



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



In the matter of:)
)
) ISCR Case No. 19-02136
)
Applicant for Security Clearance)

Appearances

For Government: Eric Price, Esq., Department Counsel
For Applicant: *Pro se*

01/06/2021

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct and handling protected information security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On January 31, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and K (handling protected information). Applicant responded to the SOR on February 6, 2020, and requested a hearing before an administrative judge. The case was assigned to me on October 20, 2020.

The hearing was convened as scheduled on November 16, 2020. Government Exhibits (GE) 1 through 6 were admitted in evidence without objection. Applicant testified, called a witness, and submitted Applicant's Exhibits (AE) A through F. The Government's objection to the results of polygraph examinations was overruled, and AE A through F were admitted.

Findings of Fact

Applicant is a 60-year-old employee of a defense contractor. He has worked for his current employer since July 2020. He seeks to retain a security clearance, which he has held with some breaks since about 1991. He earned a bachelor's degree in 1982 and a master's degree in 2003. He is married with two children. (Transcript (Tr.) at 34-35, 37-40; GE 1, 2)

Applicant has a history of traffic offenses and workplace problems, including a security violation and multiple terminations. Between 2006 and February 2019, he was cited for at least 14 moving violations in two states. Eleven of the citations were for speeding. His driving privileges were suspended for 90 days in 2011. (Applicant's response to SOR; GE 5, 6)

In September 2013, Applicant took a classified document home without authorization from one site and transported it to another classified site the next day (SOR ¶ 1.a). The security violation report indicated the document was marked "Secret/NOFORN." Applicant did not report the incident until November 2013 when he was discussing the document with the person who created the document. (Applicant's response to SOR; GE 3, 4; AE B) During the investigation of the incident, he stated:

Since I had no office space at [Site A] and was still getting settled in a new office at [Site B] with no [redacted] computer assigned to me yet. I took the document in my locked briefcase home overnight. I knew this was not proper protocol, but I felt the risk was mitigated since it was locked in my briefcase. (GE 3)

Applicant stated that the document was about ten pages long, and only one or two pages were classified. He justified his actions by stating that the document was improperly marked, without a classified cover sheet, and that the information should not have been classified because it was in the public domain and readily available through the Internet. He also stated that his locked briefcase was the functional equivalent of a courier bag. He has never had a courier card to transport classified information, and he somewhat reluctantly admitted that he knew the document was classified. He was terminated from his employment in November 2013 because of the incident (SOR ¶ 2.f). (Tr. at 12-15, 23-33, 41-59, 76-79; Applicant's response to SOR; GE 1, 2; AE B, C)

As mitigation for the incident, Applicant asserted that there were inadequate instructions for his team on how to deal with courier processes; the document was locked in his briefcase in his kitchen overnight, so there was no compromise of data; it has been seven years since the incident, with no additional incidents; and it does not constitute a pattern, therefore the incident was "inadvertent." When pressed, he admitted his actions were not "inadvertent." He has received additional security training, most recently in July 2020. (Tr. at 37-38, 42-43, 47-48, 77-79; Applicant's response to SOR; AE B, C)

Applicant has a problematic employment history with numerous employers. The SOR alleges that Applicant received an incident warning letter from an employer for an incident in July 2015, and that he was terminated from eight jobs between 2004 and 2018. Most, if not all, of the information about Applicant's employment history came from him in his Questionnaire for National Security Positions (SF 86), during his background interview, in response to interrogatories, in his SOR response, and during his testimony.

Applicant was terminated from a job in July 2004 for unsatisfactory performance (SOR ¶ 2.a). He wrote that he "was terminated after [his] manager missed an important meeting because he had something more important to do at his home." Applicant explained that his manager could not attend a meeting and the customer was unhappy with how Applicant handled the meeting. (Applicant's response to SOR; GE 1, 2).

Applicant was terminated from another job in March 2005 for not complying with his manager's directions (SOR ¶ 2.b). He wrote that he "was laid off from this position for doing too much work." He stated that he took an action at the request of a customer after his manager told him not to take that type of action. Applicant stated that he thought it was acceptable because it was at the customer's request. (Tr. at 73-74; Applicant's response to SOR; GE 1, 2).

Applicant lost a job in July 2008 (SOR ¶ 2.c). The reason for the termination is not in the record. (Applicant's response to SOR; GE 1, 2).

Applicant was terminated from a job in November 2010 for failing to complete a customer-requested task (SOR ¶ 2.d). He wrote that he "was framed by an impatient requestor who could not get his change processed fast enough." (Applicant's response to SOR; GE 1, 2).

Applicant's employment was terminated in about December 2012 for sending an e-mail to a client that was critical of the client. (SOR ¶ 2.e). He wrote that his employer "let [him] go for a silly email that the customer took offense to about spelling and grammar." Applicant stated that the client's e-mail was not well written and did not convey the message the client wanted to convey. Applicant's reply e-mail pointed out that the client's e-mail was hard to understand and poorly worded. (Tr. at 69-73; Applicant's response to SOR; GE 1, 2).

Applicant received an incident warning letter from an employer in about July 2015 for raising his voice and chastising co-workers for not displaying their badges, and for raising his voice and behaving aggressively toward a co-worker (SOR ¶ 2.g). He stated that he did not intentionally behave aggressively toward the co-worker (Tr. at 70)

Applicant was terminated from his job with the above employer in about February 2016 for failing to comply with directions (SOR ¶ 2.h). He wrote that he was "[t]erminated for doing too much work and doing unneeded work by helping [another employee] learn a new skill." (Tr. at 69-70; Applicant's response to SOR; GE 1, 2).

Applicant's employment was terminated in October 2016 after his security clearance was unable to be processed because of the 2013 security incident (SOR ¶ 2.i). (Tr. at 35; Applicant's response to SOR; GE 1, 2).

Applicant was terminated from a job in about February 2018 for lack of professionalism (SOR ¶ 2.j). He stated that he was working at a federal building, and he had to be escorted everywhere because he did not have a Common Access Card (CAC). He was observed walking to the front of the building without an escort. He stated that he was leaving the building, and he was told he did not require an escort when he was leaving. (Tr. at 65-68; Applicant's response to SOR; GE 1, 2).

Applicant's father testified that Applicant is of the highest character with strong morals, and he is active in his church. Applicant submitted documents attesting to his excellent job performance. He is praised for his reliability, attention to detail, commitment, adaptability, professionalism, responsibility, and dedication. (Tr. at 81-84; AE E, F)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines 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 national security eligibility will be resolved in favor of the national security."

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 the 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 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 EO 10865 provides that adverse 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 E, Personal Conduct

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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;

(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;

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant's history of traffic offenses and workplace problems, including a security violation and multiple terminations for problematic conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. His conduct also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(d) and 16(e) are applicable. AG ¶ 16(c) is not perfectly applicable to the allegation that he was terminated in 2013 for the security violation that is alleged under Guideline K because that conduct is sufficient for an adverse determination under the handling protected information guideline. However, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established.

SOR ¶ 2.c alleges that Applicant was terminated from a job in July 2008. There is no evidence in the record that the termination was for conduct that would raise a security concern. SOR ¶ 2.c is concluded for Applicant.

SOR ¶ 2.i alleges that Applicant was terminated from employment in October 2016 for failure to meet expectations. His security clearance was unable to be processed because of the 2013 security incident. The underlying conduct is already alleged in SOR ¶ 2.f. When the same conduct is alleged twice in the SOR under the same guideline, one of the duplicative allegations should be resolved in Applicant's favor. See ISCR Case No. 03-04704 at 3 (App. Bd. Sep. 21, 2005). SOR ¶ 2.i is concluded for Applicant.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

With the exception of the security violation, which is serious on its own, any one instance of Applicant's conduct would be unlikely to rise to the level of a security concern. Many people with security clearances have received traffic violations or been terminated from jobs. However, Applicant's conduct cannot be looked at on an individual or piecemeal basis. Collectively, his conduct reveals an individual who repeatedly showed an unwillingness to comply with the law, rules, and regulations; who exercised poor judgment; and who failed to accept responsibility for his actions. Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. The above mitigating factors are insufficient to dispel the personal conduct security concerns.

Guideline K, Handling Protected Information

The security concern for handling protected information is set out in AG ¶ 33:

Deliberate or negligent failure to comply with rules and regulations for handling protected information-which includes classified and other sensitive government information, and proprietary information-raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(b) collecting or storing protected information in any unauthorized location; and

(g) any failure to comply with rules for the protection of classified or sensitive information.

Applicant's security violation as described above establishes the above disqualifying conditions.

Conditions that could mitigate handling protected information security concerns are provided under AG ¶ 35. The following are potentially applicable:

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

(c) the security violations were due to improper or inadequate training or unclear instructions; and

(d) the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise serious questions about an applicant's suitability for access to classified information. Once it is established that an applicant has committed a security violation, he or she has a very heavy burden of demonstrating that he or she should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an administrative judge must give any claims of reform and rehabilitation strict scrutiny. In many security clearance cases, applicants are denied a clearance for having an indicator of a risk that they might commit a security violation (e.g., alcohol abuse, delinquent debts, or drug use). Security violation cases reveal more than simply an indicator of risk. See ISCR Case No. 03-26888 (App. Bd. Oct. 5, 2006).

There is only one Guideline K allegation and that occurred more than seven years ago. Had that been the only incident of poor judgment and Applicant accepted full responsibility for his conduct, he might have met the heavy burden discussed above. However, there are many incidents of poor judgment, including the February 2018 incident in which he was terminated for violating rules by walking around in a federal building without an escort, and he has minimized and attempted to justify his conduct. While there is some evidence of mitigation, Applicant's problematic history and failure to accept responsibility make it difficult to conclude that the conduct is completely 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 clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines E and K in my whole-person analysis. I also considered Applicant's character evidence, but the favorable information is insufficient to overcome his incidents involving questionable judgment and an unwillingness to comply with laws, rules, and regulations.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and handling protected information 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 K:	Against Applicant
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraphs 2.d-2.h:	Against Applicant
Subparagraph 2.i:	For Applicant
Subparagraphs 2.j-2.l:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Edward W. Loughran
Administrative Judge