



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



In the matter of:)
)
) ISCR Case No. 17-03629
)
Applicant for Security Clearance)

Appearances

For Government: Andrea Corrales, Esq., Department Counsel
For Applicant: John Berry, Esq.

01/02/2019

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct. Eligibility for access to classified information is denied.

Statement of the Case

On December 27, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective on June 8, 2017.

Applicant answered the SOR on January 30, 2018, and requested a hearing before an administrative judge. The case was assigned to me on August 3, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on September 5, 2018. I convened the hearing as scheduled on October 24, 2018. The Government offered

exhibits (GE) 1 through 3. A witness for the Government testified. Applicant and two witnesses testified on his behalf. He offered Applicant Exhibit (AE) A. There were no objections to any exhibits offered, and all were admitted into evidence. DOHA received the hearing transcript on October 31, 2018.

Findings of Fact

Applicant admitted in part and denied in part the sole allegation in the SOR. It will be considered a denial. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 45 years old. He has been married three times and to has been married to his current wife since 2010. He has three biological children, ages 16, 18 and 21 years old. He has two adult stepchildren. Applicant served in the military from 1991 to 1998. He received a General Discharge under Other than Honorable Conditions. He disclosed on his January 2017, National Security Position questionnaire that the reason for his discharge was "misconduct." He testified that the misconduct was sexual harassment. He explained he was having a relationship with another military member, and they were both married.¹

Applicant admitted that in October 2015, he was terminated from his position as a contractor. He disputes the findings of the investigation conducted by the contractor and the basis of the termination. He was accused of making threats of bodily harm to co-workers and a general threat using the term "active shooter."

While working for the primary contactor Applicant held a second job as a security officer, which required that he carry a firearm. His coworkers were aware of his second job and were aware he was authorized to have a firearm. Applicant admitted that he slept at his main job. He said he was not tired, but took a nap at his desk because he had an hour for lunch, and did not know what else to do.²

Witness X testified on behalf the Government. She stated that she and Applicant were friends both professionally and personally. She was not his supervisor, but was responsible for advising the program manager about issues in the office. She and Applicant interacted throughout the day. Employee Y provided a statement and in it said that she interacted with Applicant throughout the day.³

Witness X had observed Applicant sleeping during work over the course of a couple of months and that he kept a pillow in his desk drawer. She had reported his conduct to Mr. B, the program manager, because it impacted her job. Mr. W is the project manager and to whom Applicant reports. On October 21, 2015, the day before the alleged

¹ Tr. 91-97, 120; GE 1.

² Tr. 97-99.

³ Tr. 21-23.

incident, Mr W, in a memo to Mr. B, noted that he had observed Applicant sleeping at his desk.⁴ He stated:

I stopped by [office] yesterday to chat with [Employee Y] for a bit. I found [Applicant] sleeping at his desk, [Witness X] was quick to point out that [Applicant] was on his lunch break. (I will take her at her word that was the case). Regardless, the workplace is not the venue to catch up on your sleep. [Applicant] can find a shady spot down the road somewhere to catch a nap on his lunch hour. I will let you address this while it is a housekeeping item that doesn't go outside of our group.⁵

Witness X testified that on October 21, 2015, the morning of the alleged incident, Applicant appeared to be acting normal. Later that day she noticed a change in his behavior, and he was angry because he had been counseled for sleeping at work. He was specifically angry at Mr. B and indicated that Mr. B would have an active shooter on his hands. Witness X considered this statement a credible threat because Applicant was already angry with Mr. B based on Applicant's complaint that Mr. B was interfering in the warehouse operations. Witness X stated that Applicant had previously expressed his dissatisfaction with Mr. B by screaming at her, using profanity and dropping things in the warehouse.⁶

Witness X credibly testified that when Applicant mentioned "active shooter" she became scared. She did not know if Applicant was capable of that behavior, but was aware he had a firearm, which she believed he kept it in his car. Applicant had previously talked to her about having a gun. She thought that Applicant was always tired because he was working two jobs. Witness X's testimony is corroborated by a written statement she made the day after the incident.⁷

Employee Y was present when that "active shooter" comment was made. She made a written statement the day after the incident.⁸ She stated:

After noticing his anger and aggressive behavior, I asked [Applicant] what was wrong. He said that [Mr. W-his supervisor] told [Applicant] that he wanted to talk to him today and instructed him not leave the building until they spoke. [Applicant] said [Mr. B] told [Mr. W] that [Mr. B] caught [Applicant] sleeping and that he sleeps all the time. [Applicant] tried to explain that he only slept for 15 minutes. However, [Applicant] said that if [Mr. B] kept it up, he would have an active shooter on his hands. After

⁴ Tr. 23-25, 32, 43-44; GE 3.

⁵ GE 3 page 3.

⁶ Tr. 26-31, 44.

⁷ Tr. 31, 53; GE 3 page 7.

⁸ Tr. 31.

noticing that [Witness X] and I were not responding, he stormed off to the warehouse and continued emptying out the van with material he picked up during the day.

When I went to the warehouse to continue moving desktops to DRMO, [Applicant] walked up to me very aggressively and pointed to the office and said 'I just want to smack the piss out of her.' Without any hesitation, I responded with 'Who, [Witness X]?' After questioning him about why he would say that, he explained to me that [Witness X] runs her mouth too much and has no reason to continue telling [Mr. B] what happens in the warehouse. [Applicant] assumed that the reason [Mr. B] came down the other day was because [Witness X] mentioned to [Mr. B] that [Applicant] had been sleeping during the day. In actuality, [Mr. B] came to the warehouse to talk to me about MAC reports.

Witness X testified that after Applicant made the statement about "active shooter" she was scared, and she attempted to contact Mr. B because she wanted to get out of the office. She sent him a text stating Applicant was making inappropriate comments.⁹

Mr. W met with Mr. B on October 21, 2015, to discuss performance issues related to Applicant. During the meeting, Mr. B received Witness X's text stating Applicant was making inappropriate comments. When Mr. B asked as to what, she replied "Active Shooter." Mr. W left the meeting and proceeded to the warehouse. When he arrived at the warehouse, Witness X and Employee Y were in the parking lot leaving the warehouse. They explained to Mr. W that Applicant was angry and making threats. Mr. W inquired about the "active shooter" statement and was told by both that Applicant was angry and made the threat. Employee Y mentioned the comment that Applicant told her he was going to "slap the piss out of Witness X." Mr. W noted that both were visibly upset.¹⁰

Mr. W met with Applicant and counseled him about sleeping at work and several other matters. Mr. W did not initially bring up the "active shooter" comment and was waiting to see if Applicant would do so on his own.¹¹ He did not. Mr. W stated:

I stated I had heard the term "Active Shooter," was used by him and asked if he had said it or not. He said "yes" he had said active shooter, it was not directed at anyone in specific only that he was angry over the issues that occurred that day and he was not actually threatening anyone. I explained the statement was completely inappropriate and even stating it without any threat intended was not acceptable behavior. I told him I had seen both [Witness X] and [Employee Y] as I arrived and they appeared visibly shaken and upset. I stated perhaps an apology was appropriate. I required no

⁹ Tr. 31, 48; GE 3.

¹⁰ Tr. 33, 39-40, 48-51, 56.

¹¹ Tr. 56; GE 3.

further information and when [Applicant] asked, I did not state whether he would be terminated or not. I simply stated it was a possibility. With his response, the counseling session was over and I proceed to the OCIO Conference room to meet with [Mr. B].¹²

Mr. W met with Mr. B, Witness X, and Employee Y immediately after the counseling session with Applicant.¹³ In Mr. W's incident report he stated:

I relayed my first impression and listened to [Witness X] and [Employee Y's] perception of the threat. Both relayed their perception was that it was real, or could be real. [Mr. B] indicated [Applicant] was to be removed from the project.¹⁴

Witness X said she received seven phone calls and text messages within a ten-minute time span while she was still in the conference room with Mr. B, Mr. W, and Employee Y from Applicant asking that she call him. She did not respond. About twenty minutes later she received a text message from Applicant saying "Thanks I'm fired."¹⁵ He also attempted to contact her by phone in 2016, but instead talked to Witness X's husband. She has blocked his number. She testified she was very scared and hesitant to be in the same building with him. She said she agreed to testify because she decided if she did not then she was not doing her part. She is afraid he will gain access to the place where she works, and she is afraid to see him. When cross-examined, she confirmed that there was no one in the warehouse for him to direct his active shooter comment to. She confirmed that Applicant was referring to Mr. B when he said he would have an active shooter on his hands. She testified that she felt like Applicant was going to get his gun and his comments were directed toward both Mr. B and those in the office. Applicant was standing next to Witness X when he made the comments.¹⁶

Applicant testified that he maintains a weapon as part of his second job, but it kept on the premises at that location. Applicant testified that he had a discussion with Mr. B and was told Mr. W would be talking with him. He admitted to sleeping during his lunchbreak, but denied other performance issues. He left his meeting with Mr. B and went to the warehouse.¹⁷

Applicant testified he was speaking to a Marine in the warehouse and they were discussing active shooter training. He believed Employee Y heard the conversation. He

¹² GE 3 pages 1-2.

¹³ GE 3.

¹⁴ GE 3 pages 1-2.

¹⁵ Tr. 51-52; GE 3 page 7.

¹⁶ Tr. 34-37, 45-47; GE 3.

¹⁷ Tr. 65-69.

surmised that Employee Y told Witness X about the conversation. He said Employee Y then returned and asked him what was going on. He stated that he told her that he believed Witness X told Mr. B about him sleeping at his desk. Her response was that Applicant always sleeps at his desk. Employee Y then left with Witness X. Applicant testified that Witness X was not present when he was talking to the Marine, and she would not have been able to hear his conversation.¹⁸

Applicant testified that the Marine, with whom he was having the discussion about active shooter training, was returning equipment to the warehouse. The Marine was required to log the equipment in and out and sign his name to a log. Applicant did not provide the name of the Marine to corroborate his statement.¹⁹

Applicant was then contacted by Mr. W. When Mr. W told him to apologize to Witness X and Employee Y, Applicant did not know the reason for that request. He testified he was not angry or agitated. His demeanor is always “happy go lucky.”²⁰ He was a little upset with Mr. B. He concurred that Witness X was in a different room and would not have been able to hear the conversation with the Marine.²¹

Applicant testified that he did not mention “active shooter” to Witness X and Employee Y. He does not know why Witness X would be frightened as they had been friends and attended family social gatherings. He denied he said he wanted to slap Witness X. He believe both Witness X and Employee Y misunderstood the active shooter issue. He said he did not threaten anyone.²²

There is no mention of the Marine in the incident report or in the email Mr. W sent to Mr. B days later. Applicant does not know why Mr. W did not include it.²³

Applicant testified that Witness X is lying. He has no idea why. He believes Employee Y overheard his conversation with the Marine, went and told Witness X. He testified that Employee Y was lying in her statement because she wanted his job. She was also lying when she said that Applicant stated he wanted to slap Witness X. When asked if Employee Y was intentionally sabotaging him so he would not get her position, he testified, “yes.”²⁴ Witness X was lying because “I think when she came back there and

¹⁸ Tr. 69-74.

¹⁹ Tr. 101-102.

²⁰ Tr. 76.

²¹ Tr. 69-72.

²² Tr. 69.

²³ Tr. 110-119.

²⁴ Tr. 110

mentioned active shooter, I think it agitated her due to the fact that maybe she was emotional. I don't know."²⁵

In Applicant's answer to the SOR, he stated his conversation with the Marine must have been overheard, misunderstood, and taken out of context by coworkers. He stated, "I was terminated without a chance to explain what had occurred."²⁶

Applicant's pastor testified on his behalf. He has known Applicant for ten years and believes he is honest. Applicant is part of a ministerial team that teaches bible study and spiritual awareness. The witness was unaware of the nature of Applicant's discharge from the service. Another witness testified that he has known Applicant for three years. He is his supervisor at his second job. Applicant has received numerous accolades from senior officials at this job. His demeanor is outstanding.²⁷

Applicant provided copies of achievement awards and certificates of training. He provided character letters stating he is approachable, professional, dependable, loyal, responsible, helpful, respectful, dedicated, courteous, generous, organized, prepared, and self-motivated.²⁸

Policies

When evaluating an applicant's national security eligibility, the administrative judge must consider the AG. 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.

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 national security eligibility will be resolved in favor of the national security." In reaching this decision, I have

²⁵ Tr. 73, 107, 110-119.

²⁶ Answer to SOR.

²⁷ Tr. 123-140.

²⁸ Answer to SOR.

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. Directive ¶ E3.1.15 states 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 as to 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 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 EO 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 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(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 individual

may not properly safeguard classified or sensitive information. This includes, but is not limited to, considerations of: ... (2) any disruptive, violent, or other inappropriate behavior.

Applicant was terminated from his position as a contractor in 2015 for aggressive behavior. He reportedly made threats of bodily harm and general threats using the term “active shooter.” There is credible evidence that he threatened to slap a coworker. He was angry because he was being counseled for sleeping at work and mentioned “active shooter.” The evidence is sufficient to raise the above disqualifying condition.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under 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 it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Both Witness X and Employee Y made written statements at or about the time the incident occurred. Mr. W’s summary of the events that transpired are consistent with both Witness X and Employee Y. Witness X credibly testified and was cross-examined. I did not find Applicant’s testimony credible. The evidence was reliable and sufficiently substantiated the allegation. I find AG ¶ 17(f) does not apply.

Applicant admitted to Mr. W that he said the words “active shooter.” There is no mention in Mr. W’s summary or his email to Mr. B that Applicant told him that he was talking to a Marine when he said it. To the contrary, he admitted to Mr. W that he said the term, but did not intend to make a threat. In today’s environment, and in the wake of shootings on military bases, school shootings, and shootings at nightclubs, there are serious concerns when certain words are said, even in jest, which could be cause for alarm. The public is told to report anything suspicious and to be vigilant. Witness X was scared, and she and Employee Y were upset when they noticed Applicant was angry and used the words. His statement that he wanted to slap Witness X was threatening and inappropriate. Applicant’s conduct is not minor and it casts doubt on his reliability and trustworthiness. It raises serious concerns about his judgment. I find AG ¶ 17(c) does not 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

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national security to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge