



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-07391
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel

For Applicant: *Pro se*

May 8, 2008

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on April 14, 2006 (Government Exhibit 1). On October 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E concerning the 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 President Bush on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant submitted an Answer to the SOR on November 7, 2007, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on January 7, 2008. I received the case assignment on January 9, 2008. DOHA issued a notice of hearing on February 6, 2008, and I convened the hearing as scheduled on February 25, 2008. The Government offered Government Exhibits 1

through 4, which were received without objection. Applicant testified on his own behalf and submitted Applicant's Exhibits A through G, without objection. DOHA received the transcript of the hearing on March 5, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

The Applicant is 45, single and has an Associate of Science degree in Administration of Justice. He is employed by a defense contractor as a Laboratory Technician and seeks to retain a security clearance previously granted in connection with his employment.

Guideline J - Criminal Conduct

The Applicant has been arrested twice. The first arrest happened in February 22, 2002. On that occasion the Applicant was charged with Driving Under the Influence of Alcohol and Driving With a Blood Alcohol Level above .08%. He plead no contest to a reduced charge of Reckless Driving and received a suspended sentence for 36 months, fines and ordered to attend a six month first offender alcohol education and counseling program. The Applicant successfully completed all the sentence requirements and has had no further alcohol related incidents.

The Applicant submits that this arrest is an aberration. This incident occurred during a very tumultuous time in the Applicant's life. Both of his grandparents had died within a week of each other in September 2001; he had been offered employment with his current company on October 31, 2001; he was terminated from his then employer on November 5, 2001; and he had been informed on the day of his arrest of the forthcoming date of his divorce from his first wife. (Government Exhibits 3 and 4; Applicant's Exhibits E and F; Transcript at 65-70, 78-80.)

The Applicant's second arrest occurred on October 28, 2004. In the 1990s the Applicant had worked in a gun store and also was a Reserve Police Officer. He had considerable knowledge and training in the proper use of weapons. During that time he had acquired a large collection of weapons, worth between \$80,000.00 and \$100,000.00. All of the approximately 58 weapons had been acquired legally. Nine of these weapons were subsequently classified as assault weapons and, as such, had to be registered or surrendered. The Applicant did neither. In addition, another one of his weapons had been altered so that it was legally viewed as a machine gun.

The evidence is mixed and somewhat contradictory as to what happened on the day in question. After reviewing all the available evidence, including the police report, the Applicant's testimony and the Report of Investigation, I make the following findings of fact. The Applicant, while attempting to clear a jammed round in one of his rifles, shot out a street light in a neighboring lot. Given the Applicant's knowledge of weapons, and weapons safety, this was at the very least a negligent act on his part. The police

were called to his location because of the shot and, during the investigation, confiscated all of his weapons. The Applicant initially denied any knowledge of the incident, but eventually admitted it.

The Applicant was subsequently charged with several felonies, including one count of Discharging a Weapon in Public, one count of Unlawful Possession/Transportation of a Machine Gun, and nine counts of Unlawful Possession of an Assault Weapon. On March 10, 2005, he pled nolo contendere to two misdemeanor counts, one count of Discharging a Firearm in Public and one count of Unlawful Possession of an Assault Weapon. He was sentenced to 60 days in jail, with two days credit and allowed to substitute community service for the remaining days. He was also put on 36 months informal probation; fined approximately \$5,000.00; all of his weapons were confiscated and destroyed; and he was prohibited from possessing firearms. The Applicant's probation was due to end two weeks after the hearing. The Applicant testified that, while the Court ordered him not to possess firearms, he also has no desire to possess or shoot them in the future, because of the turmoil owning weapons has caused him to have in his life. (Government Exhibits 1 and 2; Applicant's Exhibit G; Transcript at 46-65, 80-88, 94-95).

Guideline E - Personal Conduct

Under subparagraph 2.a., the Government alleges that the Applicant's conduct set forth in Paragraph 1, above, has independent validity under this Guideline. Specifically, that his conduct shows questionable judgement and/or dishonesty that raises questions about the Applicant's reliability, trustworthiness and ability to protect classified information. The facts set forth under Paragraph 1, above, will also be considered under this Guideline.

Subparagraph 2.b. concerns the Applicant's termination from employment in November 2001. The circumstances of his termination are subject to some debate since he had just been offered a job by his current employer days before he was let go. Under the facts of this case, I find that the Government has not shown that the Applicant's termination shows poor judgment on his part. This subparagraph is found for the Applicant. (Applicant's Exhibit D at 1, Transcript at 72-76.)

Mitigation

The Applicant submitted documentary evidence showing that he is a highly respected person and employee. Several friends and work associates submitted letters on his behalf to the Court in 2004. (Applicant's Exhibit A.) The Applicant is described as someone who is "genuine," "resourceful," and "a solid citizen." He has received several certificates of recognition and spot awards during his current employment. (Applicant's Exhibit D at 7-12.)

Policies

Security clearance decisions are not made in a vacuum. 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(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. In addition, the Administrative Judge may also rely on his own common sense, as well as his knowledge of the law, human nature, and the ways of the world, in making a reasoned 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. Security clearance decisions include, by necessity, consideration of the possible risk that 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.

Finally, as emphasized by President Eisenhower in Section 7 of Executive Order 10865, "Any determination under this order . . . 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.” 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 doubts 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 Applicant was involved in criminal incidents in 2002 and 2004. The 2004 incident involved firearms and is, therefore, a serious crime. AG ¶ 31(a) applies to this case, stating that a disqualifying condition is “a single serious crime or multiple lesser offenses.” In addition, AG ¶31(d) applies because, as of the date of the hearing, the Applicant was still on probation for another two weeks.

Under the particular facts of this case, several of the mitigating conditions also apply and justify a finding for the Applicant as to this Guideline. They are AG ¶ 32(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”; and AG ¶ 32(b), “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.”

It is clear from the evidence that these two incidents were aberrations for the Applicant. In looking at this case I have considered the Applicant’s background as a Reserve Police Officer and his knowledge of weapons safety. His conduct was negligent and could have been dangerous. However, he has accepted his punishment for both offenses, been forthcoming with the Government on every opportunity and expresses a credible intent not to engage in such conduct in the future. The Applicant did not attempt to justify his conduct, but rather accepted the fact that, on those occasions, he exhibited extremely poor judgment. The Applicant has mitigated the security significance of his criminal conduct and Paragraph 1 is therefore found for the Applicant.

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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns, one of which is arguably applicable here. 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," may be disqualifying. The Applicant has a criminal arrest history which includes a weapons related conviction. The evidence is sufficient to raise this potentially disqualifying condition, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct involving questionable judgment. Under AG ¶ 17(c), the disqualifying condition may be mitigated where "the offense is so minor, 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 judgment," and 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."

As stated above under Paragraph J, these two incidents were an aberration for the Applicant. While he has been on probation for the last offense, he has made changes in his life and matured a great deal. He understands and appreciates how his conduct endangered others, and reflected poorly upon himself. The evidence shows that the Applicant has reformed and that such acts will not occur in the future. Paragraph 2 is found for the Applicant.

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 commonsense 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. The Applicant is a hard-working, respected, professional person who has overcome his earlier criminal conduct. In viewing all the facts of this case, I find that the Applicant has mitigated the security significance of his prior conduct. As set forth at length above, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). In addition, I find that there is little to no potential for pressure, coercion, exploitation, or duress (AG ¶2(a)(8)), and that the likelihood of recurrence is close to nil (AG ¶2(a)(9)).

Overall, the record evidence leaves me without questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has mitigated the security concerns arising from his criminal conduct and personal conduct.

On balance, it is concluded that the Applicant has successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 of the Government's Statement of Reasons.

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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline J: | FOR THE APPLICANT |
| Subparagraph 1.a: | For the Applicant |
| Subparagraph 1.b: | For the Applicant |
| Subparagraph 1.c: | For the Applicant |
| Paragraph 2, Guideline E: | FOR THE APPLICANT |
| Subparagraph 2.a: | For the Applicant |
| Subparagraph 2.b: | For the 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge