



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



In the matter of:)
)
-----) ISCR Case No. 21-00814
)
Applicant for Security Clearance)

Appearances

For Government: Dan O'Reilly, Esq., Department Counsel
For Applicant: *Pro se*

11/30/2021

Decision

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, and exhibits, Applicant did not mitigate personal conduct concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

Statement of the Case

On July 16, 2021, the Department of Defense (DoD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the personal conduct guideline the DoD could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); *Defense Industrial Personnel Security Clearance Review Program*, DoD Directive 5220.6 (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on July 20, 2021, and elected to have his case decided on the basis of the written record, in lieu of a hearing. Applicant received the File of Relevant Material (FORM) on September 14, 2021, and interposed no objections to the materials in the FORM. He timely supplemented the FORM with a written explanation of his taking responsibility for the incident for which he was alleged to have been fired from his job. Applicant's explanation was not objected to by the Government and was admitted as Item 5.

Summary of Pleadings

Under Guideline E, Applicant allegedly was fired from his employment in January 2020 for attempting to falsify his time card by recording time worked after never showing up for work. Allegedly, he was not eligible for rehire.

In his response to the SOR, Applicant admitted the allegations with explanations. He claimed he tried to correct his mistake the following day but was not permitted to do so.

Findings of Fact

Applicant is a 42 year-old civilian inspector for a defense contractor for a defense contractor who seeks a security clearance. The admitted allegations are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant married in August 1999 and has two children from this marriage. He earned a real estate certificate in April 2019. Applicant enlisted in the Army National Guard in May 1997, while still in high school, and received a discharge under other than honorable conditions in July 1999. (Item 3)

Since March 2020, Applicant has been employed by his current defense contractor employer. (Items 2 and 4) Between October 2018 and his termination in January 2020, he was employed by another company who sponsored him for a security clearance. (Items 3-4) Previously, he worked for other employers in various capacities. (Item 3) Applicant's current employer is sponsoring him for a security clearance, but he has never held a security clearance before. (Items 3-4)

Applicant's employment history

In January 2020, while employed by his former employer, Applicant sent a text message to his direct supervisor at 3:25 PM informing him that he was going to be late for his 3:30 PM shift (which ran from 3:30 PM to 3:00 AM the following morning). (Item 5) According to Applicant in his ensuing personal subject interview (PSI), informing his supervisor that he would be running late for a shift was common for him. (Item 4)

The following morning, Applicant sent another text message to his supervisor, stating "I forgot to clock in. I got here about 5:40." (Item 5) This text message represented a false account of his actions, for Applicant never showed up for his shift. He does not dispute this chain of events.

Later on the same morning, at around 6:00 AM, Applicant's supervisor was approached by his employer's human resources representative who informed his supervisor that Applicant never showed up for his shift the previous night. (Item 5) She cited the absence of a punch-in or punch-out entry for Applicant's shift. Key code security did not reveal a building access code used for Applicant at all during his shift. (Item 6)

When asked by his supervisor whether he came to work the previous night, Applicant replied that he never intended to come to work that night and could not be sure why he could have texted his superior at 1:00 AM in the morning to confirm he had been at work that night. (Item 4) For in fact, he never reported for work that night.

To be sure, Applicant had been at a local casino that same January 2020 evening. (Item 5) Pressed by his supervisor about his early morning text confirming his reporting to work, Applicant replied that he was drunk when he texted him and never reported for work. (Item 6)

When Applicant received no answer to his inquiry of whether his January 2020 false reporting incident would result in his termination, he made the decision to quit his job and exited the conference room. (Item 6) Although he was not given a definitive answer immediately, he was later advised that he had been involuntarily terminated from his job for cause. (Item 6)

Applicant does not dispute the facts and circumstances surrounding the January 2020 false reporting incident. While accepting full responsibility for it, he claims it was an isolated incident that will not recur. (Items 2 and 7)

Policies

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), "no one has a 'right' to a security clearance." 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." *Id.* at 527. Eligibility for access to classified information may only be granted "upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied 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, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. The guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

Personal Conduct

The Concern: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, and 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 ¶ 15.

Burdens of Proof

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 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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. See *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. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Security concerns are raised over Applicant’s admitted falsification of his text message of January 2020 confirming his showing up for work in January 2020, when he had not. Personal conduct concerns cover his termination of employment and non-eligibility for return by his then-employer after testing being terminated for cause.

Applicable to Applicant’s situation based on his pleading admission and findings, is DC ¶ 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 person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; and

(3) a pattern of dishonesty or rule violations.

While Applicant's falsification of his shift time might by itself be considered an isolated event, his failure to fully own up to his mistake in candor and judgment with his supervisor, human resources representative, investigating OPM investigator, and in his SOR response only compounds his lapse in candor and judgment reflected in his falsifying his shift time the previous day.

Because of the absence of any documented remorse or other indicated steps by Applicant to ensure that similar-type incidents involving candor and judgment lapses do not recur, Applicant may not take advantage of any of the potentially available mitigating conditions. More documented evidence of positive character reinforcements are needed from Applicant to provide reliable assurances that his false reporting of his shift status was an isolated lapse in candor and judgment that poses no risk of recurrence.

Whole-person assessment

Whole-person assessment of Applicant's clearance eligibility requires consideration of whether his reported false text to his supervisor confirming his showing up for his work shift the previous day can be mitigated without substantial counterbalancing evidence of positive character endorsements and other evidence of demonstrated trustworthiness. While Applicant is entitled to credit for his civilian contributions to the defense industry, he provided no positive reinforcements of his overall trustworthiness to surmount the isolated, but nonetheless serious breach of the candor and judgment eligibility requirements for holding a security clearance. Without strong positive evidence of overall good character to counterbalance his candor and judgment lapses and absorb risks of future recurrences of candor and judgment breaches, mitigation is not available to Applicant at this time.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

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:

GUIDELINE E (PERSONAL CONDUCT): AGAINST APPLICANT

Subparagraphs 1.a:

Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, 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.

Roger C. Wesley
Administrative Judge