



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



In the matter of:)
)
-----) ISCR Case No. 07-01836
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Nichole Noel, Esquire, Department Counsel
For Applicant: James Watson, Personal Representative

January 16, 2008

Decision

ABLARD, Charles D., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86) on November 5, 2005. On May 30, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant which detailed reasons under Guideline J Criminal Conduct and Guideline E Personal Conduct why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA recommended the case be referred to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On June 25, 2007, Applicant responded to the SOR allegations, and requested a hearing. The matter was assigned to me on August 22, 2007. A notice of hearing was issued on August 28, 2007, and amended on August 30, 2007, for a hearing on

September 13, 2007, and held that day. The government offered eight exhibits and Applicant offered thirteen at the hearing. All were admitted into evidence. Applicant and his wife testified. The transcript was received on September 21, 2007. On December 18, 2007, I requested additional material from Applicant to clarify certain issues. Two documents were submitted on January 9, 2008, and accepted in evidence without objection.

Procedural and Evidentiary Rulings

Motion to Amend SOR

Department Counsel moved to amend the SOR on August 17, 2007, to add one new allegation of an offense in 1994 under the Guideline J Criminal Conduct allegations and new Guideline G Alcohol Consumption allegations which corresponded to the criminal allegations in the original SOR and the new amended allegation. Applicant was given one week in which to object to the SOR amendment. No objection was made and the answers to the amended allegations were presented at the hearing.

Findings of Fact

Applicant admitted four of the original allegations under Guideline J relating to criminal conduct between 1995 and 1998. He denied the fifth allegation (SOR ¶ 1 c) and supplied explanatory information for all. One allegation (SOR ¶ 1 d) was amended at the hearing to show that all charges were dismissed. He admitted, with explanatory information, one allegation regarding erroneous information on his SF 86 under Guideline E relating to personal conduct. He admitted all of the new allegations under Guideline G relating to drinking alcohol at the time of the incidents which gave rise to the criminal allegations under Guideline J. After a complete review of the record, I make the following findings of fact:

Applicant is a 51-year-old employee for the past 21 years of a major defense contractor as a metrology technician. He has held a security clearance for 18 years (Tr. 35). He is highly regarded for his work performance in statements and evaluations which were admitted into evidence (Exhs. B, C, and E-J). He holds an associate's degree in his field of expertise. He served on active duty in the Marine Corps for four years.

During a period between 1994 and 1999, Applicant was alleged in the SOR to have had four instances of criminal behavior relating to domestic violence one of which also involved property damage. All of them involved his wife whom he married in 1992 (Exhs. 2-7). The first was an arrest in 1994 (Exh. 3; Amended SOR ¶ 1 f.) with no evidence as to the disposition (Tr. 35). The second arrest in 1995 (SOR ¶ 1.a.) resulted in a charge of assault/domestic violence. He was found guilty and sentenced to one year of unsupervised probation and family counseling (Exhibit D). The third arrest in 1997 (SOR ¶ 1.b.) was continued until 1998. The fourth allegation in 1998 (SOR ¶ 1. c.) relates to the same offense as the third arrest and was dismissed in 1998 (Exhibit E and

Tr. 46). The last arrest for domestic violence, disorderly conduct, and property damage was in 1999 (SOR ¶ I. d.). He was found not guilty and all charges were dismissed (Exhibits F, G, and H, and Tr. 47). This allegation was amended during hearing to accurately reflect the disposition of the case (Tr. 90).

Thus, there were four arrests for specific incidents and all of them concerned difficulties Applicant and his wife were having. These problems were the result of her obsessive compulsive disorder leading to anxiety and depression which in turn led her to excessive drinking (Exh. A 2, and Tr. 23-24). He also had been drinking alcohol when all the offenses occurred (Tr. 63). When her problems first began in the early 1990's, doctors were unable to adequately treat her and the medicine prescribed was not helpful. She was hospitalized for 28 days in 1999 for alcohol treatment (Tr. 28).

Since that time, the situation has greatly improved and she now is on an effective regimen of prescription medicine which has a remarkable effect in controlling her behavior (Exh. A, and Tr. 49). She has been in psychiatric care at various times since 1995 and is still under the occasional care of a psychiatrist.

As a result of the counseling Applicant and his wife have received, he also has learned to cope with her difficulties and not react inappropriately. They are now very happily married and have had no domestic difficulty since 1999 (Tr. 34). They have both received marital counseling (Tr. 68).

The last instance of criminal behavior was in 2004 in connection with the operation of a powerboat (Exh. 8). The circumstances of the arrest were that Applicant and his wife were in their boat on a lake near their home over Memorial Day weekend on May 30, 2004, when he exceeded the speed in a "no wake" area of the lake, while returning to the dock. When the water police stopped him they gave him a breathalyzer test and he tested in excess of allowable limit for alcohol. He was charged with operating a boat under the influence of alcohol (OUI-Watercraft) with a BAC of .08, and Extreme OUI greater than .15 with two missing life preservers. On September 21, 2004, he plead guilty to Extreme OUI. All other charges were dismissed. He paid a fine of \$2,000, served ten days in jail with work release during the day, attended alcohol and drug evaluation classes for 32 hours, and was placed on three years of unsupervised probation (Exh. N 1). He also was required to attend a boating education course which he did (Exh. I p. 4).

The treatment report made as a result of this offense revealed that he had high alcohol tolerance but had been legally intoxicated once or twice during the past month. The substance abuse counselor found that he did not have a condition that could impair judgment or reliability, particularly in the context of safeguarding classified material (Exh. I p. 3). Applicant describes himself as a casual drinker and drinks only beer (Tr. 66).

On December 28, 2004, Applicant advised the court that he had fulfilled all of the requirements of the probation (Exh. N 2). He was still required to report any change of

address or legal difficulties to the court, to refrain from drinking intoxicating liquor to excess, and to refrain from drink while operating a boat. The probation ended on September 21, 2007, and no such incidents had occurred.

When Applicant submitted his SF 86 on November 5, 2005, he failed to list the 1999 arrest for domestic violence (SOR ¶ 1.d) at Question 23 (f): Your Police Record relating to other charges, arrests, or convictions in the past seven years not listed in Question 23 (a.-d). The other domestic violence arrests were before the seven year period and not required to be listed (Tr. 72). Applicant mistakenly believed that since the case was dismissed that it was not required to be listed. The 2004 felony for the boating incident was reported on his SF 86 at Question 23 as relating to being charged or convicted of a felony.

Applicant has two step-children of his wife's and two biological children from his former marriage. All are of mature age. He has a stable family life. He is well regarded in his company for work performance and ethics (Exhs. K, L. and M), and has received numerous awards for his effective services (Exh. B 1-6). His supervisors are aware of his problems both domestically and his most recent arrest in 2004 (Tr. 58).

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information." *Id.* at 527.

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised Adjudicative Guidelines (AG). The guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

The guidelines are not inflexible rules of law. Instead, they recognize the complexities of human behavior, and 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.

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" (Directive ¶ E2.2.2.). 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 based 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. 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

Security concerns under Guideline J (Criminal Conduct) relating to the four arrests between 1994 and 1999 for Assault/domestic violence/ property damage and his 2004 arrest for OUI raises security concerns since criminal activity creates doubt about judgment, reliability, and trustworthiness. By its very nature, these arrests and the actions taken by the court calls into question a person’s ability or willingness to comply with laws, rules and regulations (AG ¶ 30). Conditions that could raise a security concern and may be disqualifying include a single serious crime or multiple lesser offenses (AG ¶ 31 a).

Mitigating conditions (MC) might apply if 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 judgement (AG ¶ 32 a). Another MC provides mitigation if there is evidence of successful rehabilitation without recurrence of criminal activity, remorse, and a good employment record (AG ¶ 32 d).

The specific criminal conduct alleged in SOR ¶ 1.a.-d. and f. relating to domestic violence occurred eight to thirteen years ago under circumstances unlikely to recur. Because of the successful treatment of his wife since 1999 and Applicant’s own

education about her problems and the alcohol treatment for 32 hours he has received, I conclude that both mitigating conditions are applicable to the offenses.

The final criminal allegation SOR ¶ 1.e. concerning Operating under Influence (OUI) of a powerboat in 2004 is the most recent criminal conduct and resulted in the heaviest penalties imposed on Applicant of any of the offenses. However, from his testimony and facts and circumstances of the punishment imposed particularly the education requirements, I am confident that he has learned his lesson from the event and that it will not be repeated. I conclude that the mitigating conditions are applicable to that allegation as well.

Guideline E, Personal Conduct

Applicant's failure to report the 1999 arrest at Question 23 of his SF 86, prompted security concerns under Guideline E (Personal Conduct). Such conduct might indicate questionable judgment, unreliability, and unwillingness to comply with rules and regulations and could indicate that the person may not properly safeguard classified information (AG ¶ 15). Specifically, conditions that could raise a security concern and be disqualifying include the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire (AG ¶ 16 a).

Applicant fully revealed the 2004 arrest on his SF 86. The 1999 domestic incident was the only one of the domestic dispute issues that should have been reported, and he believed that since it had been dismissed which had in fact happened. I conclude that the omission was not deliberate as the guideline requires, and Applicant credibly denied that the omission was deliberate or made with intent to deceive. I conclude in favor of Applicant since the allegation was not proven.

Guideline J, Alcohol Consumption

The government cited a disqualifying condition (DC) under the revised adjudicative guidelines (AG) pursuant to the Directive concerning alcohol consumption under Guideline G. The security concern is that excessive alcohol consumption leads to exercise of questionable judgment and can raise questions about an individual's reliability and trustworthiness (AG ¶ 21). The specific concern is alcohol-related incidents away from work, such as driving or operating a boat while under the influence (AG ¶ 22 a).

Possible mitigating conditions (MC) might include the fact that so much time has passed, or under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgement (AG ¶ 23 a), or the individual acknowledges issues of alcohol abuse provides evidence of actions taken to overcome this problem and has established a pattern of responsible use (AG ¶ 23 b). The mitigating factors cited are applicable in view of the counseling and education that occurred after the 2004 arrest as well as the testimony at the hearing.

Whole Person Concept

Under the whole person concept, an evaluation of whether the applicant meets the security guidelines includes consideration of the following factors: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other 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 (AG ¶.2.9). Security clearances are granted only when "it is clearly consistent with the national interest to do so." Executive Order No. 10865 § 2.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances of this case. In all adjudications the protection of our national security is of paramount concern. Persons who have access to classified information have an overriding responsibility for the security concerns of the nation. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. The "whole person" concept recognizes we should view a person by the totality of his acts and omissions. Each case must be judged on its own merits taking into consideration all relevant circumstances, applying sound judgment, mature thinking, and careful analysis.

Applicant has an excellent work record with the same employer and has held a security clearance during most of the time of his employment. He has remained married throughout the difficult period of his wife's medical problems and her treatment. He has learned from his mistakes and learned to respond appropriately to his wife's medical problems. He lives and works in a stable environment and is highly valued by his employer.

After considering all the evidence in its totality, including the whole person of Applicant, I conclude that Applicant mitigated the security concerns arising from his criminal and personal conduct.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR as required by the Directive (Par. E3.1.25) are as follows:

Paragraph 1. Guideline J: FOR APPLICANT

Subparagraph 1.a.: For Applicant
Subparagraph 1.b.: For Applicant
Subparagraph 1.c.: For Applicant
Subparagraph 1.d.: For Applicant
Subparagraph 1.e.: For Applicant

Subparagraph 1.f.: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a.: For Applicant

Paragraph 3. Guideline G.:FOR APPLICANT

Subparagraph 3.a.: For Applicant

Subparagraph 3.b.: For Applicant

Subparagraph 3.c.: For Applicant

Subparagraph 3.d.: For Applicant

Subparagraph 3.e.: For Applicant

Subparagraph 3.f.: For 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 or renew a security clearance for Applicant. Clearance is granted.

Charles D. Ablard
Administrative Judge