



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



In the matter of:)
)
) ISCR Case No. 14-05025
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

02/26/2016

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the criminal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On November 12, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, criminal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on November 24, 2014, and requested a hearing before an administrative judge. The case was assigned to me on November 4, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 13, 2015, scheduling the hearing for December 10, 2015. The hearing was convened as scheduled. Government Exhibits (GE) 1 and 2 were admitted in

evidence without objection. Applicant testified, called four witnesses, and submitted Applicant's Exhibit (AE) A, which was admitted without objection. DOHA received the hearing transcript (Tr.) on December 17, 2015.

Findings of Fact

Applicant is a 37-year-old prospective employee of a defense contractor. He has been hired, but he cannot start work unless he obtains a security clearance. He served in the U.S. military from 2000 until he was honorably discharged in 2004. He has an associate's degree. He has never married. He has a nine-year-old child.¹

Applicant was arrested in August 2008 after he was involved in a fatal car accident. He was charged with manslaughter and failure to stay at the scene, with death or injury. In February 2011, he pleaded guilty to the reduced felony charge of negligent homicide, and the failure to stay at the scene charge was dismissed. He was sentenced to 12 months in jail, probation for 4 years, and community service. He served 364 days in the county jail. He completed the terms of his probation and 100 hours of community service.²

Applicant described the incident as follows: He was driving to a casino at about 5:00 on a Sunday morning, when he looked down to get aspirin out of the glove compartment. He was traveling at the speed limit of 45 miles per hour when his pickup truck hit a car that was stopped at a red light. The impact pushed the car into the intersection, and then the car drove off. Applicant sat in his truck for a period and watched the car drive off until it was out of sight. The truck was damaged, so Applicant decided against continuing on to the casino. He did a U-turn and drove back the way he came. He drove for a while until the truck broke down. He was about 25 to 30 minutes from his home, so he had the truck towed to a friend's house that was closer to where the truck broke down. He stayed at the friend's house and was taking a nap when the police arrived at about 5:00 in the afternoon and arrested him. He later learned that the impact broke the neck of the driver of the car, killing him, and the driver's "foot was stuck on the gas pedal and that is why he left the scene." (It is unclear why the victim's foot would be on the gas pedal if he was stopped at a red light.) The car drove for three quarters of a mile before it crashed onto the side of the road.³

The police tested Applicant's blood when he was arrested. His blood tested positive for the use of methamphetamine. Applicant initially testified that he used methamphetamine "maybe a couple weeks" before the accident. When asked: "And they still discovered it in your blood?" he replied "Maybe a week." He denied using

¹ Tr. at 9, 29-31; GE 1.

² Tr. at 21, 27-28; Applicant's response to SOR; GE 1, 2.

³ Tr. at 11, 15-26; Applicant's response to SOR; GE 1.

methamphetamine within 24 hours of the accident. He stated that he got up early that morning to go to the casino when it was not crowded.⁴

Applicant expressed remorse for the accident and the death of the driver. He stated that he has not used methamphetamine since the accident. There is no evidence of any other criminal conduct.⁵

Four witnesses testified and Applicant submitted numerous letters attesting to his excellent job performance, trustworthiness, reliability, dependability, work ethic, responsibility, professionalism, dedication, ethics, honesty, and integrity.⁶

Policies

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 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, administrative judges apply the guidelines in conjunction with the factors listed in 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."

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 the 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

⁴ Tr. at 19, 24, 30-33; GE 1.

⁵ Tr. at 15, 22, 29, 31; Applicant's response to SOR; GE 1, 2.

⁶ Tr. at 35-49; AE A.

grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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 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 ¶ 31 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.

The above disqualifying conditions are established by Applicant’s arrest and conviction.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following 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; 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 criminal offense occurred in August 2008. There is no evidence of any subsequent criminal conduct. Applicant completed his sentence and the terms of

his probation. He submitted a substantial amount of character evidence. Nonetheless, there are aspects of this case that are troubling. Applicant's version of events is unrebutted, but it is also uncorroborated. What is undisputed is that Applicant did not stop at a red light early on a Sunday morning; he hit a car and killed the driver; Applicant left the scene; and his blood tested positive for the use of methamphetamine. He gave inconsistent accounts of when he last used methamphetamine before the accident. He pleaded guilty to the felony offense of negligent homicide. I have doubts that the accident occurred exactly as described by Applicant.

Despite the length of time since the criminal conduct, without a consistent and completely credible accounting of the events, I cannot find complete rehabilitation. I am unable to find that criminal conduct is unlikely to recur. It continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 32(a) is not applicable. AG ¶ 32(d) is partially applicable. I find that criminal conduct security concerns remain despite the presence of some mitigation.

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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline J in my whole-person analysis.

I considered Applicant's excellent character evidence, honorable military service, and lack of other criminal involvement. However, his crime was serious and resulted in the death of an innocent victim. I also do not completely trust Applicant's version of events.

