



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-12936
SSN: -----)
)
Applicant for Security Clearance)

Appearances

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

For Applicant: *Pro se*

July 28, 2008

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on July 17, 2006. (Government Exhibit 1.) On January 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E and J 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 January 28, 2008. Pursuant to Paragraph E3.1.8 of Enclosure 3 of the Directive, the Department Counsel requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on March 14, 2008. I received the case assignment on March 20, 2008. DOHA issued a notice of hearing on April 14, 2008, and I convened the hearing as scheduled on May

5, 2008. The Government called one witness and offered Government Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf and submitted Applicant's Exhibit A, without objection. DOHA received the transcript of the hearing on May 15, 2008. The record closed on that date. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

The Applicant is 30 and married. He is employed by a defense contractor and seeks to obtain a security clearance in connection with his employment.

Guideline J - Criminal Conduct

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

Guideline E - Personal Conduct

The Government alleges in this paragraph that the Applicant is ineligible for clearance because he has failed to provide truthful and candid answers during the clearance screening process.

The Applicant was involved in a serious crime on October 1, 2005. On that date, the Applicant was attending a wedding rehearsal party with several relatives. This party went on for several hours and the Applicant became intoxicated. Early in the morning, the Applicant, and two other members of the wedding party, beat up a man who had been involved in an earlier incident with the family. The victim was seriously injured during the beating. (Government Exhibit 2 at pages 3-4, and Government Exhibits 4 and 5; Transcript at 44-45.)

The Applicant was subsequently arrested by the police and charged with Battery with Substantial Bodily Harm, a felony. On November 13, 2006, he plead guilty and was sentenced to four years probation with conditions requiring he attend various types of counseling, to pay court fees of \$300 and to pay restitution to the victim of \$15,744.34. He is currently on probation until November 2010. At the end of two years, which will occur in November 2008, the Applicant can petition to have his probation ended early because he has paid the restitution and completed all of the required counseling. (Transcript at 50.)

At the time of the incident the Applicant was extremely intoxicated and does not have any clear memory of the fight. In May 2007 he was interviewed by an investigator for the Department of Defense. In that interview, based on his knowledge at the time, the Applicant stated that he struck the victim twice while the victim was trying to get up. (Government Exhibit 2 at 3-4.) In fact, as a surveillance video shows, the victim was unconscious and the Applicant hit him several times in the face. The Applicant has

seen the video, confirmed what really happened, and is deeply regretful both for his conduct and for his unintentional misleading of the Defense Department. The police report says that the Applicant hit the victim with a bottle, but the Applicant cannot confirm that fact based on the video. (Transcript at 45-47, 57-59.)

In addition to the felony conviction, the Applicant had a minor confrontation which involved the police while he was in the Army in the early 1990s. (Transcript at 40-42.) In addition, the Applicant admits that, "My weakness is my family. I love my family, and anytime anything happens to them, it bothers me. It hurts me, and they [Anger Management Class] help me deal with that." (Transcript at 53.)

Mitigation

The Applicant submitted documentary evidence showing that he is a highly respected person and employee. (Government Exhibit 2 at 7-20, Applicant's Exhibit A.) His former supervisor states, "[The Applicant] performed his duties far above and beyond the standard." (Government Exhibit 2 at 17.) (See Government Exhibit 2 at 10, 14, 15, 17, 18 and 19.)

Several of the letters are from his relatives, including his wife. They show that the Applicant is a beloved husband and father. (See Government Exhibit 2 at 7, 8, 9, 11, 12, 13 and 16.)

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 a major criminal incident in 2005, which resulted in the victim being seriously injured. By his own admission, and as reflected by his guilty plea to felony Battery with Substantial Bodily Harm, the Applicant was a prime mover in this act. AG ¶ 31(a) applies to this case, stating that a disqualifying condition is “a single serious crime of multiple lesser offenses.”

AG ¶ 31(d) states that it can be disqualifying if the “individual is currently on parole or probation.” The Applicant’s probation is not due to expire until November

2010 and he cannot petition for early release until November 2008. This disqualifying condition also applies to this case.

Two of the mitigating conditions also may apply and have been considered. 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(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.”

This is a close case. The Applicant is a sympathetic young man, who made a very serious mistake. He is regretful and remorseful over his conduct. However, it has not yet been three years since the incident and he has only been on probation less than two years. In addition, there is some evidence that this is not an isolated incident and that the Applicant has anger management issues. Under the particular circumstances of this case, at this point in time, using the clearly consistent standard, I must find this allegation against 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.

I have examined the record and I find that the Applicant did not intentionally falsify material facts during an interview with a Department of Defense investigator in May 2007. The Applicant freely admits that he was seriously intoxicated on the night of the incident and has little direct knowledge of the event. Only after receiving a copy of the surveillance video was the Applicant able to fully understand what happened on that evening. Since his conduct was not intentional, none of the disqualifying conditions apply. 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, highly respected, professional person who is attempting to overcome his earlier criminal conviction.

Under AG ¶ 2(a)(3), the conduct occurred recently, in 2005. He has been on probation less than two years. He has taken several classes in Anger Management and other issues. However, given the relatively short time since the event, I cannot find that there have been permanent behavioral changes under AG ¶ 2(a)(6). Accordingly, at the present time, I cannot find that the likelihood of recurrence is close to nil (AG ¶2(a)9)).

Overall, the record evidence leaves me with questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude the Applicant has not mitigated the security concerns arising from his criminal conduct. The Applicant has come a long way. As stated earlier, this is a close case. He may well be eligible for a clearance in the future. He is not now.

On balance, it is concluded that the Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the Government's Statement of Reasons. As stated above, Paragraph 2 is found for the Applicant.

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 THE APPLICANT
Subparagraph 1.a:	Against the Applicant
Paragraph 2, Guideline E:	FOR THE APPLICANT
Subparagraph 2.a:	For the Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge