



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
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)	
[NAME REDACTED])	ISCR Case No. 14-04053
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden Murphy, Esq., Department Counsel
For Applicant: *Pro se*

06/16/2015

Decision

MALONE, Matthew E., Administrative Judge:

Applicant's misconduct while in the military more than 10 years ago is unlikely to recur and no longer poses a security concern. An allegation that Applicant was either reprimanded or terminated for workplace misconduct in 2012 was not established. Thus, Applicant's omission of that workplace misconduct did not constitute a deliberate false official statement. His request for access to classified information is granted.

Statement of the Case

On February 4, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to renew his eligibility for access to classified information. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is clearly consistent with the

national interest for Applicant to hold a security clearance.¹ On October 1, 2014, DOD adjudicators issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guideline² for personal conduct (Guideline E).

On October 27, 2014, Applicant responded to the SOR (Answer) and requested a decision without a hearing. However, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) timely requested a hearing,³ and the case was assigned to me on March 3, 2015. I convened a hearing on March 25, 2015. Department Counsel presented Government Exhibits (Gx.) 1 and 2.⁴ Applicant testified and proffered Applicant's Exhibit (Ax.) A. He also presented one witness. All exhibits were admitted without objection. DOHA received the hearing transcript on April 2, 2015.

Findings of Fact

Under Guideline E, the Government alleged that in 2012, Applicant used a company cell phone for personal calls, amassing a \$2,500 phone bill, which he paid (SOR 1.a); that in 2008, he was terminated from his defense contractor job for giving a false statement about unauthorized possession of alcohol in quarters while assigned to an overseas work site (SOR 1.b); that in 2005, he was discharged from the military under other than honorable (OTH) conditions for misconduct due to drug use (SOR 1.c); that the drug-related misconduct alleged in SOR 1.c was the basis for non-judicial punishment (NJP) in 2004, for which he was reduced in rank, fined one-half of his pay for two months, restricted for 30 days and assigned 30 days extra duty (SOR 1.d); that his drug-related misconduct in 2004 consisted of possession of one-half a gram of marijuana and occurred while he held a security clearance (SOR 1.e); and that Applicant deliberately made a false official statement when he did not disclose that he left the defense contractor job referenced in SOR 1.a under adverse circumstances, specifically, his misuse of a company cell phone (SOR 1.f).

Applicant admitted the allegations at SOR 1.a - 1.e, and denied SOR 1.f. As to SOR 1.b, Applicant took issue with the stated reason for his OTH discharge but otherwise admitted the nature of his discharge. In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 31 years old and works as an electronics technician III for a defense contractor in support of various military installations in the United States. He was hired

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

² The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

³ See Directive, Section E3.1.7.

⁴ A list of the Government's exhibits is included in the record as Hearing Exhibit (Hx.) 1.

for that job in December 2013. His most recent performance appraisals show he is an excellent worker. A co-worker who has known Applicant for more than ten years recommends him without reservation for a position of trust. (Gx. 1; Ax. A; Tr. 82 - 92)

Applicant and his wife have been married since August 2012. Applicant has two children, ages 2 and 8, and two stepchildren, ages 10 and 12. When Applicant's wife was pregnant with his youngest child, he was assigned to a remote job site overseas. She experienced complications during the pregnancy and was eventually placed on full bed rest. (Gx. 1; Gx. 2; Tr. 43 - 44)

Applicant enlisted in the U.S. Marine Corps in September 2001. He was trained as an aviation radio repairman and was deployed once to Iraq and once to Afghanistan in support of U.S. combat missions. Applicant held a security clearance throughout his Marine Corps enlistment. In June 2004, during his deployment to Afghanistan, Applicant was found to be in possession of a small amount of marijuana. Applicant did not use marijuana and claimed that he found a small baggy of the drug while taking a break on the roof of the building where his unit was housed. In November 2004, after having finished his deployment and returned with his unit to the United States, Applicant was given NJP for violating Uniform Code of Military Justice (UCMJ) Article 112(A) (Wrongful Possession of a Controlled Substance) for possessing the small bag of marijuana in Afghanistan. He was punished as alleged in SOR 1.d. In July 2005, an administrative separation board decided to discharge Applicant as alleged in SOR 1.b. By that time, Applicant had regained his previous rank. While in the Marines, Applicant earned a Good Conduct Medal just before the June 2004 incident. Applicant disclosed his OTH discharge as required when he submitted his 2014 EQIP. (Gx. 1; Gx. 3; Tr. 33 - 39, 48 - 55)

After his discharge in 2005, Applicant worked in restaurants and bars until October 2006, when he was hired by a defense contractor for electronic systems installation work. In April 2007, he was hired by the employer referenced in SOR 1.b for similar work in Afghanistan. While at the job site, Applicant lived in a dormitory-style room with three other civilian workers. A refrigerator in the room was primarily used to store water bottles. However, during a routine "health and safety" inspection by military personnel, one of the bottles was found to contain a clear alcoholic beverage, likely vodka, in violation of standing orders against possession or consumption of alcohol in Afghanistan. Applicant denies knowing the alcohol was there or that he knew to whom it belonged. The military demanded that Applicant's company take disciplinary action or risk losing its contract. Applicant was due to finish his deployment and return home, and he had decided to leave the company, so he offered to take the blame. In his mind, the end of his employment in August 2008 was voluntary, but he acknowledges that company records may have characterized his departure as involuntary. The company has since been bought by a large, nationally-known corporation. (Gx. 1; Gx. 2; Tr. 39 - 43, 58 - 67)

Applicant worked for the company referenced in SOR 1.a from March 2009 until August 2012. His work required him to deploy to a remote overseas location for several

months at a time. Basic utilities and internet service are unreliable there, so his company issued Applicant and his fellow employees cell phones that could be used to call the United States for business purposes only. Applicant learned that his wife was pregnant shortly after he arrived there. Because the pregnancy became complicated, he wanted to stay in close touch with her. The only reliable means of communication at his disposal was the company-issued cell phone. Applicant began using the phone to call his wife but he did not tell his supervisor. Eventually, his company presented Applicant with a \$2,500 cell phone bill, demanded that he pay it, and ordered him to not use it for personal reasons again. A summary of Applicant's subject interview on July 2, 2014, shows that no letter of reprimand or other disciplinary action was taken against Applicant. He left that job in August 2012 to be with his family. After a long period of unemployment, Applicant was hired by his current employer. (Gx. 1; Gx. 2; Tr. 44 - 46, 76 - 77)

When Applicant submitted his EQIP to renew his eligibility for access to classified information, he answered "no" to a question in Section 13 regarding his employment with the company referenced in SOR 1.a. Specifically, Applicant was asked to disclose if he had been reprimanded, disciplined or suspended while employed there. Applicant stated his reason for leaving his previous job was to spend more time with his family but made no mention of his misuse of a company cell phone. It was alleged in SOR 1.f that Applicant intentionally failed to disclose the matter of his company cell phone bill. However, on the facts presented, Applicant was not required to disclose this information because he was not reprimanded, disciplined or suspended as a result of his actions. (Answer; Gx. 1; Gx. 2)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁵ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the guidelines. Commonly referred to as the "whole-person" concept, those factors are:

(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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable

⁵ See Directive. 6.3.

guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.⁷

A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the Government.⁸

Analysis

Personal Conduct

Applicant denied the allegations at SOR 1.b and 1.f. As such, these are controverted facts and the burden remains with the Government to present information to support these allegations.

As to SOR 1.b, the basis for this allegation is a summary of a subject interview conducted by telephone with a Government investigator on March 27, 2014. Applicant recounted the same version of events as he provided in his response to the SOR and at his hearing. The interviewer did not characterize Applicant's statements as false or inconsistent, and the discussion focused on whether Applicant left his job voluntarily or was fired. The file contains no statements by others regarding these events and does not indicate that Applicant ever gave a statement about the alcohol found in his shared quarters at or near the time of the inspection. SOR 1.b is resolved for Applicant.

As to SOR 1.f, available information also is not sufficient to support the allegation that Applicant deliberately withheld relevant and material information in response to one of the EQIP Section 13 questions about his employment at the company referenced in

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; AG ¶ 2(b).

SOR 1.a. No reprimand, suspension, or other disciplinary action resulted from his misuse of a company cell phone in 2012. Likewise, there is no indication that Applicant left his previous job under adverse circumstances. Finally, SOR 1.a did not allege that he was disciplined for his misuse of the cell phone. SOR 1.f is resolved for the Applicant.

As to the remaining SOR allegations, the record is sufficient to raise a security concern about Applicant's personal conduct. That concern is addressed at AG ¶ 15, as follows:

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.

In 2004, Applicant was involved with illegal drugs while holding a security clearance as part of his duties in the Marines and while in a combat zone. He was punished through NJP in November 2004, and he was administratively separated from the Marine Corps in June 2005 with an OTH discharge. This information was not raised as a concern under the adjudicative guidelines for drug involvement and criminal conduct. Nonetheless, under Guideline E, the record requires consideration of the disqualifying condition at AG ¶ 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.

Drug involvement while holding a security clearance raises a serious concern about a person's judgment. However, these circumstances occurred more than ten years ago and there is no direct evidence, aside from Applicant's admission that he was charged and disciplined as alleged, showing that Applicant used, purchased or sold drugs at that time. Based on the passage of time, the isolated nature of the alleged conduct, and the low probability such conduct will recur, the SOR 1.c - 1.e allegations are mitigated by AG ¶ 17(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.

As to SOR 1.a, Applicant misused his employer's cell phone and amassed a significant bill. His supervisor made him pay the bill, but there is no indication Applicant

was disciplined or reprimanded for his conduct. It also appears that he left that company voluntarily to spend time with his wife and children rather than work overseas again. The misuse of his employer's cell phone is addressed by the disqualifying condition at AG ¶ 16(d):

credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to consideration of: . . . (4) evidence of significant misuse of Government or other employer's time or resources.

By contrast, Applicant's conduct did not result in any disciplinary action and is unlikely to recur. Available information shows this conduct is mitigated by AG ¶ 17(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 it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

On balance, Applicant's current circumstances are stable and productive. He did not mislead the Government about any of the potentially adverse information in his background, and the events in SOR 1.a and 1.c - e are unlikely to recur. The security concerns about Applicant's personal conduct are mitigated.

In addition to evaluating the facts presented, and having applied the appropriate adjudicative factors under Guideline E, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has a solid record in his current job, and a coworker and friend of more than ten years regards Applicant as reliable and trustworthy. A fair and commonsense assessment of this record shows that Applicant is a mature, responsible individual who can be trusted with sensitive information. On balance, he has mitigated the security concerns raised by the Government's information.

Formal Findings

Formal findings 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
Subparagraphs 1.a - 1.f:	For Applicant

Conclusion

It is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge