



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 10-09538
)
 Applicant for Security Clearance)

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

12/27/2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct) and J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on April 15, 2010. On June 20, 2011, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines E and J. 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on June 29, 2011; answered it on the same day; and requested a hearing before an administrative judge. DOHA received the request on July

7, 2011. Department Counsel was ready to proceed on August 24, 2011, and the case was assigned to me. DOHA issued a notice of hearing on September 15, 2011, scheduling it for October 25, 2011. The hearing was cancelled on October 18, 2011, because Applicant was no longer employed by the contractor who had sponsored him. DOHA issued a second notice of hearing on November 15, 2011, scheduling it for November 30, 2011, after Applicant's new employer sponsored him for a clearance. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 11 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the transcript (Tr.) on December 2, 2011.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 32-year-old electronic technician employed by a defense contractor. He has worked for defense contractors since August 2004. He began working for his current employer on July 1, 2011, after his previous employer lost its contract with the Department of the Army and the new contractor hired him. (Tr. 40.) He is doing the same job in the same place as he did with his previous employer. (Tr. 43.)

Applicant graduated from high school in June 1998 and began working as a customer service representative. For about a year, he used his company's commercial shipping account to ship his personal items. He was laid off in August 2001, and he joined the U.S. Army in September 2001. He was granted a security clearance and assigned to duties repairing special electronic devices. He continued to use his former employer's commercial shipping account while in the Army, charging about \$1,200 in personal shipping costs to his former employer's account. (GX 4 at 3, 9; Tr. 12.)

In November 2002, Applicant was caught attempting to mail two sets of night vision goggles to his home. He had assembled the goggles from repair parts that he had stolen. Each set of goggles was worth about \$3,500. (Tr. 46.) He received nonjudicial punishment on April 15, 2003, for his misconduct.¹ (GX 8.) In June 2003, his command determined that his access to classified information would not be terminated. (GX 7.) On July 21, 2003, he was discharged from the Army with an Other Than Honorable Discharge. (GX 9; GX 4 at 9.) His security clearance was administratively terminated upon his discharge. (Tr. 51.) It is not clear from the record whether Applicant's civilian misconduct before enlisting was a significant factor in his command's decision to administratively discharge him.

On July 23, 2003, as a result of Applicant's misuse of his former employer's commercial shipping account, he was charged with unlawful use of a computer, computer theft, computer trespass, and criminal use of a communication facility, all

¹ The nonjudicial punishment was imposed under Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815.

third-degree felonies. He was also charged with computer theft, computer trespass, theft by deception, theft of services, and receiving stolen property. He was placed in an accelerated rehabilitation program, placed on probation for six months, and required to perform 40 hours of community service and reimburse his former employer. After he completed the terms of his probation, the charges were dismissed. (GX 6; GX 10; (Tr. 37).)

Applicant testified that his coworkers who misused the commercial shipping account were not prosecuted. Instead, they were allowed to settle the case by reimbursing their employer. Applicant was not offered an opportunity to reimburse the company in lieu of prosecution, because he was in the Army and assigned outside the continental United States. (Tr. 29-30; AX A.)

Applicant married in April 2005. (AX D.) He and his wife purchased a home in November 2006. (AX E.) He testified that he regrets his past misconduct and has no intention of repeating it. Now that he is married, owns a home, and plans to start a family, he is not the same person who committed the offenses alleged in the SOR. (Tr. 31-32.)

One of Applicant's coworkers, who has worked with him since August 2004, describes him as reliable, proud of his work, and a hard worker. (AX B.) Another current coworker, who has known him for three years, describes him as reliable and trustworthy. (AX C.)

Applicant's former section sergeant, now a warrant officer in the Army National Guard, testified that he learned about five years ago that Applicant was in the area, and they reestablished contact. They have occasional social contact but no professional relationship. The warrant officer described Applicant as an honest, hard-working person who made a stupid mistake in the past. He would willingly take Applicant back as one of his soldiers or as a civilian employee. (Tr. 57-60, 64-65.)

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 have access to such information." *Id.* at 527. The President has 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), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "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. Thus, a decision to deny a security clearance 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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). "[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

Guideline E, Personal Conduct

The SOR alleges that Applicant received nonjudicial punishment in April 2003 for larceny of government property (SOR ¶ 1.a), that he was arrested in July 2003 for multiple offenses relating to his fraudulent use of his employer's commercial shipping

account (SOR ¶ 1.b), and that he received an Other Than Honorable Discharge from the Army in July 2003 for the conduct alleged in SOR ¶¶ 1.a and 1.b (SOR ¶ 1.c).

SOR ¶ 1.c does not allege conduct independently raising security concerns. It merely alleges the consequences of the conduct alleged in SOR ¶¶ 1.a and 1.b. As such, it duplicates SOR ¶¶ 1.a and 1.b. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 (App. Bd. Sep. 21, 2005) at 3. Accordingly, I will resolve SOR ¶ 1.c in Applicant's favor.

The concern under this guideline is set out in AG ¶ 15: "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. . . ." Applicant has admitted the misconduct alleged, and his admissions are corroborated by the documentary evidence presented at the hearing. His misconduct raises two disqualifying conditions under this guideline:

AG ¶ 16(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; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Security concerns raised by personal conduct may be mitigated if "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." AG ¶ 17(c). Although the civilian and military authorities treated Applicant's conduct as minor offenses, his misuse of his employer's commercial shipping account and his theft of military property were both serious breaches of trust. Thus, I conclude that his offenses were not "minor" within the meaning of this guideline. His misuse of the shipping account was not infrequent, occurring regularly for more than a year, and it did not occur under unique circumstances. The key question is whether his conduct is mitigated by the passage of time.

There are no "bright line" rules for determining when conduct has been mitigated by the passage of time. The determination must be based on a careful evaluation of the totality of the evidence. See ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of

misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.* Applicant’s last misconduct was in November 2002, more than nine years ago. Since his discharge from the Army, he has been gainfully employed. He has worked for defense contractors since August 2004, and he was recently rehired and sponsored for a clearance by his current employer. He has a good reputation among his coworkers. He has married and bought a home. He was remorseful, sincere, and credible at the hearing. I conclude that AG ¶ 17(c) is established.

Security concerns raised by personal conduct also may be mitigated if “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.” AG ¶ 17(d). Applicant has acknowledged his inappropriate behavior. He has not obtained counseling, but he has learned from his mistakes, matured, and become a responsible member of the community. I am satisfied that his irresponsible behavior is not likely to recur. Thus, I conclude that this mitigating condition is established.

Security concerns also may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). Applicant has made full disclosure of his past misconduct. Thus, this mitigating condition is established.

Guideline J, Criminal Conduct

The SOR cross-alleges Applicant’s personal conduct as criminal conduct. The concern raised by criminal conduct is set out in AG ¶ 30: “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.”

Disqualifying conditions under this guideline include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c). Applicant’s nonjudicial punishment for criminal offenses under the Uniform Code of Military Justice and his civilian charges related to his misuse of an employer’s commercial shipping account establish AG ¶¶ 31(a) and (c).

Security concerns raised by criminal conduct may be mitigated by evidence that “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” AG ¶ 32(a). Security concerns also may be mitigated if “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive

community involvement.” AG ¶ 32(d). For the reasons set out in the above discussion of AG ¶ 17(c), I conclude that AG 32(a) and (d) are established.

Whole-Person Concept

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. In applying the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. An 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.

I have incorporated my comments under Guidelines E and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is intelligent and well-educated. His betrayals of the trust placed in him by his civilian employer and his military supervisors have raised serious concerns about his current trustworthiness, reliability, and good judgment. However, the evidence reflects that he has learned from his mistakes, matured, and earned the trust and respect of his coworkers. After weighing the disqualifying and mitigating conditions under Guidelines E and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on personal conduct and criminal conduct. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.c:	For Applicant

Paragraph 2, Guideline J (Criminal Conduct):

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge