



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
-----)	ISCR Case No. 07-02160
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

February 21, 2008

Decision

MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on March 2, 2006. On August 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, G, 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 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 responded to the SOR (RSOR) in writing on September 10, 2007. He requested that his case be decided on the written record in lieu of a hearing.

On October 11, 2007, Department Counsel submitted the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant, and he was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on November 10, 2007.

Applicant did not submit any additional evidence. The case was assigned to this Administrative Judge on February 5, 2007.

In the FORM, Department Counsel offered 10 documentary exhibits (Items 1-10). No documents were offered by Applicant. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his RSOR (Item 4) Applicant admitted all of the SOR allegations under Guidelines J, G, and H, and he denied 4.a., under Guideline E. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including the FORM, Applicant's RSOR and the other admitted documents, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 59 years old. He works for a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

Paragraph 1 (Guideline J - Criminal Conduct)

The SOR lists 7 allegations, 1.a. through 1.g., regarding criminal conduct under Adjudicative Guideline J. All of the allegations will be discussed in the same order as they were listed in the SOR:

1.a. On June 25, 2000, Applicant was arrested for Possession of a Controlled Substance, crack cocaine, and Appearing in Public in an Intoxicated Condition. Applicant was granted First Offender Status, but on April 2, 2002, his First Offender Status was revoked and he was found guilty of Violating the Drug Control Act, which is a felony. He was sentenced to five years incarceration with five years suspended, conditioned upon good behavior and supervised probation. His driver's licence was also suspended for 6 months.

1.b. On November 6, 2000, Applicant was arrested for Contempt of Court for failing to appear in court on October 24, 2000. Applicant was found not guilty, and the charge was dismissed.

1.c. On May 1, 2001, Applicant was arrested and charged with Possession of a Controlled Substance Violating the Drug Control Act, a felony, Driving Under the Influence-2nd offense, and Driving After Forfeiture of License. Applicant was sentenced to five years incarceration with five years suspended, conditioned upon good behavior and supervised probation, which was also part of the sentence under 1.a., above.

1.d. On April 6, 2003, Applicant was charged with Driving After License Revoked. On July 28, 2003, he was found guilty and ordered to pay a fine of \$100 and court costs of \$74.

1.e. It is alleged in the SOR that on April 17, 2003, Applicant was charged with Possession of Alcohol in a Park. The evidence indicates that this incident actually occurred on May 13, 2005 (Item 7). Applicant was ordered to pay a fine and court costs of \$91.

1.f. On January 28, 2006, Applicant was arrested and charged with Driving with a Restricted License/DUI Related. He was found guilty and sentenced to serve 12 months in jail, with 9 months suspended. Applicant was also ordered to pay a fine of \$300 and court costs of \$161.

1.g. It is also alleged in the SOR that on January 28, 2006, Applicant was again charged with Possession of Alcohol in a Park. The evidence indicates that this incident actually occurred on February 13, 2006 (Item 7). Applicant was ordered to pay a fine and court costs of \$91.

Paragraph 2 (Guideline J - Alcohol Consumption)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he abuses alcohol to excess.

2.a. Applicant's conduct which has been alleged in the SOR as 1.c., is included in this paragraph under alcohol consumption.

2.b. Applicant's conduct which has been alleged in the SOR as 1.e., is included in this paragraph under alcohol consumption.

2.c. Applicant's conduct which has been alleged in the SOR as 1.g., is included in this paragraph under alcohol consumption.

Paragraph 3 (Guideline H - Drug Involvement)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has abused illegal substances.

3.a. Applicant's conduct which has been alleged in the SOR as 1.a., is included in this paragraph under drug involvement.

3.b. Applicant's conduct which has been alleged in the SOR as 1.c., is included in this paragraph under drug involvement.

Paragraph 4 (Guideline E - Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because when Applicant completed a signed, sworn Security Clearance Application (SCA) on March 2, 2006 (Item 5), he furnished untruthful information to the Government.

4.a. Applicant answered a series of questions under Section 23, regarding his police record. Applicant failed to identify his conviction on April 2, 2002, of Violating the Drug Control Act, as alleged in 1.a., and the charges for Possession of Alcohol on April 17, 2003, and January 28, 2006, as alleged in 1.e. and 1.g., above.

While it is not alleged in the SOR, I note Applicant also failed to identify his January 28, 2006 arrest and charge of Driving with a Restricted License/DUI Related, for which he was found guilty and sentenced to serve 12 months in jail, with 9 months suspended, as alleged in 1.f., above.

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(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.

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 J - Criminal Conduct

The Government has established by substantial evidence that Applicant engaged in criminal conduct, as he was arrested for, and convicted of criminal offenses from 2000 to 2006, related to illegal alcohol and drug usage and to operating a vehicle after forfeiture of his license.

In reviewing the Disqualifying Conditions (DC) under Guideline J, DC 31. (a), a single serious crime or multiple lesser offenses, applies in this case. Under Mitigation Conditions (MC), I can not find that MC 32. (d) applies to this Applicant, as there is no evidence of successful rehabilitation because the last criminal conduct occurred in 2006, only two years ago, and I have seen no evidence of sincere remorse. Applicant has not mitigated this allegation. Paragraph 1 is found against Applicant.

Guideline G - Alcohol Consumption

Applicant's alcohol consumption has resulted in four alcohol related incidents, occurring in 2001, 2003, 2005, and 2006.

The Government established, by substantial evidence, that Applicant was involved in alcohol-related incidents away from work, and binge alcohol consumption to the point of impaired judgement, specifically DUIs in 2001 and 2003, and possession of Alcohol in a Park in 2005 and 2006. DC 22. (a) and 22 (c) apply to this case.

In his response to interrogatories (Item 6), Applicant admitted to currently drinking “about a 6 pack [of beer] between Saturday and Sunday” but he indicated that he did not intend to drink alcoholic beverages in the future. Since no independent evidence was introduced as to Applicant's past or current alcohol consumption, I can not find that any MC applies under Guideline G. Paragraph 2 is found against Applicant.

Guideline H - Drug Involvement

With respect to Guideline H, the Government has established its case. Applicant has been convicted on two occasions of possessing illegal drugs in 2000 and 2001, both felonies. While Applicant denied ever using drugs in his response to interrogatories (Item 6), he was found guilty on both of these possession charges, including the incident in 2001 for which Applicant pled guilty. Based on these two convictions, I can not find credible Applicant's denial of drug usage. Pursuant to Applicant's SCA (Item 5), he has possessed a security clearance since 1982, and his drug convictions occurred after he was granted a security clearance. Applicant's overall conduct pertaining to his illegal substance abuse falls within Drug Involvement DC 25. (a) (any drug abuse), (c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution), and (g) (any illegal drug use after being granted a security clearance).

After considering the lack of any independent evidence as to Applicant's past or current drug usage, together with Applicant's lack of credibility, I can not conclude that any MC applies under this Guideline.

Accordingly, Paragraph 3 Guideline H of the SOR is concluded against Applicant.

Guideline E - Personal Conduct

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government untruthful, incomplete information, regarding his arrests for drug and alcohol usage in a SCA, executed on March 2, 2006.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to the Government, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, based on Applicant's overall history of criminal conduct, my inability to see the Applicant and judge his veracity in person, and the lack of any witness to provide testimony regarding Applicant's character, I can find no reasonable explanation for Applicant's failure to provide this very significant information to the Government on the SCA, and I must conclude that Applicant knowingly and willingly failed to give complete, honest information to the Government.

In reviewing the Disqualifying Conditions (DC) under Guideline E, I conclude that DC16. (a) applies because Applicant deliberately provided false and misleading information to the Government in a SCA. No Mitigating Condition applies under this Guideline. As a result of the misinformation that Applicant provided to the Government, his conduct exhibits questionable judgement, unreliability, and a lack of candor. I resolve Guideline E against Applicant.

On balance, it is concluded that the Applicant has not overcome the Government's evidence opposing his request for a security clearance. Accordingly, the

evidence supports a finding against Applicant as to the allegations expressed in Paragraphs 1 through 4 of the Government's SOR.

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): "(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) 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 eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I have considered the potentially disqualifying and mitigating conditions under Guidelines J, G, H, and E, in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above, including the questionable credibility of Applicant and the lack of any independent evidence on his behalf, I find that the record evidence leaves me with serious doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For these reasons, I conclude Applicant has failed to mitigate the security concerns.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Subparagraph 1.g:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

Paragraph 3, Guideline H:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant

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.

Martin H. Mogul
Administrative Judge