



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



In the matter of:)	
)	
)	ISCR Case No. 14-03701
)	
Applicant for Security Clearance)	

Appearances

For Government: Carroll J. Connelley, Esq., Department Counsel
For Applicant: James S. Del Sordo, Esq.

01/26/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's 2011 conviction for violating a General Order (hazing), indecent acts, and assault continues to raise doubts about his judgment and his willingness and ability to comply with the law and rules and regulations. His evidence is insufficient to mitigate the personal conduct security concerns. Clearance is denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on June 26, 2013. After reviewing it and the information gathered during a background investigation, on April 6, 2015, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline E (personal conduct).¹ Applicant answered the SOR on April 27, 2015, and requested a hearing

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.

before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on April 12, 2016. DOHA issued a notice of hearing on May 4, 2016, setting the hearing for June 9, 2016. At the hearing, the Government offered five exhibits (GE 1 through 5). Applicant testified on his own behalf, presented the testimony of two witnesses, and offered one exhibit (AE 1). All exhibits were made part of the record without objections. DOHA received the hearing transcript (Tr.) on June 20, 2016.

Procedural Issue

Department Counsel move to amend the first line of SOR ¶ 1.d to read: "You received an Other-Than-Honorable discharge from the U.S. Navy" Applicant did not object, and I granted the motion. (Tr. 7-9)

Findings of Fact

Applicant admitted all the factual allegations in the SOR and submitted explanations and extenuating and mitigating information. After a thorough review of the record evidence, and having considered Applicant's demeanor while testifying, I make the following findings of fact:

Applicant is a 37-year-old employee of a defense contractor. He graduated from high school in 1997, and shortly thereafter enlisted in the U.S. Navy. He was granted a clearance in 1998. He married in 2006, and has a 21-year-old stepdaughter, and two daughters, ages 13 and 7.

From his 1997 enlistment to 2011, Applicant performed well and the Navy promoted him to the rank of E-6. In September 2011, while deployed aboard a ship, Applicant was the senior enlisted and acting chief of a division. In the berthing of the ship, Applicant and five sailors hazed another sailor (victim) during a period of 60-90 minutes. During the hazing, the victim was stripped naked, restrained, photographed, and physically and indecently assaulted (a sailor placed his genitals on the victim's forehead).

At the time of the 2011 hazing incident, Applicant was 31 years old and had 13 years of service in the Navy. During those 13 years, Applicant received yearly training on the Navy's policies against hazing, sexual harassment, sexual misconduct, and the use of alcohol. Applicant knew that hazing was illegal. (Tr. 56)

Applicant pled guilty to, and was convicted at a summary court-martial for, violating a General Order (hazing) (Article 92, UCMJ), indecent acts (Article 120, UCMJ), and assault consummated by battery (Article 128, UCMJ). The court-martial reduced Applicant to the rank of E-5, placed him on restriction, and imposed a forfeiture of pay. Following the court-martial, Applicant was administratively discharged from the

Navy in August 2012 for misconduct with a service characterization other than honorable.

Between September 2011 (hazing incident) and August 2012 (discharge date), Applicant continued performing his military duties, and his security clearance was not revoked. After his discharge, Applicant worked for a private company for one-year. In June 2013, a defense contractor hired Applicant and sponsored his clearance. In March 2015, Applicant was hired by his current employer, a defense contractor.

Applicant noted that this was a single incident, and he has had no other disciplinary infractions or problems with the law after the hazing offense in 2011. Applicant believes that the passage of time, his good performance, and his honesty show that his misconduct is not likely to recur, and that he is reliable, trustworthy, and uses good judgment. Applicant further believes that he has matured substantially since 2011. He believes he has demonstrated professional growth, and continued handling classified information appropriately. He averred he has done a lot of meditating and self-reflection. He wants his daughters to be proud of him.

Applicant's current supervisor testified that Applicant always displays professional behavior, does his job well, and is a good employee. In his opinion, Applicant is reliable, trustworthy, and handles classified material properly. He favorably endorses Applicant's eligibility for a security clearance.

Applicant's commanding officer at the time of the hazing incident testified on his behalf. He is the same officer that recommended Applicant be court-martialed for his 2011 offenses. He is now a captain (O-6) and commands a ship. He considered Applicant to be an outstanding sailor. Applicant was his top first class petty officer out of about 30 aboard ship. He believes Applicant to be trustworthy, honest, and reliable. He has no concerns with Applicant holding a security clearance. He believes Applicant displayed bad judgment and made a serious mistake. However, he also believes Applicant paid for his mistake and his past behavior no longer creates doubts about Applicant's ability to protect 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 E, Personal Conduct

AG ¶ 15 articulates the security concern for personal conduct:

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.

In September 2011, Applicant and five sailors hazed another sailor during a period of 60-90 minutes. During the hazing, the victim was stripped naked, restrained, photographed, and physically and indecently assaulted. At the time, Applicant was the senior enlisted (E-6) and acting chief of a division aboard a deployed ship. He was 31-years-old and had been in the Navy for 13 years. Applicant pled guilty at a court-martial of violating a General Order (prohibiting hazing), indecent acts, and assault consummated by battery. Following his court-martial, Applicant received an other than honorable discharge.

Applicant's behavior triggers the applicability the following disqualifying conditions under 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 indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources; 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, including Applicant's age, rank, leadership position, experience in the Navy while possessing a clearance, and the circumstances surrounding his criminal behavior, I find that Applicant's evidence is insufficient to mitigate the Guideline E security concerns.

Applicant was 31 years old and had 13 years of experience in the Navy at the time of the offenses. He had received yearly training about the Navy's policies against hazing, sexual misconduct, and discrimination. Moreover, he was in a leadership position where he was responsible for taking care of sailors and enforcing compliance of Navy rules and regulations. Applicant displayed bad judgment and a disregard for his training, the law, and rules and regulations when he abused, and permitted others to abuse a fellow shipmate.

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 Guideline E in my whole-person analysis.

Applicant receives credit for his Navy service and years working for defense contractors. He is considered to be a good employee and demonstrated a high-level of competency and professionalism. I considered that Applicant's questionable behavior occurred about six years ago; that he has positive reviews from his employers since 2011; and his statement about his personal changes and increased maturity.

On the other hand, Applicant violated his leadership position and the trust bestowed on him by the Navy. He engaged in criminal behavior that demonstrated questionable judgment and his unwillingness to comply with the law, rules and regulations. The abuse of a fellow sailor occurred over a 60-90 minute period and involved serious criminal conduct. His evidence is insufficient to mitigate the 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 E:

AGAINST APPLICANT

Subparagraphs 1.a-1.d:

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