



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 20-00792
)
Applicant for Security Clearance)

Appearances

For Government: John Lynch, Esq., Department Counsel
For Applicant: Bradley P. Moss, Esq.

01/18/2022

Decision

GARCIA, Candace Le'i, Administrative Judge:

Applicant failed to mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On June 4, 2020, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E (personal conduct). The action was taken under Executive Order (Exec. Or.) 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 DOD on June 8, 2017.

Applicant responded to the SOR (Answer) on December 2, 2020, and requested a hearing before an administrative judge. The case was assigned to me on February 25, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing (NOH) on April 7, 2021, scheduling the hearing for May 4, 2021. On April 22, 2021, I granted Applicant's request for a brief continuance of his hearing. DOHA issued an

amended NOH on April 23, 2021, rescheduling the hearing for May 25, 2021. I convened the hearing as rescheduled. (Tr. at 7)

At the hearing, Government Exhibits (GE) 1 through 8 and Applicant's Exhibits (AE) A and B were admitted without objection. Applicant testified. At Applicant's request, I kept the record open until May 28, 2021, to allow him to submit additional documentation. By that date, Applicant submitted documentation which I collectively marked as AE C and admitted without objection. DOHA received the hearing transcript (Tr.) on June 9, 2021. (Tr. at 11-153; GE 1-8; AE A-C)

SOR Amendment

In reviewing the SOR while preparing this decision, I noticed an error in the text of SOR ¶ 1.c that requires addressing. The second to last sentence in SOR ¶ 1.c reads, in part, as follows: "However, you did admit . . . despite knowing she did [not] want you to contact her." The word "not" is missing. While I conclude this is a clerical error, I also conclude that good cause is established to amend SOR ¶ 1.c so that it conforms to the record evidence on a matter critical to the reading of the allegation. I do so, *sua sponte*, under ¶ E3.1.17 of the Directive, amend the second to last sentence of SOR ¶ 1.c so that it reads, in pertinent part, as follows:

However, you did admit to the investigating police officer that you had sent your former co-worker text messages despite knowing she did not want you to contact her.

Findings of Fact

Applicant admitted SOR allegation ¶ 1.c and denied SOR allegations ¶¶ 1.a, 1.b, 1.d, and 1.e. He is 32 years old. He was born in Afghanistan, immigrated to the United States in 1989, and became a naturalized U.S. citizen in 2010. He graduated from high school in 2008 and earned a bachelor's degree in accounting in 2014. He is unmarried and he does not have any children. (Answer; Tr. at 17-25; GE 1)

Applicant worked for a previous DOD contractor (company A) from April 2015 until June 2018. Since then and as of the date of the hearing, he worked as a data analyst for his employer, also a DOD contractor (company B). He was first granted a security clearance in March 2018. (Answer; Tr. at 6, 17-26, 111-113; GE 1, 3, 7)

The SOR alleged that Applicant resigned from employment with company A in June 2018, in lieu of being fired, after company A concluded that he engaged in repeated unwanted and unprofessional communication with a female co-worker (CW1), even after company A counseled him to cease communication, and that he is not eligible for rehire (SOR ¶ 1.a). The SOR also alleged that after Applicant's 2018 resignation in lieu of firing: (1) Applicant was seen in and around the exterior of company A's headquarters, where CW1 continued to work, on at least three occasions; he continued to engage in unwanted communication with CW1; and company A consequently sent him a notice to cease trespassing on its property (SOR ¶ 1.b); and (2) CW1 and CW1's spouse reported to the

police that they believed Applicant appeared outside their residence, which Applicant denied upon police questioning but admitted that he had sent CW1 unwanted text messages, and the police consequently issued him a trespass notice (SOR ¶ 1.c).

The SOR also alleged that Applicant falsified material facts on his January 2019 security clearance application (SCA), in response to “Section 13A - Employment Activities,” “Reason for Leaving. Provide the reason for leaving the employment activity,” when he listed “[p]rofessional [g]rowth” as the reason for leaving his employment with company A in June 2018. The SOR also alleged that Applicant falsified his 2019 SCA in response to “Section 13A - Employment Activities,” when he listed “No” in response to the following:

Reason for Leaving Question For this employment have any of the following happened to you in the last seven (7) years? . . . · Quit after being told you would be fired · Left by mutual agreement following charges or allegations of misconduct

In truth, the SOR alleged, Applicant resigned from company A in lieu of being fired, as set forth in SOR ¶ 1.a, and further discussed below. (SOR ¶¶ 1.d, 1.e).

The SOR allegations are established by Applicant’s admissions; June 2018 employment records from company A; an October 2018 adverse action report, submitted by company A to the Defense Security Service (DSS); a December 2018 Joint Personnel Adjudication System (JPAS) incident history report, submitted by company A to the DSS, concerning an incident that occurred on June 5, 2018; Applicant’s January 2019 SCA; a March 2019 police report concerning a suspicious event that occurred on June 13, 2018; reports of background interviews conducted in April and May 2019; and records of Applicant’s communications to CW1 between approximately 2017 and 2019. (Answer; Tr. at 27-153; GE 1-8)

Applicant and CW 1 became colleagues at company A when she was assigned, in mid to late 2017, to a project he was working on. Applicant testified that he considered her, over time, to be a “good friend,” but he never pursued or had any other kind of relationship with her. He acknowledged that in approximately late September 2017, she requested, in response to a text he sent her, that he stop texting her. He continued to text her, from his personal cellular phone to hers, through January 2018; she never responded. When CW1 contacted the police on June 13, 2018, as further discussed below, she reported that Applicant had been harassing her at work “for the past year.” (Tr. at 27-52, 113-114; GE 1-7)

Applicant’s former supervisors and senior human resources staff at company A instructed him to cease his unwanted social contact with CW1. Applicant disregarded their instructions and continued his conduct. An October 2018 adverse action report, submitted by company A to the DSS, reflects that Applicant received such instruction over the course of at least four counseling sessions. Applicant testified that he was only counseled once by company A, in mid-January 2018. He testified that during that single counseling session, he was told only that he should go through a certain manager if it

involved something with CW1, and he was not explicitly told to cease contact with CW1. (Tr. at 44-57, 114-121, 142-152; GE 2-8)

A record of a January 17, 2018 meeting between Applicant and two senior individuals from company A reflect that Applicant was informed that company A was aware of his communications with CW1, despite CW1's multiple requests that he stop; CW1 confirmed there was no further need for any professional contact because she and Applicant were no longer working on the same project; Applicant was informed, and the two senior individuals from company A "further emphasized (more than 3 times)," that company A would not tolerate any future contact he made with CW1, and he "would be expected to part ways and leave [company A] if he continued such contact;" and, if he needed to contact CW1 for professional reasons, he was expected to work directly through the two senior individuals from company A that were in attendance at the January 2018 meeting, and not CW1. The record further reflects that Applicant "confirmed his understanding of this expectation and agreed that he would not make any further contact." Applicant testified that other than in-person communications with CW1 regarding work, "I don't recall like a text, but I don't think I sent any texts after that meeting, that was non work related." The record also contains an undated letter from Applicant to CW1 in which Applicant acknowledged a potential for his termination from company A if he continued contacting CW1. He wrote, in part:

I overlooked your wishes when I was emotionally drowning so I'm going to ignore it one more time and reach out to let you know that I cannot stand on a side knowing that someone that I know is going through grief and I'm not there to help or support. I'm probably going to get fired for this if it gets back to [a senior individual from company A] or the . . . team Anyway, if I'm going to be crucified for caring, then [sic] be it.

(Tr. at 44-57, 114-121, 142-152; GE 5, 6, 8; AE B)

On June 5, 2018, company A terminated Applicant's employment due to his "repeated unwanted non-business contact with [CW1], via social media, telephone and in person;" at his request, company A permitted him to resign. Applicant maintained that he voluntarily resigned from employment with company A; he acknowledged that he did so without providing a two-week notice and that his managers did not inquire as to why he chose to voluntarily resign. He wrote in his resignation email, "Ideally, I was in with [company A] for the long haul. However[,] given the circumstances[,] I'm more [than] [willing] to resign from my role." (Tr. at 53-80, 121-127; GE 2, 3, 5-8)

Applicant testified and indicated during his April 2019 background interview that he voluntarily resigned because of a misunderstanding between him and CW1, about whom certain team managers made immature comments and which created a workplace culture over a four to six-month period that he did not want to be involved in, and that these were the "circumstances" he referenced in his resignation letter. He also testified and indicated during his April 2019 background interview that he left employment with company A because his project with company A ended, he was offered an opportunity with company B in May 2018, and he chose to accept the offer with a start date of June

18, 2018. He testified both that: (1) he did not recall company A ever telling him he was going to be fired, and (2) company A never told him he was going to be fired. He testified that at the time he left company A, he believed he was eligible for rehire as he was never given any paperwork stating otherwise. As such, Applicant maintained that he did not falsify his responses to section 13A of his 2019 SCA. (Answer; Tr. at 53-80, 121-127, 142-152; GE 1, 7, 8; AE B)

After he was terminated by company A, Applicant continued to contact CW1 on numerous occasions, via e-mails, text messages, and telephone calls, which she reported to the police. One email, dated June 12, 2018, contains, in part, the following subject line: "Didn't realize friendship requires apologies. I have ask[ed] myself could I love someone this much . . . ?" CW1 and her spouse also reported to the police on June 13, 2018, that they believed Applicant appeared in his car outside their residence; a police officer confirmed that the license plate provided by CW1's spouse belonged to Applicant. Applicant denied, when questioned by the police and at hearing, that he had driven by CW1's residence, but he admitted that he had sent her unwanted text messages. He told the police, "even though he knew [CW1] didn't want him to text[,] he didn't want [CW1] to think he had abandoned her when he 'resigned.'" He testified and indicated during his April 2019 background interview that he wanted closure from CW1 as to why she no longer wanted contact, it was hard for him to grasp that he had lost a friend due to gossip, and he wanted to let her know that he did not hold any hard feelings towards her and was still amenable to their friendship. The police issued him a trespass notice on June 13, 2018, barring him from CW1's residence. (Tr. at 80-106, 127-152; GE 2-7)

Following his employment separation from company A, Applicant was seen on at least three occasions in and around the exterior of company A's headquarters, where CW1 continued to work, despite having no known need to be in the area of company A's headquarters during normal business hours. He testified that he normally exercised in the area where company A is located, and his new employer was also located in the same vicinity. Company A sent him a "No Trespassing" letter via certified mail on June 18, 2018, notifying him that he was banned from all of its state-wide properties, and company A filed a copy of the letter with the police department in the county where its headquarters is located. Applicant acknowledged during his April 2019 background interview that because he was banned from company A's property, he was not eligible for rehire with company A. (Answer; Tr. at 80-106, 127-142; GE 7, 8)

Applicant continued to contact CW1. He testified that he wanted to confirm whether it was her, and not company A, who filed the June 13, 2018 trespass notice, and he wanted to invite her to a housewarming party. He emailed her on July 30, 2018, with the subject line, "I challenge you." He emailed her twice in August 2018. He emailed her in October 2018, after finding out that she was working for another employer (company C), to inquire about company C's hiring event. He emailed her in November 2018, to notify her that he was running the same marathon he knew she was running. He emailed her in January and February 2019. He testified that he last contacted CW1 when one of her friends contacted him in around March 2019 and asked him to stop. His communications with CW1 persisted even after she sent him this text in July 2018:

I don't want to talk to you. I do not like you. We are not friends. We were never friends. There's nothing to fix. I've made it crystal clear I can't stand you. Leave me the . . . alone.

(Answer; Tr. at 80-106, 127-152; GE 1-8)

Applicant has not faced any other allegations of misconduct. Although he testified that “. . . in terms of facing that situation, that probably will never happen again,” he also stated, “. . . at this point, I'm kind of struggling on how to -- how to approach a situation like that again” He felt his intention of being a friend was misconstrued. A former supervisor of Applicant from company A, for whom Applicant worked from around 2015 to 2017, stated that he did not have any direct, firsthand knowledge of the incidents referenced in the SOR and had never witnessed Applicant engage in any illegal, inappropriate or unprofessional conduct. He described Applicant as a “solid and dependable performer,” and he did not have any concerns with Applicant's trustworthiness and ability to conduct himself professionally. Another individual from company A, who referred to Applicant as a “business associate” in November 2017, wrote that she knew Applicant for two years and described him as an “asset” to the team. (Tr. at 25-27, 106-110; AE A, C).

A managing director at company B, who referred to Applicant as a “business associate” in November 2020, wrote that she knew Applicant for three years and described him as “helpful,” “reliable,” and “well-respected.” Another managing director at company B, who was Applicant's previous direct supervisor when Applicant started working for company B and who has maintained “frequent” contact with him, described Applicant as a “pleasure to work with” and an individual who has “excellent working relationships with those at all levels at [company B].” His “immediate manager” as of November 2020 referred to Applicant as her “most trusted senior on the audit,” and an individual of “exemplary character.” Finally, a co-worker from company B wrote, in November 2020, that he had worked with Applicant for just over a year and she considered him to be a valuable resource to their team. (AE C)

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 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(a), 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 Exec. Or. 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* Exec. Or. 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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. I considered the following relevant:

(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;

(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:

. . . (2) any disruptive, violent, or other inappropriate behavior;

Applicant resigned from employment with company A in June 2018, in lieu of being fired, after company A concluded that he engaged in repeated unwanted and unprofessional communication with CW1, even after company A counseled him to cease communication. He is not eligible for rehire with company A. After his resignation in lieu of termination, Applicant was seen in and around the exterior of company A's headquarters, where CW1 continued to work, on at least three occasions. He also continued to engage in unwanted communication with CW1. Company A consequently sent him a notice to cease trespassing on its property. In addition, CW1 and CW1's spouse reported to the police that they believed Applicant appeared outside their residence. Although he denied it upon police questioning, he admitted that he had sent CW1 unwanted text messages, and the police consequently issued him a trespass notice. Applicant also falsified material facts on his January 2019 SCA when he deliberately failed to disclose that he voluntarily resigned from his employment with company A, in lieu of being fired, for the reasons previously discussed. AG ¶¶ 16(a) and 16(d)(2) apply.

AG ¶ 17 describes the following conditions that could mitigate the personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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

(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 underlying conduct that led to his resignation from company A, in lieu of being fired, occurred over three years ago, and he has, thus far, proven his professionalism at company B. However, both the record evidence and Applicant's testimony continue to raise doubts about Applicant's reliability, trustworthiness, and judgment. I did not find Applicant to be candid or credible at the hearing. His conduct toward CW1 was inappropriate and continued after CW1 asked him to stop; after company A warned him that such continued conduct would result in his termination; and after he resigned from company A in lieu of being fired. His testimony concerning such conduct was inconsistent and in contradiction of the record evidence, to include records of his communication with her. Applicant's testimony that he voluntarily resigned from company A, without providing a two-week notice, solely because of an unacceptable workplace culture that stemmed from a misunderstood relationship between him and CW1, as well as his acceptance of company B's offer of employment, was also not credible in light of the record evidence. Applicant's failure to truthfully disclose the nature of his termination from company A on his SCA weighs against any mitigation, rehabilitation, and favorable conclusions concerning his credibility. AG ¶¶ 17(a), (b), (c), and 17(d) do not apply.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant failed to mitigate the personal conduct 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 E:	AGAINST APPLICANT
Subparagraphs 1.a - 1.e:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Candace Le'i Garcia
Administrative Judge