



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-06632
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Esq., Department Counsel
For Applicant: *Pro se*

June 2, 2010

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline E (personal conduct). Clearance is denied.

Statement of the Case

On January 23, 2008, Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP). On September 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline 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 adjudicative guidelines (AG) effective within the Department of Defense on September 1, 2006.

Applicant acknowledged receipt of the SOR on September 17, 2009. He answered the SOR on October 1, 2009, and DOHA received his answer on October 5, 2009. Department Counsel was prepared to proceed on October 23, 2009. The case was assigned to me on October 30, 2009. On October 30, 2009, DOHA issued a notice of hearing scheduling the case for November 18, 2009. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 4, which were received without objection. Applicant did not offer any exhibits, but did testify on his behalf. DOHA received the hearing transcript (Tr.) on November 30, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 39-year-old material expeditor, who has worked for his defense contractor employer since January 2008. (GE 1, Tr. 14, 22-23.) He seeks a security clearance, which is a requirement for his continued employment. (Tr. 14-16.)

Applicant graduated from high school in June 1988. He has no formal education beyond high school, but did attend several service schools while in the U.S. Marine Corps. (GE 1, Tr. 16.) He married in September 1991 and has four children from his marriage – a 17-year-old son, a 16-year-old daughter, a 13-year-old daughter, and a 7-year-old son. Applicant also has a 19-year-old son from a previous relationship. (GE 1, Tr. 16-20.) Applicant's wife is employed full-time as a cage shift supervisor at a local casino. (Tr. 79-80.)

Applicant served in the Marine Corps from October 1988 to October 1992, and was honorably discharged as a lance corporal (pay grade E-3). His military occupational specialty was 0151 (administrative clerk). He testified that he held a security clearance while in the Marine Corps. (GE 1, Tr. 14-15, 20-22, 66.)

The SOR alleges four arrests or citations and four periods of employment that ended under less than favorable conditions. Summarized, they are:

In December 1998, while employed as a dispatcher for the local sheriff's department, Applicant was arrested for felony computer tampering and felony criminal history records, unauthorized disclosure. This arrest involved work-related misconduct. He testified, "Actually, I believe the second charge ended up being a misdemeanor and I plead guilty to a Class 6 undesignated felony and a Class 1 misdemeanor is what I was convicted of." He was sentenced to three months in jail and placed on three months probation. He served 45 days in jail under a work release program. Applicant testified that he was helping out an acquaintance and added that he knew it was a violation of policy, but thought it was a "minor violation." (SOR ¶ 1.b.) Following this arrest, he was

placed on administrative leave and subsequently resigned from his position. (SOR ¶ 1.a.) (GE 2, Tr. 23-32.)

In June 2001, while employed as a circulation assistant for local newspaper, Applicant was terminated after he was involved in an accident while driving a company vehicle. He described the accident, "And as I backed around to make my turn, I smashed into the back end of the vehicle. You know, the company was responsible to pay for it. So, in turn, they terminated me. I had been there, you know, less than a year, so I think that's probably why. I hadn't been there, you know, that long." When queried by Department Counsel, Applicant conceded that he had been reported for speeding while driving a company vehicle. (GE 2, Tr. 32-34, 74-75.) (SOR ¶ 1.c.)

In February 2001, Applicant was involved in a domestic dispute with his wife which led to his being arrested and charged with disorderly conduct-fighting. He testified that he broke a chair and "didn't really know it was against the law to break my own property, but apparently it is when you're involved in a domestic." Pursuant to his guilty pleas, he was convicted and sentenced to ten days in jail (suspended), ordered to complete anger management classes, and placed on three months probation. (GE 2, Tr. 34-37.) (SOR ¶ 1.d.)

In May 2002, Applicant was involved in a domestic dispute with his wife and mother-in-law, which led to his being arrested and charged with assault. He testified, "[m]y mother-in-law came out and struck me and – and in self – I was defending – trying to defend myself from my mother-in-law and the wife scratched my face and so I grabbed her by the neck to hold her back. I was arrested. We were all three convicted of misdemeanor assault." Pursuant to his guilty plea, he was convicted and sentenced to one day in jail, ordered to complete anger management classes, and placed on one year of probation. (GE 2, Tr. 38-45.) (SOR ¶ 1.f.)

In May 2002, while employed as a route relief driver for a local linen company, Applicant was fired for not showing up for work. He testified that he was unable to report for work because he was incarcerated following his assault arrest, discussed *supra*. (GE 2, Tr. 37-38, 75.) (SOR ¶ 1.e.)

In April 2006, while employed as communications manager for the local fire department, Applicant was terminated for harassment. Applicant testified that he was unfairly terminated for purportedly sending inappropriate text messages and e-mails to a female co-worker. Referring to how he was treated by his employer during his termination, Applicant testified, "I wasn't really given a fair chance to say anything. I said – and I even told him, well, you've already made your decision apparently because you're not giving me a chance to speak, so I have nothing to say. And I was disrespected by the Human Resources Officer. I was called some disrespectful names and so it led to the entire thing just being, you know, you need to leave." (GE 2, Tr. 46-54, 82-83.) (SOR ¶ 1.g.)

In November 2007, Applicant was cited for endanger life/health of minor. He had left his four and a-half-year-old son alone while he drove his youngest daughter to

school. A neighbor called the police after observing Applicant's 4½ year old son wandering away from home. Applicant was fined "around \$200" and the charge was dismissed. He acknowledged using poor judgment. (GE 2, Tr. 54-58.)

When asked by Department Counsel what changes he made to prevent future arrests or terminations, Applicant answered:

Some of the things happened when I was a little younger. The Sheriff's Department, I was a lot younger, you know, 11 years ago I was arrested for that, in '98, you know. I'm a lot older now. I'm more mature. Try to make better decisions. You know, sometimes you're gonna make a bad decision. I try not to. You know, I try to make better judgment calls. I try not to – you know, I try to follow the rules at work, you know. Like I said, I've been there two years. I've had no problems, you know. I'm obviously still there.

You know, and regardless of the results, I'm still gonna be there. They – you know, they advised they will keep me, you know, so I – I've grown up. I'm trying to, you know, get where I see that – I'm 38. In about ten or 15 years, I gotta start thinking about retirement. So, you know, I don't – I can't – I don't have time to be bouncing around and going from job to job or doing this and that. I just – I gotta focus on getting to where I need to be when I'm, you know, a little older and time to settle down, you know. (Tr. 58-59.)

Applicant and his wife were recently given power-of-attorney to care for their 17-year-old son's 16-year-old girlfriend. She lives with Applicant's family and is pregnant. Applicant anticipates he will help support his son's girlfriend and child. (Tr. 64-66.) Applicant did not submit any references or performance evaluations.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 for 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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)

Under Adjudicative Guideline ¶ 15, the Government’s concern is:

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.

AG ¶ 16 sets out two conditions that could raise security concerns and may be disqualifying in this case:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single

guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

- (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;
- (2) disruptive, violent, or other inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violations;
- (4) evidence of significant misuse of Government or other employer's time or resources.

The Government established through Applicant's admissions and evidence presented that he had four arrests or citations from 1998 to 2007, spanning a nine-year period. His most recent citation occurred one year before submitting his e-QIP. His arrests or citations include felony computer tampering, felony historical records – unauthorized disclosure, disorderly conduct-fighting, assault, and endanger life/health of minor.

Additionally, the Government established through Applicant's admissions and evidence presented that he left four separate jobs under adverse conditions during the same nine-year period. The foregoing warrants application of AG ¶¶ 16(c) and 16(d).

Potential mitigating conditions listed under AG ¶ 17 are:

- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

None of the potential mitigating conditions under this concern are applicable. Under the totality of the circumstances, I find Applicant's behavior is recent and not isolated. Considering his behavior, the nature and seriousness of his misconduct, his exercise of repeated poor judgment culminating in his recent citation for endangering the life/health of a minor as recent as one year before submitting his e-QIP, and other factors identified *supra*, I find his favorable information is not sufficient to mitigate Guideline E security concerns. His conduct raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. His conduct also raises serious doubts and questions about his judgment. Further time and additional evidence is needed before I can overcome my concerns/doubts regarding Applicant's questionable judgment, reliability, and trustworthiness.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or refute personal conduct security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole-person concept was given due consideration and that analysis does not support a favorable decision.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹ and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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:	AGAINST APPLICANT
Subparagraph 1.a. – 1.h.:	Against Applicant

¹ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT J. TUIDER
Administrative Judge