



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



In the matter of:)
)
) ISCR Case No. 07-08919
)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Edmunds, Esq., Department Counsel
Thomas Coale, Esq., Department Counsel
For Applicant: *Pro Se*

April 7, 2008

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant mitigated the security concerns raised by his criminal conduct. Eligibility for access to classified information is granted.

On January 17, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in an undated response, and requested a hearing before an Administrative Judge. The case was assigned to me on February 27, 2008. DOHA issued a notice of hearing on February 29, 2008, and the hearing was convened as scheduled on March 25, 2008. The government offered Exhibits (GE) 1 through 3,

which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A through C, without objection. DOHA received the transcript of the hearing (Tr.) on April 2, 2008.

Motion to Amend SOR

Department Counsel submitted a motion to amend the SOR on February 12, 2008, by deleting SOR ¶ 1.c, and by adding a new ¶ 1.c and ¶¶ 1.d through 1.l. Applicant responded to the motion on February 20, 2008, and admitted to all the factual allegations in the motion. Applicant did not object to the motion to amend and it was granted. The motion is marked Hearing Exhibit (HE) I and Applicant's response is HE II.

Findings of Fact

In his Answer to the SOR and in his response to the motion to amend, Applicant admitted all the factual allegations in the SOR.

Applicant is a 49-year-old employee of a defense contractor. He was married and divorced and is currently married. He has two children, ages 29 and 23. He did not complete high school. Applicant served about four and a half months in the U.S. military in 1976. He was discharged before his end of contract because he was young, immature, and incompatible with military service.¹

Applicant had an extensive criminal record when he was younger. He is a recovering alcoholic and cocaine/heroin addict. He was arrested on ten occasions between 1978 and 1982, for offenses including assault, possession of marijuana, assault by cutting, rape, theft, malicious destruction of property, disorderly conduct, and probation violation. The assault by cutting charge involved him cutting someone with a knife in a bar fight. He was convicted on several occasions. Applicant candidly testified that he was under the influence and committed all the offenses for which he was charged, except the rape charge, which he vehemently denied. The rape arrest resulted from a false allegation and was dismissed without prosecution. The police and court records pertaining to the rape arrest were formally expunged on December 28, 2007.²

In about October 1986, while high on drugs, Applicant robbed a gas station mini-mart with a pocket knife. He was arrested, charged with robbery and robbery with a deadly weapon, and convicted of robbery. He was sentenced to five years incarceration, with three years suspended, and placed on three years supervised probation. He was credited with approximately five months for time served awaiting trial and served an additional 12 months of incarceration.³

¹ Tr. at 19-20, 30, 35; GE 1, 2.

² Tr. at 21-22, 25, 39-46; GE 2, 3; AE C; HE II.

³ Tr. at 22-23; Applicant's Answer to SOR; GE 2, 3.

Applicant was arrested in about August 1988, for possession of cocaine and conspiracy to possess cocaine. He was on probation at the time. He pled guilty to attempted possession and received probation for a year. He appeared before the Judge from the robbery charge and was ordered to serve the three years that were suspended for that charge. He was incarcerated more than two years, from 1989 through 1991. He has not been arrested or charged since he was released from prison.⁴

While he was waiting trial for the probation violation, Applicant decided that he needed to change his life. His father was an alcoholic and he wanted something better for his son. He voluntarily entered a hospital for detoxification on December 2, 1988. He was transferred to a drug and alcohol treatment facility in another state shortly thereafter. From that facility, he went to what was in essence a halfway house, where he continued to receive treatment, but he was able to work during the day. He remained at that treatment house until May 1989, when he went to court and then immediately to jail. Applicant has not had a drink of alcohol or used an illegal drug since before he entered the facility. He counts December 3, 1988 as his sobriety date because that is the first day that he did not take any substance. He continues to be involved in a 12 step program at Narcotics Anonymous (NA) and he averages three meetings a week. He has been very active in sponsoring other people. He currently is sponsoring eight people and estimates that he has sponsored hundreds over the years.⁵

Applicant met a man that lived near him while he was in the drug and alcohol treatment facility in another state. When Applicant returned to the halfway house in his state, he contacted the man about obtaining a job. He helped Applicant find a job and a trade in the building and installation area. Applicant learned a different trade while in prison and worked in that trade for about two months after he left prison. He then contacted his friend and obtained his old job back in the installation profession. He has worked continuously in that trade ever since. He is now a foreman, supervising 12 to 15 workers.⁶

Applicant married in 1992. He obtained custody of his youngest child after he was released from prison, when his son was about nine years old. He and his wife raised this son. His son is currently serving in the U.S. military. His wife works as a supervisor for the state in which they live. They own their home.⁷

Applicant's employer certified that he has been with the company since 2001, and he is a very dependable employee. His neighbor of seven years wrote that Applicant is a great neighbor, a hard worker who takes care of his family, and he is responsible and trustworthy.⁸

⁴ Tr. at 23-24, 28-29, 34, 46-47; Applicant's response to SOR; GE 2, 3.

⁵ Tr. at 21, 24-27, 32-34, 36, 47-52.

⁶ Tr. at 27, 31.

⁷ Tr. at 30, 38.

⁸ AE A, B.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense 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. 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, 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 as to obtaining 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 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.

Section 7 of Executive Order 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 relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubt about an Applicant'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 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (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 arrested and convicted numerous times in the 1970s and 1980s. His criminal history raises the above disqualifying conditions.

Four Criminal Conduct Mitigating Conditions under AG ¶¶ 32(a)-(d) are potentially applicable:

- (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.

There is no evidence that Applicant was pressured or coerced into committing his criminal acts. AG ¶ 32(b) is not applicable. He admitted committing all his crimes except for the rape arrest. The rape charge was dismissed and his arrest record expunged. AG ¶ 32(c) is applicable to SOR ¶ 1.h. Applicant was drunk, high, or both, when he committed all his crimes. He voluntarily entered drug and alcohol rehabilitation in December 1988, and has not had a drink or used illegal drugs since. He continues to be very active in NA. He has not been arrested since he left prison in 1991. He is

successful in his trade and has risen to foreman, supervising 12 to 15 workers. He has a loving and stable home life. Applicant is a model of successful rehabilitation. AG ¶¶ 32(a) and 32(d) are applicable.

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 the 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) 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 common sense 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 the facts and circumstances surrounding this case. Applicant's criminal history was all drug and alcohol related. He has not used either in almost 20 years and has not been arrested since he left prison. Applicant is not a former alcoholic and addict; he is a recovering alcoholic and addict and he continues to work at staying sober. He attends on average three NA meetings per week and is sponsoring eight people. Applicant would not have a security clearance based on the first 30 years of his life. The last 19 years prove that he is someone who can be trusted.

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 has mitigated 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 section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J: FOR APPLICANT

Subparagraphs 1.a-1.i: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Edward W. Loughran
Administrative Judge