



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-10158
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esquire, Department Counsel
For Applicant: John F. Mardula, Esquire

May 12, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on March 15, 2006. On January 8, 2008, 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 February 12, 2008. He answered the SOR in writing through counsel on February 14, 2008, and requested a hearing before an Administrative Judge. I received the case assignment on March 17, 2008. I granted Applicant's request for a delay until April 24, 2008, in order for his counsel to be available. DOHA issued a notice of hearing on March 31, 2008, and I convened the hearing as scheduled on April 24, 2008. The Government offered Exhibits (Ex.) 1

through 12, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through E, without objection. Applicant also offered the testimony of three witnesses. DOHA received the transcript of the hearing (Tr.) on May 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

In his Answer to the SOR, dated February 12, 2008, Applicant admitted the factual allegations in ¶¶ 1.a, 1.b, 1.c and ¶¶ 2.a-2.b of the SOR, with explanations. He denied that his omission was deliberate. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 36-years-old. He is divorced with no children. After his high school graduation in 1991, he attended college. He graduated in 1998 with a bachelor of science degree. While in college part time, Applicant worked full time for a government contractor. He has maintained his current employment since 2005. He has held a security clearance since 1996 (GE 1).¹

In July 2002, Applicant was charged with aggressive driving and destruction of property. Applicant explained that he was driving on the interstate and the driver to his left moved very close to Applicant's vehicle forcing Applicant to move to the right and off the road onto the shoulder. The traffic was heavy on the highway. At one point Applicant was behind the driver of the other vehicle. Applicant got out of his vehicle and approached the driver to speak to him. The driver lowered his window and there was a verbal exchange including a derogatory remark to Applicant. When Applicant was leaving he put his palm on the driver's window and leaned on it. This caused the window to shatter. When this occurred, Applicant called the police. The police arrived at the scene. Applicant was not arrested or charged with any violation. However, a few days later, the police contacted Applicant. The police officer gave Applicant a ticket for aggressive driving and destruction of property. The other party failed to appear in court and the charges against Applicant were dropped. Applicant offered to pay for the window and insisted that he did not intentionally break the window (GE 7).

On November 25, 2005, Applicant was arrested and charged with disobeying a police officer, fleeing or attempting to elude a law enforcement officer with sirens/lights activated, a felony, and reckless driving. He was found guilty of the second charge (second degree felony) and sentenced to 18 months supervised probation, fined, ordered to complete 100 hours of community service, ordered to pay approximately \$473 in court costs, and his license was suspended for one year (GE 4 and 8).

Applicant was visiting a friend for the weekend. They decided to go out motorcycle riding. Applicant insists that he saw a police car go ahead of him and stop his friend for speeding. Applicant saw the police officer and took the next exit. He insists

¹Applicant believed he had an interim clearance in 1991-1992 (Tr. 115).

that the police were not trying to stop him, nor did the police car have lights or siren alerting him to stop. Applicant exited the highway and stopped several times. He eventually followed the signs to the airport. When he reached the airport, police cars surrounded him. He reports that he was in shock and had no idea that he was being followed. He also was not sure how fast he was going (Tr. 94) Applicant testified that he was advised to plead guilty to the felony charge and not risk a trial and the possibility of jail time (Tr. 99).

Applicant reported this incident to his employer as soon as he returned to work (Tr. 97). An adverse report was issued on August 22, 2006. Thus, his employer was fully aware of Applicant's arrest and his conviction of a felony (GE 2).

Applicant has been driving for almost 20 years. He has no other driving incidents on his motor vehicle record. In fact, as of April 23, 2008, he has five plus point on his record which indicates no other incidents and that he has completed a driver improvement class. (AE D). He no longer drives a motorcycle. He uses cruise control on his vehicle (Tr. 104). He also has a Certificate of Restoration of Civil Rights for his felony conviction (AE E).

On Applicant's March 15, 2006, security clearance application he responded to Section 23: Your Police Record. He checked "yes" to a. (have you ever been charged with or convicted of any felony offense?) He disclosed his 2005 conviction and listed it as a felony. He also wrote a detailed note in the comments section.

Applicant checked "no" to 23 f. (in the last 7 years, have you ever been arrested for, charged with, or convicted of any offense(s) not listed in response to a, b, c, d, or e, above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.) Applicant did not list the 2002 charge for the aggressive driving that was ultimately dismissed. He testified credibly that it was an honest oversight. He forgot about the 2002 incident, and because he was the one who called the police and reported it and the charges were dismissed, it did not register as an arrest. He felt as if it never happened (Tr. 151).

Applicant volunteers for a youth program. The youth services coordinator with whom he works is a police officer. The police officer testified at the hearing for Applicant. He has known him for three years (AE C). Applicant helps in the explorers program teaching teenagers to be responsible when having fun. Applicant is knowledgeable about motorcycles and used that as motivation to help kids learn lessons through role plays and various scenarios. The police officer found Applicant to be consistent, articulate and a nice person. He also wants Applicant to help coach soccer. The police officer believed the traffic incidents were out of character for Applicant (Tr. 48).

Applicant's colleagues testified at the hearing that he is a detail oriented, responsible individual who follows rules and regulations (Tr. 36). He is described as

calm and trustworthy (Tr. 38). Applicant is very professional, amiable, and possesses good judgment (Tr. 62).

Applicant's supervisor recommends him. She has known him since 2005. He is a skilled professional with the ability to provide good and efficient customer support. He is a good team member and coordinates very well with management and the rest of the team. He always displays a professional attitude and takes direction from his management without any problem (AE A). He has recommendations from his colleagues, his supervisor, and a friend who is an attorney (AE B). Applicant is very professional in his conduct and work ethic. He is an asset to his current team. He gets along well with others and has a strong commitment to his job. Applicant is a conscientious and meticulous worker.

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(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." 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. 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

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, “(a) a single serious crime or multiple lesser offenses,” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

Applicant's 2002 charge and arrest for Aggressive driving and Destruction of Property and the 2005 conviction for fleeing or attempting to elude constitute criminal activity as envisioned under ¶¶ 31(a) and 31(c).

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;

(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 has had no infractions with the law since 2005. He is described as an exemplary employee. He has held a clearance with no problems since 1996. He is a

volunteer for a youth program. He regrets the incidents. He completed his probation and the incidents seem out of character for Applicant. Thus, 32(a) and (d) apply.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(a) 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant disclosed the information concerning the felony conviction (2005) on his 2006 security clearance. He did not check "yes" for 23 f. I find him credible that he did not think of that since it was in the distant past and the charges had been dropped. The government did not establish that this was an intentional omission on the part of the Applicant. If he were trying to hide something, he would not have been so open with his employer in 2005. Thus, ¶ 16(a) has not been established.

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.

Applicant has been employed with the government for almost 16 years. During college he worked part time and full time when his class schedule allowed. He is recommended for his clearance by his current supervisor. His colleagues describe him as a careful, calm and responsible person. He has volunteered with a police officer for a number of years in a youth program. The police officer trusts Applicant and believes he is a very responsible, trustworthy individual. Applicant regrets what he did in 2002. However, he called the police because he was upset at what had happened. The charges were dismissed because the complainant did not appear.

The 2005 motorcycle incident culminated in a felony conviction for Applicant. He no longer drives a motorcycle. He has changed his driving habits. His driving record supports that. He completed his probation. He has never had any difficulty at work with any situation. He immediately reported this incident to his employer after it happened. He disclosed information on his 2006 security clearance application in detail concerning his felony conviction. However, he did not check “yes” to 23 f. concerning any arrests in the last 7 years. I find him credible in his explanation that he forgot about it in light of the fact that the charges were dropped and that as far as he was concerned it never happened. Applicant did not intend to deceive the government. He did not falsify his 2006 application.

Applicant is a loyal and hardworking employee. He was candid at the hearing and was credible in his testimony that he is not vulnerable to any threats or intimidation that might jeopardize national security.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Overall, the record evidence leaves me without questions and doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from criminal conduct and personal 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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

NOREEN A. LYNCH
Administrative Judge