



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-07144
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Department Counsel
For Applicant: *Pro Se*

July 10, 2008

Decision

TESTAN, Joseph, Administrative Judge:

On October 16, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guidelines E and 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 for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on November 2, 2007, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on January 8, 2008. Applicant did not file a response to the FORM. The case was assigned to me on March 27, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is 54 years of age. He has worked for the same defense contractor employer since 1993. He has been married to his current spouse since 1979.

In 1976, applicant was charged with Brandishing a Firearm. He was convicted of the charge, fined, and sentenced to 60 days in jail. The jail sentence was suspended.

In 1985, applicant was charged with (1) Felony Possession of Marijuana and (2) Conspiracy to Distribute and Possess With Intent to Distribute a Controlled Substance (Marijuana). He was convicted of the latter charge and sentenced to five years in prison. He served over one year in prison.

In 1996, applicant was arrested and charged with Possession of Marijuana. The charge was dismissed.

In 1997, applicant was arrested for Assault and Battery on a Family Member. The charge was dismissed.

Applicant falsified material facts about his criminal history in response to three separate questions on an Electronic Personnel Security Questionnaire (EPSQ) he executed on October 18, 2006.¹ In response to Question 21, which asked: "Have you ever been charged with or convicted of any felony offense?" applicant responded "no." This response was false because, as noted above, he had been charged with and convicted of a felony in 1985. In response to Question 22, which asked: "Have you ever been charged with or convicted of a firearms or explosives offense?" applicant responded "no." This response was false because, as noted above, he was charged with and convicted of Brandishing a Firearm in 1976. In response to Question 24, which asked: "Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" applicant responded "no." This response was also false because, as noted above, he was convicted of a drug-related charge in 1985.²

In his response to the SOR, applicant admitted that he falsified material facts on the EPSQ, but offered the following statements in explanation. With respect to Question 21, he stated: "[the falsification] was not intentional as it had been more than twenty years and as I understood it, it was to go back ten years." With respect to Question 22, he stated: "This occurrence happened thirty-one years ago and I did not realize I had to disclose it." With respect to Question 24, he stated: "I did not realize it had to be disclosed as it happened more than twenty years ago." In view of the straightforward nature of the questions, and applicant's failure to offer any evidence as to how he allegedly came to believe he was "to go back ten years," his denial of an intent to deceive is not credible.

¹This finding is based on applicant's admissions to SOR Allegations 2.a., 2.b., and 2.c. The worksheet the Government submitted with the FORM (Exhibit 5) is not a substitute for the actual EPSQ.

²The fact that applicant did not disclose his 1996 drug charge in response to this question was not alleged by the Government.

Policies

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.” (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Ord. 10865, Section 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph E3. 1.15.) An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” (Directive, Paragraph E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, Section 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

The security concern for criminal conduct is set forth in Paragraph 30 of the AG, and is as follows:

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.

Paragraph 31 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 31.a., “a single serious crime or multiple lesser offenses” may be disqualifying. And, under Paragraph 31.c., an “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,” may be disqualifying. Applicant’s multiple arrests and two convictions raise these two disqualifying conditions.³

Paragraph 32 of the AG sets forth conditions that could mitigate security concerns. Under Paragraph 32.a., it may be mitigating 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 judgment.” Applicant’s last criminal conviction was over 20 years ago; his last arrest was over ten years ago. This mitigation condition is applicable. Under Paragraph 32.c. it may be mitigating if there is “evidence that the person did not commit the offense.” Based on the fact that the charges in 1996 and 1997 were dismissed, this mitigating condition is applicable. Under Paragraph 32.d., it may be mitigating if “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.” There is evidence of successful rehabilitation; namely, it has been over ten years since applicant’s criminal activity, and he has a good employment record. Accordingly, this mitigating condition is applicable.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set forth in Paragraph 15 of the AG, and is as follows:

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.

Paragraph 16 describes conditions that could raise a security concern and may be disqualifying. Under Paragraph 16.a., the “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 clearance eligibility or trustworthiness, or award fiduciary responsibilities,” may be disqualifying. This disqualifying condition is applicable because applicant intentionally provided false material information on the EPSQ.

³10 U.S.C. 986, which barred applicants who had served a year or more in prison as a result of a criminal conviction from receiving a security clearance, was repealed. Accordingly, applicant is no longer subject to this automatic bar.

Paragraph 17 sets forth conditions that could mitigate security concerns. I considered each of them and conclude none apply.

“Whole Person” Analysis

Under the whole person concept, the AJ must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph 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 Paragraph 2c, the ultimate determination of whether to grant 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 was young and immature when he was charged and convicted of the two serious crimes in the 1970s and 1980s. Even if the two dismissed charges from the 1990s were considered against applicant, given the passage of time since his last adverse contact with law enforcement, his stable home life, and his good employment record, he would have received a favorable decision had his criminal conduct been the only issue raised by the SOR. But it wasn’t. The Government alleged and proved that applicant intentionally concealed his criminal history from the Government when he completed the EPSQ in 2006, less than two years ago. The recency and extent of this dishonest conduct, together with his incredible explanations for it, preclude a finding that this type of conduct is unlikely to recur. Based on the foregoing, I conclude that, although applicant mitigated the security concerns arising from Guideline J, he failed to mitigate the security concerns arising from Guideline E.

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

Paragraph 2, Guideline J: FOR 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.

JOSEPH TESTAN
Administrative Judge