



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-05198

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel

For Applicant: Ryan C. Nerney, Esq.

10/27/2015

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On December 23, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on January 20, 2015, and requested a hearing before an administrative judge. The case was assigned to another administrative judge on May 27, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 11, 2015, scheduling the hearing for July 13, 2015. The hearing was continued at Applicant's request. The case was reassigned to me on June 26, 2015.

DOHA issued another notice of hearing on July 23, 2015, scheduling the hearing for August 19, 2015. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 3 were admitted in evidence without objection. The objection to GE 4 was sustained. Applicant testified and submitted Applicant's Exhibits (AE) A, A(1), and B through E, which were admitted without objection. The record was held open for Applicant to submit additional information. He did not submit any additional material. DOHA received the hearing transcript (Tr.) on August 27, 2015.

Findings of Fact

Applicant is a 29-year-old employee of a defense contractor. He has worked for his current employer since September 2013. He served in the U.S. military from 2004 until he was discharged in June 2013 with a general under honorable conditions discharge due to a pattern of misconduct. He seeks to retain his security clearance, which he has held since he served in the military. He has an associate's degree. He is divorced. He has three children.¹

Applicant had a series of disciplinary problems while he was in the military. In July 2009, he received nonjudicial punishment (NJP) under Article 15 of the Uniform Code of Military Justice (UCMJ) for violating Article 92 for failing to obey a lawful order to refrain from contact with a female service member. He was reduced a pay grade, ordered to forfeit \$1,063 pay per month for two months, ordered to perform extra duties for 15 days, and he was reprimanded. The reduction and forfeitures were suspended.²

Applicant received a letter of reprimand in December 2009 for having a physical confrontation with his spouse. Applicant stated that he and his wife were arguing. He stated that he went into another room to defuse the situation, but she followed him.³ He stated in his response to the letter of reprimand:

I sat on the stool and began working on my homework and continued to block her out, until I got upset. At which point, I stood up, faced her, held her arms with my hands and aggressively walked her across the room.⁴

Applicant received a letter of reprimand in August 2011 for driving a motorcycle in a reckless manner and exceeding the speed limit. He received a letter of counseling in January 2012 for reporting 38 minutes late to his appointed place of duty. He received a letter of reprimand in March 2012 for reporting an hour late to his appointed place of duty.⁵

¹ Tr. at 16-19, 39-40; GE 1, 2; AE A1, C.

² Tr. at 19-21; Applicant's response to SOR; GE 1; AE A.

³ Tr. at 33-36; Applicant's response to SOR; AE A.

⁴ AE A.

⁵ Tr. at 37-38; Applicant's response to SOR; AE A.

Applicant received NJP in December 2012 for violating Article 92 of the UCMJ by willfully disobeying an order to complete a motorcycle safety course before riding his motorcycle. He was reduced a pay grade and ordered to perform extra duties for seven days. The reduction was suspended.⁶

Applicant was issued traffic citations in 2012 for: 1) expired license plate; 2) disobeying turn lane; 3) basic speeding; 4) registration violation; 5) speeding 11-20 miles per hour over the speed limit; and 6) no proof of insurance. He did not pay the citations or appear in court, and an arrest warrant was issued. Applicant and several other motorcycle riders were stopped by the police in February 2013 for excessive noise. Applicant did not have a valid license plate on his motorcycle. The police officer arrested Applicant for the outstanding warrant. Applicant paid the fines and fees for the citations in March 2013.⁷

In February 2013, Applicant's commanding officer determined that Applicant violated Article 90 of the UCMJ by disobeying the commanding officer's order not to ride his motorcycle. That conduct violated the terms of the suspended reduction from the December 2012 NJP. Applicant was reduced a pay grade.⁸

Applicant received NJP in March 2013 for violating Article 86 of the UCMJ by absenting himself without authority from his place of duty for two days. The two days were the days Applicant was in jail after he was arrested on the warrant in February 2013. He was reduced a pay grade, ordered to forfeit \$1,007 pay per month for two months, and reprimanded. The forfeitures were suspended. By a separate action, Applicant's security clearance was suspended.⁹

Applicant indicated that he has had no additional arrests or citations since the 2013 incidents. He stated that his motorcycle is now properly registered and insured. He has a valid driver's license. He believes his actions did not constitute a pattern of misconduct. Instead, he views them as isolated incidents. He believes he has learned from his mistakes, and he asserts they will not be repeated.¹⁰

Applicant deployed twice while he was on active duty in support of Operations Iraqi Freedom and Enduring Freedom. He also worked in combat zones for his current employer. He submitted several documents attesting to his excellent job performance.¹¹

⁶ Tr. at 21-26; Applicant's response to SOR; GE 1; AE A.

⁷ Tr. at 27-30; Applicant's response to SOR; GE 2; AE A.

⁸ Tr. at 26-27; Applicant's response to SOR; GE 1; AE A.

⁹ Tr. at 26-29, 38-39, 45-46; Applicant's response to SOR; GE 1; AE A.

¹⁰ Tr. at 31-32, 36, 40-44; Applicant's response to SOR; AE E.

¹¹ AE A, A1, B-D.

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are to be used 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, administrative judges apply the guidelines 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(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."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

The security concern 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 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. The following disqualifying conditions are potentially applicable:

(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; 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 personal, professional, or community standing.

Applicant's disciplinary problems in the military, his traffic-related offenses, and his criminal conduct reflect questionable judgment and an unwillingness to comply with rules and regulations. They also created a vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

SOR ¶ 1.i alleges that Applicant's security clearance was suspended due to his military pattern of misconduct. SOR ¶ 1.k alleges that Applicant was discharged from the military due to a pattern of misconduct. Those allegations reflect the consequences of conduct already alleged. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3. SOR ¶¶ 1.i and 1.k are concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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.

There is no evidence of any citations, arrests, or convictions since February 2013. However, Applicant exhibited poor judgment and a disregard for the law on multiple occasions. I am unable to determine that similar incidents are unlikely to recur. The conduct continues to cast doubt on Applicant's current reliability, trustworthiness, and good judgment. AG ¶¶ 17(c) and 17(d) are not applicable. AG ¶ 17(e) is partially applicable. I find that personal conduct concerns remain despite the presence of some mitigation.

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 relevant 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. I have incorporated my comments under Guideline E in my whole-person analysis.

I considered Applicant's military and civilian service, and particularly his deployment to combat zones. However, there are numerous incidents of poor judgment and disregard for the law.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct 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 E:	Against Applicant
Subparagraphs 1.a-1.h:	Against Applicant
Subparagraph 1.i:	For Applicant
Subparagraph 1.j:	Against Applicant
Subparagraph 1.k:	For 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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge