



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



In the matter of:)
)
-----) ISCR Case No. 09-03010
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: *Pro Se*

January 20, 2010

Decision

HARVEY, Mark, Administrative Judge:

On July 2, 2003, Applicant left his unit in state G without authority. On August 2, 2003, he turned himself in at an Army base in state V. The military police ordered him to return to his unit in state G. He did not obey this order. He was charged with being absent without leave (AWOL) beginning on August 5, 2003. His AWOL was terminated by apprehension on May 18, 2005. His command discharged him from the service in lieu of trial by court-martial on June 8, 2005. Personal conduct concerns are not mitigated. Clearance is denied.

Statement of the Case

On February 2, 2009, Applicant submitted a security clearance application (SF-86) (Government Exhibit (GE) 1). On September 11, 2009, DOHA issued a statement of reasons (SOR) (Hearing Exhibit (HE) 2) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified; and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The September 11, 2009, SOR alleged security concerns under Guideline E (personal conduct) (HE 2). On September 30, 2009, Applicant responded to the SOR and requested a hearing (HE 3). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

Department Counsel indicated she was ready to proceed on November 4, 2009. On November 16, 2009, the case was assigned to me. On December 11, 2009, the hearing notice was issued, and Applicant's hearing was held on January 6, 2009 (HE 1). Department Counsel offered four exhibits (GE 1-4) (Transcript (Tr.) 17-18), and Applicant offered four exhibits (AE A-D) (Tr. 26-27, 38-39). There were no objections, and I admitted GE 1-4 (Tr. 18), and AE A-D (Tr. 27, 39). Additionally, I attached the Hearing Notice, SOR, and response to the SOR to the record (HE 1-3). I received the transcript on January 12, 2009.

Findings of Fact¹

Applicant admitted the SOR allegations in his response to the SOR (HE 3). His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is 32 years old and has worked for a government contractor as a dangerous goods specialist since 2006 (Tr. 7, 19, 20, 37; GE 1). He examines packages before they are placed on aircraft to ensure they are safe (Tr. 20). In 1998, he earned a general equivalency diploma (GED) (Tr. 7, 8, 19). He completed about one year of college (Tr. 7, 8, 20). On March 15, 2003, he went on active duty in the Army (Tr. 7). He held an interim security clearance for approximately 100 days in 2003 before he went AWOL (Tr. 7). He does not currently hold a security clearance (Tr. 7). He has never been married, and does not have any children (Tr. 19; GE 1).

AWOL

In 2003, Applicant joined the Army because he broke up with his girlfriend and was feeling pressure from his parents (Tr. 21-22). He did not have a job and they "just kept pushing on me and pushing on me until I eventually succumbed to them and signed up" (Tr. 42). He signed an enlistment contract for three years (Tr. 22, 41). He took the oath of enlistment (Tr. 41). He claimed he did not expect to be deployed because his recruiter told him he would be stationed close to home, and "there was no chance of me ever going, you know, going to war or anything like that" (Tr. 22-23). His initial training was at a post in state K, and then he was assigned to a post in state G (Tr. 23). He was at the post in state G about three or four weeks (Tr. 23). On July 3,

¹Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

2003, his unit informed him he would not receive leave and he wanted to go home for the 4th of July weekend (Tr. 24).² He went AWOL on July 3, 2003 (Tr. 24-25). On August 2, 2003, Applicant turned himself in at a post near his parent's home in state V (Tr. 26; AE A). A military police noncommissioned officer ordered Applicant to return to his unit in state G (Tr. 26; AE B). Applicant did not return to his unit in state G because he lacked the funds for transportation (Tr. 27). Instead he returned to his parent's residence (Tr. 28).

While he was AWOL, he communicated with his unit (Tr. 29). His command told him to return to his unit; however, he did not do so because he was homesick and did not trust the Army because of the broken promise to assign him to a post near his parent's home (Tr. 28). Initially, he lacked bus fare to return, and then later when he had the money he was nervous and scared about what would happen when he returned to military control (Tr. 40). His parents received a letter from the Army explaining the negative consequences of AWOL; however, Applicant did not "want to deal with it [and he] pushed it to the back burner. And as time went on, it just grew harder and harder" for him to return to the Army (Tr. 40-41).

On May 18, 2005, Applicant's AWOL was terminated by apprehension (Tr. 30). A police officer ran the license number on Applicant's car and discovered he was AWOL (Tr. 30-31). Applicant admitted to the police officer that he was AWOL from the Army (Tr. 31). The police officer arrested Applicant and turned him over to the Army (Tr. 31-32).

Military records are generally consistent with Applicant's description of his AWOL. On August 1, 2003, Applicant was charged with desertion on or about July 2, 2003 (AE D). On August 11, 2003, he was dropped from the rolls (GE 4 at 4). On September 13, 2003, Applicant was charged with AWOL beginning on or about August 5, 2003 (AE C). Applicant requested a discharge in lieu of trial by court-martial and on June 8, 2005, the command approved his discharge with an other than honorable characterization of his service (Tr. 33; GE 1; GE 4 at 7).

Applicant said he was immature when he went AWOL (Tr. 35, 41). He has matured and would not make the same mistake (Tr. 35). He would serve his commitment and comply with his enlistment contract (Tr. 35). There is no evidence of any disciplinary problems at work. There is no evidence of drug abuse in the last five years or alcohol-related problems. There is no evidence that he has failed to safeguard sensitive or classified information. He loves his job and would like to continue his employment and move forward with his career (Tr. 36-37).

²In 2003, the U.S. Army was deeply engaged in a conflict in Iraq. The U.S. State Department, "Background Note: Iraq," February 2008, notes, "A U.S.-led coalition removed the Ba'ath regime in March-April 2003, bringing an end to more than 12 years of Iraqi defiance of UN Security Council resolutions." Civil conflict involving large numbers of U.S. Army personnel continued in Iraq throughout the period Applicant was AWOL.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant 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), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or 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. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. 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.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein 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. 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 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline E (personal conduct) with respect to the allegations set forth in the amended SOR.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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. . . .

AG ¶ 16 describes three conditions that could raise a security concern and may be disqualifying in this case:

(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

(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 . . . ; and

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

Applicant's AWOL for about two years shows questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations, which are characteristics indicating that he may not properly safeguard classified information. AG ¶ 16(d) applies.

Applicant's two-year AWOL is embarrassing conduct that adversely affects his personal, professional and community standing. AG ¶ 16(e) applies.

Although there is insufficient evidence to establish Applicant is a deserter,³ Applicant committed the offense of AWOL over 30 days terminated by apprehension.⁴ He deliberately violated his enlistment contract when he went AWOL without legal justification or excuse for almost two years. This UCMJ violation violates his enlistment contract. A condition of employment for soldiers is performance of their military duties on behalf of their command, unit, and the Army as well as compliance with the UCMJ. AG ¶ 16(f) applies.

AG ¶ 17 provides seven conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

³Under Article 85, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 885, desertion terminated by apprehension carries a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for three years. *MCM*, 2008, ¶ 9e(2)(a).

⁴Under Article 86, UCMJ, 10 U.S.C. § 886, AWOL over 30 days terminated by apprehension carries a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for 18 months. *MCM*, 2008, ¶ 9e(2)(d). AWOL over 30 days not terminated by apprehension carries a maximum punishment of dishonorable discharge, forfeiture of all pay and allowances, and confinement for one year. *MCM*, 2008, ¶ 10e(2)(c).

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶¶ 17(a), 17(b), 17(f) and 17(g) do not apply. There is no allegation that he falsified government records, or failed to cooperate with the security clearance process. His AWOL from August 5, 2003, to June 8, 2005, terminated by apprehension, is substantiated. There is no allegation he consorted or associated with criminals.

AG ¶¶ 17(c), 17(d), and 17(e) all apply in part to SOR ¶ 1.a. The AWOL from August 5, 2003, to June 8, 2005, terminated by apprehension cannot be fully mitigated because it is too recent and serious. However, there are some positive signs of rehabilitation. No allegations of problems at his employment have surfaced. He has demonstrated remorse, an important step toward his rehabilitation. He received job training and has a good employment record. His security manager is well aware of his AWOL. Disclosure has eliminated his "vulnerability to exploitation, manipulation, or duress."

In sum, Applicant was AWOL from August 5, 2003, to June 8, 2005. His AWOL was terminated by apprehension. He had ample opportunity to end his AWOL over the 673 days he was absent from his unit. I do not believe his claim that his recruiter told him he would not have to serve overseas, nor do I believe his claim that there was a commitment that he would serve at the post near his home. He was 25 years old when he joined the Army, and he joined well after the attacks on the United States of September 11, 2001. His deliberately false official statement at his hearing about what the recruiter told him is too recent and serious to be mitigated.

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.

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. AG ¶ 2(c). I have incorporated my comments under Guideline E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is some evidence supporting approval of Applicant's access to classified information. Applicant contributed to the national defense through his work for a government contractor. There is no evidence of any disciplinary problems at work. There is no evidence of drug abuse in the last five years or alcohol-related problems. There is no evidence that he has failed to safeguard sensitive or classified information. His character and good work performance show substantial responsibility, rehabilitation, and mitigation.

The evidence against approval of Applicant's clearance is more substantial. Because of his age and maturity, Applicant was well aware of the likelihood of serving away from his home, or possibly overseas when he joined the Army in 2003. He was AWOL beginning on August 5, 2003. His AWOL was terminated by apprehension on May 18, 2005. His command discharged him from the service in lieu of trial by court-martial on June 8, 2005. He was also aware of the importance of providing accurate information in the context of evaluating and retaining a security clearance. He intentionally provided false information about why he went AWOL at his hearing on January 6, 2010. This AWOL and false statement at his hearing shows lack of judgment and a lack of trustworthiness. Such conduct establishes a serious security concern, and access to classified information is not warranted at this time.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude Applicant has not fully mitigated all security concerns. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors,"⁵ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Personal conduct security concerns are not mitigated. For the reasons stated, I conclude he is not eligible for access to classified information.

⁵See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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

Subparagraph 1.a: Against Applicant

Conclusion

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

MARK HARVEY
Administrative Judge