



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



In the matter of:)
)
) ISCR Case No. 11-00801
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: Lawrence A. Berger, Esquire

10/26/2012

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

On May 25, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. Applicant previous had access to classified information but his eligibility for such access had been revoked. After an investigation conducted by the Office of Personnel Management (OPM), the Defense Office of Hearings and Appeals (DOHA) issued to Applicant interrogatories to clarify or augment potentially disqualifying information. After reviewing the results of the background investigation and Applicant's response to the interrogatories, DOHA could not find that it is clearly consistent to continue his security clearance. On February 24, 2012, DOHA issued a Statement of Reasons (SOR) to Applicant detailing security concerns for personal conduct under Guideline E. These actions were taken 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 in the Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on March 26, 2012.

Applicant answered the SOR on March 26, 2012. He denied two and admitted one of the allegations concerning personal conduct under Guideline E. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on June 4, 2012. The case was assigned to me on June 27, 2012. DOHA issued a Notice of Hearing on June 28, 2012, for a hearing on July 26, 2012. I convened the hearing as scheduled. The Government offered ten exhibits, which I marked and admitted into the record without objection as Government exhibits (Gov. Ex.) 1 through 10. Applicant and eight witnesses testified. Applicant offered five exhibits which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through E. DOHA received the transcript of the hearing (Tr.) on August 16, 2012.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant admitted one allegation of misconduct under personal conduct, but denied the other two allegations. His admission is included in my findings of fact.

Applicant is 36 years old and received a bachelor's degree in English in 1999. He served on active duty in the Air Force for six years as a security officer and criminal investigator. After leaving active duty, he worked various civilian jobs, including a six-month tour in Iraq from February 2006 until July 2006 as a civilian explosive ordnance disposal technician. He became a civilian special investigator for the Air Force in August 2006. He was assigned at a base in the United States until September 2008 when he volunteered for assignment to Afghanistan. He is married with two children. (Tr. 111-113; Gov. Ex. 1, e-QIP, dated May 25, 2010)

Applicant was removed from federal employment by the Air Force on May 26, 2009, for misconduct. He allegedly physically and emotionally abused suspected Taliban detainees during an interrogation. He appealed his removal to the Merit Systems Protection Board (MSPB). A hearing was held before an administrative judge who found that Applicant's conduct was serious misconduct and behavior unbecoming a federal employee. The administrative judge upheld the removal on January 5, 2010. Applicant appealed the decision, and the administrative judge's decision was upheld by the MSPB Appeal Board on July 2, 2010. Applicant started working for his present defense contractor employer as a compliance officer in August 2009. He requires access to classified information in this position. (Tr. 113-116, 145-146; Gov. Ex. 7, Removal Notice, dated February 27, 2009; Gov. Ex. 8, Decision to remove, dated May 26, 2009; Gov. Ex. 9, Decision, dated January 5, 2010; Gov. Ex. 10, Final Order, dated July 2, 2010)

As a civilian criminal investigator in Afghanistan, Applicant's duties were "to collect counterintelligence to protect Department of Defense personnel and assets." He was a civilian employee and was not "in uniform," even though his supervisor was an active duty airman. He was not a combatant. He received counter-terrorism training, but not prisoner interrogation technique training. He was assigned to a base in Kandahar Province, Afghanistan, in September 2008. He was partnered with another criminal investigator who he served with previously. Applicant's partner had arrived in Afghanistan a few months before him. (Tr. 113-116; Gov. Ex. 5, Course Student Evaluation, dated April 4, 2008)

In October and November 2008, Applicant and his partner cultivated a source that had provided information enabling the agents to seize a large cache of illegal drugs. They were also able to provide additional information from their source to other intelligence teams for exploitation. The local populous engaged in criminal activity put a bounty on Applicant's and his partner's death. Their source had been compromised and had outlived his usefulness. They were visiting the source to thank him for his information when a group led by a local Taliban warlord arrived. The warlord was being sought by special operating forces for some time. Applicant and his partner apprehended the warlord and turned him over to special operating forces. The capture of the warlord doubled the Taliban bounty on them. (Tr. 116-122)

Applicant's command policy required the members of the command to comply with the Law of War regarding the treatment of detainees. The command prohibited physical or mental torture or other form of coercion. Detainees who refuse to answer questions may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind. Weapons may be drawn only if the situation could reasonably escalate to the use of deadly force. Only the minimum force necessary to deal with the threat was to be used. The command directive requires that any misconduct or violation of detainee policy be promptly reported through command channels and investigated thoroughly. (Gov. Ex. 3, Memorandum, dated August 14, 2006; Gov. Ex. 5, AFOSI Manual 71-113, dated August 9, 2005)

A few days after the completion of this mission, Applicant's command was notified that a police chief in a village about 12 kilometers away had apprehended and was holding some individuals that may be Taliban. Applicant was directed to go to the police station and interrogate the prisoners to gain intelligence. His normal partner was sick, so Applicant teamed with another special agent (SA K), who had recently arrived in Afghanistan and had not been on a mission off the base. They were accompanied by interpreters and a local Afghan security team. Applicant was the primary interrogator and the other agent was the note taker. SA K was also to provide security for Applicant. (Tr. 122-125)

When Applicant and SA K arrived at the police station, the detainees were brought separately to them for interrogation. Applicant, SA K, an interpreter, and some members of the Afghan security team were in the interrogation room. The detainees were not forthcoming with information. Applicant got close in the face of each prisoner,

poked some in the face or chest, and yelled at them. He pinned one detainee to the wall with his arm on the detainee's neck. As the detainees were being interrogated, Applicant asked each "tell me why I should not kill you now?" The police chief claimed that the leader may be the chief of the Taliban in the region and a high-value target for exploitation. If the individual was the leader, he had been sought by allied forces for some time. When the alleged leader would not talk, Applicant drew his service pistol, placed it on the detainee's forearm, and asked again why he should not kill him. Applicant and his team were unable to gain any useful information so the team left and returned safely to their base. (Tr. 125-136)

Applicant stated that he needed to get good actionable intelligence from the detainees because the local police were not trustworthy and they were in a non-secure compound. He was in fear for his life and the lives of his men. The local enemy knew what routes they would take returning to their base and had spotters out to watch them. He was not thinking of rules but just wanted good information to navigate a safe route back to base. Based on what he did learn from the detainees, he was able to select a route to return safely to their base. When the team returned to base, they were pleased with a safe return and a job well done. (Tr. 136-140)

SA K testified in a subsequent Air Force investigation into the incident and at the MSPB hearing. He stated that he was Applicant's partner on the interrogation mission and witnessed Applicant poke some of the detainees in the face and grab some detainees around the neck asking if they could feel the pressure. Applicant asked multiple detainees to give him a reason not to kill them right then. SA K testified he witnessed Applicant pull his duty weapon from his holster and place it on the arm of a detainee asking the detainee to tell him why he should not kill him. SA K testified that he advised Applicant to watch what he was doing and to take it easy. Applicant replied to the effect that this is how he does business and why he gets good information. Applicant also asked him numerous times not to tell anyone what happened, particularly their supervisory agent. (Gov. Ex. 6, Air Force Report of Investigation, dated January 6, 2009 at 5 and 6 and SA K statement at 5-7) On returning to base, SA K sought guidance from another agent regarding the reporting of the incident. He reported Applicant's conduct as required by policy to the supervisory agent the day after the incident. Applicant denied in the investigation, at the MSPB hearing, and at the DOHA hearing that he asked SA K not to report the incident to the command. (Go. Ex. 6, Air Force Report of Investigation, dated January 6, 2009, at 7 and at exhibit 8; Gov. Ex. 9. Decision, dated January 5, 2010 at 2-4)

Applicant testified in both the Air Force investigation and the MSPB hearing. Applicant initially denied any involvement in detainee abuse when questioned for the Air Force investigation. However, in preparing a written statement for the investigation, Applicant admitted becoming increasingly angry at the detainees during the questioning. He had previously seen some coworkers killed by terrorists. He felt the detainees were tied to the same network that had been responsible for the injury and death of his coworkers. He raised his voice to detainees. He lost his balance while questioning a detainee resulting in him pressing the detainee against the wall. He acknowledged

placing his duty weapon on the forearm of a detainee after he became frustrated with the interrogation. While acknowledging some of his conduct towards detainees, Applicant stated his actions were intended to obtain more and better information from the detainees. He admits that some of his actions showed poor judgment.

Applicant did not deny his conduct against the detainees in the MSPB hearing. He admitted holding his arm across the face or neck of one detainee, and drawing his weapon placing it on the forearm of a detainee, and asking the detainees "give me one reason why I shouldn't shoot you right now." He testified that he was following directions to use appropriate force to prevent harm to American and coalition personnel. He said the situation required him to threaten detainees to collect sufficient information to make a safe exit back to his base. During the interviews, he was in fear of his life, so he felt drawing his weapon was justified. He admitted losing control of his emotions. He admitted that all of his training had been pointed to avoiding coercion of suspects and detainees. (Gov. Ex. 9, MSPB Decision, dated January 5, 2010, at 5-6)

Applicant presented evidence that Kandahar province was a dangerous place when he was assigned to the region. Coalition forces were conducting a drug eradication mission in the area. (App. Ex. A, Eradication Map, dated 2007) He presented pictures of police vehicles recently blown up by Improvised Explosive Devices (IED) in the area in which four Afghan police officers were killed. (Tr. 59-63; App. Ex. B, C, and D, Pictures, undated)

Witnesses testified to the dangerous situation in Kandahar Province. A former Navy SEAL chief petty officer testified he served five deployments to Afghanistan and is familiar with Kandahar Province. There is a threat to military and civilian personnel from road-side bombs and small arms weapons in the province. Insurgents are active in the area and it is a stronghold of the Taliban. There is a high level of corruption in the police force and they are not to be trusted. Since coalition forces have become more sophisticated in stopping road side bombs detonation by cell phones, the insurgents have turned to using "spotters" to detonate bombs. He has known and worked with Applicant for over six months and finds him to be trustworthy with integrity. (Tr. 36-48).

An employee of Applicant's defense contractor employer testified that he previously served in the Army and the Marine Corps. He was a civilian contractor in Afghanistan working on drug eradication in Kandahar Province for over 27 months. In the province, there were threats against coalition forces from IEDs, small arms fire, kidnappings, and ambushes. The enemy does not distinguish between military and civilians in taking actions. In fact, he feels civilians are at greater risk of enemy action. The rules of engagement were that deadly force could be used if they were in danger of death or serious bodily harm. He has known Applicant for over three years and believes he is an outstanding person with absolute trustworthiness. (Tr. 53-68)

A retired Army veteran with over 22 years of service testified that he has previously served in Kandahar Province. The threat level of death or serious bodily harm to coalition forces in the area is extremely high. He first served in the area in 2002

and the threat level has continued to increase. The local police are untrustworthy. He has known Applicant for some time and he believes Applicant has great veracity and is trustworthy. (Tr. 76-80)

The President and CEO of Applicant's employing company testified that he has known Applicant for over three years. He hired Applicant to be his compliance officer. The regulations the company must operate under for International Trade in Arms Traffic are complex and difficult. Applicant's duties are to insure that the company is in compliance with all Government requirements. Applicant is the company's liaison with all branches of the Government in Washington. In this capacity, Applicant has been honest and trustworthy. If a mistake is made, the company would be in grave danger of losing business. He has complete trust and confidence in Applicant. (Tr. 81-92)

An Air Force captain assigned as an Air Force criminal investigator testified that he has known and worked with Applicant for over six years. He has never seen Applicant abuse or misuse information. Applicant had a stellar record and reputation as an agent. Applicant's reputation in the agency for trustworthiness and veracity is good. The witness has complete trust in Applicant. (Tr. 48-51)

The chief operating officer for Applicant's employer testified that he previously served in the Marine Corps. He has known Applicant for over two years, and has observed him on a daily basis. He has nothing but the highest respect for Applicant. Applicant told him about the circumstances of his problem from his time in Afghanistan. The witness understands that the situation was completely investigated and due process was provided. The results of the situation do not affect his opinion that Applicant is trustworthy and honest, and exercises good judgment. (Tr. 92-101)

The executive vice president of Applicant's employer testified that he was a college classmate of Applicant's and recommended him for a position with his company. Applicant informed him and the company of his problems from Afghanistan and that he was not eligible for access to classified information. He has observed Applicant since he came to work with the company, and he has no concern with Applicant having access to classified information. (Tr. 101-106)

The facility security officer for Applicant's employer testified that he has known Applicant for the three years Applicant has worked for the company. He sees Applicant on a daily basis. He believes Applicant is an honest person and he recommends him for access to classified information. (Tr. 106-110)

Applicant presented letters of recommendation. His former Air Force commander, and the person who removed him from federal service, recommends that Applicant's access to classified information not be revoked. Three other people, who worked with Applicant when he was a criminal investigator and counterterrorism official, wrote that Applicant was professional, personable, and dedicated. He never gave them any reason to doubt his truthfulness or integrity. Applicant was a good worker whose performance reports were excellent. They know of no incidents when Applicant

mishandled classified information. They have no doubt that he has the credibility and integrity to have access to classified information. (App. Ex. E, Letters, various dates)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

Analysis

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information. (AG ¶ 15)

Applicant was terminated from his civilian position with the Air Force for mistreating Taliban detainees in Afghanistan in December 2008 in violation of Air Force regulations. This incident raises Personal Conduct Disqualifying Condition 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); AG ¶ 16(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 indicting that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rule violations); 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 (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing).

The incident was investigated by the Air Force and Applicant's Air Force employment was terminated. He appealed the termination to the proper Government agency which, after a hearing, upheld the termination. Based on this information, the Government produced sufficient evidence to establish the disqualifying conditions as required in AG ¶¶ 16(c), 16(d), and 16(e). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under financial considerations. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government. Applicant raised conditions that may mitigate the security concern

I have considered Personal Conduct Mitigating Condition AG ¶ 17(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment); AG ¶17(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); AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress); and AG ¶ 17(f) (the information was unsubstantiated or from a source of questionable reliability). These mitigating conditions do not apply.

Applicant acknowledged and admitted his actions against detainees that were in violation of his command's regulations and directives. The misconduct is not minor since it violated policy on treatment of detainees and potentially the Law of War. The incident is recent, happening less than four years ago. The information is substantiated since it was fully investigated and Applicant acknowledged his conduct. The circumstances were not unique. The conditions in the area of Afghanistan where Applicant operated were dangerous with the potential for death and serious bodily harm from various Taliban activities. But Applicant was on the type of mission he had been on in the past and that was normal for the command. Even though he felt fear and that he and his team were in danger, it was the normal circumstance and condition for the team and that part of Afghanistan. I do not second-guess that Applicant felt he was in danger of death or serious injury on the mission. The circumstances were what was expected and why the detainee humane treatment policy was instituted by his command. Applicant knew he had a problem with his conduct with the detainees before he even left the interrogation site. He compounded the problem by attempting to have a fellow agent not report the detainee abuse as required by command directives. He never acknowledged this aspect of his conduct. However, it is evident that Applicant understood he violated policy in his treatment of the detainees and did not want the command to know. He had an obligation by policy to report his misconduct with the detainees. He knew that if reported his career may be in jeopardy. SA K had a duty and obligation to report Applicant's misconduct. Applicant attempted to have SA K not make the required report. Applicant has failed to present sufficient information to mitigate the security concerns based on his conduct for personal conduct.

Whole-Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant 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 that Applicant served on active duty in the Air Force, and volunteered as a civilian Government employee for dangerous service in Afghanistan. I considered the information provided by his supervisors, friends, and fellow employees concerning his work ethic and performance, as well as his reputation for honesty, reliability, and trustworthiness. The incident in question is a serious breach of policy and potentially violated the Law of War. It could have an adverse effect on future efforts of coalition forces. Applicant's behavior was reckless, irresponsible, and showed poor judgment. He only acknowledged his misconduct after it was reported to his command. He did not report it himself as required by policy. His action toward the detainees and his attempt to have SA K not report the incident indicates that he has questionable judgment, may be untrustworthy, lacks reliability, and is unwilling to comply with rules and regulations. The incident raises questions about Applicant's reliability, trustworthiness, and ability to protect classified information. The incident indicates he may not properly handle, manage, or safeguard classified information. 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 has not mitigated the personal conduct security concerns.

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.c:	Against 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.

THOMAS M. CREAN
Administrative Judge