



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-12386
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg Cervi, Esquire, Department Counsel
For Applicant: Pro Se

October 24, 2008

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on May 7, 2007. On May 9, 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 July 14, 2008. He answered the SOR in writing and requested a hearing before an Administrative Judge. I received the case assignment on August 22, 2008. DOHA issued a notice of hearing on September 3, 2008, and I convened the hearing on September 23, 2008. The Government offered Exhibits (GE) 1-6, which were received without objection. Applicant testified in his own behalf. He did not submit any exhibits. DOHA received the transcript of the hearing (Tr)

on September 30, 2008. Based upon a review of the case file, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated July 14, 2008, Applicant admitted the factual allegations in ¶¶ 1.a and 2.a of the SOR. He denied the factual allegations in ¶ 1.b. Applicant provided additional information to support his request for eligibility for a security clearance.

Applicant is a 23-year-old employee of a defense contractor. He graduated from high school in 2003. After high school, he completed college in 2006 (GE 1). Applicant is single and has no children. He has been employed with his current employer since November 2006 (Tr. 12).

On May 5, 2004, Applicant was arrested and charged with illegal selling/giving alcohol to minors. He pleaded guilty and was sentenced to 180 days of supervised probation, and was fined (GE 2). Applicant claimed he has no recollection of this incident (Tr. 31). He explained that he does not understand how he could have been charged with such an incident because he was a minor at the time. He could not answer any questions about the incident. At the hearing Applicant did not supply any information to explain the circumstances of the event.

On March 19, 2007, Applicant was charged and arrested for Driving Under the Influence of Alcohol (first Offense), possession of an Open Container of Alcohol, and Speeding. He pleaded guilty to the DUI charge. His sentence was deferred and he was placed on 364 days of supervised probation. He was ordered to perform 24 hours of community service and attend alcohol classes (GE 4). The remaining charges were dismissed. He successfully completed probation in March 2008.

Applicant was required to complete an alcohol screening as a result of the March 2007 incident. There was no recommendation for any treatment. He completed three alcohol classes by the end of July 2007 (GE 3).

As part of a requirement for a driver's license, Applicant was ordered to have an ignition interlock installed on his motor vehicle. He had the ignition interlock installed in May 2007. The interlock restriction was ordered for one year. On several occasions he tried to drive his car when he had been drinking (Tr. 27).

On May 7, 2007, Applicant completed his security clearance application (SF 86). He answered "Yes" to section 23(d): Your Police Record. He listed a March 2007 DUI conviction but did not list the May 2004 conviction for illegally selling/giving alcohol to minors. He claimed that he forgot about the incident and in the alternative that he was a minor and does not believe he could be charged with such an offense.

In June 2007, Applicant was interviewed by an investigator. He acknowledged that he has approximately eight or ten outstanding traffic tickets for speeding (GE 2). He admits that they are unpaid and have been for a “long time” (Tr. 47).

At the hearing, Applicant could not recall how many times he was arrested as a young man in high school nor how many times he was in jail for partying or fighting (Tr. 22). He acknowledged drinking in high school and that his drinking increased somewhat after he turned 21 years of age. He would go out and drink with his friends on weekends. He stated that his DWI arrest made him aware that he has to exercise better judgment and he does not plan to drink and drive in the future (Tr. 20).

On August 12, 2007, Applicant received a letter reminding him that a warrant for his arrest was outstanding. In his written interrogatories in October 2007, he explained that: “I completely forgot about the earlier arrest until August 12, 2007 when [I] received a letter of reminder. It’s hard for me to remember fines I got in 2004. I am sorry.” The 2007 incident was for failure to pay a fine (GE 2.) Then at the hearing Applicant said he learned about the 2004 incident when he tried to get his license renewed. He was told that he could not get another license until he had paid a fine from the 2004 incident (Tr. 33).

Applicant explained he requested the hearing because he needs the security clearance for his current job. He enjoys his work and wants to progress in the company (Tr. 49). He was vague about his lack of memory but did not deny that the incident occurred because it was on his record (Tr. 14). He said he feels bad about the situation and is sorry. He insists he would have put it down if he had remembered it. He wavered in his responses about when he actually learned about the 2004 incident and why he did not list it on his security application (Tr. 39). He started to explain it occurred in one location because the court was located in a place other than where he lived.

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, 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

The security concern relating to the guideline for Criminal Conduct is set out in AG & 30, “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.”

The guideline notes several conditions that could raise security concerns. Under AG & 31(a), a single serious crime or multiple lesser offenses⁶ may be potentially disqualifying. Similarly under AG & 31(c), Allegation or admission of criminal conduct, regardless of whether the person was formally charged or convicted⁶ may raise security concerns. As noted above, Applicant was arrested and charged with alcohol incidents in 2004 and 2007. He pleaded guilty to the charge in 2004. He was convicted of DUI in 2007. These facts are sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where Aso 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 current reliability, trustworthiness, or good judgment.@ Applicant-s criminal conduct occurred in 2004 and 2007. He completed supervised probation in March 2008. His citation for violation of the interlock after his DUI was in 2007. The repeated incidents create some doubt about Applicant's judgment. This potentially mitigating condition does not apply in this case.

Under AG & 30(d), it may be mitigating where Athere 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.” As noted above, Applicant has been employed since 2006 with his current employer. He completed his community service and his probation very recently. He admits he still has unpaid traffic tickets. I find this potentially mitigating condition partially applies in this case.

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 cooperate with the security clearance process.

AG 16 describes conditions that could raise a security concern and may be disqualifying. The following is potentially applicable:

(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 untrust worthiness, or award fiduciary responsibilities;

In May 2007, Applicant completed his security clearance application. His response to section 23(d) Your Police Record listed his 2007 DUI. He did not list a 2004 guilty plea for selling/giving alcohol to minors. He claims he has no recollection of the event. He also states that he does not understand how he could have been charged wit this because he was a minor at the time. Applicant stated in his 2007 interrogatories that he remembered the incident when he received the letter for the outstanding bench warrant for his arrest. Upon questioning at the hearing, Applicant could not recall how

many times he was in court or arrested for things such as fighting or drinking. At the hearing, he admitted he could not deny that the incident occurred.

Applicant's different statements concerning the 2004 incident and his inability to remember the incident do not make him credible. I find that he deliberately omitted the information from his security clearance application because he was concerned about getting his security clearance.

Paragraph 17 lists conditions that could mitigate security concerns. Specifically, AG ¶ 17 states:

(a) "the individual made prompt, good-faith efforts to correct the omission, concealment or falsification before being confronted with the facts;

(c) the offense is so minor, or 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 judgement.

(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."

After considering these mitigating conditions, I find that none of them apply in this case. Applicant has not mitigated the personal conduct concerns through his recent actions and behavior.

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) the 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 has been arrested twice in

the last four years. The incidents in 2004 and 2007 involve alcohol. He was convicted and only recently completed probation in March 2008. He also had a violation of his ignition interlock after the conviction. Applicant was vague and confusing in his testimony at the hearing. He was not credible in his lack of recollection of the 2004 incident.

Overall, the record evidence and whole person analysis leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his personal conduct and 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-b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against 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.

NOREEN A. LYNCH
Administrative Judge