



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



In the matter of:)
)
) ISCR Case No. 08-07851
)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Jr., Esquire, Department Counsel
For Applicant: *Pro Se*

January 27, 2010

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) for employment with a defense contractor on April 9, 2007. On May 21, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns for personal conduct 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 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 acknowledged receipt of the SOR on July 23, 2009.

Applicant answered the SOR in writing on August 10, 2009. Applicant admitted eight of the nine allegations of personal conduct under Guideline E with explanation. He requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on August 28, 2009, and the case was assigned to me on September 21, 2009. DOHA issued a Notice of Hearing on October 7, 2009, for a hearing on October 19, 2009. I convened the hearing as scheduled. The government offered 12 exhibits, marked government exhibit (Gov. Ex.) 1 through 12, which were received without objection. Applicant testified on his behalf. DOHA received the transcript of the hearing (Tr.) on November 6, 2009. Based on a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Procedural Issues

Applicant received a copy of the Notice of Hearing in the mail at his home. He could not remember the date the Notice of Hearing was received. He received a copy of the Notice of Hearing from his employer on October 18, 2009, the day before the hearing. Applicant is entitled to 15 days advance notice of the hearing (Directive E3.1.8). Applicant discussed with Department Counsel the hearing date of October 19, 2009, prior to the Notice of Hearing being mailed so actual notice was given more than 15 days prior to the hearing. However, Applicant signed for the Notice of Hearing only one day prior to the hearing. At the hearing, Applicant waived the 15 days notice requirement (Tr. 4-5).

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted all but one of the nine allegations under personal conduct. His admissions are considered in my findings of fact.

Applicant is 43 years old and has worked for his defense contractor employer for more than five years as a systems analyst. He served 14 years on active duty with the Army. He is married but has been separated from his wife since 1996. He presently lives with another woman. He has three children from his marriage and one with his girlfriend. The three children live with their mother, and the one child lives with him and his girlfriend (Tr. 31-33; Gov. Ex. 1, e-QIP, dated April 9, 2007; Gov. Ex. 12, DD Form 214, dated August 2008).

The personal conduct offenses date from 1986, when he first entered active duty in the Army. The personal conduct offenses involve offenses arising from domestic disputes (SOR 1.b, 1.e, 1.g); the military offense of absence without leave (SOR 1.c, 1.d), and disrespect to a noncommissioned officer (SOR 1.a); and traffic offenses (SOR 1.f, 1.h, 1.i).

Applicant received non-judicial punishment under the Uniform Code of Military Justice (UCMJ) for disrespect to a noncommissioned officer in 1986 (SOR 1.a). Applicant was involved in a verbal confrontation with a noncommissioned officer shortly after arriving at his first duty station. He was on duty and was directed to sweep the barracks area. The charge of quarters directed him to sweep some debris away from a

door. Applicant did not like what the noncommissioned officer said and disrespectfully responded back to him. He was sentenced to forfeit pay, restricted to the company area, and directed to perform extra duty (Tr. 23-24; Gov. Ex. 10, DA Form 5248-R, Report of Unfavorable Information, dated July 14, 1986).

Applicant received a reprimand from his unit commander for domestic violence in 1990 (SOR 1.b). The military police were called to Applicant's quarters by Applicant's wife because he pushed her during a verbal confrontation. His unit commander took administrative action with a written reprimand (Tr. 20-23; Gov. Ex. 7, DA Form 4833, Commander's report of disciplinary or administrative action, dated February 13, 1990).

Applicant received non-judicial punishment in 1997, for failure to report to his duty station (SOR 1.c). Applicant, now a sergeant, was the unit supply sergeant. Applicant said he was told by the first sergeant not to report to his work site until an issue involving him was resolved by the commander. The first sergeant stated he did not tell Applicant not to report to his place of duty. Applicant's commander imposed punishment for failure to go to his prescribed place of duty in violation of Article 86, UCMJ and imposed as punishment a forfeiture of \$382 (Tr. 24-26, 37-40; Gov. Ex. 8, DA Form 5248-R, Report of unfavorable information, dated October 28, 1997).

Applicant received non-judicial punishment for absence without authority in 1999 (SOR 1.d). Applicant was granted emergency leave when his grandmother died. He went to Puerto Rico for the funeral. Applicant stated he was unable to return to his unit on time because of a hurricane. He could not call his unit for an extension of his leave because telephone service was disrupted by the hurricane. Applicant returned to his unit two days late. Since he had not requested an extension of his leave, Applicant was punished by his commander for absence without leave, and was sentenced to a suspended reduction in grade, a suspended forfeiture of \$743 for two months, and extra duty (Tr. 26-27, 40-42; Gov. Ex. 9, DA Form 5248-R, Report of Unfavorable Information, dated May 20, 1999).

Applicant admitted he was arrested and charged with domestic battery in August 2001 (SOR 1.e). Applicant and his wife separated, and Applicant was living with his girlfriend and their child. She called the police charging him with domestic violence. The police arrested Applicant based on the word of the girlfriend, and he spent a night in jail. His girlfriend paid his release bond the next day. She changed her story concerning the assault, and the charge was not prosecuted by the local prosecutor (Tr. 18-19, 42-45; Gov. Ex. 3, Letter with court documents, dated August 25, 2008).

Applicant admitted he was cited and fined for driving on a suspended license in 2002 (SOR 1.f). Applicant did not realize his license had been suspended for failure to pay child support until he was stopped by the police. After separating from his wife, Applicant and his wife kept a joint checking account. Applicant's wife withdrew support funds from the account. She then withdrew all of the funds from the account, so Applicant had her name removed from the account. Applicant's wife filed for child support and she was awarded back support of \$24,000 even though she had been

withdrawing funds from the account for over two years. Applicant's wife requested child support. She received court ordered monthly support of \$1,000. Applicant was not present at the proceeding and did not know of the order. After his arrest, Applicant started making child support payments and his license was restored. He is current with his child support payments (Tr. 45-47).

Applicant admitted he was arrested for trespassing and domestic violence in 2004 (SOR 1.g). Applicant and his girlfriend, the same person involved in the incident at SOR 1.e, separated but he had visitation rights for their son. He called his girlfriend to inform her he was coming to her house to pick up the child for his visitation. She informed him it was fine. When he arrived, she would not release their son. His girlfriend called the police and he was arrested for domestic violence and first degree trespass. The domestic violence charge was dismissed and he was found guilty of trespass. His sentence was to stay away from his girlfriend. Applicant now knows if there is an issue on visitation to have a police officer accompany him to pick up the child for visitations (Tr. 18-20, 53-56; Gov. Ex. 6, Warrant, dated June 11, 2004).

Applicant was arrested for driving on a suspended license, fleeing the scene of an accident, and traffic violation on a military installation in 2006 (SOR 1.h). Applicant's license was suspended, but he nonetheless drove his girlfriend's car to work. He was involved in an accident when another vehicle pulled in front of him causing a collision. The other driver was cited for causing the accident. Applicant fled the scene of the accident, and went to a nearby gas station to call his girlfriend and inform her of the accident. He later returned to the scene of the accident to learn his car had been towed and the military police were looking for him. He turned himself in to the military police. He was cited by military police for driving on a suspended license, fleeing the scene of the accident, and involvement in a traffic accident. Applicant paid a fine and did not have to appear in court (Tr. 18-21, 48-52 Gov. Ex. 4, Military police report, dated June 15, 2006).

Applicant was apprehended in 2007, for failure to carry a driver's license with him (SOR 1.i). He did not have a valid license since there was a block on his license for two traffic citations he received in another state. He paid the fines in the other state, and now has a valid license (Tr. 53-54; Gov. Ex. 5, Citation, dated August 17, 2007).

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 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 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.

Analysis

Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules or regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information (AG ¶ 15). Applicant's multiple arrests and convictions for military offenses, domestic violence, and traffic and driving offenses raise Personal Conduct Disqualifying Conditions (PC DC) AG ¶ 16(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, support a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules or regulations, or other characteristics indicating that the person may not properly safeguard protected information); PC DC AG 16(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 or regulations, or other characteristics indicating that the person may not properly safeguard protected information); and PC DC AG 16(e) (personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities, which, if known may affect the person's personal, professional, or community standing . . .). While none of the offenses charged are by themselves serious, there are multiple lesser offenses to be considered as a whole.

I have considered all of the mitigating conditions under personal conduct. Applicant raised by his testimony Personal Conduct Mitigating Conditions (PC MC) AG ¶ 17(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); PC MC AG ¶ 17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused the untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur); PC MC AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress); PC MC AG ¶ 17(f) (the information was unsubstantiated or from a source of questionable reliability); and PC MC AG ¶ 17(g) (association with person involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations).

There was a pattern of disciplinary problems amounting to inappropriate personal conduct when Applicant was in the Army. He received non-judicial punishment for disrespect to a noncommissioned officer, and absence without leave. The offenses happened 10 to 20 years ago and were strictly military-related offenses. Since Applicant is no longer in the military, this conduct is unlikely to recur. The conduct does not now cast doubt on his reliability, trustworthiness, and good judgment because he is now older and more mature and inclined to follow rules and regulations.

There were three offenses of domestic violence with his wife or girlfriend. It does not appear he ever seriously struck either women, and the charges either received minor punishment or were not prosecuted. There is information that Applicant may not have committed the domestic assaults. He received only a reprimand from his commander for one incident, one was *nolle prosequi*, and the other was reduced to a trespass offense with only an order to stay away from the alleged victim. Applicant has shown that he understands now how to properly manage his relationships with his former wife and his girlfriend concerning visitation rights with his children. The traffic offenses were minor involving driving on a suspended license. Traffic or driving infractions can indicate a person's inability or unwillingness to comply with laws and regulations. Applicant did not know that his license was suspended for two of the incidents. The other incident he did know of the suspension and so he fled from the

scene of an accident to call his girlfriend and advise her of the accident. Knowingly driving on a suspended license is an error in judgment. However, there is evidence of successful rehabilitation in that Applicant is gainfully employed, has not had a traffic-related incident in over two years, and he expressed that he understands the need to comply with traffic and driving requirements. The offenses are minor, happened under unusual or unique circumstances that are no longer present, and are not likely to recur. Applicant has presented sufficient information to mitigate security concerns for personal conduct.

Whole Person Analysis

Under the whole person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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 a security clearance must be an overall commonsense 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. I considered that Applicant's military offenses happened over ten years ago and will not recur since he is no longer in the military. The domestic violence incidents either did not occur, or happened under unique circumstances that are no longer present. The traffic citations are also minor and there is evidence of successful rehabilitation. Applicant's personal conduct, when considered as a whole, does not support a whole person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that he may not properly safeguard protected information. Overall, on balance, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his 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 E: FOR APPLICANT

Subparagraphs 1.a - 1.i: For Applicant

Conclusion

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

THOMAS M. CREAN
Administrative Judge