

DATE: January 12, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-00108

DECISION OF ADMINISTRATIVE JUDGE

JOAN CATON ANTHONY

APPEARANCES

FOR GOVERNMENT

Catherine Engstrom, Esq., Department Counsel

FOR APPLICANT

Allyson M. Fenton, Esq., Joseph V. Kaplan, Esq.

SYNOPSIS

Applicant, employed by a defense contractor, holds a top secret clearance, granted to him in 1996 while in military service. In 2001, as a civilian, he executed a security clearance application as a part of a periodic review of his security worthiness. In 2002, when interviewed by an investigator for the Defense Investigative Service about his application, he denied committing an indecent assault on his military roommate in 1997, even though he knew this to be true. Applicant further misled the investigator by asserting that his roommate had alleged the indecent assault in order to force him out as a roommate. Applicant's falsification and lack of candor raise serious security concerns. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On March 27, 2003, under the applicable Executive Order⁽¹⁾ and Department of Defense Directive,⁽²⁾ DOHA issued a Statement of Reasons (SOR), detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) of the Directive. Applicant submitted an answer on April 21, 2003, denying the allegations in the SOR and electing to have a hearing before an administrative judge. The case was assigned to me on July 1, 2003. On August 19, 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on September 8, 2003.

FINDINGS OF FACT

The SOR in this case contains one allegation of disqualifying conduct under Guideline E, Personal Conduct. Applicant denied the allegation in his Answer to the SOR.

Applicant is 28 years old. He served in the U.S. Air Force for approximately 2½ years, from early 1995 to September 1997. Applicant was granted a top secret clearance in February 1996 for the purpose of carrying out his military duties. (Tr. 36.) On March 28, 1997, Applicant committed an indecent assault on his roommate. (Tr. 47.) Applicant's

misconduct resulted in a nonjudicial punishment (NJP) under Article 15, Uniform Code of Military Justice. The record of the NJP proceeding identifies Applicant's misconduct as follows: "You did. . . on or about 28 March 1997, commit an indecent assault upon. . . a person not your wife by unbuttoning and unzipping his pants and then putting your hand underneath his stomach and trying to turn him over with intent to gratify your sexual desires." ⁽³⁾ (Ex. 8, at 1,3.)

On May 28, 1997, as a result of the NJP, Applicant was reduced in rank. On June 2, 1997, Applicant appealed. His appeal was denied by action dated June 5, 1997. (Ex. 8.) On June 26, 1997, Applicant was notified by his commander that he was recommending Applicant's discharge from the Air Force. Applicant sought legal counsel, and on June 30, 1997, waived his right to present his case before an administrative discharge board contingent on his receipt of no less than a general discharge. On October 29, 1997, Applicant received a general discharge under honorable conditions for a homosexual act. (Ex.5.)

After his discharge from the Air Force, Applicant went to work for his present employer as a government contractor, using the top secret clearance he had held during his military service. ⁽⁴⁾ (Tr. 36.) In June 2001, he completed a security clearance application (SF-86) as a part of a periodic five-year review of his security worthiness. He was interviewed by an investigator for the Defense Investigative Service, and on May 8, 2002, he provided a signed, sworn statement discussing his financial situation. The signed, sworn statement made no mention of the conduct which caused him to receive a non-judicial punishment and to accept a general discharge.

At the hearing, the Government presented as a witness the Defense Investigative Service investigator who had interviewed Applicant in May 2002. In direct examination, the witness stated he was currently retired but that prior to his retirement, he had worked as a contract investigator for the Air Force for 12 years and had carried out approximately 120 applicant interviews each year. He stated that he had interviewed Applicant in May 2002, and, in accord with his regular practice, he made a record of what Applicant had discussed with him. The investigator identified the following paragraph as a part of a summary he prepared of his first and second interviews with Applicant. (Tr. 21):

CRIMINAL CONDUCT

Subject related that as indicated on his security form, in 1997, while in the USAF, he was apprehended by military police for making sexual advances to his roommate. Subject related that he was questioned by military investigators extensively, and admitted that he was homosexual, but that the assault and advances did not take place and that he was in compliance with the military "Don't Ask Don't Tell Policy." Subject felt that his roommate used the story as a method to get rid of a roommate he suspected to be homosexual. Subject related he was convicted in a military courts martial of assault, was reduced in rank and was separated from the USAF with an Honorable Discharge under General Conditions. Subject believed it was the standard method the military used to remove homosexuals from their ranks. Subject did not feel he could be blackmailed or coerced based on his homosexuality, because all of his friends, family and coworkers know he is "gay."

(Ex. 9, at 11; Ex. F, at 4.) ⁽⁵⁾

In direct examination by his counsel, Applicant stated that he had told the investigator that he had received the NJP for assault on his roommate, that his roommate had fabricated the allegation of sexual assault, and that the acts described by the roommate never occurred. (Tr. 39-40, 41) ⁽⁶⁾ Applicant further stated that he told the investigator that he had received a general discharge and that the roommate had alleged assault because he didn't want Applicant as a roommate. (Tr. 39-40). Applicant denied stating to the investigator that he had been arrested by military police or that he had undergone a military court martial for the offense. He also denied telling the investigator that he believed his experience reflected normal practice for removing homosexuals from the military. (Tr. 41.)

In cross examination, Applicant admitted to committing an indecent assault against his roommate in March 1997 and to being discharged from the Air Force for a homosexual act. (Tr. 47, 50, 53.) He acknowledged that the discussion of the indecent assault incident with the investigator in May 2002 was the first time he had discussed the incident in relation to his security clearance. (Tr. 59.) Applicant's admission that he committed an indecent assault on his roommate contradicts the statement he made to the investigator that the assault never took place. Applicant's admission is incorporated herein as a finding of fact.

Applicant offered exhibits in support of his character, and he called three witnesses who testified to his positive work ethic and reputation for honesty and truthfulness. (Ex. A, B, C, D, E.)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

Enclosure 2 of the Directive sets forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

CONCLUSIONS

DOHA alleged in subparagraph 1.a. of the SOR that Applicant falsified material facts in an interview with a Defense Investigative Service investigator when he stated that he had not been involved in a homosexual advance on his roommate in March 1997, while a member of the United States Air Force, and that the roommate had fabricated the allegation that he had been the victim of an indecent assault by Applicant. Applicant's alleged falsification raises security concerns under Guideline E, Personal Conduct, of the Directive. Guideline E conduct raises security concerns because it involves questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations and could indicate that an applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

Pursuant to Guideline E, an unfavorable clearance determination will normally result when it is established by substantial evidence that an individual requesting a grant or continuance of a security clearance has not provided full, frank and truthful answers to lawful questions of investigators, security officials or other official representatives in connection with a personnel security or trustworthiness determination. E2.A5.1.1.2. Conditions that could raise security concerns and which may also be disqualifying include deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a personnel security or trustworthiness determination and personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress. E2.A5.1.2.3. and E2.A5.1.2.4.

Through Applicant's admissions, the Government has established that he did not provide full, frank and truthful answers to the investigator's lawful questions. When questioned by his counsel about what he told the investigator in May 2002, Applicant stated that he told the investigator about NJP. He said he told the investigator that his roommate had fabricated the allegation of sexual assault, that the acts described by the roommate never occurred, and that the roommate's motivation in alleging sexual assault was to cause his removal as a roommate. The record of investigation confirms that Applicant made these statements to the investigator, thus distorting and misrepresenting relevant and material facts in the findings and conclusions of the NJP proceeding. Under cross examination, Applicant admitted that he had committed an indecent assault upon his roommate, thus directly contradicting his own statements to the investigator and casting doubt on his credibility, capacity for truthfulness, and security worthiness.

A witness in a security clearance investigation attests, under penalty of perjury, that his statements are true and correct. A witness's speculations about the motivations of adversarial parties lack persuasive objectivity and weight and, indeed, can be used to obscure the truth from those who have an obligation to find it. The Appeal Board addressed this issue in ISCR Case No. 01-03132, at 3 (App. Bd. Aug. 8, 2002):

An interview conducted as part of a security clearance investigation is not a forum for an applicant to split hairs or parse the truth narrowly. The federal government has a compelling interest in protecting and safeguarding classified information. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The compelling interest includes the government's legitimate interest in being able to make sound decisions (based on complete and accurate information) about who will be granted access to classified information. An applicant who deliberately fails to give full, frank, and candid answers to the government in connection with a security clearance investigation or adjudication interferes with the integrity of the industrial security program.

Applicant has the burden of presenting evidence to rebut the Government's evidence against him or to extenuate or mitigate the security concerns raised by his Guideline E conduct. He argues that he used little or no force in carrying out the assault, and he suggests that the diminished use of force should be considered a mitigating factor in determining his security worthiness. His proffer is misplaced. This forum is concerned with Applicant's candor and truthfulness in a security clearance interview and not with reviewing matters previously determined in Applicant's NJP and discharge proceedings.

Applicant also argues that the government has not shown that the summary report prepared by the Defense Investigative Service agent is accurate. He points out that the investigator stated in the report that Applicant was arrested and convicted by court-martial for the indecent assault on his roommate, when in fact this did not occur. The record of investigation summary and the testimony of the investigator confirm that the investigator did not appear to understand the difference between a trial by courts-martial and a NJP. However, this confusion is insufficient to conclude that the entire report submitted by the investigator was inaccurate. Nothing in the record suggests that the investigator lacked the experience or expertise required to record what he was told in an interview, and Applicant's allegation of inaccuracy is insufficient to rebut the presumption of good faith and regularity which attends the actions of government officials as they carry out their official duties.

A review of the available mitigating conditions for Guideline E conduct indicates that subparagraph E2.A5.1.3.1. does not apply to the instant case. The information that Applicant falsified in his security clearance interview was pertinent to a determination of his judgment, trustworthiness, and reliability. Moreover, the record shows that Applicant advanced the falsification in his 2002 interview with the investigator, making it a recent and not isolated event. Thus, mitigating factor E2.A5.1.3.2. does not apply.

In my evaluation of the record, I have carefully considered each piece of evidence in the context of the totality of evidence and under all of the Directive guidelines that were generally applicable or might be applicable to the facts of this case. Under the whole person concept, I conclude that Applicant has not successfully overcome the Government's case opposing his request for a DoD security clearance. Accordingly, the allegation in subparagraph 1.a. of the SOR is concluded against the Applicant.

FORMAL FINDINGS

The following are my conclusions as to the allegations in the SOR:

Paragraph 1. Guideline E: AGAINST APPLICANT

Subparagraph 1.a.: Against Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony

Administrative Judge

1. Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.
2. Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.
3. In testimony, Applicant stated the allegation was incorrect and observed that the military adjudicator had accepted the roommate's version of what had happened and had not accepted his version. (Tr. 47-48.)
4. Applicant testified that his employer had neither revoked nor suspended his security clearance pending the outcome of this proceeding. (Tr. 46.)
5. Under cross examination, the investigator said he didn't know if a military court martial and an Article 15 punishment meant the same thing. (Tr. 23.)
6. Applicant later denied he told the investigator that the assault did not take place. (Tr. 43-44.) He said his roommate made up the allegation that he used force in the assault. (Tr. 44.) He also denied that he told the investigator he was apprehended by military police and convicted by a military court martial. (Tr. 43.)