



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



In the matter of:)
)
) ISCR Case No. 14-02785
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

09/22/2017

Decision

RIVERA, Juan J., Administrative Judge:

Between December 2010 and November 2015, Applicant was arrested three times (burglary/theft, marijuana use and possession, and driving while intoxicated (DWI)) and convicted once for DWI. It has been almost two years since his last offense (DWI). The passage of time without additional incidents of security concern, his performance at work and school, and his positive community involvement, are sufficient to establish his successful rehabilitation. Clearance granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 17, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) on April 16, 2016, issued him a Statement of Reasons (SOR) alleging security concerns under Guideline J (criminal conduct). Applicant answered the SOR on May 3, 2016, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on February 3, 2017. DOHA issued a notice of hearing on February 9, 2016, scheduling a hearing for March 1, 2017. At the hearing, the Government offered five exhibits (GE 1 through 5). Applicant testified, presented the

testimony of one witness, and submitted exhibit (AE) A (comprised of five reference statements). All exhibits were admitted without objection, except for GE 5, which was made part of the record, but not as evidence. DOHA received the hearing transcript (Tr.) on March 9, 2017.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a – 1.c. His admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 26-year-old employee of a federal contractor. He is a 2010 high school graduate, and received an associate's degree in information technology in 2013. In December 2013, his current employer, a federal contractor and clearance sponsor, hired him as a desktop support technician. This is his first security clearance application. Applicant has never been married and has no children.

In response to Section 22 (Police Record) of his 2014 SCA, Applicant disclosed that in December 2010, he was arrested and charged with possession of burglary tools-motor vehicle; conspiracy to possess burglary tools-motor vehicle; burglary-4th degree/tools; and theft of less than \$1,000 value. He entered into a probation before judgment plea agreement and was given six months' probation. After completion of the probation terms, the charges were *nolle prosequi*. The charges were later expunged.

During an April 2014 interview with a government investigator and at his hearing, Applicant claimed he was an innocent bystander in the above offenses. He averred he was invited by a close friend and his cousins to go for a car ride. He was not aware of his friends' plans to break into cars. They stopped at a neighborhood, left him in the car, and they went on a spree of breaking into cars until they were arrested. Applicant claimed he had not associated with any of his friends involved in this incident since December 2010. At hearing, Applicant testified he still associates with his close friend, who is now a law-abiding citizen. His friend completed a master's degree, is working as a financial analyst, and is about to get married.

In March 2013, Applicant was arrested and charged with possession of marihuana and possession of drug paraphernalia. Following a pretrial diversion plea agreement, the charges were placed on a STET docket. After Applicant completed 20 hours of community service, the charges were *nolle prosequi*.

In response to Section 23 (Illegal Use of Drugs or Drug Activity), Applicant disclosed that he illegally used marihuana twice in his life "because he was around the wrong kind of people." He stated in the 2014 SCA that he last used marijuana in March 2013, the day he was arrested. He also stated he does not intend to use marijuana ever again because he wants to succeed in the U.S. Government.

At hearing, Applicant testified he illegally used marijuana for the first time in 2011, at age 19. He was in his neighborhood and someone offered marijuana to him, and he smoked it. The second time he used marijuana was a year later, in 2012. He was at a park about 15 minutes from his home and “another guy” peer-pressured him into smoking marijuana. Applicant claimed he has not used marijuana again since 2012.

In March 2013, Applicant was sitting in his car, waiting for a friend who had been riding with him and had just left the car, when a police officer pulled over and told Applicant he knew he had something in his car. Applicant looked in between the car seats, saw the marijuana “dime-bag” (a circle of about one inch in circumference) and handed the marijuana over to the police officer. Applicant claimed that the marijuana he handed over to the police officer belonged to his friend and that he did not know about it before the police approached him.

In November 2015, Applicant was charged with driving while impaired by alcohol (DWI). In January 2016, he was convicted of the offense and sentenced to one year of supervised probation and to pay a \$200 fine and court costs.

Applicant claimed he has learned his lesson the hard way. He is now trying to do his best to stay out of trouble and away from associates who are bad influences. He is focusing on school, his work, and helping his father to support his family. Additionally, Applicant volunteers at a local food pantry and as a teacher’s aid.

Applicant’s references included two co-workers, a friend, his sister, and father. Applicant was described as a hard-working, dependable, and reliable employee who is kind-hearted and dedicated to his family. His father believes Applicant was humiliated and remorseful because of the distress his DWI conviction placed on his family. Applicant promised never to repeat his foolish misconduct again. His father believes he will not engage in criminal activity in the future.

Policies

The SOR was issued under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; 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.

While the case was pending a decision, the Security Executive Agent implemented Security Executive Agent Directive (SEAD) 4, *National Security Adjudicative Guidelines* (AG), effective 8 June 2017. I decided this case under the AGs implemented by SEAD 4.

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, § 2. 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 SEAD 4, App. A ¶¶ 2(d) and 2(f). 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; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 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 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 December 2010, Applicant was charged with possession of burglary tools-motor vehicle; conspiracy to possess burglary tools-motor vehicle; burglary-4th degree/tools; and theft of less than \$1,000 value (among other offenses). He entered into a probation before judgment plea agreement and was given six months’ probation.

After completion of the probation terms, the charges were *nolle prosequi*. The court later expunged the charges at Applicant's request.

Applicant illegally used marijuana in 2011, at age 19, and in 2012. He claimed he has not used marijuana since 2012. He does not intend to use marijuana ever again because he wants to succeed in his job with a federal contractor. In March 2013, Applicant was charged with possession of marihuana and possession of paraphernalia. Applicant claimed the marijuana belonged to a friend. Following a pretrial diversion plea agreement, the charges were placed on a STET docket. After Applicant completed 20 hours of community service, the charges were *nolle prosequi*.

In November 2015, Applicant was arrested and charged with driving while impaired by alcohol (DWI). In January 2016, he was convicted of the offense and sentenced to one year of supervised probation and to pay a \$200 fine and court costs.

Applicant's criminal behavior raises security concerns under AG ¶ 31:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

AG ¶ 32 lists two 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; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶ 32(a) and (d) apply and mitigate the criminal misconduct security concerns. Applicant's five incidents of criminal behavior occurred between December 2010 and November 2015. It has been almost two years since his last offense. Applicant served his sentence to one year of supervised probation and paid his fine. There is no evidence of any additional questionable behavior.

Applicant presented evidence showing that he is on the right track to establish his successful rehabilitation. He noted that he has been involved in constructive community involvement and volunteers at a local food pantry and as a teacher's aid. His references described him as a hard-working, dependable, and reliable employee who is kind-hearted and dedicated to his family. His father believes Applicant was remorseful about the distress his DWI conviction placed on his family. Applicant expressed remorse and promised to stay away from bad influences, to concentrate on school, and to help his father support his family. Applicant's criminal behavior was likely the result of his age and immaturity. It appears he has learned a hard lesson from his past mistakes.

Applicant is now fully aware that for him to be eligible for a clearance and his job with a federal contractor, he will be required to demonstrate his trustworthiness, character, honesty, and good judgment. Any future criminal behavior will destroy the trust placed upon him by the Government and show that he is unreliable, untrustworthy, and lacks judgment.

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. SEAD 4, App. A, ¶¶ 2(a), 2(d) and 2(f). I have incorporated my comments under Guideline J in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 26-year-old employee of a federal contractor. His immaturity led him to engage in criminal behavior. Considering Applicant's age at the time of the offenses, the circumstances surrounding the offenses, the courts' actions handling those offenses, the passage of time without additional incidents of security concern, his performance at work and school, and his positive community involvement, I find that Applicant's evidence is sufficient to establish his successful rehabilitation. Considering the evidence as a whole, Applicant's past criminal behavior does not cast doubt on his current reliability, trustworthiness, and judgment.

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.c:

For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national security interests of the United States to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge