



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



In the matter of:)
)
-----) ISCR Case No. 06-26073
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Edmunds, Esquire, Department Counsel
For Applicant: Troy Williams, Personal Representative

April 22, 2008

Decision

CURRY, Marc E., Administrative Judge:

On, November 16, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J and E. 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 on December 19, 2007, admitted all of the allegations and requested a hearing. The case was assigned to me on January 23, 2008. DOHA issued a notice of hearing on February 21, 2008 scheduling it for March 12, 2008. During the hearing, I received 10 government exhibits, four Applicant exhibits, and the testimony of two Applicant witnesses. At department counsel's request, I took administrative notice of the state code governing driving under the influence of alcohol and refusal to take breathalyzers. DOHA received the hearing transcript (Tr.) on March

19, 2008. Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 37-year-old single man with three children, ages 20, 16, and 13. He has a high school education. He works for a contractor on a military base as a sheet metal welder. According to his supervisor, he is an outstanding employee with proven leadership abilities (Exhibit A).

Applicant lived with the mother of children through early 1996. They had a volatile relationship. In March 1996, he spotted her driving sitting in her car with a male passenger. They were separated at the time, with a protective order in place. Enraged, he ran toward the car, as the passenger fled from the car. Applicant then dragged her from the car and began brutally beating her. He did not cease the attack until several bystanders intervened (Exhibit 2). Applicant then went to her home to remove some jointly-owned furniture. Unable to procure a moving truck, he destroyed it with a knife (Tr. 70, Exhibit 9 at 10).

Subsequently, Applicant was charged with assault, violation of a protective order, battery, and assault with a deadly weapon (Tr. 73). While the trial was pending, he was charged three times with contempt for failure to appear at various pre-trial hearings (Exhibit 4 at 2). The record does not indicate whether the contempt charges were civil or criminal. In July 1996, he was sentenced to three years probation, and ordered to pay restitution (Exhibit 2).

In April 2000, Applicant was charged with possession of marijuana and violation of probation. He was sentenced to 30 days in jail and fined. At the hearing, Applicant testified that the marijuana belonged to his brother, and that he took the charge for him (Tr. 70). Earlier, during an interview with a security clearance investigator, Applicant stated the marijuana was his (Tr. 79). When asked by department counsel to explain why he told the investigator the marijuana was his, if it actually belonged to his brother, Applicant responded, “[b]ecause he didn’t ask if it was my brother’s” (Tr. 79).

In February 2001, Applicant was charged with theft, less than \$500 after his ex girlfriend accused him of stealing her mail (Tr. 32). The charge was not prosecuted.

In March 2001, Applicant and his ex-girlfriend got into a heated argument in a basketball gym where their daughter was playing. When the ex-girlfriend began striking Applicant, he “physically restrained” her (Tr. 33). Applicant was then charged with assault. The charge was *nolle prossed*.

In September 2005, Applicant was charged with, among other things, attempting to drive a vehicle while impaired by alcohol. In November 2005, Applicant was again charged with attempting to drive a vehicle while impaired by alcohol. The cases were

consolidated. Currently, the trial is pending. Applicant failed to list the second alcohol-related charge, as required, on a 2006 security clearance application.

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, they are applied together with the factors listed in the adjudicative process. According to AG ¶ 2(c), the entire process is a 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

Analysis

Guideline J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness" (AG ¶ 30). Also, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations" (*Id.*). Applicant has a history of criminal activity including a domestic violence-related assault charge, a drug charge, and two alcohol-related charges. The government did not establish that the contempt charges were criminal, therefore, I find in Applicant's favor with respect to SOR subparagraphs 1.c through 1.e.

The assault and the drug charges led to convictions, and the alcohol-related charges are still pending. AG ¶ 31(a), "a single serious crime or multiple lesser offenses," applies.

I have considered the mitigating conditions and conclude none apply. Applicant's good employment record constitutes evidence of rehabilitation. It is greatly outweighed by the extent, seriousness, and recency of his criminal conduct. Also, Applicant

repeatedly demonstrated a lack of credibility throughout the investigative process by providing contradictory explanations for the 2000 marijuana charge, and minimizing the severity of the 1996 assault on his then-girlfriend. I conclude his criminal conduct remains a security concern.

Guideline E, Personal Conduct

Under this guideline, “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” (AG ¶ 15). Applicant’s security clearance application omissions raise the issue of whether AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,” applies.

Because Applicant was not credible (see Criminal Conduct section, *supra*), I do not believe his explanation for the security clearance application omissions. I conclude AG ¶ 16(a) applies without 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 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.”

I considered the whole person factors in my analyses of the criminal and personal conduct sections of the decision, and my analysis does not support a favorable outcome. Clearance is denied.

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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.b:	Against Applicant

Subparagraphs 1.c - 1.e:	For Applicant
Subparagraphs 1.f - 1.j:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.b:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

MARC E. CURRY
Administrative Judge