



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-12896
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro Se*

March 20, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on September 5, 2006. On October 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E, D, and J 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 replied to the SOR (RSOR) in writing on November 26, 2007, and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on January 31, 2008. DOHA issued a notice of hearing on February 7, 2008, and I convened the hearing as scheduled on March 5, 2008, in San Diego, California. The Government offered Exhibits (Ex) 1 through 5, which were received and admitted. Applicant testified on his own behalf and submitted Exhibits A

through C. DOHA received the transcript of the hearing (Tr) on March 14, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR, Applicant admitted SOR allegations 1.a., 1.b., and 2.a., and he denied 1.c., and 3.a. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's Answer to the SOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 44 years old. He is married, and he has two children. He served in the United States Navy for 22 years.

Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he furnished untruthful information to the Government and engaged in conduct that exhibited poor judgement and untrustworthiness.

1.a. Applicant was removed from his assigned project in July 2006, and his employment was ultimately terminated in August 2006 following an investigation by the U.S. Department of the Navy wherein it was concluded that Applicant committed Sexual Battery by the unsolicited touching of the genitals of a fellow employee, while both were in the shower.

Applicant testified that this incident occurred, when he was going to pretend to grab this fellow worker's genitals as a joke in the hopes that the person would move away from Applicant, but he claimed that he accidentally did grab him, and also bumped his shoulder. Applicant conceded that he did not personally know this fellow worker, nor had he ever even spoken to him before. His only explanation for his conduct was that this other man was often looking at him, especially when they were in the locker room. Applicant claimed he tried to apologize to the man, but he was unable to do so. This coworker filed a grievance against Applicant (Tr at 35-40).

1.b. Applicant completed a signed statement, dated August 2, 2006, (Exhibit 2) which was presented to an investigator of the U.S. Navy Criminal Investigation Division, in which Applicant denied that he ever engaged in the touching of a fellow employee, as described in 1.a., above.

Applicant testified that he lied to the Naval investigator, and completed the false statement, because he was afraid that he would lose his job, and he was afraid his coworkers would think he was a homosexual. Applicant ultimately revealed that the incident did occur as he was in the process of receiving a polygraph examination. At the hearing he conceded that he had never been forthcoming about the incident, until he was actually undergoing the polygraph examination.

1.c. Applicant completed a Security Clearance Application (SCA) which he executed on September 5, 2006 (Exhibit 1). Question #22 of the SCA asked whether during the last seven years, Applicant had ever been terminated from a job, or lost his job under other than favorable circumstances. Applicant replied "No" to that question. The Government alleges that Applicant's was not truthful and he should have included his termination, as discussed in 1. a., above.

Applicant submitted a second version of the SCA (Exhibit A), in which he had corrected his answer to question #22, to show that he had lost his job under less than favorable conditions. However, Applicant conceded that he did not attempt to make this correction until after he had revealed the truth of the incident, during the time that he was receiving the polygraph examination.

Paragraph 2 (Guideline D - Sexual Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in sexual behavior that is either criminal, indicates a personality or emotional disorder, reflects lack of judgement or discretion, or which may subject an individual to undue influence or coercion.

2.a. Applicant's conduct, reviewed above in Paragraph 1, subparagraph a., constitutes the kind of sexual behavior that is of concern to the Government, as it is criminal conduct, and it exhibits a lack of discretion and good judgement.

Paragraph 3 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in criminal conduct.

2.a. Applicant's conduct, reviewed above in Paragraph 1, subparagraphs b. and c., constitutes a violation of Federal Law, Title 18, United States Code, Section 1001, which is a felony.

Mitigation

Applicant submitted two letters of reference that were extremely laudatory of Applicant's character and reliability (Exhibit B).

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

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers in a statement signed by Applicant on August 2, 2006, and on a SCA that he executed on September 5, 2006.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers regarding his drug usage to the Government.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that DC 16. (a) applies because of Applicant's deliberate omission, concealment, and falsification of relevant facts from a personnel security questionnaire, which was used to determine security clearance eligibility. DC (b) also applies since Applicant deliberately provided false relevant information to the Navy investigator. Since Applicant only revealed that the incident took place after he began the process of undergoing a polygraph examination, I can not find that any Mitigating Condition (MC) applies in this paragraph.

Applicant's conduct, considered as a whole, exhibits questionable judgement, unreliability, and a lack of candor. I resolve Paragraph 1, Guideline E, against Applicant.

Guideline D, Sexual Conduct

The Government also established by substantial evidence that Applicant engaged in the kind of sexual behavior that is of concern to the Government, as it is criminal conduct, and it exhibits a lack of discretion and good judgement.

DC 13. (a), sexual behavior that is of criminal nature, whether or not the individual has been prosecuted, applies to the facts of this case. DC (d) also applies because Applicant engaged in sexual behavior that reflects lack of discretion or judgement. No MC can be found to apply here. Paragraph 2, Guideline D is found against Applicant.

Guideline J, Criminal Conduct

The Government also established by substantial evidence that Applicant engaged in criminal conduct, by his knowingly providing false and misleading information to the Government investigator and on a security questionnaire, which is a felony.

DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. DC 31. (c), allegations or admissions of criminal conduct, regardless of whether the person was formally charged, is also applicable to this case. There is no MC under Criminal Conduct. Paragraph 3, Guideline J is found against 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. Based on all of the reasons cited above, regarding Applicant's sexual conduct and his lack of candor, I find that the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

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:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 2, Guideline D:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 3.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.

Martin H. Mogul
Administrative Judge