



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



In the matter of:)
)
) ISCR Case No. 19-02740
)
)
Applicant for Security Clearance)

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

January 25, 2021

Decision

GLENDON, John Bayard, Administrative Judge:

Applicant mitigated security concerns regarding his personal conduct and use of information technology. National security eligibility for access to classified information is granted.

Statement of the Case

On January 15, 2018, Applicant filed a security clearance application (SCA). The Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant on December 27, 2019, setting forth one allegation under Guideline E and one allegation under Guideline M. The DoD CAF acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (Dec. 10, 2016), effective within the Department of Defense for all adjudicative decisions on or after June 8, 2017.

On January 29, 2020, Applicant responded to the SOR (Answer). He requested a hearing before an administrative judge of the Defense Office of Hearings and Appeals (DOHA). On April 28, 2020, the case was assigned to me. The hearing on the case was delayed due to the Covid-19 pandemic. DOHA issued a notice of hearing on October 1, 2020, scheduling the hearing for October 29, 2020.

I convened the hearing as scheduled. Department Counsel presented four proposed exhibits marked as Government Exhibits (GE) 1 through 4 and an exhibit list, which I marked as Hearing Exhibit I. Applicant offered eight proposed exhibits marked as Applicant Exhibits (AE) A through H. Absent any objections, I admitted all of the exhibits into the record. DOHA received the transcript of the hearing (Tr.) on November 10, 2020.

Findings of Fact

Applicant's personal information is extracted from his SCA unless otherwise indicated by a parenthetical citation to the record. After a thorough and careful review of the pleadings, including Applicant's admissions in his Answer, his hearing testimony, and the documentary evidence in the record, I make the following findings of fact:

Applicant is 55 years old and has been married for 32 years. He and his wife have four children. He earned a bachelor's degree in 1987 and two advanced certificates in 1999. His degree is in a specialized engineering field, and he has worked in the field since 1987. He has also held a security clearance since 1987, except for an eight-year period when his employment did not require a clearance. From 2004 until October 2017, Applicant worked for a major U.S. Government contractor as an engineering project manager and was granted special access eligibility for a number of years. His employment was terminated for cause in October 2017. As a result, he lost his eligibility for special access. The next month he was hired by another Federal contractor and has worked there since as a senior project engineer. With the renewal of his clearance, he hopes to regain his special access eligibility. (Tr. at 19-20, 25, 44-45.)

At the time of his termination in 2017, and for a period of four-to-five years before that, Applicant worked in a room in which cellphones were not permitted. An investigation revealed that he had used the instant messaging and email systems on his employer's internal information technology (IT) systems to communicate personal messages to co-workers that were inappropriate. During the period 2004 through 2017, the investigation revealed a total of 578 improper communications. (Tr. at 21-23, 27-29, 39-42, 45; GE 4 at 1.)

Often, Applicant's messages were directly with female co-workers on personal subjects and at times were mutually flirtatious. Some messages were simply inappropriate. Other times, he sent messages to a friend at the company that were of a sexual nature about female co-workers. Some communications included company profile pictures of these co-workers. His employer has a written policy stating that its IT system is only to be used for work-related purposes. (Tr. at 21-23, 27-29, 39-42, 45; GE 3: GE 4 at 4.)

To Applicant's knowledge, no one ever complained that he had engaged in harassing behavior. His termination letter makes no reference to harassment. GE 3 references harassment. There is, however, no specific evidence in the record of harassment. Some of his messages were likely perceived by the recipients as harassment, such as messages calling the women by pet names or requesting social time while on business travel. (Tr. at 21-23, 27-29, 39-42, 45; GE 4 at 1-2.)

Prior to his termination, no supervisor or co-worker ever complained or spoke to Applicant about his actions. He was never romantically or sexually involved with any of his co-workers. The employer's HR department learned about his inappropriate messages and suspended him for two weeks, while it investigated Applicant's conduct. Thereafter, he was terminated. (Tr. at 30; GE 3.)

Applicant advised his wife of the reason for his suspension and termination. He recognized immediately after his termination that he had behaved like an "idiot." He and his wife received counseling from their church leader. Three months prior to the hearing, they signed up for more formal marriage counselling within their religious tradition. He did this so that he would have a tangible document, AE G, to present at the hearing. He has returned to his traditional faith and takes his religious beliefs seriously. He works hard every day to be a better person for his wife, his family, his employer, and his co-workers. He also strives to better follow the teachings of his religion. (Tr. at 21-23, 27-29, 39-42, 45; AE G; GE 3; GE 4 at 4.)

Applicant voluntarily sought individual counseling to better understand his behavior that lead to the termination of his employment. He now realizes that he was being selfish and was looking for attention. He has learned to accept full responsibility for the consequences of his actions. He deeply regrets his behavior. He has also learned to appreciate fully what he has in his life that is positive, starting with his wife, who he described as very religious. She has helped him find his way back to a more pious life. (Tr. at 21, 31-35, 46-48.)

Shortly after his termination, Applicant was in contact with former co-workers who presently work for Applicant's new employer. He truthfully told them why he lost his job and was looking for a new position. He also advised everyone he interviewed with at his new employer why he had been terminated by his former employer. He was given a new opportunity to continue working in his field with strict requirements that he be a model employee. He has performed well and has honored his employer's requirement that he not repeat his past behavior. (Tr. at 33-34.)

Character Testimony

Two witnesses testified at the hearing on Applicant's behalf. They also provided character letters. Both were employees of Applicant's former employer and knew Applicant from having worked with him in the past. Both witnesses were responsible for hiring Applicant in his new position. One witness, who is the employer's deputy general manager and Applicant's current second-line supervisor, had a serious talk with Applicant about the reasons for his prior termination. Applicant was very candid with him. The witness warned Applicant that such behavior could not be repeated and that there would

be “zero tolerance” for any misbehavior. He was never, however, formally put on probationary status. He also advised Applicant that he would need to receive counseling. Applicant started counseling at the outset of his employment and has continued up until the present. Applicant works with a number of female employees in his new position. The witness testified that he has received no complaints from anyone regarding Applicant’s behavior. The witness described Applicant as a “valued employee” whose job performance was “exemplary.” The witness also testified that Applicant was “conscientious” and “very hardworking.” (Tr. at 50-62; AE B; AE C.)

A second witness testified about Applicant’s character. He is Applicant’s current first-line supervisor and director of a program supporting the U.S. military. He worked with Applicant at their former employer as peers for about 12 years. When they worked together, the witness had a very high opinion of Applicant. This witness and the other character witness made the decision to hire Applicant to work for them at their new employer. They felt that they were not taking any risk in doing so, even after they were fully advised by Applicant and his former supervisor about Applicant’s behavior that led to his termination in 2017. Based upon their discussions with Applicant, they were confident that Applicant’s past behavior would not be repeated. In the three years that Applicant has worked at his new position, he has done a “fantastic” job without any problems. No team members have made any negative comments about Applicant’s behavior. Applicant has been open with this witness regarding the religious counselling he participates in with his wife. (Tr. at 63-68; AE C.)

Whole-Person Evidence

Applicant also provided his two most recent performance evaluations. They established that he is a “High Performer” (2018) or a “Solid Performer” (2019) He also submitted three documents that evidence his religious commitment and the support system he has created to help him maintain his focus on being a better person and more devout, religious person. (AE D at 5; AE E at 5; AE F; AE G; AE H.)

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.” *Id.* 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.” Exec. Or. 10865 § 2.

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, 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.” Exec. Or. 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. 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. 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. See 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.

Analysis

Guideline E, Personal Conduct

The security concern under this guideline is set out in AG ¶ 15:

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. The following will normally result in

an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility.

Applicant's admissions in his Answer and his testimony and the documentary evidence in the record establish the following potentially disqualifying conditions under this guideline:

AG ¶ 16(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

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:

- (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.

The application of the above disqualifying conditions shifts the burden to Applicant to provide evidence in mitigation. AG ¶ 17 contains seven conditions that could mitigate security concerns arising from personal conduct. Two of them have possible applicability to the facts of this case:

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.

Applicant's evidence fully established both of the above mitigating conditions. Applicant's misconduct last occurred three years ago. In light of how he has aggressively addressed his efforts to change his behavior and his employer's zero tolerance for any repetition of his past conduct, it is unlikely to recur. Applicant has made a dedicated and convincing commitment to his wife, family, and religion. Accordingly, I conclude that his past conduct does not cast doubt on his current reliability, trustworthiness, or good judgment.

Moreover, Applicant has acknowledged the inappropriateness of his past conduct and has obtained counseling to change that behavior. His commitment to his counseling is sincere and his renewed devotion to his religion will likely be lifelong. His past misconduct is unlikely to recur. Paragraph 1 of the SOR is found for Applicant.

Guideline M, Use of Information Technology

The security concern under this Guideline is set out in AG ¶ 39:

Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks, and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

Applicant's admissions in his Answer and his testimony and the documentary evidence in the record establish the following potentially disqualifying conditions under this guideline:

AG ¶ 40(e): unauthorized use of any information technology system.

The application of the above disqualifying condition shifts the burden to Applicant to provide evidence in mitigation. AG ¶ 41 contains four conditions that could mitigate security concerns arising from use of information technology. One of the mitigating conditions has possible applicability to the facts of this case:

AG ¶ 41(a): so much time has elapsed since the 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.

AG ¶ 41(a) is fully established. Applicant's behavior ceased with his termination from his former employer over three years ago. Since then, he has taken corrective actions to make sure that behavior never recurs. He suffered significant embarrassment with his wife, children, and friends by losing his employment. He was required to relocate his family to a new area. He has sought several different forms of personal and religious

counselling, both with his wife and individually. His new employment strictly requires that his past misuse of information technology never be repeated. None of his past behavior created a risk to national security. He did not commit a security violation. Applicant's misuse of information technology is now well in the past. Under all of the circumstances, his conduct does not cast doubt on Applicant's current reliability, trustworthiness, or good judgment. Applicant has mitigated security concerns under this guideline. Paragraph 2 of the SOR is found for Applicant.

Whole-Person Analysis

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d). These factors are:

- (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 Guidelines E and M in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Applicant has established that he has made a serious commitment to change his past misconduct and misuse of information technology. With the forgiveness and help of his wife, he has made a sincere commitment to his faith and to becoming a better person every day. His new employment requires that he not engage in any misconduct in the workplace, which reinforces his need to be responsible and maintain his commitment to change his past behavior. I conclude that Applicant has mitigated security concerns raised by his past personal conduct and use of information technology.

Formal Findings

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline M:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's national security eligibility for access to classified information. Clearance is granted.

John Bayard Glendon
Administrative Judge