



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



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| In the matter of: |) | |
| |) | |
| ----- |) | ISCR Case No. 07-12525 |
| SSN:----- |) | |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

September 16, 2008

Decision

ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline E (Personal Conduct). Clearance is denied.

Statement of the Case

Applicant submitted his Security Clearance Application (SF 86), on December 20, 2006. On March 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns for Applicant under Guideline E (Personal Conduct). 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 May 5, 2008. He admitted all eight allegations in the SOR with explanation and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on June 4, 2008, and I received the case assignment on June 10, 2008. DOHA issued a notice of hearing on June 20, 2008, for a hearing on July 22, 2008. I convened the hearing as scheduled.

At the hearing, the government submitted four exhibits (Exh.) which were admitted in evidence without objection. Applicant submitted eight exhibits which were admitted without objection. He testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on July 30, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Rulings

Amendments to SOR

The government moved before the hearing to amend the SOR to change the month in the date in SOR ¶ 1.h., and to add two additional allegations relating to falsification of material facts on his SF 86 (SOR ¶ 1.i.), and in statements to an investigator (SOR ¶ 1.j.). Applicant filed an answer to the Amended SOR. He agreed to the date correction and admitted the two additional allegations. The amendments were adopted without objection.

Findings of Fact

In his Answer to the SOR, Applicant admitted all of the ten allegations under Guideline E (Personal Conduct) in the SOR relating to arrests, traffic, omissions and other personal conduct issues.

Applicant is a 31-year-old employee of a major government contractor working for the past 18 months as support staff for information technology for the Department of Homeland Security.

Applicant served in the Navy between 1996 and 2004 when he was medically separated. The allegations in the SOR occurred over a 23 year period beginning with receiving a ticket for driving without a license in his home town when he was 17-years-old (SOR ¶ 1.a.).

The next allegations (SOR ¶¶ 1.b., and 1.c.) relate to activity while Applicant was on active duty in 1996-1997. During that period his wife shoplifted several times, both alone and with him, in private stores and with him at a Post Exchange where they were arrested in August 1997. He was given non-judicial punishment under Article 81 (conspiracy to shoplift) of the UCMJ. His punishment included a pay forfeiture, a suspended reduction in paygrade, and 45 days of restriction and extra duty. His access to SCI was temporarily suspended but restored a month later at the request of his command. After filing for divorce in 2001, Applicant and his wife were divorced by a decree dated January 11, 2002. He has never re-married.

In August 2001, while stationed in Puerto Rico, Applicant was riding a motorcycle and had a head on collision with an automobile that ran in front of him. He suffered multiple fractures, was hospitalized, and unable to work for a year of recovery (Exh. H). After his recovery in the summer of 2002 he joined a motorcycle club and participated in thrill riding such as driving in excess of 100 mph fleeing the police and eluding lawful stops. On one occasion he was stopped by police while driving without a license (SOR ¶¶ 1.d., and 1.e.).

In November, 2003, around Thanksgiving, Applicant was stopped by a police officer for speeding. During the police inquiry he provided false information to the officer by identifying himself with a false name since he knew he had a suspended license (SOR ¶ 1.f.).

Applicant submitted a security clearance application in 2005 on which he denied at Question 32, relating to denial or suspension of a security clearance, that his security clearance had ever been suspended whereas it had been in 1997 as noted above (SOR ¶ 1.g.). On January 18, 2006, the National Security Agency denied access to NSA SCI for Applicant based on all of the above cited allegations (SOR ¶ 1.h.). Subsequently, Applicant filed the SF 86 at issue in this proceeding and denied that access had ever been denied him at Question 26. On that application he did answer correctly concerning the 1997 suspension (SOR ¶ 1.i.).

In the course of the investigation for this matter, Applicant was interviewed on July 12, 2007, by an investigator and denied knowledge of his former wife's intent to shoplift during the 1996-1997 incidents for which he received non-judicial punishment for conspiracy to shoplift (SOR ¶ 1.j.).

Applicant is well regarded for his honesty and trustworthiness by several friends and co-workers (Exhs. A-D). He is a successful contributor in his work and is regarded as a good collaborator and hard worker by his rater for the 2007 calendar year (Exh. E). Applicant's mother submitted a lengthy letter regarding his background and some of the difficulties he and his family have had over the years (Exh. F).

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 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 following disqualifying conditions (DC) in the guideline will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and,

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

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;

(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;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of a pattern of dishonesty or rule violations.

Based on the evidence in the record, Applicant failed to provide full and frank answers to certain critical questions on two SF 86s as noted in the first two DC's noted above. His other conduct involving speeding, giving false information to the police, other

driving offenses, and conspiracy to shoplift were insufficient to establish a basis for allegations under other guidelines, but do indicate a whole person assessment of questionable judgment, and unwillingness to comply with rules and regulations. All of these factors established a sufficient basis for a security concern under Guideline E.

AG ¶ 17 provides conditions that could mitigate security concerns:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.
- (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 judgment;
- (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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;
- (f) the information was unsubstantiated or from a source of questionable reliability; and,
- (g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

While most of the mitigating conditions are not applicable; several could be such as the passage of so much time since the earliest offenses and the fact that he no longer is married to his former wife who appears to have initiated the shoplifting. However, he too, was deemed culpable yet continues to equivocate regarding his responsibility. Security concerns pertaining to personal conduct are not mitigated.

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):

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 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.

Applicant has been involved in a variety of rule-breaking and rule-bending actions for many years. Some could be mitigated as in the distant past but even some of those continue to complicate his life as he seems to want to change the story as to how they occurred. He has not made wise choices as particularly illustrated by his motorcycle racing only one year after a near fatal accident. His actions with regard to his SF 86's in 2005 and 2006 show a cavalier attitude about carefulness in reporting problems he has had in his life. That is not to say that he is a security risk or likely to compromise classified information, but those actions are sufficiently recent as to convince me that it is premature to grant him a clearance at this time.

Applicant has not mitigated the security concerns arising from these personal conduct allegations.

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

Subparagraph 1.a.: For 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
Subparagraph 1.j.: 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. Access to classified information is denied.

CHARLES D. ABLARD
Administrative Judge