



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-02013
)	
Applicant for Security Clearance)	

Appearances

For Government: Paul M. DeLaney, Esq., Department Counsel
For Applicant: *Pro se*

August 16, 2010

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

Statement of the Case

On March 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. 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 for SORs issued after September 1, 2006.

Applicant answered the SOR on March 29, 2010, and elected to have his case decided on the written record. Department Counsel submitted the Government's File of Relevant Material (FORM) on May 6, 2010. The FORM was mailed to Applicant, and he received it on March 15, 2010. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant submitted a reply that was received by DOHA on June 16, 2010. The case was assigned to me on July 2, 2010.

Findings of Fact

In Applicant's answer to the SOR, he admitted ¶¶ 1.a - 1.f, and denied 1.g. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 26 years old. He is single and has no children. Since June 2007, he has worked as a security guard for a defense contractor.¹ He served on active duty in the Navy as an enlisted member from May 2002 until February 2005. He was involuntarily discharged from the Navy for a pattern of misconduct. He received a general (under honorable conditions) discharge.²

Applicant's admitted conduct raised in the SOR includes: (1) receiving nonjudicial punishment (Captain's Mast) in 2004, for a variety of offenses including, unauthorized absence, missing movement, underage drinking, making a false statement, and altering a document; (2) receiving nonjudicial punishment (Captain's Mast) in 2005, for a variety of offenses including, unauthorized absence, underage drinking, driving while impaired, and wrongful appropriation of a vehicle and other property; (3) being discharged from the Navy on February 28, 2005, with a general discharge due to a pattern of misconduct; (4) being arrested in 2006, and pleading guilty to disturbing the peace in St. Joseph, Missouri; (5) altering a doctor's note in February 2007, and providing the forged note to his employer to support an absence from work; and, (6) resigning from his job in February 2007, after allegations of misconduct because of the forged doctor's note provided to his employer.³

In explanation, Applicant attributes his misconduct in the Navy was attributed to his alcohol dependency. He further states that he requested treatment from the Navy, but because of impending deployments he was never allowed to enroll in any alcohol treatment programs. Applicant also claims he saw a counselor at Pearl Harbor but had to deploy soon thereafter and received no follow-on treatment.⁴ When interviewed by an investigator for his security clearance in December 2007, Applicant stated he did not

¹ Item 5.

² Item 6.

³ Items 4, 6, 9, 10

⁴ Item 4: Applicant's response to FORM.

have an alcohol problem and continues to drink alcohol. There is no other evidence in the record concerning alcohol counseling or treatment for Applicant.⁵

Applicant relates that his post-Navy conduct of disturbing the peace was caused by drinking too much alcohol after graduating from a course he attended. Additionally, he admits to using “very bad judgment” when he chose to alter a doctor’s note that he gave to his employer to cover an absence from work. He explained that he didn’t have insurance at the time and couldn’t afford to go to the doctor. Because he needed a doctor’s note to return to work, he altered an earlier doctor’s note by changing the dates and submitting it to his employer. When confronted by his employer, he resigned from his position. Applicant also claims he did not intentionally omit his 2005 nonjudicial punishment from his security clearance application completed in June 2007. He states that by then he had moved on with his life and forgot the details about the event.⁶

Applicant presented two Navy fitness reports for the years 2002-2003 and 2003-2004. Overall Applicant was a sailor who met Navy standards and was described by his rating officials as a “vital asset”, a “key player”, and someone who performed his duties in an exceptional manner with pride and professionalism.⁷

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

⁵ Item 8.

⁶ Item 4; Applicant’s response to FORM.

⁷ Applicant’s response to FORM.

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

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. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;

(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;

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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and,

(4) evidence of significant misuse of Government or other employer's time or resources; 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 pattern of behavior, both while in the Navy and more recently while working in the civilian world, call into question his judgment, honesty and ability to follow rules. He was discharged from the Navy for a pattern of misconduct that included receiving discipline for under age drinking on two occasions, altering a document and making false official statement, among other things. Since he left the Navy, he resigned from a job because he altered a doctor's note. All these actions represent a pattern of dishonesty and a lack of integrity calling into question Applicant's fitness to hold a security clearance. AG ¶¶ 16(c), 16(d), and 16(e) apply to SOR ¶¶ 1.a – 1.f.

When Applicant completed his June 2007, SF-86, he failed to list his January 2005, nonjudicial punishment. However, this does not prove Applicant deliberately failed

to disclose information about his Captain's Mast. Applicant listed his earlier nonjudicial punishment received in 2004. Applicant denied any intentional falsification. Deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government, when applying for a security clearance, is a security concern. But every inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. When Applicant completed his SF-86, he failed to remember his second nonjudicial punishment. I am persuaded that Appellant was not attempting to deceive the government when he neglected to list this information. AG ¶ 16(a) does not apply to SOR ¶¶ 1.g.

The guideline also includes examples of 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 actions in repeatedly breaking rules while in the Navy and engaging in behavior involving dishonesty, both in and out of the Navy, casts doubt on his overall reliability, trustworthiness, and good judgment. AG ¶ 17(c) does not apply.

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 have considered Applicant's

positive fitness reports, written six and seven years ago, and his explanation that alcohol indulgence contributed to the problems he experienced while in the Navy. However, I also considered that a significant number of Applicant's acts involved aspects of dishonesty (false statements, altering documents, wrongful appropriation, and providing a false doctor's note). These acts are numerous and extend over a considerable time frame. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate 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:	AGAINST APPLICANT
Subparagraphs 1.a-1.f:	Against Applicant
Subparagraph 1.g:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge