



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



In the matter of:)
)
) ISCR Case No. 08-01075
)
Applicant for Security Clearance)

Appearances

For Government: John Bayard Glendon, Jr., Esq., Department Counsel
For Applicant: Gregory D. McCormack, Esq.

April 21, 2011

Decision

COACHER, Robert E., Administrative Judge:

The evidence fails to establish some disqualifying conduct and Applicant mitigated the remaining security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On December 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOHA subsequently issued Applicant an amended SOR on October 13, 2010.¹ DOHA acted 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 adjudicative guidelines (AG), effective within the Department of Defense on September 1, 2006.

¹ Department Counsel amended the SOR pursuant to Directive ¶ E.3.1.13.

Applicant answered the original SOR on December 31, 2008, and he answered the amended SOR on November 5, 2010. He requested a hearing before an administrative judge. The case was assigned to me on November 2, 2010. DOHA issued a notice of hearing on December 14, 2010, with a hearing date of January 11, 2011. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 8, which were admitted into evidence without any objection. Department Counsel's exhibit index was marked as hearing exhibit (HE) I. Applicant testified, presented one witness, and offered exhibits (AE) A through F that were admitted into evidence without any objections. Applicant's cover page and table of contents was marked as HE II. DOHA received the hearing transcript (Tr.) on January 21, 2011.

Procedural Issue

During the hearing, the Government presented evidence that another defense agency granted Applicant eligibility for access to sensitive compartmented information (SCI) on October 31, 2009.² This fact raised an issue of whether Applicant should be given reciprocity under section 2-204 of the National Industrial Security Program Operating Manual (NISPOM), dated February 28, 2006. Section 2-204 of the NISPOM states, in part:

Any previously granted PCL (Personnel Clearance) based upon a current investigation of a scope that meets or exceeds that necessary for the clearance required shall provide the basis for a new clearance without further investigation or adjudication unless significant derogatory information that was not previously adjudicated becomes known to the granting agency.

Applicant contends that because another defense agency granted a personal clearance/access eligibility to the Applicant based upon a current investigation of a scope that met or exceeded that necessary for the clearance required, Applicant should be issued a security clearance without the requirement of further investigation or adjudication. Department Counsel contends that reciprocity does not apply because the amended SOR addresses matters that were not previously adjudicated, specifically, alleged false statements to an investigator (SOR ¶¶ 1.f and 1.g).

I find that reciprocity does not apply in Applicant's case because it is unclear from the Government evidence what specific conduct was adjudicated by the other defense agency before it granted Applicant access to SCI on October 31, 2009. Although the Personal Conduct, Alcohol Consumption, and Criminal Conduct guidelines were cited in the evidence, no specific facts were delineated. Because of the ambiguity of the evidence, I cannot determine if any of the current SOR allegations were adjudicated in the prior investigation and therefore will not apply reciprocity.³

² GE 8.

³ See ISCR Case No. 08-10088 (App. Bd. July 19, 2010).

Findings of Fact

In Applicant's answer to the SOR, he admitted ¶¶ 1.a (partially) through 1.c of the original SOR, and denied ¶¶ 1.d through 1.g of the amended SOR. After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 43 years old. He is divorced and has two sons. He currently works for a defense contractor in the area of technology integration. He holds both a bachelor's degree and a master's degree. He served in the Army from May 1989 until he was administratively separated in lieu of court-martial in October 2003 at the rank of major. He has held a security clearance since 1998.⁴

Applicant's conduct raised in the SOR includes: (1) committing several offenses under the Uniform Code of Military Justice (UCMJ) in 2003 for which he accepted an administrative discharge, under other than honorable conditions, in lieu of trial by court-martial (SOR ¶ 1.a); (2) engaging in sexual relations with an enlisted women while he was an officer in 2003 (SOR ¶ 1.b); (3) being named as the subject of sexual harassment allegations while working for a defense contractor in 2005 (SOR ¶ 1.c); (4) having his authorization to SCI suspended by the Army on September 2, 2003 (SOR ¶ 1.d); (5) making false statements on a security clearance application and to investigators concerning his knowledge of his suspended SCI access in 2003, whether he had any employment problems when he worked for a defense contractor, and the reason for his termination from employment with a defense contractor (SOR ¶¶ 1.e-1.g).

In 2003, Applicant was assigned to a hostile-fire overseas area. He was a major working as a counterintelligence officer for a special operations unit. In January 2003, Applicant and two enlisted servicemembers had dinner out in a local town. They had drinks with dinner. After dinner, they decided to take a drive up to a mountain resort area. Because of possible hostilities, all three were armed. They were all wearing civilian clothing. On their way up to the mountain resort they saw an abandoned vehicle. According to Applicant, one of the enlisted members began shooting at the vehicle. Applicant was the senior military member and failed to stop the shooting. Later, their vehicle got stuck in the snow and they had to call for assistance. The local police were called to investigate the shooting incident and ultimately Applicant's role was revealed. After an investigation, in May 2003, general court-martial charges were preferred against Applicant. The specifications included: violation of two general orders (violation of curfew and drinking alcohol while in possession of a weapon); damage to property, conduct prejudicial to good order and discipline; and conduct unbecoming an officer. Rather than face the possibility of conviction on the charges, Applicant offered to resign his commission. His offer was accepted and he was administratively separated with an other than honorable discharge in August 2003.⁵

⁴ Tr. at 80-81, 168; GE 1, 8.

⁵ Tr. at 86-92; GE 5-6.

In June 2003, in conjunction with Applicant's decision to resign his commission, his access to classified information was suspended by the Army. Applicant denies that he was informed of the suspension. There is no information in the record indicating that Applicant was made aware of the suspension until recently when he was provided information in preparation for this hearing.⁶

Applicant engaged in a sexual relationship with an enlisted female (H.R.) while he was a commissioned officer and while he was married. The relationship began in late 2002 or early 2003. Upon his discharge from the Army and return to the United States, Applicant's marriage broke up, in part, due to his infidelity. In September 2003, while separated from his wife, Applicant resumed the relationship with H.R. Eventually, both were hired by the same defense contractor. The two continued their personal relationship until October 2004. According to Applicant, between October 2004 and October 2005, they had minimal professional contacts. In September 2005, Applicant was informed by his employer that H.R. raised sexual harassment allegations against him. He was asked to respond to them. He told his employer there was nothing to them. According to Applicant, no disciplinary action resulted from the complaint. The record contains no independent evidence of the substance of the sexual harassment allegations, any investigation of the allegations, or resulting actions by management.⁷

Applicant was laid off from his job with a defense contractor in February 2006. He was working on a particular contract that ended in March 2006. He was abruptly taken off the contract in February 2006 because of complaints from the government/client representative. Applicant denied that he was terminated for cause and believed the government/client representative had a personality clash with him. The complaints were not made directly to Applicant, but to his employer. His employer tried to find him another position, but because the contract was ending in March 2006, there was nothing else available. When Applicant left the company in February 2006, he received a severance package.⁸

A former coworker testified about Applicant's release from the contract that led to his layoff. She was also released from the contract because of a similar complaint by the government/client representative. She corroborated Applicant's version of events surrounding their release from the contract. She and Applicant were in a relationship at that time.⁹

On January 5, 2007, and September 11, 2007, Applicant was interviewed by an investigator concerning his security clearance eligibility. Those interviews were summarized and included as part of GE 3. The summarized interviews do not contain

⁶ Tr. at 97-98; GE 5.

⁷ Tr. at 94-97; GE 3.

⁸ Tr. at 104-114.

⁹ Tr. at 52-77.

specific questions asked by the investigator, nor do they contain verbatim answers by the Applicant.¹⁰

The Government did not offer any written statements by the Applicant concerning this interview. Additionally, the Government agent conducting the interview did not testify at hearing. Alternatively, Applicant testified at the hearing about his departure from the government contractor in question and was subject to cross-examination by Department Counsel. He denied making any false statements to investigators or providing false information on his security clearance application. I found his testimony credible.¹¹

Applicant presented the statements of several former coworkers from other contractor positions and military members who served with him. All the statements indicate that Applicant is a professional who is dedicated to his mission. He is characterized as loyal, trustworthy, and dependable. Applicant also provided his civilian performance appraisals and Army officer evaluation reports. Both sets of documents reflect Applicant's outstanding performance during the years covered.¹²

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 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, 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 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

¹⁰ GE 3.

¹¹ Tr. at 98, 101-114, 163.

¹² AE B-F.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that 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

AG ¶ 15 expresses the security concern for personal conduct:

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 in this case. The following disqualifying conditions are potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;
- (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's conduct resulting in his discharge from the Army and his sexual relationship with an enlisted person reflect personal conduct that creates a vulnerability to his personal standing. AG ¶ 16(e) applies to SOR ¶¶ 1.a and 1.b. Although Applicant admits some type of sexual harassment allegation was made against him, insufficient evidence was offered by the Government regarding the substance of the allegation. No vulnerability was established for SOR ¶ 1.c. The allegation listed at SOR ¶ 1.d has the same factual basis as the allegation listed at SOR ¶ 1.a and will not be separately considered.

I found Applicant's denial of submitting a false security clearance application and making false statements to investigator's credible. The Government produced no evidence showing Applicant was aware his SCI access was suspended when he completed his security clearance application. Likewise, the Government's proof to establish Applicant's false statements to investigators is also lacking. The Government's evidence to prove the falsifications was based upon a report that summarized an interview by an agent who did not testify and was not subject to cross-examination. The report does not state the specific questions the interviewer asked and it does not contain the verbatim answers of the Applicant. I gave this evidence less weight than Applicant's testimony. Therefore, the evidence does not support the allegations in SOR ¶¶ 1.e – 1.g, and AG ¶¶ 16(a) and 16(b) do not apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

(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.

Applicant's poor judgment and lack of leadership that led to his unfavorable discharge from the Army happened eight years ago. He has acknowledged his responsibility regarding those incidents and has learned from them. He paid a significant price for his lapse in judgment. He presented outstanding performance appraisals from recent employers and is held in high regard by coworkers. Applicant's reliability, trustworthiness, and good judgment are not in doubt. I am convinced that these types of action will not recur. AG ¶ 17(c) applies to SOR ¶¶ 1.a and 1.b.

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) 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 considered Applicant's service to his country before the events that led to his discharge. I also considered the seriousness of his actions resulting in the discharge. I am satisfied Applicant realizes the lack of judgment he exhibited eight years ago and has learned from that experience. I also considered the passage of time since then. Additionally, I considered his current work environment and the strong recommendation he received from coworkers concerning his reliability and trustworthiness. Applicant met his burden and provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline E, Personal Conduct.

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:	FOR APPLICANT
Subparagraphs 1.a-1.g:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge