



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-01041
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: James F. Duffy, Department Counsel
For Applicant: *Pro Se*

February 24, 2009

Decision

TESTAN, Joseph, Administrative Judge:

On July 3, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to applicant detailing the security concerns under Guideline J. 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 in writing on July 9, 2008, and requested an Administrative Determination by an Administrative Judge (AJ). Department Counsel issued a File of Relevant Material (FORM) on September 19, 2008. Applicant did not file a response to the FORM. The case was assigned to me on December 12, 2008. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

Findings of Fact

Applicant is a 29 year old employee of a defense contractor.

In August 1997, and again in March 1998, applicant was arrested and charged with Alcohol Possession by a Person Under 21. On both occasions he pleaded nolo contendere and adjudication was withheld.

In November 1997, applicant was charged with Driving While Drivers License Suspended. He was found guilty.

In March 1999, applicant was arrested and charged with three crimes involving the sale of drugs (felony), evidence tampering (felony), and resisting an officer without violence (misdemeanor). Adjudication was withheld for six months, during which time applicant was on probation. If applicant had served his probation without incident, the charges would have been dismissed. However, the charges were not dismissed because applicant violated the terms of his probation when he was arrested in August 1999 (discussed below).

In August 1999, applicant was arrested and charged with Possession of a Controlled Substance Without a Prescription, a felony. He pleaded nolo contendere, was placed on probation for three years, and was ordered to pay court costs. He violated the terms of this probation when he was arrested in 2000 (discussed below).

In 2000, applicant was arrested and charged with Driving While Drivers License Suspended/Cancelled/Revoked. He was found guilty. Based on the guilty finding and his probation violation, he was sentenced to home confinement for six months.

In September 2003, applicant was arrested and charged with DUI Alcohol or Drugs 1st Offense. In October 2003, he was found guilty, fined, placed on probation for 12 months, and ordered to attend DUI school.

In September 2006, applicant was arrested and charged with Resist Officer-Obstructions W/O Violence. In October 2006, he pleaded no contest, adjudication was withheld, he was placed on probation for 6 months, and he was ordered to pay court costs.

During an interview with an OPM investigator in September 2007, applicant stated that his criminal conduct was the result of associating with the wrong people. He further stated that he has not used drugs since 1999, and no longer associates with drug users.

Policies

The President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position that will give that person access to such information.” (*Department of the Navy v. Egan*, 484 U.S. 518,527 (1988).) In Executive Order 10865, *Safeguarding*

Classified Information Within Industry (February 20, 1960), the President set out guidelines and procedures for safeguarding classified information within the executive branch. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (Exec. Ord. 10865, Section 2.)

To be eligible for a security clearance, an applicant must meet the security guidelines contained in the Directive. Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the applicant from being eligible for access to classified information. (Directive, Paragraph E3.1.14.) Thereafter, the applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate the facts. (Directive, Paragraph E3. 1.15.) An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).) “Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security.” (Directive, Paragraph E2.2.2.)

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not a determination as to the loyalty of the applicant. (Exec. Ord. 10865, Section 7.) It is merely an indication that the applicant has not met the strict guidelines the President has established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

The security concern for criminal conduct is set forth in Paragraph 30 of the AG, and is as follows:

Criminal activity creates doubt 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.

Paragraph 31 describes conditions that could raise a security concern and may be disqualifying: Under Paragraph 31.a., “a single serious crime or multiple lesser offenses” may be disqualifying. Under Paragraph 31.c., “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted” may be disqualifying. And, under Paragraph 31.e., “violation of parole or probation, or failure to complete a court-mandated rehabilitation program” may be disqualifying. Applicant’s multiple criminal convictions, multiple crimes for which there

was no formal conviction because adjudication was withheld, and his two violations of probation, raise these disqualifying conditions.

Paragraph 32 of the AG sets forth conditions that could mitigate security concerns. Under Paragraph 32.a., it may be mitigating if “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.” Under Paragraph 32.d., it may be mitigating if “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.” Applicant’s last criminal conduct occurred about two years ago, which is a positive sign. However, because he twice went more than two years between crimes during his period of criminal activity between 1997 and 2006, these two years, by themselves, do not support a finding that his criminal activity will not recur. This fact, together with applicant’s failure to offer any positive evidence of reform and rehabilitation from independent sources who know him well (e.g., family, friends, coworkers, supervisors), preclude application of either mitigating condition.

“Whole Person” Analysis

Under the whole person concept, the AJ must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the circumstances. An AJ should consider the nine adjudicative process factors listed at AG Paragraph 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 Paragraph 2c, the ultimate determination of whether to grant a security clearance must be an overall common sense 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. Applicant was a relatively young man when his criminal activity began, but it continued well into his twenties. He voluntarily engaged in this conduct, which occurred over a period of about ten years. Applicant’s “clean” record during the last two years is a positive sign, as is his statement that he no longer associates with drug users. But, in the absence of any credible independent evidence that suggests he is unlikely to engage in criminal conduct or exercise such poor judgment in the future, this evidence is insufficient to support a finding that his criminal conduct and poor judgment are unlikely to recur. Accordingly, applicant failed to mitigate the security concerns arising under Guideline J.

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

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.

JOSEPH TESTAN
Administrative Judge