



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
 [REDACTED]) ISCR Case No. 20-00096
)
 Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*
07/27/2021

Decision

MARINE, Gina L., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on March 6, 2017. On November 20, 2020, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines F and E. The DCSA CAF acted 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on December 6, 2020, and requested a decision on the written record in lieu of a hearing. On January 28, 2021, the Government sent Applicant a complete copy of its written case, a file of relevant material (FORM), including pleadings and evidentiary documents identified as Items 1 through 8. He was given an opportunity to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation to the Government's evidence. He

received the FORM on February 9, 2021, and did not respond or object to the Government's evidence. The case was assigned to me on June 4, 2021.

Evidentiary Matter

Items 1 and 2 contain the pleadings in the case. Items 3 through 8 are admitted into evidence.

Procedural Matter

Pursuant to Directive ¶ E3.1.6, the Government has withdrawn the Guideline F allegation in its entirety, including subparagraphs 1.a through 1.f.

Findings of Fact

Applicant, age 59, is married with one adult child. He earned an associate degree in 1983, a bachelor's degree in 1989, and a master's degree in 2006. He has been employed by a defense contractor as an operations manager in the Information Technology (IT) field since April 2018. He was previously granted a DOD security clearance in 2003. He was granted an interim DOD security clearance in August 2017. (Item 3; Item 4 at 5; Item 8)

Applicant was employed by another defense contractor (Employer A) between February 2017 and March 2018 in the IT field, first as a network manager and then as a technical specialist. His work performance was highly regarded. However, he was terminated for cause, without eligibility for rehire, because he made threatening statements involving the use of a weapon. (Items 4, 5, 6, 7)

In March 2018, Applicant was called into a meeting with two coworkers, one of whom appeared with him in person (Person A) and one of whom appeared via telephone (Person B). The meeting was held in a building that housed both Applicant's employer and the client for whom he was contracted to work. The meeting was called to gain Applicant's support for forthcoming changes on the project for which he worked. Apparently, Applicant was unaware of the purpose of the meeting. Before the conversation started, Applicant stated: 1) ". . . so you wanted to talk to me, are you going to fire me, because if you are I have a gun," and 2) "I've been fired before . . . the next person that fires me better watch out." At some point during the meeting, another coworker joined the meeting in person (Person C). By the end of the meeting, Applicant had calmed down and voiced his support for the proposed changes. (Item 5)

Upon further reflection after the meeting, Person A deemed the statements Applicant made during the meeting to be a credible threat. In making that determination, Person A considered Applicant's body language and the fact that he was not laughing when he made the statements. Person A reported the incident the morning after the meeting to Employer A security personnel. (Item 5)

Immediately upon being notified of the incident, Employer A initiated an investigation in conjunction with building security and local police. When Applicant was questioned by local police during the investigation, he denied everything and provided another story (which the police did not disclose). The investigation (which included interviews of Persons A, B, and C) concluded that the statements Applicant made at the meeting were a “moderate risk.” As a result, Applicant’s badge access to the building was revoked and local police officers escorted him from the building. He was subsequently banned from returning to the building and terminated from employment. (Item 5)

The current background investigation on Applicant’s eligibility for a security clearance was initiated by the security clearance application he submitted in March 2017. In connection with his background investigation, he was interviewed by a DOD authorized investigator twice in October 2018 and once in December 2018. During his first interview, he stated that his reason for leaving Employer A was just wanting to do something different and that he was not officially reprimanded, suspended or disciplined for misconduct. No further information or details about Applicant’s employment with or termination from Employer A were discussed during his second or third interviews. (Item 4 at 6, 11)

In his SOR answer, Applicant denied the facts alleged in SOR ¶ 2.a concerning his threatening statements and termination from Employer A and asserted “I was falsely accused of making threatening comments.” He did not proffer any documentary or other evidence in support of his claim. Because the SOR did not include any allegations related to the statements Applicant made to the investigator during his first interview, I will consider them only to evaluate mitigation and the whole-person analysis. (Item 2)

Policies

“[N]o one has a ‘right’ to a security clearance.” (*Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988)). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” (*Egan* at 527). The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” (EO 10865 § 2)

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and

endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” (EO 10865 § 7). Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. (*Egan*, 484 U.S. at 531). “Substantial evidence” is “more than a scintilla but less than a preponderance.” (See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994)). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016). Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. (Directive ¶ E3.1.15). An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. (ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005))

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” (ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002)). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” (*Egan*, 484 U.S. at 531; AG ¶ 2(b))

Analysis

Guideline E: Personal Conduct

The concern under this guideline, as set out in AG ¶ 15, includes: “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.”

The facts alleged in SOR ¶ 2.a. establish the following disqualifying condition under this guideline:

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 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; . . .

Neither of the following potentially relevant mitigating conditions under this guideline are established:

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

AG ¶ 17 (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.

The threatening statements Applicant made involving the use of a weapon demonstrate not only a grave error in judgment, but were also wholly inappropriate and disruptive, particularly in a workplace. While he made the statements over three years ago, their security significance is brought current by Applicant's failure to acknowledge or accept responsibility for them. The uncorroborated claim he made in his SOR answer does not suffice to overcome the substantial record evidence of his misconduct. I have serious doubts about Applicant's reliability, trustworthiness, and judgment.

Whole-Person Analysis

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 common sense judgment based upon careful consideration of the adjudicative guidelines, each of which is to be evaluated in the context of the whole person. An 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.

I have incorporated my comments under Guideline E in my whole-person analysis, and I have considered the factors in AG ¶ 2(d). After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude that Applicant has not mitigated the security concerns raised by his personal conduct. Accordingly, Applicant has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 2, Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the interests of national security to grant Applicant eligibility for access to classified information. Clearance is denied.

Gina L. Marine
Administrative Judge