



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
-----) ISCR Case No. 06-25322
SSN:-----)
)
Applicant for Security Clearance)

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: Todd Conorman, Esq.

March 24, 2008

Decision

CURRY, Marc E., Administrative Judge:

On October 18, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J and E. 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.

DOHA received Applicant's SOR answer on December 10, 2007, and requested a hearing. The case was assigned to me on January 7, 2008. DOHA issued a notice of hearing on January 24, 2008 scheduling it for February 5, 2008. The case was then rescheduled for February 6, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

Applicant admitted all of the SOR allegations. He is a 50-year-old married man with two adult children. He is currently attending college (Tr. 63). He served in the U.S. Army from 1975 through his retirement in 2004 when he was honorably discharged at the rank of command sergeant major. Since retiring, he has worked for a defense contractor as a transportation liaison for mobilization and demobilization operations on a military base. He supervises 12 employees.

Applicant is highly respected on the job. His supervisor characterizes his performance as “superb in every regard” (Recommendation Letter, dated December 5, 2007, as included in Answer at 4). According to a coworker, he exhibits “high standards of integrity, honesty, responsibility, and commitment” (Exhibit D). He volunteers at church and participates in various youth mentor programs (Answer at 2).

In 1998, Applicant was arrested and charged with secret peeping. He was tried in a state court and found guilty (Tr. 65). At his request, the court then granted a prayer for judgment,¹ and the case was continued without an entry of guilt or a conviction. Also, Applicant was ordered to serve one year of unsupervised probation (Tr. 70). Applicant’s unit took no punitive actions against him after the incident, and it was not reflected in that year’s annual performance evaluation (Tr. 41).

In 2003, Applicant removed a computer and stereo equipment from a soldier’s room on a military base. The soldier reported the theft, and the military police contacted Applicant. He was charged with burglary and larceny of private property. Before the court-martial, he returned the property to the soldier (*Id.*). Applicant pleaded guilty to the burglary charge, and was found guilty of a lesser charge, wrongful appropriation of property. He was fined \$6,000 (Answer at 1) and re-assigned to another unit.

Applicant did not take the property with the intention of keeping it. Instead, he took it to teach the soldier a lesson about leaving her room unlocked (Exhibit 3 at 2). He acknowledged, in hindsight, that “it was a dumb thing to do,” but reasoned it would have more impact on the soldier for her to notice her property was missing “versus telling [her] that she had them unsecured.” The soldier was not in his chain of command.

Applicant completed a security clearance application in June 2005. He answered “no” to Question 25 (*Your Police Record - Military Court In the last 7 years, have you been subject to court martial or other disciplinary proceedings under the Uniform Code of Military Justice?*). His clerk prepared the rough draft of the application (Tr. 16). It was an extremely busy time when she completed the draft application because a major troop redeployment was occurring at the same time another company was assuming their contract (Tr. 16 - Clerk’s testimony). She had to complete draft applications for 11 other

¹According to Applicant’s counsel and department counsel, both of whom are licensed in the state where the crime occurred, a prayer for judgment is an option available for first-time offenders whereupon they can avoid sentencing, if granted at the judge’s discretion.

employees simultaneously (Tr. 18 - Clerk's testimony). Before inputting Applicant's family and employment history into the computer, she double-checked it with him. She did not ask him about any derogatory criminal information because she "just didn't think that anything like that had ever been in [Applicant's] past, or anything," (Tr. 18) and she "assume[d] that he would check it over and make any corrections if it wasn't right" (Tr. 25).

Applicant testified that he "sort of glanced through" the application but did not check it thoroughly before executing it (Tr. 32). In his Answer, Applicant stated "I admit to willfully omitting information regarding court-martial proceedings while a member of the U.S. Army" because "this was an extremely embarrassing time in my military career" (Answer at 1). He omitted the information "in an attempt to obtain a security clearance" (Answer at 2).

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 common sense decision. According to AG ¶ 2(c), the entire process is a 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. 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.

Analysis

Guideline E, Personal Conduct

Under this guideline, "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" (AG ¶15). Applicant's omission of his court-martial from his 2005 security clearance application raises the issue of whether 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 clearance eligibility or trustworthiness, or award fiduciary responsibilities," applies. In Applicant's Answer, he admitted unequivocally to falsifying the security clearance application, and he provided an explanation for the falsification. Consequently, I do not believe his testimony that the omission was unintentional.

In reaching this conclusion, I considered Applicant's clerk's testimony. Although she testified credibly, it had little probative value in light of Applicant's admission in his Answer. AG ¶ 16(a) applies without mitigation.

Guideline J, Criminal Conduct

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness" (AG ¶ 30). Also, "by its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations" (*Id.*). Here, Applicant's 1998 criminal charge, his 2003 court-martial, and his security clearance falsification raise the issue of whether AG ¶ 31(a), "a single, serious crime or multiple lesser offenses," and AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," apply.

The 1998 offense was remote in time and the 2003 offense happened under unusual circumstances that are unlikely to recur. Applicant is attending college, has a good employment record, and is active in his community. However, his 2005 falsification, perpetuated at the hearing, constitutes an additional criminal offense under 18 U.S.C. 1001. By undermining Applicant's credibility, it casts doubt upon his testimony regarding the surrounding circumstances of the earlier criminal conduct. I conclude Applicant has engaged in an unacceptable pattern of recurrent criminal conduct that outweighs the evidence of rehabilitation. None of the mitigating conditions apply, and his criminal conduct remains a security concern.

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.”

I considered the whole person factors in my evaluation of the Criminal Conduct section of the Decision. I conclude Applicant has not mitigated the criminal conduct and personal conduct security concern.

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
Subparagraphs 1.a - 1.c:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

MARC E. CURRY
Administrative Judge