



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 07-09576
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

August 14, 2009

Decision

LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on January 29, 2007. On December 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J 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 acknowledged receipt of the SOR, dated December 8, 2009, and elected to have his case decided on the record in lieu of a hearing. Department Counsel submitted the Government's written case on April 17, 2009. Applicant received a copy of the File of Relevant Material (FORM) on May 22, 2009. Applicant did not submit any additional information. I received the case assignment on August 3, 2009. The

Government submitted nine items in support of its case. Based upon a review of the record, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, dated March 9, 2009, Applicant admitted the factual allegations in ¶¶ 1.a. through 1.f, and 2.a. through 2.c of the SOR. He did not provide any additional information for the record.

Applicant is a 58-year-old employee of a defense contractor. He graduated from high school in June 1970. From February 1971 until December 1972, he served on inactive reserve in the United States Army (USA). He is divorced and has one adult child. Applicant has been employed as a warehouse specialist with his current employer since October 2000 (Item 4).

In 1991, Applicant was arrested for sexually molesting the teenage daughter of his former girlfriend (Item 3). He was charged with four counts of indecent liberties with children (Felony). He pled guilty and was convicted of indecent liberties and indecent liberties with a juvenile (Item 7). Two counts were Nolle Prossed.

In June 1996, Applicant was arrested for profane, threatening language over a public airway (misdemeanor) and burning or destroying a dwelling (felony). During a phone call argument with his girlfriend, Appellant threatened to beat her up and to burn down her house (Item 3). Both charges were Nolle Prossed.

In 1997, Applicant was arrested and charged with stalking (felony). The charges were later dismissed. In October 1997, Applicant was charged with Failure to Appear (misdemeanor). The charges were later dismissed (Item 6).

In 1998, Applicant was charged with driving under the influence (DUI). He attended a Christmas party. He drove home after drinking at the party and was stopped by the police for a headlight violation. He appeared in court and was convicted of DUI (Item 8). He was fined \$250.

In May 2007, Applicant was arrested for trespassing (misdemeanor). This happened when he arrived at a girlfriend's home and waited for her to come home. She was angry that he was there trying to confront her about dating other people (Item 9). The charges were later dropped.

Applicant completed a Security Clearance Application on January 29, 2007. He answered Section 23(d) concerning charges or convictions of a felony offense regarding his criminal history by listing a 1999 DUI conviction. He did not disclose the other arrests that resulted in felony charges in 1996 and 1997, nor his 1992 conviction for indecent liberties. Applicant admitted that he falsified his security clearance application (Item 3). He did not explain or give any rationale.

Applicant was interviewed by a Department of Defense (DOD) investigator in April 2008 (Item 5). He acknowledged and admitted the behavior that resulted in his series of arrests.

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, 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

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “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.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying, “(a) a single serious crime or multiple lesser offenses,” and “(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

Applicant admitted to his criminal history. He was arrested in 1991, 1996, 1997, 1998, and 2007. He was convicted of DUI in 1998. In 1991, Applicant was arrested and found guilty of two felony charges. AG ¶ 31(a) and (c) apply in this case.

AG ¶ 32 provides conditions that could mitigate security concerns:

(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;

(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 has not provided any mitigation for his criminal behavior. He has a pattern of criminal activity from 1991. Applicant's last incident of criminal conduct was in May 2007. This is too soon to find that he is successfully rehabilitated. There is no evidence in the record that Applicant received any counseling to suggest that this behavior would not occur again in the future. Thus, AG ¶ 32(a) and (d) do not apply in this case.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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 cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 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 eligibility or trustworthiness, or award fiduciary responsibilities" is potentially disqualifying.

Applicant only disclosed his 1999 DUI on his security clearance application in response to Section 23 concerning his police record. He acknowledged that he omitted other offenses. He admitted that he had a deliberate intent to falsify his answers to the questions. Applicant admitted to his falsifications in his answer. He did not provide any explanation or rationale to supplement the record.

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 common sense 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 served in the Army for a one year. He has been employed in a variety of positions. He provided little information upon which to base a favorable "whole person" analysis.

Applicant was a mature man when he committed the sexual offenses with a juvenile. He has a pattern of criminal activity involving women. He deliberately falsified

his security clearance application in 2007. His last incident of criminal behavior was in 2007.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his criminal conduct and 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 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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

NOREEN A. LYNCH
Administrative Judge