



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



In the matter of:

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) ISCR Case No. 14-05922
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Applicant for Security Clearance

Appearances

For Government: Ray T. Blank, Esquire, Department Counsel
For Applicant: *Pro se*

October 18, 2016

Decision

GOLDSTEIN, Jennifer I., Administrative Judge:

On March 28, 2014, Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP). On December 4, 2015, the Department of Defense Consolidated Adjudications Facility (DODCAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines J (Criminal Conduct), M (Use of Information Technology Systems), and E (Personal 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 (AG) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR in writing on December 28, 2015 (Answer). Applicant requested his case be decided on the written record in lieu of a hearing.

A complete copy of the file of relevant material (FORM), consisting of Items 1 to 7, was provided to Applicant on February 18, 2016. He was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant received the file on February 23, 2016. Applicant filed a Response to the FORM dated March 15, 2016 (Response).

Department Counsel submitted seven Items in support of the SOR allegations. Item 7 is inadmissible. It will not be considered or cited as evidence in this case. It is the summary of an unsworn interview of Applicant conducted by an interviewer from the Office of Personnel Management in April 2014. Applicant did not adopt it as his own statement, or otherwise certify it to be accurate. Under Directive ¶ E3.1.20, this Report of Investigation summary is inadmissible in the absence of an authenticating witness. In light of Applicant's admissions, it is also cumulative.

I received the case assignment on July 19, 2016. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is granted.

Findings of Fact

Applicant is 26 years old. He is a high school graduate. He has been employed with a Federal Contractor since February 2014. He has never been married and has no children. (Item 4.)

Under Paragraph 1, Criminal Conduct, Applicant admitted that in May 2010 he was arrested and charged with Assault Menacing with a Deadly Weapon and Making False Report Explosives, both felonies. The charges were reduced to Petty Offense Disturbing the Peace in September 2011. He was found guilty and sentenced to 75 hours of community service, court costs, one year of unsupervised probation, and to write letters of apology. In April 2012, the deferred charges were dismissed. This criminal activity was cross alleged as a security concern under Guideline E, Personal Conduct. (Item 2; Item 5; Item 6; Answer.)

Under "Section 22-Police Record" on his e-QIP, Applicant disclosed:

I was helping a friend with a photography contest held by a local photography group in which the subject needed to involve a mailbox in some way. My friend wanted to take a satirical photo by having me wear a costume including a scarf and a gasmask. I stood by a mailbox and poured powdered sugar into an envelope while my friend took a few pictures. My friend and I then continued with our day and had lunch and went to develop the photos. We were contacted by the police a short time later and were alerted that they were searching for us. We told them where we were and they picked us up to ask questions and eventually take us into custody. We were interviewed by the FBI because of the nature of the event and they deemed that we were not attempting to do

anything malicious and left us to the local authorities. We were placed in custody for the night and released the following day with orders to go to court. Our court dates continued getting pushed back for nearly a year, we eventually started taking care of business at the court dates and the last court date occurred in 04/2012. We were able to show the court that we did not intend any harm and regretted our decision. The court lowered the charge to a deferred sentence Petty Offense of Disturbing the Peace because of the trouble the event had caused. We completed 75 hours of community service and continued to write letters of apology to the FBI inspector, Police Chief, Fire Chief, and Postmaster that had been involved. I have deeply regretted this decision since the event occurred, it was a stupid mistake, as you will see during my background check there are no other events on my record. I have done my best to be [a] responsible, positive and productive member of my community and I hope that I will not be denied this clearance based on a single mistake. (Item 4.)

In his Answer and Response, Applicant indicated that there has been no subsequent conduct of a similar nature. He also stated that such conduct is unlikely to recur. He expressed sincere remorse. His Response included copies of the sincere apology letters he wrote to the police and fire department involved. He also included his log of community service to show it was completed. (Answer; Response.)

Under Paragraph 2, Use of Information Technology Systems, Applicant admitted that he received four reprimands while employed at a credit union for misuse of information technology systems between December 2013 and January 2014. (Answer.) He worked in the information technology department at that institution. These reprimands were also cross alleged as a security concern under Guideline E, Personal Conduct. (Item 2; Answer.)

From January 2013 to February 2014, Applicant worked for a credit union in its information technology department. Applicant explained that the job “called for more experience and knowledge than I had to offer at the time. While my manager knew of my inexperience when he hired me he hoped I would be able to be trained and grow into the position. Unfortunately, time did not allow for much training and I could not grow into the position in the time that [the employer] had hoped.” (Item 4.) As a result, he received two disciplinary actions in December 2013, for failure to inform management of potentially malicious behavior that he could not resolve; and for a security incident for powering off all servers without authorization and against company policy. In January 2014¹ Applicant received disciplinary action twice, for failure to perform trace scans and removed unencrypted operating systems; and for unwillingness to follow rules, regulations, and procedures. Applicant decided to leave this job in February 2014, after he was told that if his performance did not improve, he could be terminated. He provided a copy of his resignation letter in his Response. (Item 4; Response.)

¹ The SOR incorrectly refers to these events as occurring in January 2013.

Applicant indicated in his Response that these were isolated incidents, due to his improper training and the work environment at the credit union. He indicated he has a strong work ethic and has thrived in positions since leaving the credit union. (Response.) He presented 2014 and 2015 performance reviews from his employer that demonstrate his technical proficiency and professional conduct. He also presented a 2010-2012 performance review from a previous employer that shows Applicant performed well and took responsibility for his actions, decisions, and all tasks delegated to him. (Response.)

Applicant presented seven character reference letters. His pastor indicated that he has known Applicant all his life and that the criminal incident was “out of character.” Another minister from his church indicated that Applicant was creative and will “learn more appropriate ways to express his creativity after growing from his [criminal] mistake.” (Response.) His two former supervisors and an associate wrote letters on Applicant’s behalf indicating Applicant is responsible and hard working. Applicant’s facility security officer wrote a letter to “personally attest to [Applicant’s] conscientiousness in the workplace.” She indicated Applicant abides by all security guidelines and “is a man of integrity and character and that his youthful indiscretions were a terrible mistake.” (Response.)

Applicant is active in community service. He teaches a troop of boys “life skills, survival techniques, and leadership skills.” (Response.) He earned an Associate’s Degree in 2011 and has earned several certificates in different areas of the information technology field. (Response; Item 5.)

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 and mitigating conditions, which are useful 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, the administrative judge applies the guidelines 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(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.

According to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance 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 the applicant may deliberately or inadvertently fail to protect or 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. See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive 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 five conditions that could raise a security concern and may be disqualifying. One condition applies:

(a) a single serious crime or multiple lesser offenses.

Applicant was convicted of Petty Offence Disturbing the Peace in September 2011. His conduct raises security concerns under DC 31(a), and shifts the burden to Applicant to rebut, extenuate, or mitigate those concerns.

AG ¶ 32 provides four conditions that could mitigate security concerns. Two conditions may apply:

(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 presented evidence to establish full application of the above mitigating conditions. Six years ago, Applicant was 20 years old. He lacked maturity and participated in an extremely thoughtless photoshoot, which ended in his arrest after the authorities were alerted to his actions. His letters of apology demonstrate sincere remorse for his improper conduct. He fully completed all of the court-ordered community service. His Answer, Response, and recommendation letters from the people that know him best, reflect that this instance was an aberrational event. He has learned from his past behavior and will not engage in such conduct again. He has not repeated such imprudent behavior in the past six years. The above mitigating conditions apply.

Guideline M, Use of Information Technology Systems

The security concern relating to the guideline for Use of Information Technology Systems is set out in AG ¶ 39:

Noncompliance with rules, procedure, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(e) unauthorized use of a government or other information technology system; and

(g) negligence or lax security habits in handling information technology that persist despite counseling by management.

The above disqualifying conditions have been established.

AG ¶ 41 provides conditions that could mitigate security concerns. Applicant admitted that in December 2013 to January 2014, he received four disciplinary actions

for: failure to inform management of potentially malicious behavior that he could not resolve; a security incident for powering off all servers without authorization and against company policy; failure to perform trace scans and removed unencrypted operating systems; and for unwillingness to follow rules, regulations, and procedures. The following is potentially applicable:

(a) so much time has elapsed since the 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.

Applicant acknowledges his on-the-job errors from December 2013 to January 2014. He admitted that he lacked the proper training to do his job adequately without errors and expressed remorse at his failings. As a result, he decided to seek other employment. He is successful in his current position. His infractions occurred under circumstances that are unlikely to be repeated. He has not had any security issues at his new job, which he has successfully held for two years. Similar circumstances are unlikely to recur and his past conduct does not cast doubt on his current reliability, trustworthiness, and good judgment. The above mitigating condition applies.

Guideline E, Personal Conduct

The security concern for the Personal Conduct guideline is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Department Counsel argued the following disqualifying condition is applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

Department Counsel argued that Applicant engaged in a course of unacceptable behavior over a several year span from 2010 to 2014. His 2010 arrest and his 2013 to

2014 employment misconduct are isolated events, but when considered as a whole, may indicate a history of exercising questionable judgment. AG ¶16(c) is applicable.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant met his burden to establish mitigation. As noted above, he presented evidence including letters expressing remorse, and letters from his current employer to show how his past actions no longer cast doubt on his reliability, trustworthiness, and judgment. He has matured and has technical proficiency at his current job. He completed the court ordered community service. He demonstrated positive performance reviews since January 2014. He has taken steps to alleviate the stressors, circumstances, or factors that caused his untrustworthy, unreliable, and inappropriate behavior including obtaining additional certificates of training. He acts as a role model to youth in his community. The above mitigating conditions fully apply.

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 facts and circumstances surrounding this case. Applicant committed a criminal offense at the age of 20 and was reprimanded four times between December 2013 and January 2014. He is now 26 years old. He has matured and is unlikely to engage in criminal conduct in the future. He has obtained additional job training and is successful in his current occupation. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guidelines for Criminal Conduct, Use of Information Technology Systems, and Personal 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
Paragraph 2, Guideline M:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.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.

Jennifer I. Goldstein
Administrative Judge