



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

SSN: -----

Applicant for Security Clearance

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ISCR Case No. 07-04866

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

June 30, 2008

Decision

WHITE, David M., Administrative Judge:

Applicant was arrested for, and convicted of nine criminal offenses between 1979 and 2005. He remains on probation from his latest conviction for driving while intoxicated (DWI). Based upon a thorough review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaires for Investigations Processing (SF 86), on September 18, 2006. On September 28, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J. 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 (DoD) for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on October 15, 2007, but did not indicate whether he requested a hearing before an administrative judge. On October 24, 2007, DOHA informed Applicant that he needed to state whether he wished to have a hearing in order for his answer to be considered complete. Applicant responded again on November 6, 2007, indicating that he wished to have the case decided without a hearing. After a discussion with Department Counsel, Applicant changed his mind and, on February 27, 2008, sent an email expressing his desire to have a hearing before an administrative judge. Department Counsel was prepared to proceed on February 27, 2008, and DOHA assigned the case to me on March 20, 2008.

DOHA issued a notice of hearing on April 9, 2008, and I convened the hearing as scheduled on May 13, 2008. Department Counsel offered Government Exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified on his own behalf, and submitted Applicant's Exhibits (AE) A through C, which were also admitted without objection. DOHA received the transcript of the hearing (Tr.) on May 22, 2008.

Findings of Fact

Applicant is a 49-year-old employee of a defense contractor, for whom he has worked for two years. He has never held a security clearance, or been employed in any government capacity. He is divorced, with five children, none of whom live with him.

In his Answer to the SOR, and during testimony at the hearing, Applicant admitted each of the nine arrests and convictions alleged in SOR ¶¶ 1.a through 1.i. The earliest incident took place in June 1979, when he stole a car in order to leave the state in which he was then living. After the car ran out of gas on the highway, he was arrested and held in jail for three months pending trial. He pled guilty, was convicted and sentenced to serve one to five years confinement, suspended, and three years probation. (Tr. at 29-30.)

Applicant was next arrested in November 1985, and charged with leaving the scene of an accident. He had backed his uncle's large truck into the car that was parked behind the truck as he was leaving the area after picking up a friend at a bar. He testified that he had not realized he hit the car, although his friend told him that he had. He pled guilty to this offense, and was sentenced to 30 days confinement, suspended, fined \$150, and to serve one year of probation. (Tr. at 31-34.) In January 1987, he was arrested for DWI while driving home from a bar after a few drinks with the same friend. His blood alcohol content was close to, but over the limit, and he pled guilty. He was sentenced to 30 days in jail, with 27 suspended, fined \$250, and his driver's license was revoked. (Tr. at 34-35.)

During 1987, Applicant and his wife were smoking a lot of marijuana. He decided to grow his own, rather than purchase it, and stole about \$300 worth of peat moss to use while potting the plants. After he was questioned about this by police, they searched his home and found the growing marijuana. This led to the convictions described in SOR ¶¶ 1.d and 1.e, for producing marijuana and larceny. He was

sentenced to 15 days in jail on the first charge, and 90 days in jail, with 85 days suspended, on the second charge. (Tr. at 37-42.) During May 1989, he was arrested for driving while his license was suspended (from the earlier DWI). He was convicted and sentenced to 40 days in jail, all suspended, fined and given two years of probation. (Tr. at 42-43.) All three of these convictions were subsequently set aside by the courts after he successfully served as an undercover informant for police conducting investigations into drug distribution. He became an informant during 1993 to 1995, in return for not being prosecuted after being caught selling marijuana. (Tr. at 50-53.)

In June 1992, he was arrested for assaulting his wife during an argument. He was convicted of disorderly conduct - refusal to disperse, and sentenced to 10 days in jail, all suspended, fined, placed on one year of probation, and ordered to perform 20 hours of community service. (Tr. at 43-45.) During January 1998, he was arrested and charged with leaving the scene of an accident after he hit a parked car with a front-loader he had been using for snow removal. He was placed on 180 days probation for this conviction, which was also subsequently set aside as a result of his earlier undercover police work. (Tr. at 47-51.)

On September 30, 2005, Applicant became very intoxicated while drinking a combination of beer and whiskey at his home. He blacked out, and does not remember anything except being arrested in his car on the other side of town from where he lives. He has seen police video of the arrest, and he was incoherent. He was convicted of DWI again, and sentenced to 90 days in jail, with 87 days suspended, fined \$3,000, with \$1,500 suspended, ordered to complete an alcohol safety program, and placed on three years probation, which will continue until January 2009. His probation is presently unsupervised. He completed the alcohol program, but continues to drink alcohol in moderation. (Tr. at 53-58, 69-71.)

Applicant submitted three letters from union and company officials, attesting to his consistently outstanding and trustworthy performance of his work responsibilities. (AE A, B, and C.) He testified that he is trying to be responsible in his private life as well. He has not smoked marijuana for the past 12 years, and hopes to become a better example for his children.

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 used to evaluate 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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant 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.”

A person applying for access to classified information seeks to enter 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.

Analysis

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct: “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.” AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying, including: “(a) a single serious crime or multiple lesser offenses;” “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;” and “(d) individual is currently on parole or probation.” All three of these disqualifying conditions are established in this case, and Applicant's long and varied criminal history raises

substantial doubt about his judgment, reliability, and willingness to comply with laws, rules and regulations.

AG ¶ 32 provides conditions that could mitigate security concerns:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (d) 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.

Applicant's crimes 20 or 30 years ago, if viewed in isolation, would create limited doubt about his current reliability and judgement. They do not exist in isolation, however. His pattern of criminal activity resulted in nine convictions over that 30-year period, the most recent of which was for a serious DWI incident less than 3 years ago. His absence of new offenses since that date is less indicative of reformation than would otherwise be the case since he remains on probation with significant suspended punishment hanging over his head.

The variety and number of crimes involved do not reflect any outside pressure to break the law, nor could they support a conclusion that criminal behavior is unlikely to recur. Applicant did present evidence of a recent good employment record, but that too occurred during his period of probation. While Applicant has done just about everything that he could have done since his last DWI incident in 2005, insufficient time has passed to support significant mitigation under any of these mitigating conditions. The setting aside of the convictions set forth in SOR ¶¶ 1.d, 1.e, 1.f, and 1.h took place in return for Applicant's undercover police work, not because he did not actually commit any of those offenses.

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 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's conduct of potential concern involves substantial criminal conduct resulting in nine convictions for major and minor offenses over the past 30 years, with the most recent less than 3 years ago. Applicant is a mature, experienced adult who is accountable for his decisions and conduct. He remains on probation, so his recent absence of arrests is less probative of true reform than might otherwise be the case.

Applicant's extensive pattern precludes any conclusion that continuation or recurrence is unlikely. Applicant's good reputation at work and within his union is commendable, but insufficient in itself to mitigate security concerns arising from his conduct. His record reflects a consistent inability or unwillingness to follow laws, rules and regulations, together with significant lapses of judgment.

On balance, Applicant presented insufficient evidence to mitigate reliability and trustworthiness security concerns arising from his numerous and varied criminal acts over the past 30 years. Overall, the record evidence leaves substantial doubts as to Applicant's present eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his 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
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant

Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Subparagraph 1.h:	Against Applicant
Subparagraph 1.i:	Against Applicant

Conclusion

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

DAVID M. WHITE
Administrative Judge