



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-01052
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel

For Applicant: *Pro se*

February 29, 2008

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on April 22, 2005 (Government Exhibit 1). On July 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E concerning the Applicant. 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on August 21, 2007, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on September 19, 2007. I received the case assignment on October 1, 2007. DOHA issued a notice of hearing on October 18, 2007, and I convened the hearing as scheduled on November 14, 2007. The Government offered Government Exhibits 1

through 3, which were received without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits A and B, without objection. The Applicant asked for the record to remain open for a brief period and, on November 26, 2007, he submitted Applicant's Exhibit C, without objection. DOHA received the transcript of the hearing on November 28, 2007. The record closed on November 28, 2007. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 30 and single. He is employed by a defense contractor as an electrician and seeks to obtain a security clearance in connection with his employment.

Guideline J - Criminal Conduct

The Applicant has been arrested three times. The first arrest happened in December 1995. On that occasion the Applicant was charged with Driving Under the Influence of Alcohol. He plead no contest and was sentenced to attend an alcohol class. He did not attend the class and eventually served 40 days in jail because of his failure. The Applicant admits that he did not make good decisions at that time, when he was under the age of 20. (Transcript at 22- 26.)

By his own account, the Applicant ran with a rough crowd when he was younger. He had friends at that time who were drug users. On December 22, 1996, when he was only 19, the Applicant was arrested for Possession of a Controlled Substance. He was stopped by police and a baggie with drug residue was found in his car. The Applicant successfully completed the diversion program he was sentenced to for this offense. He stated that he learned his lesson about doing what the judge tells you to do because of having to go to jail over his previous arrest. (Transcript at 26-30.)

The Applicant's last arrest occurred on March 26, 2005. On that day, a Saturday, the Applicant was helping a former co-worker pack up his truck. The Applicant and his friend had been drinking and making a lot of noise. The police were called by neighbors and the Applicant's friend was arrested for Driving Under the Influence. The Applicant interfered with the police officer by telling his friend not to submit to a breathalyzer and he was arrested for Disorderly Conduct Under the Influence of Alcohol or Drugs. The Applicant admits that he made a mistake that night in interfering with the police, pleaded guilty, and paid a \$100 fine. (Transcript at 30-32, 45-48.)

Guideline E - Personal Conduct

The Applicant filled out a Questionnaire for National Security Positions (SF 86) by hand on Wednesday, March 23, 2005. (Applicant's Exhibit A.) Question 23 of that form asks the Applicant about his police record. He correctly reported his arrests in 1995 and 1996 on that form.

The Applicant testified that he turned the form into his supervisor the same day. His supervisor subsequently turned the hand written questionnaire over the main office for typing the next day. The Applicant further testified:

Over the weekend I was arrested, I returned to work on Monday [March 28, 2005] and I explained to [my supervisor] about the arrest and that I wanted to change the questionnaire.

[My supervisor] told me the questionnaire was already being processed, and that he did not want to stop the process. So on April 22nd, the completed, typed forms were sent back to [the work site] for me to sign. This was a typed version of the questionnaire that I had handwritten.¹

I told him then again that I would like to change the statement in that questionnaire. He told me or actually he pointed out the Privacy Act, which states that there would be an oral interview, and that I could clear up any discrepancies or differences in the questionnaire at that time.² I believed him. (Transcript at 35.)³

Government Exhibit 1 is the Security Clearance Application that was submitted to the Government. As stated, it was signed by the Applicant on April 22, 2005, and does not have reference to the Applicant's March 26, 2005, arrest under Questions 24 or 26.

The Applicant submitted a letter from the President/Facility Security Officer of his employer. (Applicant's Exhibit C at 3.) This letter confirms that he received a signed questionnaire from the Applicant on March 24, 2005, dated March 23, 2005.

A letter was also submitted from the Applicant's supervisor. (Applicant's Exhibit C at 4.) In this letter he states, "I personally handed [the Applicant] his completed application for security clearance positions on 4/22/05. I advised [the Applicant] to sign and date the completed application on 4/22/05. Previously, [the Applicant] had advised me of his arrest record."

Mitigation

The Applicant submitted documentary evidence showing that he is a highly respected person. A Superior Court Judge, a Fire Department Captain, and a State employee all submitted letters on the Applicant's behalf. (Applicant's Exhibit B.) The Applicant is described as someone who is "intelligent," "trustworthy," and "honest and an asset to society."

¹Government Exhibit 1.

²Applicant's Exhibit A at 14-15.

³See, Transcript at 39.

Policies

Security clearance decisions are not made in a vacuum. 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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order . . . shall be a determination 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 doubts 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 Applicant was involved in minor criminal incidents in 1995, 1996 and 2005. AG ¶ 31(a) applies to this case, stating that a disqualifying condition is “a single serious crime or multiple lesser offenses.”

The first two incidents happened when the Applicant was quite young and, by his own admission, foolish. The last occurred because the Applicant got involved in his friend’s arrest, again a foolish act. The Applicant’s credible testimonial evidence is that he has learned his lesson from these incidents. He showed a mature grasp of what happened here, why, and how to avoid it in the future.

Under the particular facts of this case, several of the mitigating conditions also apply and justify a finding for the Applicant as to this Guideline. They are 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”; and AG ¶ 32(b), “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.”

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct 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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), the “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire,” is potentially disqualifying. The Applicant submitted a Questionnaire to the Government which did not have complete information concerning his arrest record. The evidence is sufficient to raise this potentially disqualifying condition, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct involving falsifications. Under AG ¶ 17(a), the disqualifying condition may be mitigated where “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” The Applicant testified that his supervisor advised him that he could discuss the 2005 arrest during his interview with a Department of Defense investigator. This interview took place a year later. (Transcript at 43-48.) The evidence is clear that the Applicant’s effort to correct the omission in his questionnaire was made in good faith. The obvious question is whether it is “prompt.” It is certainly arguable that, in this particular case, he was prompt. The Applicant has never had a security clearance, and does not have one now. Therefore, he had no basis of knowledge to know when his interview would take place, and did the best he could to clear up the record when it did occur. However, the application of this mitigating condition is not essential to my resolution of this case.

As stated above, the Applicant argues that he was following the orders of his supervisor when he signed the questionnaire omitting his 2005 arrest. AG ¶ 17(b) states that the disqualifying conditions may be mitigated where “the refusal or failure to cooperate, omission or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.” There is considerable evidence, from the Applicant and his supervisor, that the Applicant was very open in discussing his arrest record. The draft Questionnaire, which he submitted three days before his arrest, was accurate. His supervisor confirms that he advised the Applicant to sign the incorrect Questionnaire, and that he had prior knowledge of the Applicant’s arrest history. The Applicant’s situation falls clearly within the requirements of this mitigating condition and, under the particular circumstances of this case, I find that it is 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 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. The Applicant is a hard-working, respected, professional person who has overcome his earlier minor criminal conduct. In viewing all the facts of this case, I find that the Applicant did not have an intent to deceive the Government when he signed and submitted Government Exhibit 1. His failure to inform the Government of his 2005 arrest was a fault of timing and improper instruction from his supervisor. Timing, because he filled out the form mere days before the event. Based on my analysis of his testimony, the available evidence and his demeanor, I find that he would have told the Government of this arrest in a timely manner if given the opportunity. Improper instruction, because his supervisor told the Applicant that the subject interview would be the appropriate place and time to tell the Government of his recent criminal conduct. Until he received the Statement of Reasons, the Applicant had no reason to believe that his conduct had not been appropriate.

Under AG ¶ 2(a)(2), as discussed above, the Applicant followed the incorrect advice of his supervisor in submitting a flawed Questionnaire. Therefore, I find that his conduct was not knowing, in that he did not have an intent to deceive the Government. He well understands what happened and why, and has expressed a credible intent not to allow such errors to occur in the future. Accordingly, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Finally, at the present time, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that the likelihood of recurrence is close to nil (AG ¶2(a)(9)).

Overall, the record evidence leaves me without questions and/or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has mitigated the security concerns arising from his personal conduct.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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 THE APPLICANT
Subparagraph 1.a:	For the Applicant
Subparagraph 1.b:	For the Applicant
Subparagraph 1.c:	For the Applicant
Subparagraph 1.d:	For the Applicant
Paragraph 2, Guideline E:	FOR THE APPLICANT
Subparagraph 2.a:	For the Applicant
Subparagraph 2.b:	For the 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.

WILFORD H. ROSS
Administrative Judge