



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



In the matter of:)	
)	
Redacted)	ISCR Case No. 15-04578
)	
Applicant for Security Clearance)	

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

03/27/2017

Decision

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant was placed on accelerated rehabilitation in 2012 for his involvement in a felony burglary. In January 2015, he was arrested for a probation violation for failing to complete all of his community service. He has yet to demonstrate that he possesses the sound judgment required for security clearance eligibility. Clearance is denied.

Statement of the Case

On December 12, 2015, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing a security concern under Guideline J, Criminal Conduct, and explaining why it was unable to find that it is clearly consistent with the national interest to grant him security clearance eligibility. The DOD CAF took the action under Executive Order 10865 (EO), *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6 (Directive), *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG) effective within the DOD on September 1, 2006.

Applicant responded to the SOR allegation on December 28, 2015, and he requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. On April 22, 2016, the case was assigned to a DOHA Administrative Judge to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The case was transferred to me on May 23, 2016. On May 31, 2016, I scheduled a hearing for July 13, 2016.

I convened the hearing as scheduled. Three Government exhibits (GEs 1-3) and one Applicant exhibit (AE A) were admitted into evidence without objection. Applicant testified, as reflected in a transcript (Tr.) received on July 21, 2016.

I held the record open until August 15, 2016, for Applicant to submit additional documents. Applicant submitted a character reference (AE B) on August 8, 2016, which was admitted without objection. On August 22, 2016, I received four more character references (AEs C-F). Department Counsel filed no comment by the September 19, 2016 deadline.

There was a delay in issuing a decision in this case due to my workload. On reviewing Applicant's case file in February 2017, I noted the lack of any confirmation from the Government that it had received Applicant's post-hearing submissions. I faxed a copy of AEs C-F to Department Counsel, who indicated on February 17, 2017, that the Government had no objections. Accordingly, I admitted AEs C-F into the record.

Given the importance of the resolution of the criminal charges in this case, I reopened the record on February 17, 2017, to give Applicant an opportunity to provide corroboration for his testimony that he had completed the requirements of his accelerated rehabilitation and resolved his probation issue. Applicant received my Order, sent by certified mail, on February 28, 2017, and he had a March 6, 2017 deadline for mailing a response. No documentation had been received by March 20, 2017, two weeks after the deadline.

Findings of Fact

The only SOR allegation is that Applicant was arrested in August 2012 on charges of burglary and criminal mischief and that an order for his re-arrest was issued for failure to complete the terms of his probation (SOR ¶ 1.a). Applicant admitted to the probation violation when he answered the SOR, but he also indicated that it was a misunderstanding. He had assumed that his probation was fulfilled, and he denied any intent to violate the terms of his probation. After considering the pleadings, exhibits, and transcript, I make the following findings of fact.

Applicant is a 27-year-old high school graduate with some college credits. He was raised in the foster care system from a very young age. He had a succession of placements until age 13, when he was placed in a stable foster environment with a caring family. (Tr. 27-29.) He began working for his employer, a defense contractor, in December 2014 and seeks a secret clearance for his duties. (GEs 1, 3; Tr. 33-34.)

After two years at a local college studying criminal justice (Tr. 30), Applicant transferred to another college in December 2010 to play football for the school. In August 2012, Applicant was playing basketball with a friend from grade school when his friend suggested that they could come up with some money by robbing someone with whom this friend had some “business” dealings. Applicant was struggling to pay his bills, and he agreed with the plan. Together they went to the victim’s apartment. When the victim opened the door, they pushed him out of the way and stole a safe containing approximately \$7,000. Applicant did not have a weapon on him or strike the victim. After Applicant and his childhood friend split the money, they went their separate ways. Applicant was subsequently arrested and charged with burglary, a class C felony, and with criminal mischief, a class B misdemeanor. Applicant refused to implicate his childhood friend in the crime because he feared retaliation and no longer wanted to be associated with him. Approximately one month after his arrest, Applicant pleaded guilty. Because it was his first offense, he was placed in an accelerated rehabilitation program. He was ordered to complete two years of probation and 40 hours of community service with the charges to be expunged in two years provided he fulfilled the terms. Applicant was not required to pay restitution to the victim because the police suspected that the stolen funds had come from the victim’s illegal activity.¹ The victim would not tell the police what was taken. Applicant used his share of the stolen money to pay for the attorney who represented him in the criminal proceeding. (GEs 1-3; Tr. 37-44, 46, 61, 68-70.) Applicant understands that he made a “stupid choice” by becoming involved in the home invasion and theft in August 2012. “[He] just wasn’t thinking.” (Tr. 38, 62.)

On October 21, 2014, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) in application to work for his current employer. In response to the police record inquiries, Applicant disclosed his criminal charges in August 2012, for which he received two years of probation and 40 hours of community service. He indicated that the charges were expunged. (GE 1.)

Applicant began working for his employer in early December 2014. He attended training for the first month to learn his trade. (Tr. 33-34.) On February 18, 2015, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). Applicant detailed his involvement in the criminal offense in August 2012. He explained that as a first offender, he was given accelerated rehabilitation. Concerning his probation, Applicant indicated that he had given his address to the probation office, but he did not have to report to a probation officer. He explained that he had completed 32 hours of his 40 hours of community service and that he expected to complete his hours in the spring of 2015. Applicant expressed his understanding that the criminal charges would be expunged two years from the date he was charged. He denied any contact with his co-perpetrator since the crime or with anyone else involved in any illegal activity. (GE 3.)

¹ Applicant came to learn that the victim, who had come from a good family and was an excellent student in high school, was a drug dealer. (Tr. 68, 70-72.)

Applicant “got caught up with work” and forgot to complete the rest of his community service. In January 2015, the court issued an order for him to be arrested for violating the terms of his probation.² According to Applicant, he learned about the order after he had purchased a used car so that he could drive to work. He tried to return the car because he was paying too much for the vehicle and became angry when the dealer refused to take it back. The dealer called the police, who informed him there was an order for his re-arrest. Applicant assumed it was the situation with his community service. Approximately two days after he explained the situation to the police chief, he made a payment of \$400 in lieu of completing his community service because he was working full time for the defense contractor and part time for a landscaping company, and he did not have the time to complete his community service hours.³ (Tr. 45-47, 50-51.) Applicant provided no proof that he paid the \$400, completed his community service hours, or fulfilled some other condition to satisfy his probation.

In December 2015, the DOD CAF issued an SOR to Applicant alleging the order for his arrest in January 2015 for violating the terms of his probation. Applicant explained that he had assumed that his probation was satisfied because he had paid his court fees and completed his community service. He denied any intention to avoid the conditions of his probation and indicated that he never received notice from his lawyer or the court of any additional requirements that he failed to fulfill. (Answer.)

Applicant started his employment at entry level, and he progressed through five steps to his current step-six position. (Tr. 34-35.) In July 2016, he received a pay increase to his current wage of almost \$18 an hour. (Tr. 66.) He has been reprimanded twice at work: for violating the smoking policy and for lost time when he had a car accident during his initial six-month probationary period and missed a day of work. (Tr. 34-35.) Applicant is grateful for his job. He credits his employment with the defense contractor as the primary reason for avoiding further trouble and being “a changed person.” He feels “part of something.” The job has given him the income to pay his bills and some extras, like taking his girlfriend out to eat or going downtown and having a few beers while watching a football game. (Tr. 64-66, 75-76.)

Applicant does not knowingly associate with anyone involved in criminal activity. (Tr. 81.) Applicant had been involved in a cohabitant relationship with his girlfriend for about a year as of July 2016. They dated for a little over a year before they moved in together. (Tr. 36-37, 77-78.) She works as a cook at a local hotel. (Tr. 37.) When Applicant goes out, it is usually with his girlfriend. (Tr. 81.) They also socialize as a couple with one of Applicant’s co-workers and this co-worker’s girlfriend. (Tr. 81.) Applicant helps out informally at a local community center by refereeing youth basketball games for an hour twice a month. (Tr. 55.)

² The Government had some information that the re-arrest order had been issued in January 2015 (Tr. 47), although no documentation was presented of the order or of the probation violation.

³ Applicant testified that he had to obtain the receipt showing his payment, which could shed light on the date about when he learned of the order for his arrest. (Tr. 50.) His post-hearing submissions did not include the receipt or court records showing that the charge had been expunged.

Character references

Applicant's social worker in the foster-care system watched Applicant grow into a very resilient young adult. The social worker expressed pride at the person Applicant has become. He believes Applicant will continue to build on the successful career that he has started with the defense contractor. (AE F.) A foster brother attested that he has seen Applicant mature in his work ethic and in his decision-making process. (AE C.) Applicant's cohabitant girlfriend described Applicant as "passionate" about his career. She believes Applicant has changed to the point where he will not allow himself to fail again. (AE E.) Applicant expressed his pride in his job to his biological half-sister. (AE B.) An operations supervisor, who has had an opportunity to observe Applicant's work performance throughout Applicant's tenure with the defense contractor, has found Applicant to be conscientious, punctual, dependable, and willing to accept any task given him. Applicant has proven himself to be an "excellent employee." (AEs A, D.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has 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). When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered 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 the adjudicative process. The administrative judge's overall 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. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion to obtain a favorable security 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 that the applicant may deliberately or inadvertently fail to 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. Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline J, Criminal Conduct

The security concern for criminal conduct is articulated in AG ¶ 30:

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.

The criminal conduct concerns are established by Applicant’s August 2012 felony burglary and misdemeanor criminal mischief charges and his violation of probation by failing to fully complete his community service hours within two years of him being given accelerated rehabilitation. There is no evidence of a criminal conviction on his record. Even so, disqualifying conditions AG ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted,” and AG ¶ 31(e), “violation of parole or probation, of failure to complete a court-mandated rehabilitation program,” apply.

Mitigating condition AG ¶ 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 good judgment,” applies in part in that the burglary and criminal mischief occurred approximately four years ago when he was 22 years old, lacked purpose in life, and did not consider the possible consequences to his behavior. His candor about the incident on his SF 86, during his OPM interview, and at his hearing, lend credence to his testimony that he did not knowingly set out to violate his probation by failing to complete all of his community service. Nonetheless, his criminal conduct was serious and his violation of probation was too recent to fully mitigate the negative implications for his reliability, trustworthiness, or good judgment under AG ¶ 32(a).

As of his hearing in July 2016, Applicant had been with his defense contractor employer for approximately 20 months. Applicant’s supervisor attested to Applicant being a reliable, excellent employee. The fact that Applicant has progressed, apparently rather quickly, from step one to step six at work, is another indicator of his commitment to his job. More generally, it reflects his growing maturity and desire to become a responsible, productive adult; as he stated, to be the good person that his foster family raised him to

be.⁴ His good work record with his employer is evidence of successful rehabilitation that is considering mitigating under AG ¶ 32(d), which provides:

(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 also exhibited some reform by admitting his participation in the crime in August 2012.

However, Applicant also cast some doubt about whether he can be relied on to exercise the sound judgment that must be demanded of persons granted security clearance eligibility by not completing the terms of his accelerated rehabilitation within the time allotted by the court. Applicant provided conflicting accounts of the status of his probation. On his October 2014 SF 86, Applicant stated, “I received probation for 2 years and also did 40 hours of community service, charges were expunged.” (GE 1.) However, when he was interviewed by the OPM investigator on February 18, 2015, Applicant discrepantly advised that he would finish his remaining eight hours of community service in the spring of 2015. (GE 3.) He did not mention the order for his re-arrest for violation of probation. It is unclear whether he knew as of his interview about the January 2015 order for his re-arrest. However, he knew when he completed his SF 86 that he had not yet fully satisfied his community service hours. At his hearing, Applicant testified that he was allowed to pay \$400 in lieu of completing the rest of his community service. Under ¶ E.3.1.15 of the Directive, the burden is on Applicant to produce evidence to mitigate established security concerns related to his failure to complete the conditions of his accelerated rehabilitation for a criminal felony. Documentation showing that the charges had been expunged, that he had completed his accelerated rehabilitation, or to corroborate his claim of paying \$400 would have gone a long way toward addressing the security concerns. Without some evidence showing that all criminal charges have been completely resolved, I cannot give dispositive weight to AG ¶ 32(d). As the record stands, I cannot find that the criminal conduct security concerns are fully mitigated.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(a).⁵ In making the overall commonsense determination required under AG ¶ 2(c), I have

⁴When asked whether there was anything he could point to beside his stable employment to show that he is a changed person from 2012, Applicant responded, “I go to work and I come home. I spend a lot of time with my girlfriend. I know—I just want to grow and be the man that I know my foster family knows I can be. They raised me to be a good person.” (Tr. 62.)

⁵The factors under AG ¶ 2(a) are as follows:

to consider Applicant's very poor judgment in becoming involved in the criminal burglary and theft in August 2012. His youth at the time is a mitigating factor, but he also had every incentive to comply with the terms of his accelerated rehabilitation and failed to do so. The conditions of his two-year probation term were not particularly onerous. He had only to fulfill 40 hours of community service for the charges to be expunged from his record. The Government must be assured that individuals who are granted security clearance eligibility can be counted on to fulfill security requirements irrespective of work and time demands or personal convenience. Even assuming that Applicant forgot about his remaining community service hours because of work, he was on notice as of the SOR of the importance of showing that he had resolved the issue. He failed to take advantage of the opportunity to provide the evidence to mitigate the security concerns raised by the court order for his re-arrest for violating his probation.

It is well settled that once a security concern arises, there is a strong presumption against the grant or continuation of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). At some future date, Applicant may well be able to demonstrate the judgment, reliability, and trustworthiness necessary for security clearance eligibility. For the reasons already discussed, I am not yet able to find that it is clearly consistent with the national interest to grant Applicant eligibility.

Formal Finding

Formal finding for or against Applicant on the allegation set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, is:

Paragraph 1, Guideline J: AGAINST APPLICANT

Subparagraph 1.a: Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Elizabeth M. Matchinski
Administrative Judge

(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.