



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-13561
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jennifer I. Campbell, Department Counsel
For Applicant: *Pro Se*

August 20, 2008

Decision

LOKEY-ANDERSON, Darlene, Administrative Judge:

Applicant submitted his Questionnaire for National Security Positions (e-QIP), on a January 26, 2007. On February 12, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether clearance should be denied or revoked.

The Applicant responded to the SOR on April 17, 2008, and he requested a hearing before a DOHA Administrative Judge. This case was originally assigned to another Administrative Judge on June 25, 2008. The case was transferred to the undersigned Administrative Judge on July 7, 2008. A notice of hearing was issued on July 8, 2008, scheduling the hearing for August 6, 2008. At the hearing the Government presented five exhibits, referred to as Government Exhibits 1 through 5. The Applicant presented one exhibit, referred to as Applicant's Exhibit A. He also testified on his own behalf. The official transcript (Trs.) was received on August 12, 2008.

Request for Administrative Notice

Department Counsel requested that I take administrative notice of the California Family Code Section 308 includes the validity of foreign marriages and the definition of common law marriage. The Applicant had no objection. (Tr. p. 49). The request and the attached document was not admitted into evidence but was included in the record. The facts administratively noticed are set out in the Findings of Fact, below.

FINDINGS OF FACT

The following Findings of Fact are based on the Applicant's Answer to the SOR, the testimony and the exhibits. The Applicant is 60 years old, married, and has an Associate degree in psychology, photography and music. He is employed by a defense contractor as a Security Guard and is seeking to maintain a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). After a complete and thorough review of the evidence in the record, and upon due consideration of the same, the following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because he intentionally falsified material aspects of his personal background during the clearance screening process.

The Applicant has lived with his mother since 1959, except for a short time when he had an apartment, and during his short Army career from August 67 to March 68 for which he received an honorable discharge. In 1990, he began working for his current employer and has been assigned to a number of different posts. He applied for a security clearance and has been in an interim status since then. Except for the incident described below, the Applicant has never committed any security violations of any type and he has no criminal record.

About five years ago, the Applicant met a widower in a store that he befriended and later started dating. Over time, the Applicant developed an intimate relationship with her. Eventually he began supporting her financially, by depositing \$500.00 a month into her bank account to cover her mortgage. He lived with her as much as he was able to, and they represented to people that they were married.

In January 2005, without ill intentions, the Applicant applied for medical benefits for his girlfriend through his employer, by enrolling her as his spouse. The Applicant testified that he believed that he had entered into a common law marriage with his girlfriend and based on that, thought that she was eligible for medical coverage under his insurance. It was also about this time that the Applicant discovered that his girlfriend's breast cancer had returned, and had metastasized to her lungs, liver and pancreas. She discussed with the Applicant the fact that she needed medical coverage that would provide chemotherapy treatment.

On October 5, 2008, the Applicant's company informed him that his girlfriend's insurance coverage was not valid. She could not receive medical insurance through the company as his spouse because common law marriage was not recognized and they were not legally married. The very next day, on October 6, 2008, the Applicant and his girlfriend were married in a civil ceremony at the County Clerk's Office. (Applicant's Exhibit A). She is now properly receiving medical benefits under the Applicant's insurance.

An adverse information report dated November 7, 2006, concerning the Applicant was written up by a manager, who is no longer employed at the company. The report states that the Applicant fraudulently enrolled his girlfriend in his medical benefits, claiming her as his spouse. An e-mail dated November 6, 2006, from the benefits manager at the time, states that the Applicant knew that he could not enroll his girlfriend. (Government Exhibit 2).

Although he does not remember signing it, on October 30, 2006, the Applicant received a notice of counseling concerning a violation of company rules for enrolling his girlfriend on his medical plan by claiming she was his spouse. (See Government Exhibit 5).

The Applicant explained that although he and his wife are now legally married, they still maintain separate residences. The Applicant still lives with his mother, who recently broke her hip and needs him to care for her. His wife lives in her house. Nothing has changed between the Applicant and his now wife except the fact that they are now legally married.

The California Family Code Section 308 which includes the validity of foreign marriages and the definition of common law marriage infers that the common law marriage, as it is widely known is not recognized in the state.

POLICIES

Enclosure 2 and Section E.2.2. of the Directive sets forth adjudication policies divided into "Disqualifying Factors" and "Mitigating Factors." The following Disqualifying Factors and Mitigating Factors are found to be applicable in this case:

Guideline E (Personal Conduct)

15. *The Concern.* 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.

Conditions that could raise a security concern:

16.(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;

16.(b) deliberately providing false or misleading information concerning relevant facts to an employer, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Conditions that could mitigate security concerns:

17. (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes
- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is "clearly consistent with the national interest" to grant an Applicant's request for access to classified information.

The DoD Directive states, "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable should be considered in reaching a determination." The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical

basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in 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."

CONCLUSIONS

In the defense industry, the security of classified industrial secrets is entrusted to civilian workers who must be counted upon to safeguard such sensitive information twenty-four hours per day, seven days per week. The Government is therefore appropriately concerned when available information indicates that an Applicant for clearance may be involved in dishonesty that demonstrates poor judgment or unreliability.

It is the Government's responsibility to present substantial evidence to support the finding of a nexus, or rational connection, between the Applicant's conduct and the continued holding of a security clearance. If such a case has been established, the burden then shifts to the Applicant to go forward with evidence in rebuttal, explanation or mitigation, which is sufficient to overcome or outweigh the Government's case. The Applicant bears the ultimate burden of persuasion in proving that it is clearly consistent with the national interest to grant him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in dishonesty (Guideline E). The totality of this evidence indicates poor judgment, unreliability and untrustworthiness on the part of the Applicant. Because of the scope and nature of the Applicant's conduct, I conclude there is a nexus or connection with his security clearance eligibility.

Considering all of the evidence, the Applicant has introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guideline E of the SOR.

The Government contends that the Applicant fraudulently enrolled his girlfriend on his vision, medical and dental benefit plan by claiming that she was his wife. The evidence is not convincing. Under the circumstances, it is obvious that the Applicant is unsophisticated, naive and innocent concerning the ways of the world. I find that he honestly believed that his girlfriend was his common law spouse and that she could be eligible for medical benefits under his insurance. The Applicant's belief was wrong, but was made in good faith. The only evidence to the contrary is an e-mail from an individual who no longer works for the company that informs the Applicant of the fraud. The Applicant contends that he never received the e-mail and there is no evidence to prove that he did.

Under Guideline E, Personal Conduct, disqualifying condition 16(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 and 16.(b) deliberately providing false or misleading information concerning relevant facts to an employer, security officials, or other official representatives in connection with a personnel security or trustworthiness determination apply. However Mitigating Condition 17(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress also applies.

I have also considered the “whole person concept” in evaluating the Applicant’s eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, do not support a whole person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard classified information.

Here, the Applicant is a sixty year old man who has lived with his mother almost his entire life. For the past five years, he has had a girlfriend who has served as a wife to him. In fact, his girlfriend was the closest thing to a wife he has ever known. He provided her with financial and emotional support and felt responsible to take care of her medical needs. He believed that he had a common law marriage with her. Based upon the evidence presented, I find that the Applicant did not fraudulently enroll his girlfriend on his vision, medical and dental benefit plan but was under the misconception that she was his common law wife and that she was eligible for the benefits. When he learned that she was not eligible for benefits because they were not legally married, he immediately married her. She is now rightfully receiving medical benefits under his insurance.

This Applicant has demonstrated that he is trustworthy, and does meet the eligibility requirements for access to classified information. Accordingly, I find for the Applicant under Guideline E (Personal Conduct).

On balance, it is concluded that the Applicant has overcome the Government’s case opposing his request for a security clearance. Accordingly, the evidence supports a finding for the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

FORMAL FINDINGS

Formal findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: For the Applicant.

Subpara. 1.a.: For the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge