



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 06-23077
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

March 28, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on August 18, 2005. On October 24, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and 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 November 9, 2007, and elected to have his case decided on the record in lieu of a hearing. Department Counsel submitted the Government's written case on September 25, 2007. Applicant received a complete file of relevant material (FORM) on January 28, 2008, and was provided the opportunity to file objections and submit material to refute, extenuate, or mitigate the

Government's case.¹ Applicant did not submit additional information. The case was assigned to me on March 6, 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 November 9, 2007 and resigned December 21, 2007, Applicant admitted the factual allegation in ¶ 1.a of the SOR. He also admitted the factual allegations in ¶¶ 2.a-c of the SOR.² He did not provide additional information to support his request for eligibility for a security clearance.

Applicant is a 26-year-old employee of a defense contractor. He attended college from 2002 to the present. He is single. He has worked for his current employer since December 2004.³

Applicant served in the U.S. Coast Guard (active duty) from July 1999 until May 2004.⁴ He was administratively discharged due to his unsatisfactory performance.⁵ During Applicant's military service he received 15 citations for failure to conform to military rules. He disclosed the incidents in his security application. Applicant claimed a conflict of interest with the commanding office for each of the incidents listed on the security application. He provided no additional information after receiving the FORM.

In 2002, Applicant failed to monitor a critical alarm status while on watch. He also signed the day's log indicating that he had performed proper security rounds. He, in fact, did not.⁶ He was counseled and instructed on proper watch procedures. He was given opportunities to retrain. He was warned that future incidents could result in disciplinary actions.

Applicant was placed on probation in September 2003 for his failure to conform to military rules and his inability to stand a proper watch. During the probation, he received 15 instances of failing to conform and four instances of improper watch standing.

¹The Government submitted six items in support of its contentions.

²Item 3 (Applicant's answer to SOR).

³Item 4 (Security Clearance Questionnaire, dated August 18, 2005).

⁴*Id.*

⁵Item 5 (Discharge Form, dated May 12, 2004).

⁶Item 6 (U.S. Coast Guard Memorandum with attachments, dated March 12, 2004).

Applicant was awarded Non Judicial Punishment on three occasions. He was counseled and reduced in rank in 2004. His unsatisfactory performance continued. He was less than honest concerning his actions on and off duty.⁷

His commanding officer reported that Applicant was unable to hold himself accountable for his actions and had an established history of shirking his responsibility.

On or about October 10, 2004 Applicant failed to stop for an accident. He was charged with (1) Hit and Run Driving (2) Trespass-Refuse to Leave and (3), Failure to Report an Accident. He was found guilty of the charges under counts two and three. He was fined and ordered to complete 80 hours of community service. He was put on a three year supervised probation. The probation was scheduled to end on January 3, 2008.

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.

⁷Item 6 at 1.

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 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 guideline notes several conditions that could raise security concerns. Under AG & 31(a), an Asingle serious crime or multiple lesser offenses@ may be potentially disqualifying. Similarly under AG & 131(c), Aan allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted@ may raise security concerns. As noted above, Applicant admits he committed a crime in October 2004 when he failed to report an accident. His probation was just scheduled to end in January 2008. These facts are sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 32(a), the disqualifying condition may be mitigated where Also 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 current reliability, trustworthiness, or good judgment.@ Applicant-s criminal conduct shows a pattern of unlawful behavior continuing until very recently. His supervised probation has recently ended. It is premature to know if this behavior will not recur. It shows poor judgment given his record. This potentially mitigating condition does not apply.

Under AG & 30(d), it may be mitigating where 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.” As noted above, Applicant just completed probation. He provided no additional information to consider for mitigation. I find this potentially mitigating condition is not a factor for consideration in this case.

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. Under AG ¶ 16(c), “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.” Applicant was administratively discharged from the Coast Guard due to a history of unsatisfactory performance. He was cited numerous times for failing to conform to military rules. Despite warnings and a probation, he continued to show unwillingness to comply with the regulations.

Similarly, AG ¶ 16(d) provides that “credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that he person may not properly safeguard protected information. This includes but is not limited to consideration of . . . (3) a pattern of dishonesty or rule violations; and,

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”

Applicant’s record is replete with rule violations and Non Judicial Punishments throughout his career in the Coast Guard. He was considered to be less than honest in responding to several incidents. He did not take responsibility for his actions. He

reported the incidents were due to a conflict of interest with his commanding officer. He submitted a false statement in his log. He consistently showed poor judgment and questionable judgment.

Paragraph 17 lists conditions that could mitigate security concerns. Specifically, ¶ 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” does not apply in this case. Moreover, ¶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. Applicant was warned and given probation and still did not perform or comply with the rules and regulations.

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 in the U.S. Coast Guard from 1999 until his administrative discharge in 2004 for unsatisfactory performance. He had numerous rule violations and did not successfully complete a 2003 probation. He did not accept responsibility for his actions during his military service. He believed everything was a conflict of interest with his commanding officer. Despite numerous opportunities to modify his behavior, he continued to exhibit poor judgment. After leaving the military, Applicant was involved in a serious crime. He just completed his probation. He has not met his burden of proof in this case to overcome the government’s case.

Overall, the record evidence 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 and 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a-c:	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