



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



In the matter of:)
)
) ISCR Case No. 21-00371
)
Applicant for Security Clearance)

Appearances

For Government: Mark Lawton, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2023

Decision

Hyams, Ross D., Administrative Judge:

Applicant mitigated the personal conduct security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 30, 2017. On November 15, 2021, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E (personal conduct). Applicant submitted an undated response to the SOR, and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals. After a delay because of the COVID-19 pandemic, the case was assigned to me on July 21, 2022.

The hearing was originally scheduled for September 15, 2022. Applicant requested a continuance, which was granted. The hearing was convened on September 28, 2022. Department Counsel submitted Government Exhibits (GE) 1-5, which were admitted in evidence without objection. Applicant did not submit any exhibits at the hearing. After the hearing, I held the record open for two weeks to provide him the opportunity to submit documentary evidence. He timely submitted documents that I marked as Applicant's Exhibits (AE) A-G, which were admitted in evidence without objection.

Amendment to the SOR

At the start of the hearing, Department Counsel moved to amend the SOR to correct four administrative errors. In SOR ¶ 1.a, the spelling of the employer's name was corrected. In SOR ¶ 1.b, the full name of the bank was added. In SOR ¶¶ 1.c and 1.d, the date of the SCA was corrected to June 30, 2017. The motion to amend the SOR was granted without objection. Applicant was asked if he needed more time to prepare his case given these corrections. He stated that he was ready to proceed. (Tr. 9-11)

Findings of Fact

In his answer, Applicant denied the SOR allegations. After review of the pleadings, testimony, and evidence submitted, I make the following findings of fact.

Applicant is 36 years old. He earned a bachelor's degree in 2012. He was first granted a security clearance in 2010. His most recent SCA was submitted in June 2017. For over ten years, he has worked for government contractors in a national security related information technology field. He possesses specialized knowledge, skills, and experience in this field. (Tr. 19-21; GE 1, 2)

The SOR alleges that Applicant was terminated or resigned in lieu of termination from the government contractor in 2015 for timecard fraud (SOR ¶ 1.a) and from the bank in 2010 for falsification or fraud (SOR ¶ 1.b). It also alleges that he deliberately falsified his 2017 SCA about why he left these two jobs and failed to disclose that he was terminated or resigned in lieu of termination. (SOR ¶¶ 1.c and 1.d).

Applicant stated that his first real job was as a personal banker with a national bank chain. Prior to this job, he worked part-time jobs while going to school. He reported that his job at the bank was to assist customers with their accounts, and to encourage them to open new accounts. He asserted that newly opened accounts were an important metric for management compensation. He stated that he was paid a flat salary and did not earn a bonus. (Tr. 27-36, 68-92, GE 1, 2, 3)

In the eight months that Applicant worked at the bank, he reported that he was trained by a more experienced banker on how to open accounts for customers. He claims that he was told that a way to improve his monthly performance metrics was to contact customers about their existing accounts, and without their explicit approval open new accounts in their names for 30 days, and then close them at the end of that time period. He asserted that no money needed to be moved. He testified that he watched his trainer do this on several occasions, but did not do it himself. (Tr. 27-36, 68-92, GE 1, 2, 3)

In the summary report of his 2018 background interview with a government investigator, Applicant reported that he used this tactic to open accounts for customers that he knew, such as family members or friends. He reported that he did this on about four occasions. At the hearing, he denied opening the accounts himself. He testified that the summary report was incorrect. He claims that he told the investigator that he saw his

trainer improperly open four accounts, but did not say that he opened them himself. He claims that he did not read this portion of the summary carefully enough before verifying it. (Tr. 27-36, 68-92, GE 1, 2, 3)

In early 2010, Applicant stated that his manager informed his team that there was a customer complaint about an account that was opened without the customer's approval, and the bank chain was going to conduct an investigation. He reported that he quit his job before the investigation started. He asserted that he had already been looking to leave this job to go into the government-contracting world, and he did not want to be in a position where he could be fired. He stated that he wanted to leave the door open to work in the banking industry again in the future, if the government contracting career path did not work out. He asserted that he was not personally confronted by the manager or told that he would be fired or disciplined. He stated that he feared having a blemish on his employment record, and this caused him to make the quick decision to quit that job. His next two jobs were in government contracting. On his 2017 SCA, he stated that he left this job to transition from commercial banking to government contracting, and that he was not fired and did not quit after being told that he would be fired. (Tr. 27-36, 68-92, GE 1, 2, 3)

The way that these unapproved accounts were opened was not unique to the branch that Applicant worked in. In 2020, the bank chain agreed to pay \$3 billion to resolve criminal and civil investigations into opening customer accounts without authorization. The Department of Justice stated that the bank pressured employees nationwide to meet unrealistic sales goals, which led to employees providing products or accounts under false pretenses or without consent. (AE F)

In June 2015, Applicant started working for a government contractor in a specialized information technology field. He reported that when he started this position, the deputy program manager (DPM) of the project told him that he needed to bill "straight eights" on his time card, but that if he worked longer hours, he could stockpile that time and use it as compensatory time off. He claimed that he would work out the time off arrangements informally with the DPM. He stated that the work slowed shortly after he started working there, because they had already depleted most of the funding for the contract, and later the company had lost the bid for contract renewal. During his employment, he found other job openings in a similar practice area with a large government contractor. A friend employed by that contractor referred him for one of these positions, and he had submitted applications for new employment to them by September 27, 2015. (Tr. 19-27, 31-34, 39-68, 73, 88-105; GE 1, 2, 4, 5; AE B, C, D, E, G)

On October 7, 2015, Applicant was informed by his program manager (PM) that an audit was being conducted of employee time cards, and that the auditors wanted to meet with him. He stated to the PM that he did not want to be involved in an audit. The PM told him that he could avoid the audit if he resigned, or he could meet with the auditor and find a new position with the company when the contract for his current position ended. Applicant stated that he had no reason to believe that he would be fired because of the audit, and his PM gave him no indication that was the case. He stated that since he was

already seeking new employment, he decided to resign. His resignation took effect immediately. He reported that in this type of work, two weeks' notice was not necessary, because when an employee states that they are leaving, they are removed from the project immediately for security reasons. The day after he resigned, he received an out-processing letter from company HR, which asked him to stay in touch and connected with the company, and asked him to refer family and friends to work for them. There was no negative language about his resignation in the out-processing letter. Later that month, he started working for the large government contractor with which he applied in late September. On his 2017 SCA, he stated that he left this job because of minimal workload and that he was recruited for other work with a government contractor, and that he was not fired and did not quit after being told that he would be fired. (Tr. 19-27, 31-34, 39-68, 73, 88-105; AE D)

In 2019, Applicant was informed by his security officer at another employer that there was an incident report about him from October 15, 2015, but they were not allowed to show it to him. In April 2019, he filed a Freedom of Information Act (FOIA) request to obtain information about the report. It was not provided to him until Department Counsel sent him the report in January 2022. The report claims that in October 2015, he resigned in lieu of termination for violating company time-charging policy. It states that an investigation found that he mischarged 30.5 hours in the period of a week in late September 2015, and it described instances of erratic behavior that month. Applicant denied the allegations in the report. He stated that when he resigned he had no reason to believe that he would be terminated. His specialized knowledge, skills, and experience would make termination unlikely for a timecard issue from one week of employment. He argued that it would not be possible to mischarge 30 hours in a week, as someone would immediately notice that he had missed almost an entire week of work. In mid-September 2015, he had oral surgery and a follow-up visit in late September. He stated that he did not have enough leave banked to use for his recovery, and he was not permitted to take leave in advance of earning it. He reported that he had to come into work while still taking prescribed pain medications. The Government submitted 65 pages of employment records from this time period, and none corroborates the information in the incident report. The one page that the Government cited as support is illegible. (Tr. 19-27, 31-34, 39-68, 73, 88-105; GE 4 at page 56, 5; AE E, G; HE 2)

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

Applicant sufficiently refuted the falsification allegations that he deliberately lied about why he left his bank job in 2010 and government contractor job 2015. He also sufficiently refuted the falsification allegations that he deliberately failed to report that he was terminated or resigned in lieu of termination. SOR ¶¶ 1.c and 1.d are found for Applicant.

AG ¶ 15 details 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

I have considered the disqualifying conditions for personal conduct under AG ¶ 16 and the following are applicable:

(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.

I have considered the mitigating conditions under AG ¶ 17. 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; and

(f) the information was unsubstantiated or from a source of questionable reliability;

Applicant disputes that he was involved in fraudulent activity in 2010 at his job with the bank, or that he resigned in lieu of termination. He claimed that he only witnessed his trainer open accounts without explicit customer consent. The record

shows that he stood no financial gain from opening these accounts, and the activity was part of a larger nationwide problem with this bank chain.

The conduct alleged occurred about 13 years ago, as a trainee in his first real job. These are unusual circumstances that are unlikely to recur, and it does not cast doubt on his reliability, trustworthiness, and good judgment. Applicant's claim that he quit his job to ensure that there was no blemish on his employment record is credible. AG ¶ 17(c) applies to SOR ¶¶ 1.b.

Applicant disputes that he falsified his time card in September 2015 or that he resigned in lieu of termination from the government contractor. Applicant provided sufficient documentation to find that he had already been referred to another employer, and submitted applications for new employment prior to his resignation from this job. His specialized knowledge, skills and experience allowed him to easily obtain new employment with other government contractors. Applicant's narrative that he resigned because he did not want to participate in the audit and he believed that new employment was imminent is credible.

Although it is possible that there could have been discrepancies on his timecard from late September, the reason for such discrepancies would not be limited to fraud. His descriptions of the DPM's instructions for billing "straight eights" on his timecard and compensatory time off are commonplace in government contracting. The incident report only cites one week that Applicant mischarged time; it does not allege a pattern of dishonesty or rule violations. The fact that Applicant had oral surgery six days prior to the time alleged, and a follow-up appointment during the week in question, shows great possibility for confusion and mistake. The conduct alleged occurred over seven years ago under circumstances that are unlikely to reoccur, and it does not cast doubt on his reliability, trustworthiness, and good judgment. AG ¶ 17(c) and (f) applies to SOR ¶¶ 1.a.

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 considered his service to the government as a contractor. I have incorporated my comments under Guideline E in my whole-person analysis.

I had the chance to observe Applicant's demeanor and assess his credibility. Under pressure from extensive questioning by Department Counsel, his narrative was consistent and he more than adequately explained the circumstances surrounding the SOR allegations and the corollary issues in the record. I found his testimony and explanations to be credible, and the documentation that he submitted in the record was sufficient to substantiate his story.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude that Applicant mitigated 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:	FOR APPLICANT
Subparagraphs 1.a-1.d:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interest of the United States to grant Applicant's eligibility for access to classified information. Applicant's eligibility for a security clearance is granted.

Ross D. Hyams
Administrative Judge