



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 09-02493
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Jeff A. Nagel, Department Counsel
For Applicant: *Pro se*

April 30, 2010

Decision

LOKEY ANDERSON, Darlene D., Administrative Judge:

Applicant submitted her Electronic Questionnaire for Investigations Processing, (e-QIP) on December 1, 2008. (Government Exhibit 1.) On September 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E 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 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 28, 2009, and requested a hearing before an Administrative Judge. The case was assigned to the undersigned Administrative Judge on December 10, 2009. A notice of hearing was issued on January 8, 2010, scheduling the hearing for March 9, 2010. The Government offered six exhibits, referred to as Government Exhibits 1 through 6, which were received without objection. Applicant offered two exhibits, referred to Applicant's Exhibits A and B, which were admitted without objection. She also testified on her own behalf. The record remained open until close of business on March 15, 2010, for receipt of additional documentation. The Applicant submitted two Post-Hearing Exhibits, referred

to a Applicant's Post-Hearing Exhibits A and B. The transcript of the hearing (Tr.) was received on March 17, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

FINDINGS OF FACT

The Applicant is 26 years old and has a high school diploma and one year of college. She is employed by a defense contractor as a Range Support Specialist I, and is applying for a security clearance in connection with her employment.

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges that the Applicant is ineligible for clearance because the Applicant engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that raise questions about her reliability, trustworthiness and ability to protect classified information.

The Applicant was hired by her current employer in October 2008. Her father works for the same company. The Applicant states that she loves her job, would like to keep it, and appreciates the fact that she is helping to save lives involved in the war.

The Applicant completed an Electronic Questionnaire for Investigations Processing (s-QIP) dated December 1, 2008. (Government Exhibit 1.) Question 23(f) of the application asked her if in the last 7 years, had she been arrested for, charged with, or convicted of any offenses(s) not listed in response to questions 23(a), (b), (c), (d), or (e). The Applicant answered, "NO." This was a false response. She failed to list her arrests and charges in 2002, for Vandalism; and in 2003, for Disturbing the Peace/Intoxicated, Resisting Arrest, and Taking Contraband To/From Penal Institutions.

She explained that she was told that the charge was removed from her record, and so she answered, "NO" to question 23(f). She also thought that the arrest might have occurred over 7 years ago. The Applicant admitted that she was given instructions on how to fill out the application, and had the opportunity to ask any questions she might have for clarification. (Tr. p. 25.)

Question 24(a) of the same application asked the Applicant if since the age of 16 or in the last 7 years, whichever was shorter, had she illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish etc. The Applicant answered, "NO." This was a false response. She failed to list her use of marijuana in 2003.

The Applicant stated that she deliberately answered, "NO," to question 24(a) because she was nervous and afraid that she would be denied employment if she told the truth. (Tr. pp. 36-37.) She realizes that she made a mistake and states that it will not happen again. (Tr. p. 37.) I find that the Applicant intentionally sought to conceal her arrests in 2002 and in 2003, and her marijuana use in 2003, from the Government on the application in fear that it would jeopardize her job.

Paragraph 2 (Guideline J - Criminal Conduct). The Government alleges that the Applicant is ineligible for clearance because she has engaged in criminal conduct.

In December 2002, the Applicant was arrested and charged with Vandalism \$400.00 or More, a felony. (Government Exhibits 5 and 6.) She testified that she was upset on the evening in question. She was 18 or 19 years old at the time. She had quit her job and missed her family. While roaming around she saw a vehicle owned by one of her coworkers, and decided to destroy it. (Tr. p. 26.) She keyed the vehicle and took the windshield wiper blades off. The Applicant was captured on video surveillance in the parking lot where she had engaged in the misconduct, and was arrested the next day. (Tr. p. 29.) She states that she felt bad after she did it. She forgot about her court date on the charge and as she stated, “simply blew it off.” (Tr. p. 29.)

In June 2006, when she went to get her driver’s license, she learned that a warrant had been issued for her arrest. She pled guilty to a reduced charge of misdemeanor Vandalism and was sentenced to 10 days in jail with 10 days credit, 36 months supervised probation, community service, and ordered to pay restitution. The warrant remained active. On March 3, 2010, a week before this hearing, the Applicant paid restitution of \$1,926.57, probation was terminated, and the warrant was withdrawn. (Applicant’s Exhibit A.)

A year later, in November 2003, the Applicant was arrested and charged with (1) Disturbing the Peace/Intoxicated, (2) Resisting Arrest, and (3) Taking Contraband To/From Penal Institution. (Government Exhibits 4 and 6.) The Applicant explained that she and her cousins lived together in an apartment house, and had a big party. The neighbors reported them for disturbing the peace. The police arrested the Applicant, and while sitting in the back of the police car, she slipped her hand out of the handcuffs to fix her hair and was accused of resisting arrest. In her front pocket she had a marijuana pipe that she states she was not aware of at the time. She pled no contest to Counts (1) and (2) and was sentenced to time in jail, suspended, one year of probation, and community service in lieu of a fine. Count (3) was not prosecuted. (Government Exhibit 4.) In about May 2004, a bench warrant was issued for her arrest for Failure to Appear. The warrant remained active. On March 1, 2010, a week before this hearing, the Applicant submitted proof of completing 40 hours of community service, paid a \$50.00 contempt fee, and the warrant was withdrawn. (Applicant’s Exhibit B.)

Applicant’s work evaluation dated May 18, 2009, reflects an overall average rating of 3.3 out of 5. This indicates that she “meets expectations” in every category. She is fully competent and is satisfactorily performing the job as well as or above the level of her peers. (Applicant’s Post-Hearing Exhibit A.)

Three letters of recommendation from the Applicant’s Lead, coworkers, and professional associates, attest to her maturity, knowledge, ability to work well with others, ethical nature, quick learning, and her ability to complete the physical and mental demands of the job. She is recommended for a position of trust. (Applicant’s Post-Hearing Exhibit B.)

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 E (Personal Conduct)

15. *The Concern.* 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.

Conditions that could raise a security concern:

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;

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, 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.

Conditions that could mitigate security concerns:

None.

Guideline J (Criminal Conduct)

30. *The Concern.* 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.

Conditions that could raise a security concern:

31. (a) a single crime or multiple lesser 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:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 18-19, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature, extent, and seriousness of the conduct;
- 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 extent to which participation is voluntary;
- f. The presence or absence of rehabilitation and other permanent behavior changes;
- g. The motivation for the conduct;
- h. The potential for pressure, coercion, exploitation or duress; and
- 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 predicated 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 dishonesty and 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 him a security clearance.

In this case the Government has met its initial burden of proving that the Applicant intentionally falsified her security clearance application (Guideline E) and 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.

I have considered all of the evidence presented in this case, including all of the favorable letters of recommendation, as well as the Applicant's recent performance evaluation. The Applicant has not introduced persuasive evidence in rebuttal, explanation or mitigation that is sufficient to overcome the Government's case under Guidelines E and J of the SOR.

With respect to Guideline E, the Applicant deliberately concealed material information from the Government on her security clearance application in response to her arrest and drug history. With the particular evidence that I have been provided, there is no reasonable excuse for her failure to answer the questions truthfully. Consequently, the evidence shows that the Applicant cannot be trusted with the national secrets. Disqualifying Conditions 16(a) *the deliberate omission, concealment, or falsification of relevant and material 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, and 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, 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* apply. None of the mitigating conditions are applicable in this case. Consequently, I find against the Applicant under Guideline E, Personal Conduct.

Under Guideline J, Criminal Conduct, Disqualifying Conditions 31(a) *a single crime or multiple lesser offenses*, and 31(c) *allegation or admission of criminal conduct*, regardless of whether the person was formally charged, formally prosecuted or convicted apply. None of the mitigating conditions are applicable. The sentencing requirements imposed by the court as a result of the Applicant's criminal arrests in 2002, and in 2003, were resolved in March 2010, just days before the hearing in this matter. Until then, the Applicant did not see the need or make the effort to address these issues, and the warrants remained outstanding. This is a classic case of too little, too late. This attitude of neglect shows irresponsibility and untrustworthiness. Accordingly, I find against the Applicant under Guideline J, Criminal Conduct.

I have also considered the "whole-person concept" in evaluating the Applicant's eligibility for access to classified information. The Applicant is 26 years old. She has a troubled history of poor judgment and unreliability, and it has taken some time for her to mature. On both occasions of her arrests, her criminal conduct was reckless and in total disregard for others. 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 poor judgement, untrustworthiness, unreliability, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

This Applicant has not demonstrated that she sufficiently trustworthy, and at this time, she does meet the eligibility requirements for access to classified information. Accordingly, I find against the Applicant under Guidelines E (Personal Conduct) and J (Criminal Conduct).

On balance, it is concluded that the Applicant has failed to overcome the Government's case opposing her request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraphs 1 and 2 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: Against the Applicant.
 - Subpara. 1.a.: Against the Applicant.
 - Subpara. 1.b.: Against the Applicant.

- Paragraph 2: Against the Applicant.
 - Subpara. 2.a.: Against the Applicant.

DECISION

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for the Applicant.

Darlene Lokey Anderson
Administrative Judge