



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 08-02070
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Department Counsel
For Applicant: *Pro Se*

October 30, 2008

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Questionnaire for Sensitive Positions, on May 12, 2007. On June 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F 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 answered the SOR in writing on June 28, 2008, and requested a hearing before an Administrative Judge. This Administrative Judge was assigned the case on August 11, 2008. A notice of hearing on September 12, 2008, scheduling the hearing on October 8, 2008. The Government offered five exhibits, referred to as Government Exhibits 1 through 5, which were received without objection. Applicant offered seven exhibits, referred to as Applicant's Exhibits A through G without objection, and testified on his own behalf. The transcript of the hearing (Tr.) was received on October 20, 2008. I granted Applicant's request to keep the record open until October 22, 2008, to submit additional matters. He submitted one Post-Hearing Exhibit, consisting of two pages. The record closed on October 22, 2008. Based upon a review

of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

FINDINGS OF FACT

The Applicant is 54 years old and has about two years of college. He is employed by a defense contractor as a Integrated Systems Technician, and is applying for a security clearance in connection with his employment.

Paragraph 1 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because he engaged in criminal conduct.

The Applicant has worked for his current employer for more than 20 years. He has held a security clearance since 1990, and has never committed a security violation. Prior to that, he served in the United States Marines for 8 years, held a security clearance during that time, and never violated security rules or regulations. The arrest described below was isolated, occurred under unusual circumstances and the chances of reoccurrence are nil.

The Applicant's wife is suffering from a serious illness, known as graves disease. The condition requires that she not get overly excited or nervous which could bring on a heart attack. Applicant's wife is a very giving person, and it is her nature to help people who are less fortunate than she. From time to time, she gratuitously provided financial assistance to a woman and her two children who were on welfare. The situation got to the point, where the woman was frequently requesting money from the Applicant's wife, and the Applicant felt his wife was being taken advantage of. On one occasion, the woman asked for money and the Applicant refused her. That day, the Applicant had left \$75.00 on the table. When the woman left his house, the Applicant's money was gone. The Applicant called the woman and she admitted to taking the money and said that she would bring it right back. She never did.

Several days later the woman telephoned, and sounded suicidal. Concerned about the woman's well being, the Applicant's wife went over to the woman's apartment. The Applicant, being concerned about his wife's health condition and the drama that could result from the situation, went with his wife. At the apartment, an altercation ensued. The woman began pulling the Applicant's wife by the head into her apartment while screaming that she was being robbed. A lamp shade was broken during the commotion. The Applicant, in an effort to defend his wife pushed the woman back, and he and his wife left. Once at home, the Applicant called the police and explained the situation. On March 30, 2006, the Applicant was arrested and charged with (1) Aggravated Trespass, (2) Vandalism-Damage \$400.00 or more, and (3) Battery. On or about September 2006, two additional charges were added: (4) Obstructing Telephone Line, and (5) Prevent or Dissuade Witness or Victim from giving Testimony. The Applicant hired an attorney and was advised to take the plea bargain. The Applicant pleaded guilty to Counts (1) and (2) and the remaining charges were dismissed on or about December 19, 2006. The Applicant was sentenced to three years probation, to pay approximately \$200.00 in fines/assessments, to complete 160 hours of community service, attend an anger management program, and was ordered to stay away from the victim. The Applicant has completed all of the sentencing requirements except his

probationary period. He is on unsupervised probation until December 2009. (Applicant's Exhibit C)

Following the incident, the Applicant reported to work and immediately informed his security department of the arrest. The Applicant is extremely remorseful about the incident, and he and his wife no longer associate with the woman.

For the past thirty years, the Applicant has not been arrested, charged or convicted of any offense. Other than the incident in question, he indicated that he was arrested for Drunk Driving some thirty years ago.

Two letters of recommendation from professional colleagues of the Applicant attest to the Applicant's strong technical ability to the aircraft, including testing, troubleshooting and problem solving. They maintain that he is a team player and a great asset to the organization. (Applicant's Post-Hearing Exhibit).

Applicant has received several awards from his employer for excellent performance on the job. (Applicant's Exhibit D).

Applicant has been a regular blood donor for the Red Cross for many years. (Applicant's Exhibit F).

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 J (Criminal Conduct)

30. *The Concern.* Criminal activity creates a 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.

Conditions that could raise a security concern:

31.(a) a single serious crime or multiple offenses;

31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Conditions that could mitigate security concerns:

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;

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.

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 criminal conduct 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 her a security clearance.

In this case the Government has met its initial burden of proving that the Applicant has engaged in criminal conduct (Guideline J). 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 her 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 J of the SOR.

The evidence shows that the Applicant's arrest in March 2006, was an isolated incident that occurred over two years ago. His only other encounter with law enforcement occurred over thirty years ago. Although he was convicted of Aggravated Trespass and Vandalism, except for his probationary period, he has satisfied all of the courts sentencing requirements. Under Guideline J, Criminal Conduct, disqualifying conditions, *31.(a) a single serious crime or multiple offenses and 31.(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply. However, Mitigating Conditions *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 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* also apply.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. The Applicant has worked for the same defense contractor for over twenty years. He has never received a security violation. He is respected and admired by his colleagues. He made a one time poor decision that has caused him serious grief. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of good judgement, trustworthiness, reliability, candor, a willingness to

comply with rules and regulations, or other characteristics indicating that the person may properly safeguard classified information.

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 J (Criminal 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