



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-17306
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Ray P. Blank, Esquire, Department Counsel
For Applicant: *Pro se*

July 30, 2008

Decision

CURRY, Marc E., Administrative Judge:

On April 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. 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 on April 18, 2008, and requested a hearing. I received the case assignment on May 19, 2008. DOHA issued a notice of hearing on May 22, 2008, and I convened the hearing as scheduled on June 10, 2008. During the hearing, I received four government exhibits and Applicant's testimony. DOHA received the hearing transcript (Tr.) on June 18, 2008. Based upon a review of the record evidence, I conclude that Applicant's application for a security clearance must be denied.

Findings of Fact

Applicant is a 42-year-old, single man with three children ages nineteen, nine, an eight. He has been married once, previously. It ended in divorce in 2003. Currently he lives with his girlfriend and his nine-year-old son. He has had custody of his son for two years (Tr. 15). He is actively involved with his family, volunteering as a coach for his son's YMCA football team (Tr. 38). For the past two years, he has worked for a contractor that manufactures night vision goggles.

In June 1989, Applicant was arrested and charged with assault after a domestic violence incident with his then girlfriend. Approximately five months later, the charge was dismissed.

In July 1997, Applicant was arrested and charged with property damage and domestic assault after another incident involving his then-girlfriend.¹ He was found guilty of the domestic assault charge, and the court dismissed the property damage charge.

In November 1997, Applicant was charged with domestic assault. The charge was later dismissed. Applicant and his then girlfriend were ordered to attend anger management classes after each of the domestic incidents (Tr. 42).

In January 2007, Applicant was charged with assault and battery - family member. The charges stemmed from an argument his current girlfriend initiated in the morning while he was in the process of getting his son ready to go to daycare. As Applicant prepared to leave with his son, his girlfriend blocked the door. Applicant then called 911. The girlfriend moved from the doorway before the police arrived, and Applicant left with his son. Before leaving, he told the 911 operator that police assistance was unnecessary.

While Applicant was dropping off his son, his girlfriend contacted the police, and sought a restraining order (Tr. 17). When Applicant returned home, a policeman arrived, served him with the restraining order, charged him with assault and battery, and arrested him (Tr. 22). He was not handcuffed and he was not "read his rights" (Tr. 19). At a subsequent hearing, the court nolle prossed the charge.

In June 2007, Applicant completed a security clearance application. Question 23 required him to list any arrests, charges or convictions that had occurred within seven years of completing the application. He did not disclose the January 2007 incident. At the hearing, he stated he did not list it because he did not think he was actually arrested (Tr. 19). Later during the hearing, he explained that he omitted it because "it was thrown [sic] out of court" (Tr. 20). He understood that he was facing charges when he went to court (Tr. 23).

¹The girlfriend was the woman he later married. He characterized their relationship through the 1990s as "on again, off again" (Tr. 35).

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, they are applied in conjunction with the factors listed in the adjudicative process. 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.

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."

Analysis

Applicant's conduct raises criminal and personal conduct security concerns under Adjudicative Guidelines J and E. "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness," and by its very nature raises questions about a person's willingness to comply with laws, rules and regulations (AG ¶ 30). Under Guideline E, "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" (AG ¶ 15).

Applicant's domestic violence-related arrests trigger the application of AG ¶ 31(a), "a single serious crime, or multiple lesser offenses." None were serious, and only one occurred in the last 10 years. Moreover, Applicant's role as a stabilizing influence in his son's life, whom he is raising and maintains custody, is evidence of rehabilitation.

Nevertheless, I conclude that none of the criminal conduct guideline's mitigating conditions apply. He omitted the most recent charge from his security clearance application. His contradictory explanation leads me to conclude that he falsified the application. This constitutes a felony under 18 U.S.C. § 1001, and together with the four earlier domestic violence arrests represents an unacceptable pattern of criminal behavior. Applicant has not mitigated the criminal conduct security concern.

The intentional nature of Applicant's security clearance application omission also triggers the application of AG ¶ 16(a) of the Personal Conduct guideline.² For the reasons set forth above, none of the corresponding mitigating conditions apply.

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. Considering this case in light of the whole person concept, I conclude Applicant's criminal and personal conduct remain a security concern. Clearance is denied.

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
Subparagraphs 1.a - 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

²Deliberate 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.

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.

MARC E. CURRY
Administrative Judge