



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



In the matter of:)
)
) ISCR Case No. 11-10107
)
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: T.G., Personal Representative

06/19/2013

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, personal conduct. However, he mitigated the concerns under Guideline D, sexual behavior. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On November 20, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines E and D. DOD 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 DOD on September 1, 2006.

Applicant answered (Answer) the SOR on December 15, 2012, and requested a hearing before an administrative judge. The case was assigned to me on April 5, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 12, 2013, and the hearing was convened as scheduled on May 20, 2013. The Government offered exhibits (GE) 1 through 6, which were admitted into the record without objection. Department Counsel's exhibit list is marked as Hearing Exhibit (HE) I. Applicant testified, called one witness, and offered exhibits (AE) A through G that were admitted into the record without objection. The record was left open for Applicant to submit additional evidence. He submitted AE H in a timely manner and it was admitted into the record with no objection. Department Counsel's transmittal letter is marked as Hearing Exhibit (HE) II. DOHA received the hearing transcript (Tr.) on June 3, 2013.

Findings of Fact

In Applicant's answer to the SOR, he admitted all the Guideline E allegations, but denied the Guideline D allegation. The admissions are incorporated as findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following additional findings of fact.

Applicant is 48 years old. He has worked for a defense contractor since 2010 as a quality control officer. He was married in 1990. He has one adult daughter, who suffered a head injury when she was an infant and will be dependent on her parents care for the foreseeable future. He served 20 years in the Army before retiring with an honorable discharge as a staff sergeant (pay grade E-6) in 2010.¹

Applicant's conduct raised in the SOR includes: (1) making a false statement to an Army investigator in February 2009 (admitted); (2) making two false statements to a defense investigator in April 2011 (admitted); (3) failing to list material information on his March 2011 security clearance application concerning prior criminal offenses (admitted); and, (4) engaging in sodomy with a women, not his wife, on two occasions in October 2008 (denied).

In October 2008, Applicant was serving overseas as a platoon sergeant for his Army unit. He invited a female subordinate back to his room to watch movies and drink alcohol. The female became intoxicated. Applicant began kissing the female as they lay on his bed. At some point, the female arose from the bed and indicated she did not want to do anything more. Applicant assured her that everything was alright and she sat back on the bed. Applicant then performed oral sex on the female without her consent. She later blacked-out that night. The next morning Applicant again was performing oral sex on her when she told him to stop, which he did. She got dressed and left the room. She did not report the incident at that time. However, several months later, while facing discipline from Applicant for other unrelated actions, the female revealed what had happened in Applicant's room in October 2008. An investigation ensued and Applicant was formally offered nonjudicial punishment (NJP) (under the Uniform Code of Military

¹ Tr. at 7, 29-31; GE 1.

Justice (UCMJ), Article 15) for committing the offenses of forcible sodomy, cruelty, and maltreatment to a subordinate, and making a false official statement. He accepted NJP from his commander, rather than face a court-martial. He was sentenced to 45 days extra duties, 30 days restrictions, and a suspended reduction in grade.²

In February 2009, Applicant was interviewed by Army investigators about the allegations that he performed oral sex on his subordinate. He initially admitted performing oral sex on one occasion, but denied any other acts. He later admitted performing oral sex on her a second time. His initial denial about the second act of oral sodomy to the investigator was the false official statement specification that was included in his Article 15 NJP.³

In March 2011, Applicant completed his security clearance application (SCA) in connection with his current employment. Section 22(c) of the SCA asked whether he was ever charged with any felony offense. It also stated “include those under the UCMJ.” Applicant answered “no” to this question. He did not include information about the forcible sodomy charge that was resolved through NJP. He also did not include a 1982 charge of burglary of a vehicle. He did include this offense in an earlier SCA he completed in October 1990. In Section 22(e) of the March 2011 SCA, he was asked if he had ever been charged with a drug or alcohol offense. He answered “yes” to the question and listed a 1992 driving under the influence (DUI) offense for which he received NJP while in the Army. That was the only offense he listed. He did not list two DUI offenses occurring in August 1986 and November 1987. He did list the November 1987 DUI offense in an SCA dated March 2003, but he did not include the August 1986 offense in any earlier SCA. In a follow-up interview conducted by a defense investigator in June 2011, Applicant admitted that there were two other unreported DUI offenses that he was charged with in the summer of 1987. The two offenses occurred within weeks of each other. The cases were combined and he pleaded guilty to the offenses. He told the investigator that he failed to list these offenses because he believed they would affect his ability to receive a security clearance. He did not list them on any earlier SCA. During his testimony, he gave conflicting information. Initially, he agreed with his statement to the investigator that he didn’t list the DUI offenses because he was concerned he would not receive a security clearance if he did list them. Later, he testified that he was confused by the question, in that he believed he only had to include offenses that occurred within the past seven years and that was why he did not list the two 1987 DUI charges. I found Applicant’s testimony to be contradictory and inconsistent.⁴

In April 2011, an investigator contacted Applicant about his security clearance and conducted an interview. During the interview, Applicant was specifically asked

² GE 4, 5.

³ GE 4, 5.

⁴ Tr. at 47-49; GE 1, 2, 4, 6, AE A.

about his answer to SCA Section 13(c)(2), where he listed that he received NJP for “conduct unbecoming a noncommissioned officer.”⁵ He described the specific conduct as having a female in his room, which was against Army policy and telling Army investigators that the female had not been in his room, which was a false statement. He further stated that he and the female watched a movie together. He also told the investigator that he did not engage in forcible sodomy or sexual activity with her. During a subsequent interview, Applicant told the investigator that he had lied earlier and that he did have sexual contact with the female soldier in October 2008. When asked why he lied during the first interview, Applicant replied that he was afraid disclosing the true information would cost him his job and a chance for a security clearance. During his hearing testimony, he confirmed that he lied to the investigator at his initial interview.⁶

Applicant claims that he characterized his NJP as “conduct unbecoming a noncommissioned officer” because he wanted to give as little information as possible so his wife would not find out about what happened. His wife did not become aware of the acts that led to his NJP until she inadvertently came across information related to his security clearance in 2012. He also claimed that his company’s security officer told him it was alright to describe his actions this way. Applicant could not give the name of the security officer, nor did he supply it later when he was given an opportunity to do so. He also claims that he initiated the contact with the defense investigator that led to his revealing the true facts about his prior NJP. A summarized interview, which Applicant swore under oath was true and accurate, indicated that the investigator made the contact to follow-up on information he requested from the Applicant. I do not find Applicant’s testimony credible.⁷

Applicant supplied his Army evaluation reports from 1996 to 2009. His overall rating for each of those years was either “among the best” or “fully capable.” He also produced decorations and awards he received. Applicant offered the character letter of a coworker who attests to his leadership, dedication, loyalty, integrity, and experience.⁸

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.

⁵ Under the UCMJ, Article 133 is entitled “conduct unbecoming an officer and gentleman” and it applies to commissioned officers, cadets, or midshipman. There is no specific article in the UCMJ that covers conduct unbecoming a noncommissioned officer.

⁶ Tr. at 41, 44; GE 4.

⁷ Tr. at 38-39, 41-44, 50, 55-57; GE 4.

⁸ AE B, D-G.

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.

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 personal conduct security concern:

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 in this case. The following disqualifying conditions are potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant deliberately provided false information on his security clearance application by not listing previous DUI offenses and by providing false information to a defense investigator concerning the true circumstances related to his 2009 NJP from the Army. He previously provided deliberate false information to Army investigators that led to his 2009 NJP. His failure to list the 1982 burglary charge was not material since he had previously disclosed that offense in an earlier SCA. Likewise, his failure to list that he was charged with a felony (forcible sodomy) does not meet this disqualifying condition because he was never "charged" as that term of art is used in military law. He was offered and accepted NJP process and punished by his commander. Disposition of the sodomy incident under Article 15, NJP, does not constitute being charged with the a criminal offense under military law. AG ¶ 16(a) applies to SOR ¶ 1.e, but not to 1.d. AG ¶ 16(b) applies to ¶ 1.a through 1.c.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and the following are potentially applicable:

(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; and

(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 has a history of providing false information and continued to do so through his security clearance process. He did not make prompt disclosures on either his SCA or after his initial interview about the true circumstances related to his 2009 NJP. I do not find credible his explanation that a security officer told him to describe all his criminal action in his SCA as "conduct unbecoming a noncommissioned officer." Even if that were true, it does not explain why he lied to Army and defense investigators about his actions. His lying and providing false information about his past criminal action is not minor, occurred as recently as 2011, and is repeated behavior, which casts doubt on his reliability, trustworthiness, and good judgment. None of the above cited mitigating conditions apply.

Guideline D, Sexual Behavior

AG ¶ 12 expresses the sexual behavior security concern:

Sexual behavior that involves a criminal offense indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this guideline may be raised solely on the basis of the sexual orientation of the individual.

I have considered all of the sexual behavior disqualifying conditions under AG ¶ 13 and the following are potentially applicable:

(a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and

(d) sexual behavior of a public nature and/or that reflects lack of discretion or judgment.

In 2008, Applicant performed oral sex on a female Army subordinate who was intoxicated. He was married at the time and his wife did not find out about the incident until 2012. He received NJP for his act of forcible sodomy committed on the female soldier. There is no evidence of any other similar behavior since then. All the above listed disqualifying conditions apply.

I have considered all of the sexual behavior mitigating conditions under AG ¶ 14 and the following are potentially applicable:

(b) the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(c) the behavior no longer serves as a basis for coercion, exploitation, or duress.

Applicant's action occurred over five years ago and there is no evidence of similar behavior. He is no longer in the military with subordinates reporting to him so a recurrence of similar behavior is unlikely. His wife is now aware of his past actions and the behavior can no longer serve as a basis for coercion, exploitation, or duress. Both mitigating conditions 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 Army record and his supportive character evidence. However, I also considered that Applicant has repeatedly lied to official investigators starting in 2009 when he was asked about his actions with the female soldier, all the way through 2011, when he continued to lie to investigators through his security clearance review. 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, but he did mitigate the concerns under Guideline D, sexual behavior.

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
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline D:	FOR APPLICANT
Subparagraph: 2.a:	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