



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



In the matter of:)
)
) ISCR Case No. 19-03802
)
Applicant for Security Clearance)

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: Christopher Ponce, Esq., and Michael Melito, Esq.

12/23/2021

Decision

COACHER, Robert E., Administrative Judge:

Applicant mitigated the security concerns under Guideline J, criminal conduct, and Guideline E, personal conduct, concerns were either mitigated or not established. Applicant's eligibility for a security clearance is granted.

Statement of the Case

On April 9, 2020, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J. The DOD 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 May 9, 2020, and requested a hearing. On January 25, 2021, Department Counsel issued an amendment to the SOR (ASOR)

alleging disqualifying conduct under Guideline E (ASOR ¶¶ 2.a-2.e). On February 20, 2021, Applicant answered the ASOR. Department Counsel withdrew ASOR ¶ 2.a at the beginning of his closing argument. The case was assigned to me on June 8, 2021. The scheduling of the case was delayed because of the COVID-19 pandemic. On July 14, 2021, the Defense Office of Hearings and Appeals (DOHA) notified Applicant's counsel that the hearing was scheduled for August 17 and 18, 2021.

I convened the hearing as scheduled using the video capabilities of the Defense Collaboration Services. The Government offered exhibits (GE) 1 through 4, which were admitted into evidence without objection. The Government's exhibit list and discovery letter were marked as hearing exhibits (HE) I and II. Applicant testified, called seven witnesses, and offered exhibits (AE) A through C (AE C is paginated with Bates stamping on the bottom right corner of the pages from 000001 to 000132. However, there were some unmarked introductory pages to the exhibit, which I marked as AE C-1 to C-6 because some were referred to at the hearing), which were admitted without objection. Applicant's exhibit list was marked as HE III. DOHA received the hearing transcripts (Tr1 and Tr2) on August 26, 2021.

Findings of Fact

Applicant denied all the SOR and ASOR allegations, except for SOR ¶ 1.b, which he admitted with explanations. The admission is adopted as a finding of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 34 years old. He has worked for his current government contractor-employer since May 2019 as a quality engineer. He had worked overseas for government contractors from approximately May 2011 to May 2013. He is seeking his first security clearance. He holds both associate's and bachelor's degrees. He completed his bachelor's degree in 2019. He is married with no children. (Tr1 98, Tr2 120; GE 1)

The SOR alleged, under Guideline J, that in March 2013, Applicant was working as a civilian contractor in an overseas location and was "charged" with larceny of government property and conspiracy. It further stated that his contract was terminated by his employer and he was sent back to the United States. Additionally, on July 5, 2014, the deputy commander of the location where Applicant had worked debarred him from all such overseas locations in that theater. (SOR ¶ 1.a) The SOR also alleged that in August 2014, Applicant was charged with harassment. (SOR ¶ 1.b)

The ASOR alleged, under Guideline E, SOR ¶ 2.a-2.c, essentially the same conduct alleged against Applicant under Guideline J above. Additionally, it alleged Applicant was terminated from a delivery-driver position in December 2016 for late deliveries and a missing package (SOR ¶ 2.d). It was further alleged that Applicant falsified his May 2019 security clearance application (SCA) by failing to disclose the

material details concerning his termination from his position listed in Section 13A (# 8), of the SCA (SOR ¶ 2.e).

Overseas Allegations and Investigation (SOR ¶ 1.a; ASOR 2.b-2.c)

In March 2013, Applicant was employed as a supervisor over third-party-national employees (3PN) working at an overseas Army base. He worked as a receiver in the Defense Reutilization Marketing Office (DRMO) yard and warehouses at the base. He was one of three U.S. employees working at the DRMO site. His supervisor (S) was one of the other U.S. employees. DRMO is where all Army units take surplus or unserviceable supplies and equipment to be properly disposed of off their unit's inventory and accounted for by the Defense Logistics Agency (DLA). Items turned into DRMO are either destroyed or reutilized by another unit. (Tr1 41-42; Tr2 103)

On March 22, 2013, Applicant was contacted by members of the Army Criminal Investigation Division (CID) concerning questions they had about a possible attempted theft of a government generator found off the military installation on a non-authorized vehicle. The generator was recovered, but CID was looking into who may have been involved with the attempted theft. Applicant was sought out because he signed the DD Form 1348 (1348) receiving the generator into the DRMO yard for destruction. He admitted signing the 1348, but did not specifically remember this one because he had signed for other generators. The generator was brought to DRMO to be turned in by the possessing unit. The soldier who turned it in had not been through the process before and admitted in his sworn statement that he skipped a step and therefore the turn-in process was not actually completed. The soldier was unaware that he needed to take an additional step to clear the property from his unit's inventory. Applicant does not normally receive property via 1348s in the yard, which is normally done by 3PN employees, but he filled in doing the job when the 3PNs took their lunch breaks. S was also contacted by CID because he was the overall contractor manager of DRMO. When S was later interviewed by CID he opined that Applicant had nothing to do with the attempted theft of the generator. (Tr1 45-46, 48; Tr2 31-33, 103-106)

Applicant fully cooperated with CID by agreeing to be interviewed, preparing a sworn written statement, and consenting to a search of his property, including all his electronic devices. He denied being involved with the attempted theft of the property or of conspiring to take the property. Aside from an uncorroborated reference to Applicant by an unidentified 3PN as a person involved with the generator and Applicant's signature on the 1348, there was no evidence of his involvement with the generator. Despite this lack of evidence, Applicant and S were told by their contractor (K) that the government had told K that Applicant and S were to be removed from the project and the country. Applicant and S both soon left for the United States. After Applicant was back in the United States in April 2013, the company CEO emailed Applicant as follows:

On the situation [referring to the generator incident]. The accusations were not what sent you home. The government requested that you and [S] be

removed from the project and the country. [My company] had no say in the matter.

As a result of the government request to K, sometime in late March or early April 2013, Applicant and S were sent back to the United States. They received their final pay from K and did not go back to work for the company, although Applicant believed he could work for K again in some other capacity if he wanted to do so. Applicant was never informed when he was overseas that he was formally charged with any offense. When he was overseas in March 2013, there is no evidence that he was formally charged with any crime. When he got to the United States, he was never charged with any criminal offense related to the generator incident. At the time he left the overseas location in approximately April 2013, he was unaware of any administrative action taken against him by any government agency. Applicant credibly testified that he was confused as to the reasons why he was sent home from overseas. (Tr1 44; Tr2 31-32, 34, 44-46, 48-50, 55, 96-97, 126; AE A)

The third U.S. employee (E3) who worked at the DRMO with Applicant and S, but who was not investigated because he was out of the country when the generator incident happened, testified at the hearing. Although E3 was gone when the incident occurred, he was back and present when Applicant and S faced questioning by the CID. He opined that Applicant would not be part of any attempted theft. He stated that the communication between K and the employees was poor and that K did not clarify with the employees why Applicant and S were sent home. He noted that in discussing things with Applicant before he was sent home, Applicant expressed confusion about what was happening and he was not getting any answers from K. (Tr1 153-154, 156, 164)

The CID concluded their investigation and issued a final report on March 12, 2014, nearly a year after the incident and after Applicant returned to the United States. That report, which was redacted and excluded exhibits, is GE 3. In the report, an Army judge advocate opined that probable cause existed to believe that Applicant committed the offenses of larceny of government property and conspiracy. There is no evidence that this probable cause opinion was ever reviewed by a judge or magistrate. Applicant was not informed of this opinion at this time, nor was he sent a copy of the investigation. He was living in the United States at this time but had not worked for K since he left the overseas location. On July 15, 2014, a commander's report of disciplinary action was completed, which stated that:

[Applicant] was subsequently fired by his employer and sent back to the United States following the termination of employment, Deputy Commander [redacted] signed a notice of debarment for life which covers all installations.

Applicant was not notified of this administrative action at the time it was taken. (Tr2 49-50, 54, 58; GE 3; AE C (pp. 000001 to 000007))

Applicant stayed in touch with his former supervisor, S. During one of their discussions sometime in 2015, S told Applicant that a job opportunity was affected because he was named in the CID report as a suspect and that report was inputted into the FBI data base. This came to light during his job opportunity. S discovered how to obtain a copy of his report, which he did. S ultimately filed an appeal with the CID and had his name removed as a subject. S told Applicant about this and Applicant filed three of his own requests, in November 2015, December 2015, and July 2020. He received his first response in January 2016, which included a redacted copy of the CID report (AE C). He has told that to have his name removed from the report required him to provide new evidence to which he had no access. Applicant testified that he recalls receiving everything in 2015, except for the commander's report of discipline (AE C pp.000001 to 000007), which he believes he did not receive until the 2020 response. He was not sure what debarment meant and what impact it had on him. (Tr1 58-60; Tr2 54-55, 66, 76-78; AE C)

Applicant's Answers on his May 2019 SCA (ASOR ¶ 2.e)

In answering the relevant questions concerning his employment with K in section 13A (employment activity # 8), Applicant stated his reason for leaving was, "contract ended." In employment activity # 7, Applicant admitted being fired for delivering a late package. In section 22, police record, Applicant disclosed his 2014 arrest for harassment and included specific details. In section 25, Government Debarment, Applicant answered "yes" to if he had ever been debarred from government service. His optional comment was: "I was part of an investigation but I wasn't sure about being debarred or not." He listed the government agency taking the debarment as "CID" in "04/2013 (estimated)." He then went on to explain the circumstances of the 2013 incident involving the generator and his lack of understanding about what happened and what impact a debarment had for him. He credibly testified that he had no intent to provide false information in response to Section 13A. He believed the information he provided in section 25 about his perceived debarment would be taken together with his information regarding section 13A, since they both involved the same underlying incident. When questioned by an investigator during his background check in August 2019, Applicant disclosed specific details about the generator incident without being prompted by the investigator. The report specifically notes when Applicant was confronted with specific facts by the investigator, but such notation is absent when discussing this issue. (Tr2 81-82, 128-129; GE 1, 4)

August 2014 Harassment Arrest (SOR ¶ 1.b)

Applicant credibly testified that an ex-girlfriend claimed that he has harassing her by sending numerous unwanted text messages. She filed a formal complaint and in August 2014, Applicant was arrested on a misdemeanor charge of harassment. He delivered evidence to his attorney in the form of texts and messages that showed that the complainant had initiated contact with him. His attorney presented the information to the District Attorney's office. The District Attorney filed a motion to dismiss the charge,

which was granted in December 2014. Applicant has had no further similar incidents. (Tr2 71-72; SOR answer with attached dismissal order)

December 2016 Termination from Courier Position (SOR ¶ 2.d)

From 2013 to 2016, Applicant was employed as a courier for a package delivery company. During his background interview, Applicant explained that he was first suspended and ultimately fired from his courier position because he had two reported incidents within a one-year period. The first incident involved a missing package from his truck, which he had scanned when he picked it up. The intended recipient reported not receiving the package. Applicant did not know what happened to the package. This was during the Christmas season in 2015, when they were very busy and it could have been delivered to a wrong address and not returned or someone could have taken the package from the truck when he was out of it. He denied taking the package. He was written up for this incident as a performance issue. Less than a year later, a second performance issue was documented against Applicant. In this instance, he was tasked with delivering a package, which had already been attempted once, but no one was available to receive it. On this second delivery attempt, Applicant did not get to it until the end of the day because the package had slid in the truck and he did not see it until all the other packages were delivered. When he did deliver it, the recipient complained that it was late and Applicant was written up for the incident. He was initially suspended from work by his employer, then terminated a day or so later because company policy was that two reported incidents within one year were grounds for termination. Applicant reported this incident on his SCA and during his background interview. He has had no similar incidents since these. (Tr2 22-25, 111-116; GE 1, 4)

Character Evidence

Applicant also presented character testimony from his wife and several work colleagues, including supervisors. His wife described Applicant as a loving, kind, generous, hard-working, honest, and good husband. Three coworkers (two supervisors) from Applicant's current employer, who are familiar with the reason Applicant is having this hearing, all described him as an honest, energetic, and a trusted employee with whom they have no reservations about him obtaining a security clearance. (Tr1 95-98, 102-111, 114-122, 136-141)

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(a), the entire process is a careful weighing 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, 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 that an 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 EO 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

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

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 in this case. The following is potentially applicable:

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

Applicant was a suspect in the CID investigation of the attempted theft and conspiracy to steal a government generator in March 2013. He was never criminally charged with any crime, but the administrative sanction of debarment was issued by the Deputy Commander of the overseas installation in July 2014. This action took place a year after Applicant left the country, and he was never notified of the debarment at the time the action took place and was never given an opportunity to respond to it. Applicant was arrested for harassment in August 2014, but the charge was ultimately dismissed in December 2014. I find that the stated disqualifying condition minimally applies.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following 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;

(c) no reliable evidence to support that the individual committed the offense; 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.

The allegation and investigation into Applicant's role into the attempted theft of the overseas generator occurred over eight years ago and the dismissed harassment charge occurred over seven years ago. Since then he has not had any additional criminal allegations against him. AG ¶ 32(a) applies. The evidence to support Applicant's involvement with the criminal conspiracy and attempted theft of the generator is insufficient. Department Counsel conceded this point in his closing argument by stating that the evidence does not support that Applicant was going to steal or had the intent to steal the generator. Applicant was sent home by his employer, at the direction of the Army, as the safest and most expedient way to deal with the situation. His employer, K, risked losing the contract if it did not comply with the Army's direction so Applicant was sent home with little to no explanation as to why. Although Applicant was a named subject in the CID report, he was never criminally charged with

any offense by any sovereign jurisdiction. The harassment charge was dismissed. AG ¶ 32(c) applies. He completed his bachelor's degree in 2019 and was hired as an engineer by his current employer where he is considered a trusted reliable employee worthy of holding a security clearance. AG ¶ 32(d) applies.

Guideline E, Personal Conduct

AG ¶ 15 expresses the personal conduct security 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, 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 in this case. The following disqualifying condition is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities;

(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:

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

- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and
- (4) evidence of significant misuse of Government or other employer's time or resources;

As discussed above, ASOR ¶ 2.a was withdrawn by Department Counsel and is no longer at issue. ASOR ¶¶ 2.b and 2.c allege essentially the same conduct also alleged in SOR ¶ 1.a under Guideline J. By the explicit language of both AG ¶¶ 16(c) and 16(d), since Guideline J is specifically applicable to the alleged conduct, those AGs do not apply to ASOR ¶¶ 2.b and 2.c. However, if they did apply, Applicant's conduct would be mitigated for the same reasons stated under the Guideline J discussion above and by the application of AGs ¶¶ 17(c) and 17(f). The circumstances leading to the investigation of Applicant were unique and unlikely to recur and they do not cast doubt on his current reliability, trustworthiness and good judgment. Additionally, the information from the CID investigation, as a whole, was unsubstantiated or from a source of questionable reliability.

ASOR ¶ 2.d is mitigated because this allegation is more about Applicant's performance at a previous job than it is about misconduct. Additionally, this occurred over seven years ago and there is no evidence of more recent similar action by Applicant. His character evidence supports that he is reliable, trustworthy, and shows good judgment. AG ¶ 17(c) applies.

The developed facts do not support the allegation that Applicant deliberately falsified his 2019 SCA when he listed his reason for leaving the employ of K as "contract ended." First, if his entire SCA answers are considered, then he provided sufficient information about the overseas generator incident when you also consider his answers to Section 25 about government debarments to allow further investigation if deemed necessary. Second, there is no evidence that Applicant ever received any written notice of misconduct from his employer, K, related to the events of March 2013. While he eventually received a copy of the CID investigation in 2016 and 2020, he admitted being confused by the information and not understanding what some of it meant, specifically what a debarment was. This lack of understanding undercuts the argument that he deliberately gave false information in response to the SCA question. Finally, in answering other areas of the SCA, Applicant was quite candid in disclosing a prior minor conviction (SOR ¶ 1.b) and a prior employment termination (ASOR ¶ 2.d). His willingness to disclose these unfavorable incidents, undercuts the idea that he would deliberately falsify information related to Section 13A. Disqualification, under AG 16 ¶ (a) was not established for SOR ¶ 2.e.

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 the 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 clearance 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 considered the evidence of Applicant's good character, and his successful completion of his bachelor's degree. The criminal conduct security concerns are mitigated and personal conduct security concerns were either not established or were mitigated.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated all the 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 |
| Subparagraph 2.a: | Withdrawn |
| Subparagraphs 2.b - .2.e: | 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 Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Robert E. Coacher
Administrative Judge