



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 19-00222

Appearances

For Government: Adrienne Driskill, Esquire, Department Counsel

For Applicant: *Pro se*

October 17, 2019

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted his most recent Electronic Questionnaire for Investigations Processing (e-QIP) on May 21, 2016. (Government Exhibit 1.) On March 8, 2019, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E (Personal Conduct). The action was taken 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on April 4, 2019, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on April 30, 2019. The case was assigned to me on May 21, 2019. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on June 10, 2019. I convened the hearing as scheduled on August 2, 2019. The Government offered Government Exhibits 1 through 6, which were admitted without objection. Applicant offered Applicant Exhibits A through D, which were admitted without objection, and testified on his own behalf. I granted Applicant's request to leave the record open to permit him to submit additional evidence. On August 2, 2019, he submitted Applicant Exhibits E and F, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 14, 2019.

Findings of Fact

Applicant is a 59-year-old married employee of a defense contractor. He has a bachelor's degree, and a master's degree. He is employed as a security manager, and is seeking to retain a security clearance previously granted in connection with his employment. He has worked for his current employer since 2016. He has worked in the security field, either as a contractor employee or a Federal civil servant, since 1985. For most of that time he held a security clearance. (Tr. 55; Government Exhibit 1 at Sections 12, 13A, and 17; Exhibit 4 at Section 13B.)

Paragraph 1 (Guideline E – Personal Conduct)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has engaged in conduct that shows poor judgment, untrustworthiness or unreliability. Applicant denied both allegations under this paragraph. The allegations will be addressed in chronological order for ease of discussion.

Applicant worked for a defense contractor [Company A] from 2004 until 2016. During that time he was a security manager.

1.b. The SOR alleged in this subparagraph that Applicant was suspended from employment for three days in about April 2010 for inappropriate comments concerning ethics and diversity in the workplace. Applicant denied this allegation.

The records of this incident are rather sparse, but it appears that Company A's Human Resources department [HR] was concerned about a comment made by Applicant, who is white, concerning diversity in the workplace. Applicant has consistently stated that he merely repeated back to the original speaker, a minority woman, the comment she had made to him in a joking manner, "You had to be black to work in this [Applicant's] department." (Tr. 32-37, 72-75; Answer; Government Exhibit 5, and Exhibit 6 at 8.)

Applicant's version of this event was supported by another minority woman, who was present at the time of the incident. Applicant Exhibit A at 11 is a letter from this person, confirming Applicant's account. She further stated that the original comment was in jest, and also stated that neither the writer nor the original speaker were offended by Applicant repeating the phrase.

Although Applicant has repeatedly and consistently proclaimed his innocence, he agreed to accept a three-day suspension without pay. He took these days off during previously scheduled vacation, so technically it did not result in a suspension from the work place. Applicant's first and second-line supervisors at that time submitted letters that confirm it was on their recommendation Applicant agreed to the suspension. Both writers also stated that they believed the Applicant to be innocent of any racial intent in his statement. (Tr. 75-78; Applicant Exhibit A at 5-8.)

1.a. The SOR alleged in this subparagraph that Applicant was terminated from his employment with Company A in October 2016 for engaging in a pattern of harassing and inappropriate behavior of a sexual nature in the workplace. Applicant denied this allegation.

Applicant was the subject of an investigation by Company A in the early fall of 2016. This investigation was based on the complaints of a Confidential Reporting Party (CRP). The CRP stated that Applicant had engaged in four incidents of sexual harassment during 2015 and 2016. The CRP was a witness to the incidents, but the Applicant's conduct was not aimed at the CRP. In a nutshell, Applicant was alleged to have used suggestive language when speaking to work colleagues. He also complimented a female coworker on her attire, and made a comment about the legs of another female coworker. Finally, he was alleged to have leered at another female employee and made a suggestive noise. (Government Exhibit 6.)

Applicant admitted complimenting a coworker on her attire, and calling another coworker, "Legs," once in a joking manner. He denied the other two allegations, stating he could not remember the conduct, or that his conduct was misinterpreted. He did admit that the "Legs" comment was probably out of place. He indicated that the occasion when he was accused of making suggestive noises was due to side effects of heart medication. (Answer; Government Exhibit 2; Applicant Exhibit A at 3-4, Exhibit D; Tr. 38-53, 81-83, 87-89.)

After the completion of the investigator's report on September 16, 2016, several things were happening almost simultaneously. While Company A was deciding what to do with Applicant, he had received a job offer from Company B, which he submitted as an exhibit. This offer, dated September 22, 2016, had a proposed start date for Applicant of October 17, 2016, a Monday. Applicant submitted his resignation from Company A on Friday, September 30, 2016. In his resignation, Applicant proposed a final day of his working for Company A of Friday, October 14, 2019. On Tuesday, October 4, 2016, Applicant was called into a meeting with an HR representative and his manager. At that

meeting Applicant was told that Company A was accepting his resignation in lieu of terminating him. Applicant stated that he was resigning anyway, they could characterize it however they wanted, but he felt he was not resigning in lieu of being terminated. (Government Exhibit 2; Applicant Exhibit A at 3-4, Exhibit F; Tr. 37, 91-96, 105-107.)

Applicant expressed issues with the credibility of the CRP, stating this person was vindictive towards Applicant. He also expressed concerns with how the investigation was conducted and the subsequent report written. Applicant stated there were inaccuracies in the report. (Answer; Applicant Exhibit A at 3-4; Tr. 40-41, 45-47, 50, 55-59, 84-86, 102, 108.)

Applicant admitted that he had changed how he did his job based on this investigation, and its aftermath. He stated, "I have to be very conservative, very businesslike, very cautious as far as who I say what to who and who's in earshot." (Tr. 100-103.)

Mitigation

Applicant submitted evidence showing that he is a highly respected and successful person and employee. He has a demanding job, and does it well. Letters of recommendation were submitted for Applicant from people who know him personally and professionally. The writers include three of his former supervisors, as well as coworkers, a retired judge, and an FBI agent. He is described by all of the writers as an ethical, honorable, and moral person. They all indicated an understanding of the allegations against Applicant, and considered them out of character. (Applicant Exhibit A; Tr. 21-23.)

Applicant is heavily involved in charity work in his community. In addition, he has been involved in several organizations that are related to his career field. (Applicant Exhibit A at 2, 13; Tr. 53-55.)

Policies

Security clearance decisions are not made in a vacuum. When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions (DCs) and mitigating conditions (MCs), 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, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶¶ 2(a) and 2(c), the entire process is a conscientious scrutiny of applicable

guidelines in the context 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. In addition, the administrative judge may also rely on his or her own common sense, as well as knowledge of the law, human nature, and the ways of the world, in making a reasoned decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that, “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the 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. 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. 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides: “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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 protect or 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.

Analysis

Paragraph 1 (Guideline E – Personal Conduct)

The security concern relating to Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules or regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

I have examined the disqualifying conditions under AG ¶ 16 and especially considered the following:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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;

(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.

The following mitigating conditions under AG ¶ 17 apply to the facts of this case:

(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

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

Turning first to the 2010 incident, which resulted in a three-day suspension from work without pay. The evidence indicates that this was not a case of racial insensitivity on the part of Applicant. Rather, as confirmed by one of the people involved in the incident, herself a woman of color, Applicant was merely repeating back to the speaker a comment that was made to him. While the conduct itself was substantiated, it does not have any continuing security significance. It is also mitigating that this conduct occurred nine years ago.

With regard to the 2016 situation, the Applicant did engage in at least two incidents that could have been seen as harassing. Specifically the “Legs” incident and the compliment. The other two incidents were very minor, and the evidence very sparse. The CRP asserted all of them to be harassing. Applicant indicated that this person had a potential vendetta against Applicant, and that is why he was reported. These four allegations, while fairly innocuous individually, were interpreted by Company A management as showing Applicant not being sensitive enough to how the work environment had changed. Based on the report, Company A made a decision to terminate Applicant. Applicant’s decision to resign about the same time and accept another job may have given Company A’s HR department a convenient out, when they accepted it early.

Applicant has changed his work habits. As stated, the conduct was minor and did not involve any overt sexual harassment. Applicant has not engaged in any conduct of a similar nature in his three years at his new employment. AG ¶¶ 17(a), (b), and (c) apply to Applicant’s conduct under both subparagraphs. Paragraph 1 is found for Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant’s national security eligibility 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 the granting or continuing of national security eligibility is clearly consistent with the interests of national security

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 pertinent facts and circumstances surrounding this case. Applicant is a law abiding, trustworthy, and responsible person and employee. He acknowledged that his conduct, which he believed to be innocent and innocuous, could be misinterpreted. Applicant has changed how he conducts himself. Any potential for pressure, coercion, or duress has been eliminated, and such conduct is unlikely to recur. Overall, the record evidence does not create doubt as to Applicant's present suitability for national security eligibility.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is granted.

WILFORD H. ROSS
Administrative Judge