



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
 XXXXXX, Xxxx Xxxxxx ) ISCR Case No. 11-04187  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Robert J. Kilmartin, Esquire, Department Counsel  
For Applicant: *Pro se*

09/18/2012

**Decision**

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,<sup>1</sup> I grant Applicant's clearance.

On 7 May 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct.<sup>2</sup> Applicant timely answered the SOR, requesting a hearing. DOHA assigned the case to me 20 July 2012, and I convened a hearing 21 August 2012. DOHA received the transcript (Tr.) 29 August 2012.

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<sup>1</sup>Consisting of the transcript (Tr.) and Government exhibits (GE) 1-3.

<sup>2</sup>DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

## Findings of Fact

Applicant admitted receiving the non-judicial punishment (NJP) alleged in SOR 1.a. He denied the falsification allegations of SOR 1.b and 1.c. He is a 26-year-old lead security officer employed by a Government contractor since March 2010. He seeks reinstatement of the security clearance he held while in the military.

Applicant served in the U.S. military from March 2005 to March 2010. He held a clearance without incident as necessary during his military service and was honorably discharged in March 2010.

In September 2009, Applicant was referred to squadron-level NJP on three charges under the Uniform Code of Military Justice (UCMJ) as alleged in SOR 1.a and documented in GE 3. The charges were not intended for referral to court-martial. The specifications were inartfully drawn, and jurisdictionally deficient for referral to court-martial. Further, Applicant received his rights advisement from a lawyer simultaneously with 10-12 other military members being referred to NJP—an acceptable procedure in an administrative setting, but legally deficient for charges intended for court-martial. Finally, because Applicant was assigned to a land-based command, he had the right to demand trial by court-martial, which he declined.

In September 2009, Applicant accepted punishment at squadron-level NJP for violating UCMJ, Article 134-General Article (Conduct was of a Nature to bring Discredit Upon the Armed Forces). He was reduced in rank one paygrade and received other punishments consistent with squadron-level NJP. Unit records reflect that he received punishment only for the third of the alleged charges, not the first two charges, which alleged more serious misconduct. He was released from active duty into reserve status in March 2010, subject to recall per the terms of his enlistment agreement. He is eligible for re-enlistment.

In his August 2010 clearance application (GE 1), Applicant disclosed his NJP and the circumstances leading to his punishment in response to Section 13C: Employment Record<sup>3</sup> and Section 15: Military History.<sup>4</sup> He provided essentially the same information to a government investigator in August 2010. Because of his military experience, Applicant knew that his NJP would be in military record systems, and thus retrievable as part of his background investigation. Under his work history, Applicant reported in detail the several military duty stations where he had been assigned. The SOR alleges that Applicant falsified his clearance application and provided misleading information to the investigator because he did not provide the details of the two more-serious charges.

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<sup>3</sup>Specifically, Applicant answered “yes” to a question asking him if he had “received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace?” He described the violation as “discredit to the armed services,” and provided the details of the reprimand he received at NJP.

<sup>4</sup>Applicant disclosed that he had been subject to “other disciplinary proceedings under the Uniform Code of Military Justice” for “discredit to the armed services.”

The sole support for the allegations in SOR 1.a is the charge sheet appended to Applicant's NJP record. There is no police report or report of investigation covering any of the allegations referred to NJP. These allegations lack proof. Applicant admitted the lesser charge of "conduct to bring discredit," and that is what his commanding officer punished him for. The Applicant's admission documents the "conduct to bring discredit," but the Applicant's denial of the two more serious charges put the burden on the Government to substantiate those charges. Mere allegation cannot substantiate those charges. The commanding officer recorded no formal disposition of the two more serious charges, but none is required because the proceeding is non-judicial. SOR 1.a alleges only that Applicant went to NJP on the three charges listed and that Applicant accepted punishment as listed. His admission to that allegation does not admit that he received punishment for all three offenses, and the Government's own evidence shows that he was only punished for the third offense.

### **Policies**

The adjudicative guidelines (AG) list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>5</sup>

### **Analysis**

The Government established a case for disqualification under Guideline E. Applicant's October 2009 NJP revealed conduct demonstrating poor judgment.

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<sup>5</sup>See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

However, only in a military setting does the conduct constitute a violation of the UCMJ. And in this instance, Applicant's Commanding Officer chose to resolve the charges through NJP.<sup>6</sup> Although the conduct demonstrated poor judgment, it occurred in October 2009, has not been repeated, and Applicant completed his enlistment without further incident. Nothing in the record suggests that this conduct is likely to recur, and is sufficiently known to not present any potential for undue influence.

Notwithstanding the NJP, the Government did not establish its case for falsification of Applicant's clearance application or for misrepresentation during his August 2010 subject interview. Applicant disclosed his NJP both as an employment-related disciplinary action because he was reprimanded, and under his military history because he was subject to NJP under the UCMJ. Applicant disclosed the misconduct for which he was punished, and was aware that military records contained the details of his NJP. The idea that his failure to list the two other charges (for which he was not punished) constitutes a deliberate falsification or misrepresentation is a quibble, based on a stretched reading of the question. Applicant was subjected to discipline under the UCMJ only for "conduct of a nature to bring discredit upon the armed forces." Only a hyper-technical interpretation of the question argues that he was also subjected to discipline under the UCMJ for the other two offenses, neither of which resulted in any punishment and neither of which has any evidence to support them. Further, there is nothing in the wording of the question allegedly falsified to suggest that Applicant should have provided more information than he did, or that the information he provided was otherwise insufficient to put the Government on notice of Applicant's misconduct. I resolve Guideline E for Applicant.

### **Formal Findings**

Paragraph 1. Guideline E:           FOR APPLICANT

    Subparagraph a-c:           For Applicant

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<sup>6</sup>¶ 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;

## **Conclusion**

Under the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

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JOHN GRATTAN METZ, JR  
Administrative Judge