasons (SOR) to Applicant, detailing security concerns 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 Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing (AR) on September 26, 2013, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on October 28, 2013. The case was assigned to me on October 31, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Video Teleconference Hearing on November 20, 2013, and I convened the hearing as scheduled on December 9, 2013.¹ The Government offered exhibits (GE) 1 through 3, which were admitted without objection. Applicant offered no documentary evidence, and testified on his own behalf. I granted Applicant's request to leave the record open until December 30, 2013, to permit submission of written evidence. DOHA received the transcript of the hearing (Tr.) on December 17, 2013. On January 3, 2014, Department Counsel forwarded Applicant's exhibit (AE) A, which had been timely submitted, without objection to its admission. The exhibit was admitted and the record closed.

Findings of Fact

Applicant is a 22-year-old employee of a defense contractor, for whom he has worked as a marine painter since January 2011. He is single, with no children. He graduated from high school in June 2010.² In his response to the SOR, Applicant admitted the truth of all allegations, with some explanations.³ Applicant's admissions, including his statements in response to DOHA interrogatories,⁴ are incorporated in the following findings.

Applicant was arrested on minor theft-related charges twice, in March and June 2010, as alleged in SOR ¶¶ 1.b and 1.c. The first incident involved his attempt to shoplift some carbon dioxide cartridges and BBs from a discount department store that he and a friend visited to kill some time. The friend decided that he wanted to shoplift a BB gun, and enlisted Applicant's help to steal the accessories for him. As they were leaving the store, an employee yelled at them to stop. Applicant did, but his friend ran away. Applicant was charged with Theft 3rd Degree, and subsequently charged with Obstructing Law Enforcement because he initially gave false information to the arresting officer when asked to identify his friend.⁵

Applicant and his attorney were able to negotiate a pretrial diversion agreement concerning these charges in the county District Court.⁶ Under the agreement, Applicant admitted his guilt of the charged offenses and the prosecution agreed to delay the trial

¹Department Counsel participated by video teleconference. All other participants were present in person.

²GE 1; Tr. 30-32.

³AR.

⁴GE 2.

⁵AR; GE 2; GE 3; Tr. 35-36.

⁶The District Court is the lower-level court that handles misdemeanors and traffic offenses.

for a two-year period after which, if Applicant committed no further offenses, the charges would be dismissed. Should he re-offend during the two year period, his guilty pleas would be entered and he could be sentenced for the resulting conviction.⁷

Applicant did not see his shoplifting friend again until late June 2010, at which time he and another friend came by to “hang out” with Applicant one evening. They decided to go walk around the neighborhood and steal items from unlocked parked cars. When a police patrol car interrupted their activities, Applicant and the first friend ran away, but the third friend was caught and provided their identities to the police. About an hour later, as the two tried to walk home, a police officer told them to stop. The friend ran away again, but Applicant surrendered, gave the officer his stolen items, and was issued a ticket citing him for Vehicle Prowling, Theft, Criminal Trespass, and Obstructing Law Enforcement. Applicant later pled guilty to Vehicle Prowling 2nd Degree in the city Municipal Court. He was sentenced as set forth in the SOR, with jail time and \$4,150 in fines suspended for a two year probationary period. He performed 22 days of court-ordered community service. He could not afford to pay his unsuspended \$850 in fines, so he worked about 8 additional hours of community service for which he received partial credit. In April 2011, after he obtained his current job and began earning money for the first time, he paid the remaining \$500 or \$600 balance.⁸

In January 2011, Applicant was hired by his present employer. In September 2012, he was sent to temporarily work on a project in a shipyard in another state. In January 2013, he learned for the first time that the county District Court had issued a bench warrant for his arrest after finally learning that he had violated the pretrial diversion agreement by committing the June 2010 offense for which he was convicted in the city Municipal Court. He obtained time off to return home and surrender to the court and resolve the issue. At his initial hearing, the District Court continued the case for about a month. Applicant again returned home in late February 2013 for the sentencing hearing. The judge determined that Applicant had turned his life around and demonstrated almost three years of responsible behavior. Accordingly, he was found guilty of Theft 3rd Degree for the March 2010 shoplifting incident, sentenced to serve one day in jail and fined \$850. He satisfied these obligations, and is under no further court supervision or probation.⁹

Applicant no longer associates with any former high school friends with whom he got into trouble in 2010. He works 60 to 85 hours per week, and spends any leisure time playing video games at home or working on his truck. He has earned three substantial wage raises and been promoted to serving as lead man on his paint crew. His company’s regional superintendent wrote a letter praising his hard work, trustworthiness, and good character. Applicant loves his job, and hopes to make a career in his field. He takes pride in having matured over the past four years and

⁷GE2; Tr. 29, 37-38.

⁸AR; GE 2; Tr. 38-41, 55-56.

⁹AR; GE 2; Tr. 28-29, 41-45.

becoming a responsible and productive contributor at home and work.¹⁰ He made a very good impression during his hearing, exhibiting an understanding of the potentially serious consequences of any future misconduct as well as a sincere commitment to being a good citizen.

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 (DCs) and mitigating conditions (MCs), 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 the 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "[t]he 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Section 7 of Executive Order 10865 provides: "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned."

A person applying for access to classified information seeks to enter 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

¹⁰ AE A; Tr. 46-51.

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.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The Criminal Conduct DCs established by the undisputed evidence in this case are:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was caught in the acts of shoplifting and car prowling in March and June 2010. He pled guilty to both minor offenses, paid the resulting fines, served one day in jail, and performed some community service.

AG ¶ 32 provides conditions that could mitigate security concerns:

- (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.

Applicant's two offenses occurred almost 4 years ago, when he was 18 years old and before he began his current period of successful employment. While he was not under any great degree of pressure or coercion to commit these minor crimes, his

involvement was essentially going along with the plan of his former friend in an unwise surrender to peer pressure. He did not attempt to place blame on the friend, however, and accepted responsibility for his bad decisions. He dissociated himself from such friends several years ago, and has become a mature and productive adult whose current reliability and trustworthiness are apparent. Mitigation under AG ¶¶ 32(a) and (b) is thus established.

Applicant admitted the two offenses in question, so AG ¶ 32(c) does not apply. However, his ready acceptance of responsibility, immediate restitution of all stolen goods, excellent employment record since January 2011, and absence of any criminal conduct for almost four years combine to show successful rehabilitation and mitigation under AG ¶ 32(d).

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 pertinent facts and circumstances surrounding this case. Applicant was caught in the act while attempting to commit two minor theft-related offenses shortly after he turned 18. He accepted responsibility and fulfilled all requirements of his resulting sentences. He has since become a mature individual who has demonstrated accountability and made good choices for almost four years. There is no resulting susceptibility to pressure or duress, and recurrence of misconduct is unlikely. He also provided substantial evidence of good work performance and good character to overcome potential security concerns. Overall, the record evidence alleviates earlier doubt as to Applicant's present eligibility and suitability for a security clearance. He met his burden to mitigate the security concerns arising from his criminal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	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.

DAVID M. WHITE
Administrative Judge