DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 19-02312
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2021
_____

Decision
_____

Curry, Marc E., Administrative Judge:

Applicant mitigated the security concern. Clearance is granted.

Statement of the Case

On November 12, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline E, personal conduct, explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and 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 June 8, 2017.

On December 12, 2019, Applicant answered the SOR, admitting the allegations and requesting a hearing, whereupon the case was assigned to me on June 2, 2021. On July 23, 2021, the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's case for August 10, 2021. The hearing was held by

videoteleconference, as scheduled. Before the hearing, I received three Government exhibits (GE 1 - GE 3), four Applicant exhibits. (AE A – AE D), and incorporated them into the record at the hearing. I considered Applicant's testimony. I also incorporated a copy of the discovery letter that Department Counsel mailed to Applicant (Hearing Exhibit I). The transcript (Tr.) was received on August 19, 2021.

Findings of Fact

Applicant is a 31-year-old single man. He graduated from college in 2015 with a degree in software engineering. (Ex. 1 at 14) He has been working for his current employer since May 2018 as an assurance engineer. (GE 1 at 16) His duties include quality control. (Tr. 89)

Applicant began working as a software tester for his previous employer in 2015. It was the first full-time job that he worked after finishing college. (Tr. 69). He was fired in February 2018 for violating company standards of conduct after altering test-result data. (Answer at 1) Applicant admits that he was fired for altering data; however, he denies that he did so with any fraudulent intent.

Applicant's job was to run software to ascertain whether it "behaved" as designed. (Tr. 24) Applicant worked among a group of first-line engineers who ran the new software with the hardware. He did so by creating source code that bridged software to hardware. If the hardware then performed as instructed by the software, the software was considered to have passed, and was moved to the test leader for additional validation. If it passed this second level of testing, it was submitted to the customer. (Tr. 34-35)

Applicant performed hundreds of software tests during his stint with his previous employer. On six or seven out of approximately 200 tests, the test reports indicated that the software failed. (Tr. 21, 37) When Applicant reviewed the test reports that indicated the software failed, and re-tested the software, he discovered that the software was not the problem. Rather, the failures were false negatives, caused either because of spelling errors he made when writing the source code that bridged the software to the hardware or because there was a timing glitch in the hardware that caused it to misread the software. (Tr. 30–31, 38)

Convinced that test failures sometimes were caused by spelling errors or timing glitches and not by software problems, Applicant began changing failures to passes whenever he thought these issues presented themselves. (Tr. 28) He did not do these to cover up any mistake that he may have made, or because of any deadline pressure or performance incentives. (Tr. 28) Instead, he thought that if he was wrong and the problem, in fact, related to software design, it would be caught at the next level review, and returned to him, whereupon, he could rework the testing code. (Tr. 29) In sum, he contends that he did not intentionally violate company policy because he mistakenly believed his actions were "within the bounds of testing, and that it's something that [he] could just rework and recover." (Tr. 40; GE 2 at 6)

Applicant's employer began to notice that some of Applicant's software that he reported as passing the tests, actually were not working when tested at the next level. (Tr. 46) This prompted an investigation. When confronted, Applicant admitted that he altered the test results, prompting his employer to terminate him. In doing so, Applicant's employer concluded that he "fraudulently altered documentation in violation of the Company's standards of conduct," by "manipulating several test files to indicate a passing result when in fact the test run had resulted in failure." (GE 3)

In retrospect, Applicant recognizes that his actions were wrong, testifying that "the blame lies with [him]" for assuming what the problem was, without consulting with his team members. (Tr. 55, 57) Moreover, he testified that such failure "undermines the software development cycle," and could have jeopardized his employer's relationship with the customer, in that the customer could have discovered the problem during a program audit, which it had the right to conduct at any time. (Tr. 59, 73) When Applicant's current employer hired him, he was forthcoming about the circumstances that led to the termination from his previous job. (Answer at 2)

Applicant has been working with his current employer in their software quality assurance division since 2018. (Tr. 89) His duties include formal test witnessing, code/test procedure reviews, and media verifications. (AE A) Per his supervisor, who has overseen his work for the past two years, Applicant has proven "to be a great hire and a key addition to the team, [and] has received several recognition awards from his peers." (AE A) Per Applicant's supervisor who supervised him during the first two years of his tenure with his current employer, Applicant was well-respected by the company's stakeholder, and was doing a good job with the "essential 'block and tackle' skills that keep system engineers out of trouble." (Answer at 4) Applicant's first supervisor at the current job also complemented him for scheduling meetings to ensure that team members "are on the same page." (Answer at 7)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall 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 drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. 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 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 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. 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).

Under the whole-person concept, the administrative judge must consider the totality of an applicant's conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).[1]

Analysis

Guideline E: Personal Conduct

Under this guideline, "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." (AG ¶ 15) Moreover, conduct that may not be sufficient alone for an adverse determination may be disqualifying if it generates whole-person concerns of untrustworthiness, questionable judgment, and unwillingness to comply with rules and

---

[1] The factors under AG ¶ 2(d) are as follows:

> (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.

regulations. (AG ¶ 16) Specifically, Applicant's conduct triggers the application of the following disqualifying conditions:

> AG ¶ 16(d)(1) untrustworthy or unreliable behavior . . .;

> AG ¶ 16(d)(3) a pattern of dishonesty or rule violations; and

> AG ¶ 16(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment.

There is no record evidence that Applicant was under any deadline to complete his work, or received any incentives based on the number of passing software tests. Moreover, he was not responsible for software design, and faced no consequences if the software applications failed. Consequently, I conclude that Applicant did not intend to mislead his employer when he altered the test results.

Applicant tested a theory about why the software test results were sometimes inaccurate without conferring with his supervisor or co-workers, reasoning that if he was wrong, the second-level testing would catch any software design problems. In doing so, Applicant bypassed the established testing system of the employer, and increased the possibility that software with design defects could escape detection and be provided to the customer. Consequently, the nature and seriousness of Applicant's transgression remains significant, regardless of whether he intended to mislead his employer.

The job in which the misconduct occurred was the first full-time job that Applicant held after finishing college. Nearly four years have passed since Applicant last altered a test result. Applicant's current job, like his previous job, involves quality assurance of software production and testing procedure reviews. He has been doing a good job, as reflected by the strong reference letters from his current supervisor and his performance reviews. In addition, recognizing that his poor decision-making at his previous job was caused, in part, by his failure to consult with team members, he now schedules meetings regularly with team members to ensure everyone is on the same page. Under these circumstances, I conclude that AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," applies.

Whole-Person Concept

The nature and seriousness of Applicant's transgression was significant. However, it is outweighed when viewed in the context of Applicant's inexperience when the lapse in judgment occurred, his contrition, the length of time that has elapsed since the misconduct, and the strong presence of rehabilitation, as demonstrated by his current job performance. I conclude that Applicant has mitigated the security concern.

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: FOR APPLICANT

      Subparagraph 1.a: For Applicant

Conclusion

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

_____
Marc E. Curry
Administrative Judge