



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)
)
) ISCR Case No. 08-03314
)
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

February 26, 2009

Decision

DAM, Shari, Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

On July 21, 2005, Applicant submitted a Security Clearance Application (SF-86). On August 19, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under the guidelines for Criminal Conduct and Personal Conduct. 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 September 12, 2008, and waived his right to a hearing before an administrative judge. On October 17, 2008, the Government filed a request for hearing pursuant Paragraph E3.1.7 of the Additional Procedural Guidance at Enclosure 3 of DoD Directive 5220.6. On December 8, 2008, DOHA assigned the case to me and issued a Notice of Hearing on January 7, 2009. The case was heard on January 29, 2009, as scheduled. Department Counsel offered Government exhibits (GE) 1 and 2 into evidence without objection. Applicant testified. The record remained open until February 13, 2009, in order to give Applicant an opportunity to submit pertinent information. On February 11, 2009, he submitted exhibits (AE) A through I that were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on February 9, 2009.

Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations contained in ¶¶ 1.a through 1.c of the SOR, and denied the allegation contained in ¶ 2.a. Those admissions are incorporated into the following findings of fact:

Applicant is 41 years old and twice married. He married his first wife in 1987 and had two children with her, ages 18 and 20. One of these children is in college and the other lives with Applicant's former wife. Applicant married his current wife in 1998 with whom he has two children. His wife has a child by a former marriage. The three children, ages 7, 10 and 13, all reside with them. His wife is a licensed professional counselor.

Applicant enlisted in the Air Force in 1986 and retired with an honorable discharge in September 2006 as a Technical Sergeant (E-6). While in the Air Force, he had a Top Secret clearance. He worked in the Command Control Division and had access to classified information. He was assigned to Special Operations for two years, during which he was deployed overseas most of the time. He comes from a family with a history of military service. Both of his grandfathers served in the Army. His father was in the U.S. Marines and Army, and his brother is a Technical Sergeant in the Air Force. He has held a security clearance since 1986 with no discrepancies in security policies. He earned a Bachelor of Science in Computer Science while in the service.

Applicant earned several awards and decorations during his military career, including four achievement medals, and a Joint Service Achievement Medal. (AE I) His former commander, a Senior Master Sergeant, submitted a character letter. He found Applicant to be very reliable, competent, dependable and hardworking. (AE H)

After being discharged from the Air Force in 2006, Applicant worked for two defense contractors until April 2008, when he obtained his current position with another federal contractor as an information systems security analyst. He has had access to classified information while working for these contractors.

In September 2003, Applicant was arrested for Child Neglect by the military police on the base where he lived. Immediately prior to the arrest, he had returned home from work in the morning and was responsible for the care of his two children, ages 2 and 5, as his wife had left for work. He was tired that morning, having worked the night shift. He admitted that he mistakenly fell asleep and his children left the house, and went to the park behind their house unsupervised. His neighbor called the police, who then came to his house and woke him up. His wife came home and his supervisor came over. He was handcuffed and taken to the station where he wrote a statement and was then released. He subsequently received a Letter of Reprimand. He did not receive any other disciplinary action. (Tr. 28)

In March 2006, Applicant was arrested for shoplifting a computer disk from the base store. He had paid for other items before leaving the store. On April 1, 2006, at a hearing conducted under Article 15, Uniform Code of Military Justice, he admitted the shoplifting charge and received a reduction in pay grade (suspended) and forfeited \$438. After being disciplined, he voluntarily decided to seek professional help because of the shame he felt. (Tr. 31-32) He attended weekly counseling for about six months. Although he does not have a clear explanation for the impulsive act, he learned a great deal about himself through the counseling sessions. He is a better husband and father, having participated in it. (Tr. 34) He remains very embarrassed by the incident, which was out of character for him. He repaid the base store \$200 two weeks after the arrest. (GE 2)

In July 2005, Applicant completed his SF 86. Section 26 on the SF 86 inquired about his Police Record – Other Offenses: *“In the last 7 years, have you ever been charged with or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?”* In response to that question, he answered “No” and did not disclose the September 2003 child neglect arrest at the base. However, he did disclose that he had consulted a mental health professional in the past.¹

Applicant did not disclose the 2003 charge because he did not understand that he was arrested on that date.² (Tr. 22) He was taken to the police station after the police arrived at his home, but he never went to court or received notice of anything about it other than a letter of reprimand. He did, however, mention the incident to a government investigator when he was discussing more fully his answers on his SF-86. (Tr. 30) He was then told he should have disclosed it. He did not deliberately fail to disclose it and had no intention to defraud or withhold information from the Government. (Tr. 23; 33)

Applicant’s immediate supervisor requested a salary increase for him as a result of his outstanding work during his first year with his present employer. In the first annual performance evaluation, the supervisor referred to Applicant as “a model employee.” (AE E) In a character letter, the supervisor noted that he is aware of Applicant’s security

¹Applicant sought mental health services in June 2001 for counseling about his children from his first marriage. (GE 2)

² Applicant completed his SF 86 in July 2005, which was before the March 2006 arrest.

clearance issues, as Applicant's has been very "forthcoming and open about the circumstances surround this issue and quick to answer questions and provide details when asked." (AE F) He has no reservations about recommending him for a clearance. (*Id.*)

While testifying, Applicant expressed remorse over both incidents and indicated that he has not been arrested or charged with any other incident since the March 2006 charge. (Tr. 33) Applicant's wife, supervisor and co-workers were aware of incidents and his counseling at the time they occurred. (GE 2).

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(a), 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.

Directive ¶ E3.1.14 requires the Government to 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 and has the ultimate burden of persuasion as to obtaining a favorable security decision." 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."

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.

Analysis

Guideline J, Criminal Conduct

The Government's concerns regarding criminal conduct are set forth in AG ¶ 30:

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.

AG ¶ 31 describes six conditions that could raise a security concern, two of which may be disqualifying in this case:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant admitted the two criminal arrests for minor offenses and that he went to an Article 15 UCMJ hearing for theft. The Government established both disqualifications.

After the Government raised a disqualification, the burden shifted to Applicant to provide evidence to rebut or to prove mitigation. AG ¶ 32 provides conditions that could mitigate security concerns:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; and
- (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.

The record evidence supports the application of AG ¶ 32(d). The last criminal offense occurred two years ago and there is no evidence of the recurrence of similar misconduct. Applicant is very remorseful and made restitution on the theft charge two weeks after his arrest. He voluntarily entered counseling and completed it after six months. He had a good work record while in the Air Force and during his first year with a defense contractor. He spoke candidly of his misconduct and dedication to his current employer.

The record does not support the application of the other three mitigating conditions under AG ¶ 32.

Guideline E, Personal Conduct

AG ¶ 15 expresses the Government's security concern pertaining to personal conduct:

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.

The Government alleged in SOR ¶ 2.a that Applicant falsified his answer to Section 26. *Your Police Record – Other Offenses*, in that he failed to disclose the September 2003 Child Neglect arrest. The Government contended that the omission may raise a security concern and be disqualifying under AG ¶ 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.

Applicant denied that he deliberately omitted information about the 2003 incident.

When a falsification allegation is controverted or denied, the government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's state of mind at the time the omission occurred. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant did not realize that the previous 2003 incident was a charge or arrest that he needed to disclose when he completed his SF 86 because he never went to court or received any type of punishment for the incident, other than a letter of reprimand. He subsequently disclosed it during an interview with a government investigator while discussing more fully his answers to the SF 86. At that time, he learned it should have been disclosed. Given his truthful disclosure of his 2001 counseling for issues related to one of his children and his candid testimony during this hearing, I find his explanation plausible and credible. The omission of the information was not intentional; hence, the evidence does not establish deliberate falsification or a violation of federal law. This Guideline is found in his favor.

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). They include the following:

- (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.

According to AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must include an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, including the many positive aspects in Applicant's life. He is a 41-year-old man, who honorably served his country for twenty years in the U.S. Air Force, during which time he held a Top-Secret clearance. After leaving military service, he began employment with a defense contractor and continues to successfully support the Government in his new position, while maintaining a Top Secret security clearance. He is intelligent, honest and hardworking. His background contains two minor negative incidents, for which Applicant feels great embarrassment and remorse. After the 2006 shoplifting arrest, he voluntarily sought counseling and continued it for several months. As a result, he learned a great deal about himself and improved his relationship with his family. His previous and current supervisors, as well as his family, are aware of his background, decreasing the potential for coercion or exploitation over the incidents. He recognizes his mistakes and has taken steps to address them.

Overall, the record evidence leaves me without questions as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Criminal Conduct and Personal Conduct.

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 Subparagraphs 1.a -1.c:	FOR APPLICANT For Applicant
Paragraph 2, Guideline E Subparagraph 2.a:	FOR APPLICANT For Applicant

Conclusion

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

SHARI DAM
Administrative Judge