



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-01121
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel
For Applicant: Pro Se

June 27, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on September 21, 2005. On February 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for 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 the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on March 4, 2008. He answered the SOR in writing and requested a hearing before an Administrative Judge. I received the case assignment on May 8, 2008. DOHA issued a notice of hearing on May 22, 2008, and I convened the hearing on June 12, 2008. The Government offered Exhibits (GE) 1-5, which were received with Applicant's stipulation. Applicant testified on his own behalf. He submitted Exhibit (AE) A, without objection. DOHA received the transcript of the

hearing (Tr.) on June 19, 2008. Based upon a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated March 4, 2008, Applicant denied the factual allegations in ¶¶ 1.a-1.e of the SOR. Applicant provided additional information to support his request for eligibility for a security clearance.

Applicant is a 57-year-old employee of a defense contractor. He graduated from high school in 1968. After high school, he attended college for a period of time. He enlisted in the U.S. Air Force in 1975 and received an honorable discharge in 1980. Applicant married in 1978 but his marriage ended in divorce in 1992. He has one child as a result of that marriage. He remarried in 1993 and divorced in 2000 (Tr. 19). He is currently single. He held a security clearance from 1975 through 2002. (GE 1). He currently holds an interim top secret clearance.

Applicant's career with defense contractors spans more than 21 years with one company (from November 1980 until October 2002). In 2001, Applicant was promoted from production test lead, a non-exempt payroll position, to systems engineer which was an exempt payroll position. He was assigned the night shift and Applicant claimed that his supervisor permitted him to leave early if the work assignments were completed (Tr. 21). However, he received disciplinary actions due to complaints about his work performance in 2002. Specifically, the company reviewed time records and found a significant overstatement of time worked during a time frame of two months. After two counseling sessions, Applicant was terminated from his long-time employment with the company, effective October 18, 2002 (GE 3).

In 2001, Applicant was dating a woman. He claimed that he terminated the relationship. She filed charges against him for rape in April 2001. He was arrested and charged with the following counts: rape of a drugged victim, rape- incapable of consent, sodomy, and oral copulation (GE 5). The case was not prosecuted. Applicant posted bond and he never appeared in court (Tr. 26). He admits that he was embarrassed about answering this question (Tr. 52).

Applicant was unemployed from October 2002 until May 2004. He applied for and received unemployment benefits during that time. In 2004, Applicant worked as a production manager for a company. However, he was again unemployed in November 2004 until approximately January 2005.

Applicant has been fully employed since 2005. He began his current employment in August 2005. When Applicant applied for this position in July 2005, he completed his employment history in his application. He reported that the reason for leaving his prior employment of 21 years was due to a "layoff." He signed and certified that his employment application information was true and correct (GE 4).

On September 21, 2005, Applicant completed a security clearance application. In section 22 - your employment record - he answered "no" to the question concerning any termination from employment or leaving employment under unfavorable conditions.

Applicant answered interrogatories in January 2008 as part of his security investigation. He stated that he was laid off from his position in 2002 due to "least seniority." He further explained in his answer to question eight in that same interrogatory that he did not list his prior unfavorable termination because he collected unemployment insurance due to a reduction in force. He stated that his claim was never disputed by the employer (GE 2).

Applicant asserted at the hearing that he has never compromised national security during the more than 33 years, including his service in the Air Force, that he has worked in the defense community. His security clearance has never been challenged prior to this time.

Applicant denied the rape. He also admitted at the hearing that he "took a little license with that definition [termination]" that are now alleged as falsifications (Tr. 23-24). He admitted that his former company let him go after 22 years and there was "an embarrassment issue." He admitted that he was arrested in April 2001 but never appeared in court. He also thought the incident was expunged. He stated that his answer was false but was not trying to deceive or cover up anything because it is a public record. He stated he has nothing to hide. He further elaborated that there is no security issue involved in his case (Tr. 24).

When cross examined, Applicant maintained that he denied the SOR allegations in his answer to enable him to receive a hearing. He stated that he had the option of agreeing or denying the findings. He signed the Disciplinary-Termination form on October 18, 2002 (Tr. 38) and acknowledged that he was being terminated for cause. He admitted that he was not totally up front with the questions and that he gave himself bad advice (Tr. 40). He agreed he was not totally forthright. He acknowledged that it is hard to get a job and he rationalized that even if he answered the questions "no", there would be an investigation—"its gonna [sic] come forth" (Tr. 43).

With respect to question 23 (police record), Applicant admitted that he should have answered "yes" and listed the April 2001 arrest and charge but he did not do so because he was embarrassed (Tr. 48). Applicant explained "I honestly didn't know that arrest record was on - on my record. So that is the only explanation for that one" (Tr. 26).

When Applicant was interviewed as part of his security clearance process, he stated that when questioned a second time (a year or so ago), he revealed and explained his answers and rationale for those answers to the investigator. Applicant acknowledged that at that point the investigator presented Applicant's arrest record to him. He stated that he was stunned to learn that it had not been expunged because the

whole case was dropped. He then stated that “so, I am guilty of — in the most fine definition of having falsified that document - yes” (Tr. 26).

Applicant’s current employer recommends him highly. He is valued as a mature and professional individual. He is respected and has the complete trust and confidence of his employer. He is trusted with safeguarding classified material and decision making in that arena (AE A).

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, 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 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 cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. AG ¶ 16(a) provides:

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 eligibility or trustworthiness or award fiduciary responsibilities

AG 16(b) states:

deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative is a disqualifying condition.

Applicant was not credible in his testimony at the hearing that he did not intend to deceive the government through the omissions to various questions. Applicant admitted he lost his job due to his excessive claims for compensation. Applicant rationalized his efforts to mislead employers and security personnel with his answers to questions on his July 2005 employment application, his September 2005 security application and his January 2008 interrogatories. His explanation for not believing he was “terminated” was based on the fact that he received unemployment benefits. Applicant acknowledged that he did not have any real basis for that belief. H also claimed the company wanted to let him go and used seniority as a reason. His explanations are not credible. I find

that he deliberately withheld information about his termination to be hired and then to obtain a clearance.

Applicant did not list his April 2001 arrest on his security application. His explanation that he believed the record was expunged was not credible. He admitted that due to embarrassment, he did not answer the question. He denied all the SOR allegations but at the hearing he explained he did that so that he could have a hearing. I find that Applicant intentionally falsified his September 21, 2005, SF 86 security clearance application and his July 20, 2005 application for employment. Moreover, he falsely denied the allegations in his SOR response

AG ¶ 16(e) “personal conduct, or concealment of information about one’s conduct that creates a vulnerability to exploitation, manipulation or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing.” This disqualifying condition is not a factor for consideration because Applicant revealed the incidents during his investigation in 2008.

Paragraph 17 lists conditions that could mitigate security concerns. Specifically, AG ¶ 17(c) “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgement” is a factor for consideration in this case. Moreover, AG ¶17(d) “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur” does not apply. Thus, AG 17(e) “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress” is a factor for consideration. Applicant has not mitigated his personal conduct concerns regarding his intentional falsifications. He tried to explain and clarify his answers, but I conclude he was not fully forthright and candid at the hearing.

As recent as his 2008 interrogatories, he stated that he was not terminated but laid off. He admitted he took a little license with his answers. He admitted embarrassment over the April 2001 arrest. He acknowledged that it would have been more difficult to find employment in 2005 if he admitted he had been terminated in 2002. Applicant’s statement at the hearing that the incidents occurred and he has cleared everything up and now everything is public record is not sufficient for mitigation. I do not find that Applicant has sufficiently mitigated personal conduct security concerns through his recent actions and behavior.

None of the mitigating conditions in AG 17 apply. Applicant’s falsification of his SF 86 on September 21, 2005, and his response to DOHA interrogatories in 2008 is recent. He did not promptly inform the government of the falsification. No one advised him to falsify his answers. He admitted the false statements at issue, and the falsification of his documents is substantiated. The falsifications cast doubt on his current reliability, trustworthiness, and good judgment.

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) 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 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 served his country in the U.S. Air Force and received an honorable discharge. He held a security clearance for more than 30 years. He was employed with one company for more than 21 years. He has a letter of recommendation from his current employer.

However, he did not report truthfully on his security clearance application with respect to questions 22 and 23. He also did not report his termination on his 2005 employment application. Applicant was embarrassed about the April 2001 charge and arrest. He did not want the Government or his future employer to find out about these events. In January 2008, he was not truthful and candid in his reply to a DOHA Interrogatory about the reason he lost his job in 2002. The fact that Applicant has held a security clearance for many years does not excuse the personal conduct issue. This recent falsification has a serious negative impact on my security clearance determination because it damages his integrity and trustworthiness.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors" and supporting evidence, my application of the pertinent factors under the Adjudicative Process, all the evidence in this decision, especially his contributions to his employer, and my interpretation of my responsibilities under the Guidelines.

Overall, the record evidence and whole person analysis leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his personal conduct. I further conclude he is not eligible for access to classified information.

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 E: AGAINST APPLICANT

Subparagraph 1.a-e: Against Applicant

Conclusion

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

NOREEN A. LYNCH
Administrative Judge