



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



In the matter of:)	
)	
)	ISCR Case No. 12-01979
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

06/25/2014

Decision

RIVERA, Juan J., Administrative Judge:

While serving in the U.S. Army, Applicant engaged in criminal conduct and was administratively discharged under other than honorable conditions in lieu of trial by court-martial in 2002. His current falsifications concerning his past criminal behavior raise serious questions about his reliability, trustworthiness, judgment, and his ability to protect classified information. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on January 29, 2011. On September 19, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline J (criminal conduct) and Guideline E (personal conduct).¹ Applicant answered the SOR on

¹ DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

November 5, 2013, and elected to have his case decided on the written record in lieu of a hearing.

A copy of the Government's file of relevant material (FORM), dated March 21, 2014, was provided to him by transmittal letter dated March 25, 2014. Applicant received the FORM on April 28, 2014. He was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. He timely responded to the FORM and provided a statement, dated May 15, 2014, with eight enclosures that I made part of the record. The case was assigned to me on June 3, 2014.

Findings of Fact

Applicant admitted all the factual allegations in the SOR, but with reservations. His admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, including his answers to the SOR, the FORM, his May 2013 response to interrogatories, and his November 2003 statement, I make the following findings of fact.

Applicant is a 43-year-old field engineer working for a government contractor in support of deployed U.S. personnel. He graduated from high school in 1989, and completed some college courses in 1993, but did not earn a degree. He married his first wife in February 1989, and divorced in August 2010. He has three grown-up daughters from this relationship. He married his current wife in 2012.

Applicant enlisted in the U.S. Army in August 1989, shortly after his high school graduation. He served on active duty until August 2002, when he was administratively discharged in lieu of trial by court-martial. In 2001, he was a drill sergeant in a training unit, and held the rank of sergeant first class (E-7). He and other drill sergeants were investigated for rape and maltreatment of subordinates. Applicant denied any involvement with the rape allegations or the maltreatment of subordinates' incident. He was offered non-judicial punishment for those offenses, which he refused, and he demanded trial by court-martial. He averred that after he demanded trial by court-martial, a subsequent investigation was conducted, and additional charges were preferred against him.

In June 2002, Applicant was charged with violating a lawful general regulation for engaging in four wrongful relationships with three different enlisted women, and an indecent assault on a fourth female trainee. He was referred to a special court-martial empowered to adjudged a bad conduct discharge. After consulting with his attorney and receiving advice from supervisors, Applicant requested an administrative discharge in lieu of trial by court-martial. In his request for the administrative discharge, Applicant admitted to one specification of having an improper relationship with a trainee. Upon his discharge, Applicant was reduced to the rank of E-1, and his service was characterized as under other than honorable conditions (OTH).

After his discharge, Applicant was hired by a government contractor and applied for a security clearance. On November 6, 2003, Applicant was interviewed by a government agent conducting a background investigation. He provided an official statement, which he certified as true under the provision of 18 U.S.C. Section 1001. In his November 2003 statement, Applicant claimed that a female soldier accused him of assaulting another female soldier. After an investigation, he was offered non-judicial punishment for sexual assault, and he refused it because he did not assault anyone, and he did not want to take the Article 15 and say that he had. He claimed he did not assault a female soldier in the hotel room, and averred she never said he assaulted her.

Applicant was hired by a government contractor in June 2003, and he has been working for different government contractors to present. He started working for his current employer in January 2011.

Applicant submitted his most recent security clearance application (SCA) on January 29, 2011. He disclosed in Section 15 (Military History) of the 2011 SCA, that he was charged with indecent assault and maltreatment of subordinates in 2002, and referred to trial by court-martial after he refused non-judicial punishment. He then requested an administrative discharge in lieu of trial by court-martial and was administratively separated from the Army with an OTH.

On August 29, 2011, Applicant was interviewed by a government investigator concerning his 2002 court-martial charges. Applicant told the investigator that he was offered an Article 15 for offenses he did not commit. He demanded trial by court-martial and additional charges were preferred against him. He told the investigator that he had no idea why he was charged with indecent acts, failure to obey a regulation, and cruelty and maltreatment of subordinates because he did not do anything. He took the "fall" as he was instructed to do.

In his response to DOD interrogatories (sworn on May 8, 2013), Applicant stated that the only reason he received an OTH discharge is because he refused to accept an Article 15 punishment for something he did not do.

In his November 2013 answer to the SOR, Applicant admitted all the Guideline J allegations with reservations, because he did not remember the circumstances surrounding the 2002 offenses. He admitted to touching a female soldier inappropriately, but he denied any use of physical force.

In his May 2014 response to the FORM, Applicant stated that he never intentionally tried to disavow any of the 2002 charges against him. He explained that when he told the investigator in 2011, that he was forced to take the fall for somebody else, he was expressing his recollection of the events. The investigator did not provide him with any documents to refresh his memory of the 2002 events before the interview. He claimed that he did not remember the circumstances that led to the 2002 charges against him. Applicant also claimed he never abused his position as a drill sergeant or

made inappropriate comments to female trainees. He answered the investigators questions to the best of his recollection.

Applicant considers himself to be trustworthy, reliable, and a good worker. The only criminal charges ever filed against him were the 2002 court-martial charges. Except for the SOR allegations, he has never been the subject of any security concerns. Since 2002, he has been working for government contractors providing services to deployed U.S. personnel in hostile environments in Iraq and Afghanistan. He is currently deployed to Central America providing support to deployed U.S. personnel.

As an aviation mechanic, Applicant was entrusted with the safety and security of airplanes and those who flew them. He has not received any negative operational readiness reports. He also has performed as his unit's sensitive items custodian without incidents. He has selflessly dedicated himself to the U.S. service without waiver, and has received numerous awards and recognition for a job well done. He currently holds a managerial position, which is also recognition of his trustworthiness and reliability. In support of his good job performance, Applicant submitted two President's Awards, commendable ratings, certificates of appreciation, and letters of recommendation. Applicant is considered to be a well-respected professional by his peers and supervisors. He is an invaluable asset to his unit. He demonstrates a high level of reliability and trustworthiness. He has established a reputation for following rules and enforcing strict performance standards. His references recommended his eligibility for access to classified information.

Policies

Eligibility for access to classified information may be granted "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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person's suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

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 the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest 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. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline J, Criminal Conduct

Under Guideline J, the Government’s concern is that 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.” AG ¶ 30.

Applicant admitted (with reservations because he did not remember the circumstances) that he violated a lawful regulation three times by engaging in wrongful relationships with three female subordinates. He also admitted to indecently assaulting a female subordinate, but without the use of force. Applicant was offered non-judicial punishment for the above offenses in 2002, which he refused, and demanded trial by court-martial. Later, he requested an administrative discharge in lieu of trial by court-martial, and admitted to one incident of having an unlawful relationship with a subordinate. Applicant’s behavior raises security concerns under AG ¶ 31(a) “a single serious crime or multiple lesser offenses,” and AG ¶ 31(c) “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

AG ¶ 32 lists conditions that could mitigate the criminal conduct security concerns raised under AG ¶ 31:

(a) 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; and

(d) 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.

Considering the record as a whole, I find that both mitigating conditions partially apply, but do not fully mitigate the security concerns. Applicant's offenses were serious and violated the trust placed in him as a leader and drill sergeant. He used his position to abuse subordinates. Notwithstanding, his commander offered him non-judicial punishment, an administrative measure reserved for less serious offenses, and later approved Applicant's administrative discharge in lieu of trial by court-martial. Such action also indicates the commander did not consider Applicant's behavior sufficiently serious to warrant a court-martial.

Except for the SOR allegations, there is no evidence of Applicant being involved in any additional criminal conduct before 2002, or after 2002. Applicant's good service to the United States during the last 12 years serves as some evidence of his possible rehabilitation

Notwithstanding, Applicant's past criminal behavior is aggravated by his 2011 and 2013 false statements and falsifications, both of which are felony offenses in violation of 18 U.S.C. Section 1001. Applicant's failure to fully disclose his past criminal behavior together with his current false statements bring to the forefront his lack of judgment, reliability, and trustworthiness. It shows Appellant's lack of reform and rehabilitation and his unwillingness to comply with laws, rules, and regulations.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

The personal conduct security concerns are based on the same facts alleged under the criminal conduct guideline, incorporated herein, and the fact that he made false statements to an investigator in August 2011 and falsified his April 2013 response to Government interrogatories.

Notwithstanding Applicant's numerous contradictory statements, the record shows that he indecently touched a female subordinate and engaged in an improper relationship with at least another female subordinate. Applicant made false statements to an investigator and falsified his response to interrogatories when he minimized his criminal behavior and failed to disclose the full extent of his prior criminal behavior.

Applicant's criminal behavior and falsifications trigger the applicability of the following disqualifying conditions under AG ¶ 16:

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

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct 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;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

Considering the evidence as a whole, I find that none of the mitigating conditions apply. Applicant made no effort to correct his numerous false statements and falsifications until he answered the SOR admitting (with reservations) his 2001-2002 criminal behavior. He then minimized his past criminal behavior in his response to the FORM. Applicant's past criminal behavior and current falsifications raise serious questions about his reliability, trustworthiness, judgment, and his ability to protect classified information.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). I have incorporated my comments under Guidelines J and E in my whole-person analysis.

Applicant served 13 years on active duty in the Army until he was administratively discharged under other than honorable conditions in lieu of trial by court-martial. Since 2002, he has served the United States well while employed with government contractors supporting U.S. personnel in dangerous environments.

Notwithstanding, Applicant's falsifications concerning his past criminal behavior raise serious questions about his reliability, trustworthiness, judgment, and his ability to protect classified information. He failed to mitigate the Guideline J and Guideline E 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 J:	AGAINST APPLICANT
Subparagraph 1.a and 1.c:	For Applicant
Subparagraph 1.b and 1.d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a- 2.f:	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 eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge