



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 07-18525
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: B. Daniel Lynch, Esquire

August 25, 2009

Decision On Remand

MOGUL, Martin H., Administrative Judge:

On July 24, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E 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 responded to the SOR (RSOR) in writing on August 28, 2008, and requested a hearing before an Administrative Judge (AJ). The case was assigned to AJ Darlene D. Lokey Anderson on September 12, 2008, and a hearing was held on November 6, 2008. The AJ issued a Decision on November 25, 2008, which found that "it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant." Applicant filed a timely appeal and the Appeal Board (AB) issued its decision on February 18, 2009, which concluded that the case be Remanded and assigned to a new AJ. The AB held that based on the "vigor and length with which

the Administrative Judge questioned [Applicant] as well as her citation in the course of that questioning to matters outside the record . . . A careful review of the transcript has led the Board to conclude that it could cause a reasonable person to question the Judge's impartiality." Finally there was an instruction from the AB to "treat all SOR allegations as controverted."

The Remand was assigned to this AJ on March 9, 2009. DOHA issued a Notice of the Remand Hearing on March 25, 2009, and I convened the hearing on April 6, 2009. The Government offered Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf and two other witnesses testified on behalf of Applicant. He submitted Exhibits A through F, which were entered into evidence without objection. DOHA received the transcript of the hearing (Tr) on April 21, 2009.

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 his witnesses, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 30 years old. He is not married, and he has no children. He received a Bachelor of Science degree in 2000. Applicant works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

(Guideline E - Personal Conduct)

1.a. It is alleged that on or about February 16, 2006, Applicant received a written warning from his employer for attempting to sponsor unauthorized persons in GTMO (Guantanamo).

During his testimony, Applicant denied that he had attempted to sponsor an unauthorized person in GTMO. He averred that he did make an oral inquiry on one occasion of the potential of sponsoring the brother of a linguist acquaintance of Applicant for a visit to the housing area of Applicant's employer. Applicant was informed that it would not be possible to authorize this individual, whose brother worked for another company, to enter their housing site. Applicant seemed to believe that this individual should have been authorized, since he was a United States citizen, but it was only because he was the brother of an employee of a rival company. However, in any event, according to Applicant's quite credible testimony, once he was so informed, he never made any other inquiry or attempt to have this individual gain access to this site (Tr at 93-98).

Despite the fact that Applicant did receive a written warning from his supervisor regarding this conduct (Exhibit 5), I do not find any other evidence to establish that

Applicant's oral inquiry actually violated any company rules or regulations, or in any way could be considered a security violation.

1.b. It is alleged that in May 2004, Applicant received a verbal warning and counseling from his employer for accessing inappropriate pornographic web sites on his Government computer and for over reporting the hours that he purportedly worked.

There are two concerns raised in this allegation, and they will be addressed separately:

At the hearing, Applicant denied, as he has continuously done, that he ever accessed any pornographic web sites on any Government computers. Witnesses A, who appeared on behalf of Applicant, testified that at the time in question, it was not permissible to access pornographic sites. This witness, who is soon to be a First Lieutenant in the United States Army reserve, worked as a military liaison with Applicant in Guantanamo, on an almost daily basis in the same room. He reiterated that at the time period in question, the Government had on its computers, a kind of fire wall, that would block any pornographic web sites or any sites that if found objectionable, and it would make a note of the account of the individual attempting to gain access to that site. He also stated that, to his knowledge, he was not aware of Applicant ever attempting to gain access to a pornographic site, nor had he ever heard from anyone else that Applicant had tried to visit objectionable sites (Tr at 42-45).

The only site that appears to have been of concern, and which Applicant concedes that he used, was "Myspace." However, Witness A also testified that at the time they were at Guantanamo, social networking websites such as Myspace were permitted by the Government (Tr at 43-44.) While Exhibit 5 does show that Applicant did receive a written warning from his supervisor regarding improper ADP usage, based on the very credible and objective testimony of Witness A that pornographic websites could not be accessed on Government computers, plus the consistent denial by Applicant that he ever accessed pornographic sites, I do not see that any evidence has been submitted to prove that Applicant ever accessed any pornographic sites on a Government computer.

The second concern addressed in this allegation concerns Applicant giving incorrect information about the hours that he worked. Applicant testified that this allegation only concerns one event occurring on April 12, 2004, when, at the time he was allowed one hour for lunch, he allegedly took an extra half hour, which he did not properly report on his timecard.

It is Applicant's contention that there was scheduled on April 12, 2004, a sale of surplus furniture on the base. He stated that he received authorization from the Navy non-commissioned officer to attend the sale, and since he was going to be back one half hour later than planned because of the crowd attending the sale, he also called to report his delay to the Navy non-commissioned officer before his return. He also stated that he followed the proper procedure, and there was no one from his company to whom he was authorized to report (Tr at 113-117).

During Witness A's testimony, he also averred that for the approximately six months that he worked with Applicant, he never was aware of Applicant failing to report to duty on time or failing to complete his shift in a proper manner (Tr at 50-52).

Applicant's reporting back to work one half hour late, on one occasion, certainly does not show a failure to follow rules and regulations.

1.c. It is alleged that on or about January 5, 2005, Applicant received a written warning from his employer for losing two security badges (The date listed on the SOR was December 2004, but upon a motion by Department Counsel, based upon evidence introduced at the hearing (Exhibit 3), and with no objection from Applicant's counsel, the date was amended to January 5, 2005.)

At the hearing, Applicant conceded that he lost two identification badges on one occasion, on or about December 12, 2004. Exhibit E includes the January 5, 2005 written warning, which states that Applicant was formally counseled for the loss of his identification badges. There is also included an email that shows the badges were ultimately found and recovered without ever being misused.

Mitigation

Applicant offered into evidence seven new character letters from individuals who know or have known him in his professional or private life (Exhibit A), as well as five character letters that had previously been offered into evidence for the first hearing (Exhibit B). They were all remarkably laudatory in describing Applicant's high integrity, reliability, and good judgement. A Lieutenant Commander from the U.S. Navy, who was Applicant's Officer-in-Charge, described Applicant in Exhibit B as "Dependable and committed, he could be counted on to work beyond his scheduled hours or on designated days off without complaint or questions . . . a man of the highest caliber and integrity."

He submitted three Certificates of Appreciation that he received for his meritorious service (Exhibit C). His performance evaluations for September 2004 and April 2005 were also offered (Exhibit D). The 2005 review stated, "Linguist demonstrates high level of professionalism and self-motivation. Linguist is considered very dependable and provides quality service. Supports Cell-Block as night shift dispatcher. Most reliable night shift linguist."

Finally, Witness B, who is a personal friend of Applicant, even though there is a 32 year difference in their ages, testified on his behalf. He has known Applicant for 10 years, and, he stated that Applicant "is one of the finest young men I've ever met . . . He is a person of character . . . I would trust him with my family and my life" (Tr at 78-81).

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 has failed to establish that Applicant committed any conduct that could be considered to involve questionable judgement, lack of candor, dishonesty, or unwillingness to comply with rules and regulations. While Applicant's loss of his security badges on one occasion in December 2004, had the potential to be an issue of concern, no evidence was introduced to show that this negligent conduct occurred more than one time or more recently than December 2004.

Therefore, I do not find that any of his conduct as alleged by the Government should be considered a security concern under Guideline E. In reviewing the Disqualifying Conditions (DCs) under Guideline E, I conclude that no DCs apply. I resolve Guideline E for 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) 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 have considered the potentially disqualifying and mitigating conditions under Guideline E, in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, including Applicant's strong and credible testimony, together with his positive employment evaluations, and the many extremely laudatory letters of recommendation and the positive testimony from the two witnesses, I find that the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant mitigated the security concerns in the SOR.

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: FOR APPLICANT

Subparagraph 1.a. -1.c.: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul
Administrative Judge