



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-00746
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro se*

September 10, 2010

DECISION

ROSS, Wilford H., Administrative Judge:

Applicant submitted his Questionnaire for Sensitive Positions (SF 86), on July 25, 2006. (Government Exhibit 1.) He submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on September 16, 2008. (Government Exhibit 3.) On July 13, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J (Criminal Conduct), and F (Financial Considerations) concerning 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 adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered (Answer) the SOR in writing on August 3, 2009, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on September 17, 2009. This case was assigned to me on September 24, 2009. DOHA issued the notice of hearing on September 28, 2009, and I

convened the hearing as scheduled on October 30, 2009. The Government offered Government Exhibits 1 through 11, which were received without objection. Applicant testified on his own behalf, called one additional witness, and submitted Applicant Exhibit A, which was also received without objection. Applicant requested time to submit additional evidence and, on November 23, 2009, submitted Applicant Exhibit B, which was received without objection. DOHA received the final transcript of the hearing on November 16, 2009. 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 26, separated from his wife, and has two children. He is employed by a defense contractor and seeks to retain a security clearance in connection with his employment. Applicant admitted subparagraphs 2.a. and 2.b. of the Statement of Reasons. Those admissions are hereby deemed findings of fact. He denied subparagraph 1.a. He also submitted additional information in support of his request for a security clearance.

Paragraph 1 (Guideline J - Criminal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for a clearance because he has engaged in criminal conduct.

Applicant and his wife were married in 2000. She is a law enforcement professional. By late 2007 they were having marital problems. In early 2008 Applicant moved out of the marital home, but visited his wife and children.

In March 2008 the Applicant and his wife became engaged in an emotional and heated argument over their future. The Applicant, by his own admission, lost control of the situation and accidentally fired his wife's service weapon. He was not aiming the weapon at his wife or himself.

Because of his wife's position, and the fact that their two young children were in the house at the time of the incident, it was reported to law enforcement. Eventually, the Applicant was charged with Discharge of a Firearm. The case was originally charged as a felony, but he eventually plead nolo contendere to a misdemeanor version of the same charge in January 2009. He was sentenced to serve 30 days in jail, 30 days community service, 36 months probation and attend a one year domestic violence course. (Government Exhibits 4 and 7; Transcript at 45-53.) As of the time of the hearing, Applicant was successfully attending the domestic violence course. (Applicant Exhibit B at 13.) He will be on probation until January 2012.

Applicant has been attempting to have his plea withdrawn and his case dismissed. While his attorney has filed some documents with the court, there is no information as to the current status of his appeal. (Applicant Exhibit A, Exhibit B at 4, 28-51.)

Immediately after the incident, Applicant moved out of the marital house. He and his wife separated, and remain separated as of the date of the hearing.

Paragraph 2 (Guideline F - Financial Considerations)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he is financially overextended, and therefore at risk of having to engage in illegal acts to generate funds.

Applicant and his wife owned a house that they bought in 2005. Applicant took out two mortgages, for a total of approximately \$262,000. (SOR 2.a. and 2.b.) After he left the house in March 2008, Applicant could no longer afford to pay the mortgages and maintain another household. His wife also left the house. It was foreclosed on and sold during the height of the recession in April 2009 for \$38,000. (Applicant Exhibit B at 52-64; Transcript at 55-58, 61-64.) Under the applicable state anti-deficiency statute, the foreclosure sale wiped out any indebtedness owed by the Applicant. (Transcript at 88-89.)

Applicant's current financial situation is stable, as is shown by the most recent credit report in the record, dated October 29, 2009. (Government Exhibit 11.) He shares custody of his daughters and works two jobs to make ends meet. (Applicant Exhibit B at 6-7; Transcript at 65-73.)

Mitigation

Several co-workers and friends submitted letters on the Applicant's behalf. He is described as responsible, dedicated and enthusiastic. The letters from his supervisors indicate that he has been given increasing levels of responsibility. (Applicant Exhibit B at 22-25.)

Applicant's father testified on his behalf. (Transcript at 31-43.) He testified about the incident between Applicant and his wife, his son's remorse and how Applicant is resolving the situation. The witness also testified about the fact that, until the separation, Applicant was very good about paying his bills.

Evidence was also submitted showing that the Applicant kept his employer fully and promptly informed of the proceedings in this case. (Government Exhibit 4.)

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 over-arching 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. In addition, the Administrative Judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned 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.

Finally, as emphasized by President Eisenhower in Section 7 of 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Paragraph 1 (Guideline J - Criminal Conduct)

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

Criminal activity creates doubts 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.

Applicant was involved in a single act of accidentally discharging his wife's service weapon during a domestic dispute, which resulted in the Applicant being arrested, and convicted of a misdemeanor. AG ¶ 31(a) under Guideline J applies to this case, stating that a disqualifying condition is "a single serious crime or multiple lesser offenses." AG ¶ 31(d) also applies, "individual is currently on parole or probation."

Two of the mitigating conditions also apply and have been considered. They are AG ¶ 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 AG ¶ 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."

Applicant admitted to, and regrets, his poor judgment on this occasion. It happened in extremely unusual circumstances and he has taken steps to make sure it does not happen again. Though he is still on probation, that fact is mitigated by the eighteen months since the incident, without recurrence of any criminal acts, and his taking a domestic violence course.

Based on all of the evidence presented, Applicant has mitigated the security concerns of his single misdemeanor conviction of Discharge of a Firearm, and the factual circumstances behind it. Paragraph 1 of the SOR is found for the Applicant.

Paragraph 2 (Guideline F, Financial Considerations)

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an “inability or unwillingness to satisfy debts” is potentially disqualifying. Similarly under AG ¶ 19(c), “a history of not meeting financial obligations” may raise security concerns. Applicant, by his own admission, and supported by the documentary evidence, had approximately \$265,000 in past-due mortgage debts, which have been due and owing since 2008. The evidence is sufficient to raise these potentially disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where “the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment.” AG ¶ 20(b) states that the disqualifying conditions may be mitigated where “the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances.” Finally, AG ¶ 20(d) states it is mitigating where “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Applicant’s financial difficulties arose in about 2008, in relation to his criminal case, and separation from his wife. Given the circumstances, he had no alternative but to let his house be foreclosed on in the current financial situation. What is telling is the price the house went for at foreclosure. His current financial situation is stable. These mitigating conditions apply to this case. Paragraph 2 is found for the Applicant.

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 relevant circumstances. Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. The administrative judge must 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant’s criminal conduct, involving the accidental discharge of his wife’s service weapon, occurred over eighteen

months ago. Under AG ¶ 2(a)(1) and (2), Applicant's conduct was serious, but unique. Based on the state of the record, and as discussed in depth above, I find that there have been permanent behavioral changes under AG ¶ 2(a)(6). This is in regards to the allegation of criminal conduct, and also his ability to handle his financial affairs. Accordingly, at the present time, I find that there is no potential for pressure, coercion, exploitation, or duress (AG ¶ 2(a)(8)); and that there is no likelihood of recurrence (AG ¶ 2(a)(9)).

Overall, 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 criminal conduct, and financial considerations. The evidence supports his request for a security clearance. Accordingly, Paragraphs 1 and 2 are found for the Applicant.

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:	FOR THE APPLICANT
Subparagraph 1.a:	For the Applicant
Paragraph 2, Guideline F:	FOR THE APPLICANT
Subparagraph 2.a:	For the Applicant
Subparagraph 2.b:	For the Applicant

Conclusion

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

WILFORD H. ROSS
Administrative Judge