



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-07483
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Tom Coale, Esquire, Department Counsel
For Applicant: *Pro Se*

May 29, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted a Security Clearance Application (SF 86), on January 5, 2006. On October 31, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline, 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 acknowledged receipt of the SOR on December 22, 2008 and answered it on the same day. He requested a hearing before an Administrative Judge through Counsel. I received the case assignment on April 2, 2009. DOHA issued a notice of hearing on April 15, 2009, and I convened the hearing as scheduled on May 13, 2009. The government offered Exhibits (GE) 1 through 6, which were received without objection. Applicant testified on his own behalf. He submitted Exhibits (AE) A

through C, without objection. DOHA received the transcript of the hearing (Tr.) on May 26, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated December 18, 2008, Applicant admitted the factual allegations in ¶¶ 1.a-1.b but denied 1.c of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is 33 years old. He has never been married and has no children (Tr. 1). He graduated from high school in 1994 and received his undergraduate degree in 2002. He has never held a security clearance. He has been with his current employer for three years (Tr. 17).

In June 2000, Applicant was charged with Trespass Voyeurism. He was walking around aimlessly in a neighborhood. Someone reported a suspicious person and the police were called. He was arrested for looking in bedroom windows. He admits that he had previously done the same thing. He acknowledged at the time that it was a "stupid thing to do." He pled guilty to a misdemeanor for trespassing and paid a fine of \$300. The court ordered counseling (GE 2).

Applicant consulted with a psychiatrist per a court order. He had been wrestling with several issues and had already sought some counseling. He continued with the same physician. He also sought ecclesiastical advice and counsel based on the incident. He attended counseling for a period of three or four months on a bi-weekly basis (Tr. 32). He did not receive a diagnosis from the counselor (GE 4).

In 2005, Applicant again visited a counselor on his own accord. He was experiencing a stressful time with relationships and his life goals (GE 4). He acknowledged that he was also dealing with some anger and frustration (Tr. 33). He discussed his problems with his church counselors as well as his parents. He realized that he needed some guidance in his personal life (Tr. 33) and was very open to receiving help. He attended sessions for approximately three months.

Applicant completed a security clearance application in January 2006 (GE 1). His supervisor sat at a computer and she read the questions to Applicant. He responded to each question and she entered the data (Tr. 39). When she asked about Section 23 (concerning a police record), Applicant told her he had a trespassing conviction in 2000. He elaborated that it was a Class C misdemeanor. His supervisor told Applicant that no derogatory information was found during his background employment investigation. She entered a "no" for that section. Applicant admitted that this made him uncomfortable. He was expecting more questions concerning the facts of the incident. At the same time, he believed he gave her the criminal disposition and she chose not to enter it into the application (Tr. 20). Applicant stressed that she had a strong personality and he decided

not to make any more comments to her about the incident since she was the person in charge of security issues. He acknowledges that he signed the application but did not read the entire form (Tr. 46).

Applicant was credible in his explanation at the hearing that he was not familiar with the security clearance process or the application. He relied on his supervisor's expertise in the matter. He concedes that if he had completed the application himself, he would have entered the 2000 trespass conviction. At the hearing, he acknowledged that it was his responsibility. However, he answered to the best of his ability and trusted the expertise of his supervisor (Tr. 49).

Applicant completed his formal employment application on September 29, 2005. The application asked for detailed information. He clearly answered a question concerning any convictions to a felony or misdemeanor on the application with a "yes" and wrote trespassing - September 2000 (AE B).

Applicant also completed an Application for Licensure (Unarmed Private Security Officer) on December 6, 2005. He disclosed the 2000 conviction to the State for his license. He attached the printout from the case to the Application Licensure (AE C).

Applicant was extremely candid at the hearing. He explained that since this incident with the security application, he has had trust issues with his employer. He believed he had given sufficient information to his employer about the embarrassing incident and did mention to the background investigator that he would prefer "not to have anyone at [his] place of employment know that information". However, Applicant decided to provide them with the same information that he provided on his State application. He presented copies of the police report and court documents to his Operations Manager (AE A).

At the hearing, Applicant was also extremely open about his one charge and conviction for trespass in 2000. He answered all questions and was not evasive. He explained his humiliation about the episode. Applicant has not had any further incidents of any kind. He believes that he has learned important things about himself and has a standard of integrity. He explained that he wanted the hearing to defend his honor and commitment to his work.

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 E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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 describes conditions that could raise a security concern and may be disqualifying:

(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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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 indicting that the person may not properly safeguard protected information is another disqualifying condition; and

(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 professional, or community standing.

Applicant's 2006 security clearance application did not contain his 2000 arrest and conviction for Trespass for Voyeurism. Applicant disclosed the conviction in his employment application for "trespass" with no details about the specifics. When his supervisor asked him to respond to Section 23 on the security clearance application, he told her that he had a conviction for a misdemeanor trespass. She did not enter the information. Applicant, although uncomfortable, relied on her judgment and expertise in the security process and signed the application. He knew that he had disclosed the information to her verbally and on his employment application. He was not familiar with the security clearance process. Thus, AG ¶16(a) and 16(b) do not apply.

In this case, Applicant was found guilty of Trespass Voyeurism in June 2000. He admits that he walked around a neighborhood on several occasions before this incident and looked in bedroom windows. He was embarrassed about the incident and knows it was a stupid thing to do. Thus, AG ¶16(c) (d), and(e) apply.

Under AG ¶ 17, the following conditions could mitigate the government's security concerns:

(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

I find that Applicant has mitigated the personal conduct concern in this case. He completed court ordered counseling for the 2000 incident. This is the only conviction Applicant on his record. He continued counseling in 2005 and has discussed the incident with his parents and church advisors as well as his counselors. He has disclosed the specific facts of the arrest and conviction with his employer. Applicant was completely candid at his hearing. He accepted responsibility for his actions. In this case, AG ¶ 17(c), (d), and (e) are applicable.

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) 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 eligibility for 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. Applicant is a hard-working, earnest young man. He was very candid and open at the hearing. He acknowledged that he did a very stupid thing and that he cannot change the past. He wants to move on. He likes his position and wants to maintain his position.

Applicant relied on his supervisor's expertise when completing the security clearance application. He told her about a trespass conviction and also disclosed it on an employment application and an application for a state license for a security guard position. His license was granted and he has been working for the company for three years. He had no intention to deliberately deceive the Government.

Applicant obtained counseling and has addressed personal issues. He advised his church elders and his parents about the 2000 incident. He has given the complete court document to his Operations Manager. He was credible at the hearing and also very sincere in acknowledging his mistakes and accepting responsibility for his actions.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility, judgment, and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from 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
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	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 .

NOREEN A. LYNCH
Administrative Judge