



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



In the matter of:)
)
) ISCR Case No. 18-02232
)
Applicant for Security Clearance)

Appearances

For Government: Bryan J. Olmos, Esq., Department Counsel
For Applicant: *Pro se*

09/12/2019

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On March 22, 2019, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines B (foreign influence) and E (personal conduct). Applicant responded to the SOR on April 16, 2019, and requested a hearing before an administrative judge. The case was assigned to me on June 24, 2019.

The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 27, 2019, scheduling the hearing for August 8, 2019. The hearing was convened as scheduled. Department Counsel withdrew the Guideline B allegations after the evidence was presented.

Evidence

Government Exhibits (GE) 1 through 8 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibit (AE) A, which was admitted without objection.

Department Counsel requested that I take administrative notice of certain facts about Iraq. Without objection, I took administrative notice of the facts contained in the request. Since foreign influence is no longer a concern in this case, the administrative notice and other facts about Applicant's foreign connections will not be addressed in this decision.

Findings of Fact

Applicant is a 63-year-old prospective employee of a defense contractor. He will be hired if he obtains a security clearance. He served on active duty in the U.S. military from 1981 until he was honorably discharged in 1985. He then served in the Reserve, with periods of active duty, until he was honorably discharged in 1992. He worked under hazardous conditions for defense contractors in Iraq from 2006 to 2007 and from 2010 to 2011. He earned a bachelor's degree in 1988 and a master's degree in 2002. He has never married, and he has no children. (Transcript (Tr.) at 18-22, 62; GE 1-3; AE A)

Applicant has a history of workplace problems related to when he was a college instructor for a year and a substitute school teacher at four schools in two school districts. He worked on a one-year assignment as an instructor at a university from 2014 to 2015. In about November 2014, he received a written warning after complaints were made against him by two female graduate students who were located close to Applicant's office. The complainants stated that female graduate students in that location felt uncomfortable by the attention paid to them by Applicant. They also stated that they overheard inappropriate conversations Applicant had in his office with a male student about romantic relationships. The chair of the department reported that she outlined the concerns to Applicant, who did not deny the reports, but thought they were exaggerated. She reported that he was contrite and apologetic, and the matter was resolved satisfactorily. (Tr. at 23-32; Applicant's response to SOR; GE 1-4; AE A) Applicant described the incident in his response to the SOR, as follows:

The conversation for which I received counseling by the head of the [department] where I then taught was a private conversation in my office between me and one of my male students who was an Army ROTC student. He would often stop by my office to talk about my experience with the Army in Iraq where I had been employed . . . for two periods totaling nearly two years. He enjoyed hearing stories from someone who had worked in a war zone since he himself would be commissioned an Army officer upon graduation. The door to my office was open, unfortunately, and women graduate students in the area outside my office overheard our conversation. During our conversation we talked about pretty girls on campus, not mentioning any by name nor using obscene language, but

speaking candidly about preferences, and specifically about how older men are more “attuned” to beauty than younger men are. One or more women students who overheard our conversation took notes, and reported our conversation to the Department Head. . . . To the sensibilities of the women who overheard us, and to the Dept Head, our conversation was inappropriate. I was indeed embarrassed to have been overheard in “guy talk” and to be counseled. There was no repeat of that incident.

Applicant discussed the above incident during his background interview in September 2017. A signed statement was not obtained, but the investigator summarized the interview in a report of investigation (ROI). Applicant verified the accuracy of the ROI in an interrogatory provided to DOHA in October 2018. He stated that he and the ROTC student discussed how an older man looks at beauty different than a younger man. He admitted that they may have discussed one or more female students, and that the ROTC student “had been with” one of the students. Applicant told the interviewer that the student the ROTC student had been with was pretty, and that Applicant had to try and not look at her in class because “she would wear yoga pants to class.” (GE 3)

Applicant testified that there were a lot of pretty girls on campus, and an older man is more sensitive to their attractiveness than a younger man. He stated that he was “an old bachelor on campus full of pretty girls,” and that he can always look, but he tried to be discrete. He stated that he would notice pretty girls of marriageable age: “If I’m on a campus with young women, I notice when I see a pretty young woman, whether she be 16 or 17 or 20 or 30.” (Tr. at 26-27)

Applicant worked as a substitute teacher in a school district in State A in 2016. In April 2016, the principal at a junior high school filed a substitute exclusion form with the school district requesting that Applicant not be allowed to serve as a substitute teacher at the school. The reason cited was: “Inappropriate language when dealing with our students. Unprofessional.” Applicant testified that a male student asked him if he liked rap music, to which he replied words to the effect, “hell no. I hate that s**t.” (Tr. at 32-35; Applicant’s response to SOR; GE 3, 5) Applicant described the incident in his response to DOHA interrogatories as follows:

A boy asked if I liked rap music, and I replied “hell no!” Later a girl asked me about the use of “spat” which she thought should be “spitted.” I replied that it was like “sat to sit” and like “shat to you-know-what.” I did not use the common word. (GE 3)

Towards the end of the 2016 school year, the principal at a high school in the same school district informed Applicant that he would not be permitted to continue substitute teaching at the high school for the remainder of the semester, and that the principal would decide later whether he would be permitted to return in the fall. The principal later informed him that he was allowed to return and student teach at the high school. (Tr. at 41-42; Applicant’s response to SOR; GE 1-3, 8; AE A) Applicant wrote in his Questionnaire for National Security Positions (SF 86) in September 2017:

[The principal] said it involved an incident of “borderline harassment” involving a staff member. He did not say who the staff member was or what the offense involved. I believe it was a reference to my having contacted a female teacher via text message about music on off-duty hours. I had given her a cd of music which she accepted, but perhaps only out of politeness. (GE 1)

Applicant stated in his background interview in September 2017 that if the “borderline harassment” did not refer to the above incident, it could have been related to another incident he had with a female teacher. Applicant asked a married teacher why she was not wearing a wedding ring. He told the teacher that she should put a wedding ring on, otherwise men like him would notice she was not wearing one. (GE 3)

Applicant worked as a substitute teacher in a school district in another state (State B) in 2017. In February 2017, a parent complained to the high school where Applicant was teaching that he engaged in an inappropriate discussion with her son about Palestine in which he made derogatory comments about Palestine. The son felt that Applicant embarrassed him because he told Applicant that he was from Palestine. Applicant was blocked from teaching at that high school, but permitted to work at other high schools in the district. (Tr. at 50-55; Applicant’s response to SOR; GE 3, 7) He described the incident in his response to the SOR:

[The student] said his family are Palestinians, and they would like to visit relatives in the Palestinian territories, but couldn’t because of the war. I explained that there was no war between Israel and the Palestinians, but that there was a civil war in Syria, a bordering country. I explained that there was a security wall between Israel “proper” and the “Palestinian territories” to keep terrorists from infiltrating Israel and committing terrorist acts. I also explained that Palestine is not a “country” but a geographic term, somewhat like “Appalachia” in America does not refer to any particular state but to a region. I also compared the security wall to a hypothetical wall in [U.S. city] that could encircle an area known for crime to keep criminals from preying on other citizens. The student reported what I said to his parents who called the principal and complained about me. I was asked to come to the School District office where the same administrator mentioned in [SOR ¶ 1.c] above questioned me about what I had said to the student, and told me that his parents were very upset. Nothing I said to the student was unfactual. Palestine is not a country. The wall was erected to prevent terrorist attacks and has been very successful. But the family were nonetheless upset by my seemingly negative attitude toward Palestinians (although I did not express any negative opinions about Palestinians in general).

Applicant described the school’s actions as “an example of political correctness driving school policy.” (AE A)

Applicant worked as a substitute teacher in another high school in the same school district in March 2017 (incorrectly alleged as “approximately April 2016” in SOR ¶ 1.c). In April 2017, a mother of a female student complained about inappropriate behavior by Applicant towards her daughter. The school interviewed several students. They stated that Applicant was talking to several students and classical music came up. The daughter stated that she liked classical music. After a somewhat lengthy conversation, he asked her name and offered to burn a CD of classical music for her. Two days later he gave her three CDs of classical music. He gave another female student a CD with a different style of music. The initial student’s mother stated that her daughter felt uncomfortable by Applicant singling her out. The mother felt that Applicant’s conduct was “grooming activity,” defined by the Department of Education as “a desensitization strategy common in adult educator sexual misconduct.” The high school blocked Applicant from working at that high school. (GE 3, 6)

Applicant admitted to making a CD for the student. He stated that he is “evangelistic about music.” He stated that the student’s mother was a regular complainer who filed numerous complaints over matters later determined not to be serious. He stated that he was told that he had broken no school district rules, and that he was barred from future assignments at that high school to avoid any future problems with the student's mother. (Tr. at 35-40, 55; Applicant’s response to SOR; GE 3; AE A)

Applicant returned to State A. In January 2018, he worked as a substitute teacher at the school that did not permit him to continue substitute teaching through the end of the 2016 school year, but later permitted him to return. (GE 3, 8) Applicant was asked to resign after a female cosmetology student teacher complained, as follows:

I [redacted] was helping [Applicant] (substitute) take over papers to the cosmetology classroom. As I was putting the papers on the desks, I tried to get pas[t] him and noticed he wouldn’t move. As I was standing there [Applicant] looked me in the eyes and said “I hope you have shorts on underneath that.” I had on a dress that day so it made me feel very uncomfortable after asking me that. Also with it just being me and him in the classroom when he asked me that, I immediately walked out of the class and told Mrs. [redacted] what he had said to me. (GE 8)

Applicant provided his version in the response to the SOR.

The incident mentioned in this section involved a young student teacher. I was one of two teachers assigned to a large class, and the young woman was doing her residential training. I admit I made an inappropriate comment regarding her attire. The young woman was wearing a large button-down shirt like a dress with a belt around her waist, and it seemed to me to be rather short. It was not my place to comment in any way on her attire. I was not her superior. I commented, “I hope you’re wearing something under that,” which anyone of my generation would recognize as a “prudish” statement, not a “perverted” one. It meant, “I think your dress is too short.” It did not mean I wanted to see under her dress. I further

asked if she had shorts (as in gym shorts) on. She apparently objected and reported me to the female teacher.

Applicant further stated that the school administrator “explained that he did not believe my comments were sexual in nature, but that schools are highly sensitive environments and one must be extremely careful about what one might say which could bring offense.” Applicant wrote a letter of resignation at the school administrator’s request. (Tr. at 55; Applicant’s response to SOR; GE 2, 3)

Applicant described the above incidents as “trivial and unimportant.” He stated that they were “due to hypersensitivity on the part of a student or a teacher or an administrator.” (Tr. at 55-58, 63; Applicant’s response to SOR; GE 2, 3; AE A) He stated that a security clearance will permit him to return to working under hazardous conditions overseas. He asserted the incidents have no bearing on his security worthiness:

Each of them has to do with some occurrence at a university, or at public schools which government representatives say reflect “questionable judgement” on my part. The common denominator in all of these instances is not questionable judgement on my part, but hyper-sensitivity and political correctness endemic to contemporary educational institutions. No US military officer on deployment in Iraq would find these incidents anything more than trivial and unimportant, and certainly having no bearing on the trustworthiness of another American who has already served both in and with the military and has held security clearances.(AE A)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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.”

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel.” The applicant 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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. The following disqualifying condition is 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, consideration of:

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant has a history of workplace problems related to inappropriate comments and conduct when he was a college instructor for a year and a substitute school teacher at four schools in two school districts. He received a written warning from the university. He was barred from working at three schools and temporarily barred from a fourth. After he was permitted to return to work at the fourth, he was forced to resign from the school district for inappropriate comments to a student teacher.

Applicant's conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(d) and 16(e) are applicable.

SOR ¶ 1.e alleges conduct at a specific high school in "approximately April 2016." The conduct in that school occurred in about March 2017. I do not find that Applicant was misled by the incorrect date in the allegation.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant accepts little responsibility for his conduct. He described the incidents as “trivial and unimportant,” and due to “political correctness” and “hypersensitivity on the part of a student or a teacher or an administrator.” Any one or more of the incidents, if considered in isolation or in a piecemeal manner, might not be enough to affect Applicant’s security clearance eligibility. However, the number of incidents and the recidivistic nature of the conduct, despite the adverse consequences to Applicant, suggest he would not or could not conform his conduct to societal norms. I also note that the last incident occurred at a school he was permitted to return to; and it occurred after he submitted an SF 86 and was interviewed for his background investigation in which he discussed other incidents. He claims that the comment to the student teacher was a “prudish” statement, not a “perverted” one. That is difficult to accept in light of his previous comments and actions. However, even if true, it reveals a significant flaw in Applicant’s judgment. Applicant’s actions caused him to be disciplined at a university, prevented from working at three schools, and forced to resign from a fourth. Perhaps it is time for him to look at himself and stop blaming everyone else for being hypersensitive.

I am unable to determine that additional inappropriate conduct is unlikely to recur. Applicant’s conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. The above mitigating factors, individually or collectively, are insufficient to dispel the personal conduct security concerns.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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 have incorporated my comments under Guideline E in my whole-person analysis. I also considered Applicant’s honorable military service and his work under dangerous conditions in support of the

U.S. mission in Iraq. However, that is insufficient to overcome the concerns raised by his repeated inappropriate conduct.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct 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.f:	Against Applicant
Paragraph 2, Guideline B:	Withdrawn
Subparagraphs 2.a-2.b:	Withdrawn

Conclusion

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.

Edward W. Loughran
Administrative Judge