



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 19-00484
)
Applicant for Security Clearance)

Appearances

For Government: Erin Thompson, Esq., Department Counsel
For Applicant: *Pro se*

10/29/2019

Decision

BENSON, Pamela C., Administrative Judge:

Applicant made significant lifestyle changes and has not engaged in criminal conduct for over four years. He mitigated the criminal conduct and personal conduct security concerns. National security eligibility for access to classified information is granted.

Statement of the Case

On January 31, 2018, Applicant completed and signed his security clearance application (SCA). On March 18, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J (Criminal Conduct), and 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 *National Security Adjudicative Guidelines* (AG) effective within the DOD on June 8, 2017.

Applicant answered the SOR on March 26, 2019, and requested a hearing before an administrative judge. He admitted all of the SOR allegations and provided explanations

why he believed his misconduct should be mitigated. On August 8, 2019, the case was assigned to me. On August 30, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for September 18, 2019. The hearing was held as scheduled.

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3; Applicant testified and offered nine documents, Applicant Exhibits (AE) A through I into evidence. I admitted all proffered exhibits into evidence without objection. DOHA received the hearing transcript (Tr.) on September 30, 2019, and the record closed.

Findings of Fact

Applicant is 33 years old. He earned a bachelor's degree in 2018, and in 2019, he enrolled into a graduate program for a masters of business administration (MBA) degree. He expects to graduate with his MBA in 2021. He married in 2011. He has two daughters, ages seven and fifteen. He also has three stepchildren, ages ten, twelve, and fourteen. He has been employed by a DOD contractor since January 2018 as a quality engineer. In 2018, Applicant was issued an interim DOD security clearance, however, that security clearance was removed in approximately September 2019. (Tr. 16, 20-22; GE 1, AE A)

SOR ¶ 1.a alleges that Applicant was arrested in 2004 and charged with criminal damage, theft, and tapering with coin machines. He admitted this arrest and stated that he was 18 years old. He had a young daughter at the time and needed to provide additional financial support. He cut the locks off of vending machines and took the money. The vending machines were located at his place of employment, a grocery store, and he was observed on a video camera stealing the money. Applicant was terminated by his employer. The court sentenced him to 180 days in jail, with all but three days suspended, and he was ordered to pay full restitution to his former employer. (Tr. 23-25; GE 1)

SOR ¶ 1.b alleges that Applicant was charged in May 2015 with Theft. He was at a national discount department store and stole several items, to include a Fitbit tracker and a box of cards. He was 29 years old and married at the time. He stated that the theft of the items was an unplanned impulse while he was shopping, and the Fitbit was going to be a gift for his wife. Applicant was caught on video surveillance stealing the items. He pleaded guilty, the court and ordered him to pay restitution, and he was sentenced to serve time in the county jail, with all jail time suspended. (Tr. 25-28; GE 1)

SOR ¶ 2.a cross referenced the allegations set forth under paragraph 1.

SOR ¶ 2.b alleges that Applicant resigned his employment by mutual agreement in June 2015 with a restaurant chain after his involvement of theft. As a manager of the restaurant, he had the ability to void sales and pocket the money. The stolen money totaled nearly \$2,000, and was taken over an 18-month period between 2014 and 2015. Applicant stated the money was used to buy the restaurant work crew drinks at another bar after they closed the restaurant. (Tr. 28-30)

Applicant stated that since June 2015, he has never had the impulse to steal again. He has taken steps to better himself, such as obtaining his bachelor's degree in May 2018, and eliminating people in his life that are not a good influence. His job and family are very important to him. He started his graduate program in September 2019, with a focus on executive management, and his employer is providing some assistance with his tuition expense. His wife earned a bachelor's degree in psychology, and he has been using her as a source to set goals in his life. Applicant had an undesirable upbringing, and his wife has helped him deal with issues stemming from his childhood. Applicant admitted he has made mistakes in the past for which he is embarrassed and remorseful. He is continuously working to rectify those mistakes and to ensure they will never be repeated. (Tr. 31-36, 38)

Applicant provided two character reference letters and two of his most recent employee performance appraisals at the hearing. Applicant's current manager reported that Applicant was initially hired for an internship, and after observing his dedication and exceptional business knowledge on the job, Applicant was offered permanent employment. For over a year under his supervision, Applicant consistently demonstrated excellent engineering and leadership skills, and is considered an asset by the DOD contractor. Applicant's two employee appraisals also support the highlighted qualities enumerated by his manager. (AE B, AE C, AE G, AE H)

Policies

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 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 access to classified information will be resolved in favor of 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 not drawn inferences grounded on mere speculation or conjecture.

Directive ¶ E3.1.14 requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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 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 Executive Order 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 J; Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct:

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 ¶ 31 describes conditions that could raise a security concern and may be disqualifying. I considered the following relevant:

(a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual’s judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted or convicted.

Applicant was charged with criminal offenses in 2004 and in 2015. Applicant also stole approximately \$2,000 from his employer between 2014 and 2015, for which he was not criminally charged, but Applicant admits his conduct was criminal. AG¶¶ 31(a) and 31(b) are established.

I have considered all of the mitigating conditions under AG ¶ 32 and the following conditions are relevant:

(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, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant's thefts establish a pattern of criminal conduct, and despite suffering legal consequences, the pattern shows that he had a difficult time controlling his impulse to steal. In June 2015, Applicant decided he needed to make positive changes in his life. He removed himself from people who have a negative impact on his behavior. He is supported by his wife, who has a bachelor's in psychology, to work on his impulsive behavior and prevent future criminal conduct. Applicant has set goals in his life, and in 2018, he graduated with a bachelor's degree in business. This year he enrolled into a graduate program with the full support of his employer. There has been no criminal conduct for over four years, which shows his criminal behavior is unlikely to recur. His continued success at his place of employment and the high regard his employer has for Applicant also shows he is reliable, trustworthy, and uses good judgment. Criminal conduct security concerns are mitigated. AG ¶¶ 32(a) and 32(d) apply.

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

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

(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; and

(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: . . .

(3) a pattern of dishonesty or rule violations.

Guideline J allegations ¶¶ 1.a and 1.b are cross-alleged under Guideline E ¶ 2.a. Each of them is established by the record evidence. Since I held that Guideline J security concerns were mitigated, there is no need to further discuss the criminal conduct security concerns that were also cross-alleged here. Guideline E ¶ 2.b alleges Applicant's theft from his employer totaling nearly \$2,000 over an 18-month period. AG ¶¶ 16(c) and 16(d)(3) apply.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

(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

(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.

Applicant has not been involved in any thefts since 2015. He has made positive lifestyle changes, and obtained a bachelor's degree in 2018. He acknowledged the behavior and is remorseful for his misconduct. As to SOR ¶ 2.b, AG ¶¶ 17(c) and 17(d) apply for the same reasons as set forth in the analysis of the mitigating conditions under Guideline J, above. Personal Conduct security concerns are mitigated.

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 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline J and Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) was addressed under that guideline, but some warrant additional comment.

The Federal government must be able to repose a high degree of trust and confidence in persons granted access to classified information. In deciding whether to grant or continue access to classified information, the Federal government can take into account facts and circumstances of an applicant's personal life that shed light on the person's judgment, reliability, and trustworthiness. Furthermore, security clearance decisions are not limited to consideration of an applicant's conduct during work or duty hours. Even if an applicant has a good work record, his off-duty conduct or circumstances can have security significance and may be considered in evaluating the applicant's national security eligibility.

Applicant has made positive changes in his life, and he continues to receive support from his spouse to stay focused on his future goals. He received a bachelor's degree in 2018, and he has a successful career with his employer. He has not engaged in criminal conduct for the past four years, and is committed to graduating with an MBA by 2021. I find future criminal behavior is unlikely to recur. After evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the criminal conduct and 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 J:	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

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

Pamela C. Benson
Administrative Judge