

KEYWORD: Personal Conduct

DIGEST: Applicant was discharged from the U.S. Air Force in 1997 for a pattern of misconduct. Applicant reported his discharge on his security clearance application, but not the exact details of a nonjudicial punishment he received. Applicant's statement to a security investigator was not totally accurate. Applicant mitigated the personal conduct security concerns. Clearance is granted.

CASENO: 04-03349.h1

DATE: 03/27/2006

DATE: March 27, 2006

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-03349

DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant was discharged from the U.S. Air Force in 1997 for a pattern of misconduct. Applicant reported his discharge on his security clearance application, but not the exact details of a nonjudicial punishment he received. Applicant's statement to a security investigator was not totally accurate. Applicant mitigated the personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on 24 Mar 2005 detailing the basis for its decision-security concerns raised under Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in writing on 4 June 2005 and elected to have a hearing before an administrative judge. The case was assigned to me on 29 November 2005. On 10 February 2006, 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 hearing transcript (Tr.) on 16 February 2006.

FINDINGS OF FACT

Applicant is a 34-year-old test technician for a defense contractor. He has been married since October 1993 and has two children. Applicant's supervisor at his current position finds him to be capable, knowledgeable, and professional in all he does.

Applicant served in the U.S. Air Force from September 1989 until November 1997. Upon completion of his first enlistment in 1994, he received an honorable discharge. In 1995, he was admonished for failing to properly document maintenance work on an aircraft; counseled for taking home an electronic module (KYK-13) used to load cryptographic keys into electronic encryption machines; counseled for failing to complete training by the required date; counseled for missing duty without proper authorization; and punished, under Article 15, Uniform Code of Military Justice (UCMJ), for disorderly conduct and assault. In 1997, he received two reprimands for failing to report for duty at the appropriate time; a reprimand for making sexually harassing remarks; and a counseling for being late for a mandatory formation. Based on this conduct, he was separated from the service prior to the completion of his second enlistment, with a general discharge under honorable conditions, for a pattern of misconduct-conduct prejudicial to good order and discipline.

On 20 February 2002, Applicant completed a security clearance application (SCA) by certifying that his statements therein were "true, complete, and correct" to the best of his knowledge and belief, and by acknowledging that any knowing and willful false statement could be punished under 18 U.S.C. § 1001 by fine and/or imprisonment. Question 25 asked if, in the previous seven years, Applicant had been subject to disciplinary proceedings under the UCMJ to include nonjudicial punishment. Applicant answered "yes" and listed the nature of the offense as misconduct and the action taken against him as "discharge."

After being interviewed by a Defense Security Service (DSS) agent, Applicant submitted a signed, sworn statement on 11 December 2003. In the statement, Applicant claimed he took the KYK-13 home, but returned it to the base and reported it to proper authorities. The incident occurred on 18 July 1995. Applicant was briefed that the KYK-13 should not be left unattended if loaded and, if it was not needed, to turn it in. Applicant took the KYK-13 home. The following morning, another airman could not find the KYK-13. He went to Applicant's house. Applicant gave him the KYK-13 to bring take back to the base.

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 authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. 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.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) 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 the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

In the SOR, DOHA alleged Applicant received a general discharge under honorable conditions from the U.S. Air Force in December 1997 for a pattern of misconduct (¶ 1.a); falsified material facts on his SCA by omitting a nonjudicial punishment he received in the Air Force in 1995 (¶ 1.b); and falsifying a statement to an investigator about taking a KYK-13 home (¶ 1.c). Applicant admitted the allegation in ¶ 1.a, but denied the others, with explanation. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.1.1.

A security concern that is possibly disqualifying may be raised when there is reliable unfavorable information about an applicant. DC E2.A5.1.2.1. An applicant may also be disqualified for a pattern of rules violations. DC E2.A5.1.2.5. The evidence established the applicability of both of these disqualifying conditions to the allegation in ¶ 1.a. Applicant was discharged from the Air Force with a considerable history of misconduct and failing to follow established rules for personal behavior. On the other hand, these incidents occurred almost 10 years ago and there is no current history of other unfavorable information or rules violations. I find for Applicant on ¶ 1.a.

The deliberate omission of relevant and material facts from any SCA is a security concern and may be disqualifying. DC E2.A5.1.2.2. Deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a security clearance may also be disqualifying. DC E2.A5.1.2.3. Information is material if it would affect a final agency decision or, if incorrect, would impede a thorough and complete investigation of an applicant's background. ISCR Case No. 01-06870, 2002 WL 32114535 (App. Bd. Sep. 13, 2002). An applicant's military disciplinary history is a matter that could affect a final agency decision on whether to grant the applicant a clearance, and his failure to disclose it would impede a thorough investigation of the applicant's background.

After carefully reviewing all of the evidence, I am not convinced Applicant deliberately falsified his SCA. In answer to question 25, he reported that he had been disciplined for misconduct and that it led to his eventual discharge from the

Air Force. While it may not have been as complete a statement as it should have been, it did provide the essentials from which the Government knew it needed to further investigate Applicant before granting him a clearance. I find for Applicant on ¶ 1.b.

Likewise, I am not convinced Applicant deliberately provided a false or misleading statement to the DSS agent. The incident with the KYK-13 occurred in July 1995, more than eight years before he completed his statement. It is understandable that he would not remember all of the details of the incident. Applicant understands the need for total candor on his SCA and in his statements and will be more careful in the future. I find for Applicant on ¶ 1.c.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline E: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

Subparagraph 1.c: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young
Administrative Judge