



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



In the matter of:)
)
) ISCR Case No. 21-00993
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

02/01/2023

Decision

Curry, Marc E., Administrative Judge:

Applicant’s sexual harassment of several female colleagues between 2016 to 2018 led to his termination from employment and generated sexual behavior and personal conduct security concerns that remain unmitigated. Clearance is denied.

Statement of the Case

On November 10, 2021, the Department of Defense Counterintelligence and Security Agency (DCSA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline D, sexual behavior, and Guideline E, personal conduct, and explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive) and the National Security Adjudicative Guidelines (AG), effective June 8, 2017.

On January 14, 2022, Applicant answered the SOR, admitting the allegation set forth in subparagraph 1.a, and denying the allegation set forth in subparagraph 2.a. He requested a hearing, whereupon the case was assigned to me on September 1, 2022. On September 27, 2022, the Defense Office of Hearings and Appeals issued a notice of video teleconference hearing, scheduling Applicant's case for October 19, 2022. The hearing was held as scheduled. I received four Government exhibits (GE 1 – GE 4), seventeen Applicant exhibits (AE A – AE R), and considered Applicant's testimony. The transcript (Tr.) was received on October 19, 2022.

Findings of Fact

Applicant is a 57-year-old married man with two adult children from a previous marriage. He earned a bachelor's degree in 2008, and in 2010, he earned a master's degree in the field of conflict management. (Tr. 15) Applicant is a veteran of the U.S. Army. He served on active duty from 1984 to 1989. After leaving activity duty, he affiliated with the Army Reserve where he served from 1989 to 2019. He retired honorably. (GE 1 at 20)

Applicant is a logistics management specialist. He has been working for his current employer since January 2020. (GE 1 at 13) He worked with his previous employer, a military command, performing similar work from 2015 to 2019. (GE 3)

In January 2016, Applicant went on temporary travel duty (TDY) with a female military officer who was superior to him on the unit's organization chart. (GE 3 at 3) It was not uncommon for coworkers to eat dinner together while on TDY. One night, while at dinner with the officer, Applicant told her that if she was not married, "[he] would be all over [her]," and that "what happens [on TDY], stays [on TDY]." (GE 3 at 3) She rebuffed his advances and did not immediately report it until some time later, when her supervisor asked her to accompany Applicant to another TDY assignment. (GE 4 at 3) The coworker's supervisor then reported the allegation to the unit commander that same day. (GE 4 at 3) Subsequently, the unit commander appointed an investigator to conduct a preliminary inquiry into the allegations. During the investigation, two additional female coworkers alleged that Applicant had made unwelcome sexual advances toward them. (GE 4 at 4) One of the sexual advances occurred between 2016 and 2017 via the following e-mail exchange:

Applicant: So how many do you have in your stables? LOL Very curious about you.

Coworker: NUNYA [None of your business]

Applicant: So no room for anyone? Let me know when you have some free space. (GE 3 at 4; GE 4 at 9))

Two of the women noted that Applicant's relationship with them became tense, confrontational, and intimidating after they rejected his advances. For example, one of the women stated that on one occasion, he intentionally bumped into her while walking by her in the hallway. (GE 3 at 5)

The investigator concluded that the allegations were substantiated, but did not rise to the level of sexual harassment. Moreover, he recommended that Applicant attend trainings on sexual harassment, conflict and anger management skills, and professionalism in the workplace and on travel. (GE 4 at 5)

The woman that Applicant propositioned while on TDY stated that her relationship with him continued to deteriorate after the investigator released his report. (GE 4 at 5) Her continued complaints prompted their supervisor, in July 2018, to initiate a hostile work environment inquiry into Applicant's behavior. (GE 4 at 5) The investigator took sworn statements from Applicant, the coworker that Applicant propositioned on TDY, three other employees, and a contractor. All of the people interviewed stated that Applicant's behavior created a tense work environment. In addition, the contractor accused Applicant of flirting with her and rubbing himself against the back of her chair while she was seated in it. As with the other woman who had reported such behavior earlier, he became hostile when she rebuffed his advances, at one point yelling at her to "get her ass" up from her chair to perform a task for him. (GE 4 at 6)

While the investigation was ongoing, a coworker, who was not involved in the ongoing in-house harassment investigation, filed a complaint with the Equal Employment Opportunity Commission (EEO) against Applicant, alleging sexual harassment. (GE 4 at 8) In the complaint, the employee stated that Applicant remarked on her looks, rubbed her shoulders on one occasion, and frequently asked her out. (GE 4 at 9)

The EEO complaint prompted the unit commander, in November 2018, to expand the investigation. (GE 4 at 8) Per the expanded investigation, the investigator asked all of the command's employees and contractors if they had seen or experienced workplace sexual harassment from Applicant. (GE 4 at 9) In response, several more women came forward to complain of sexual advances or inappropriate comments, including a woman who was the command's special victim counsel on sexual harassment, and several women in subordinate positions (GE 3 at 8; GE 4 at 10) All of them prepared sworn statements. In addition to the women who alleged sexual harassment, a coworker who witnessed an episode of inappropriate conduct provided a statement. (GE 4 at 11)

On November 14, 2018, Applicant issued a sworn statement, as part of the expanded investigation. (GE at 11) During the ISCR hearing, he testified that he was unaware that he had been under investigation for sexual harassment until he received a notice of termination in June 2019. (Tr. 19)

During the November 2018 investigation, Applicant denied all of the allegations except the allegation based on the email exchange, as set forth above. He characterized the email conversation as a continuation of harmless "banter" that the coworker initiated. (Tr. 53) He stated that his superiors never wanted him in his position from the day he started because he "wouldn't conform to what they wanted [him] to do," and that their allegations against him were part of a conspiracy to replace him with someone whom they

desired. (GE 2 at 7; Tr. 41) As for the women in subordinate grade levels, he contended that they resented him because he was a stern, sometimes abrasive taskmaster who was holding them accountable. (GE 3 at 11, 17)

In December 2018, the investigator issued a memorandum entitled “Supplemental Findings and Recommendations.” (GE 4 at 11) He found that Applicant’s denial of the allegations was “dramatically” outweighed by the cumulative, contrary testimony, and “entirely unconvincing.” (GE 4 at 11) The investigator concluded that Applicant’s conduct created a hostile work environment, and recommended that he be suspended for seven days. (GE 4 at 11)

In January 2019, the unit commander issued a memorandum regarding the investigator’s conclusion. (GE 4 at 11) He approved the findings, but concluded that they merited termination, rather than suspension. (GE 4 at 12) In reaching this conclusion, he noted that Applicant’s “failure to accept even the smallest responsibility for [his] actions was troubling,” that rehabilitation “does not appear viable,” and that Applicant “[could] not be trusted to be alone with subordinate personnel.” (GE 3 at 11) Consequently, the commander issued a notice of decision of proposed removal. (GE 4 at 15) Applicant presented an oral reply to the proposal, together with several character reference letters. (GE 4 at 16) In October 2019, the command executive officer sustained the proposed removal. In doing so, he found that Applicant’s “misconduct eroded the chain of command’s trust and confidence,” and that his “lack of ownership over his actions . . . combined with the pervasiveness of the misbehavior are clear indicators of a lack of rehabilitation potential.” (GE 3 at 10) Moreover, he concluded that Applicant’s credibility was degraded by numerous inconsistencies in his reply. (GE 3 at 11) In October 2019, the commander issued a decision letter officially removing Applicant from the job.

Applicant appealed the decision to the Merit Systems Protection Board (MSPB) After considering Applicant’s testimony and the sworn statements of his accusers, the MSPB, in July 2020, affirmed the decision. In doing so, the judge noted four times in the decision that Applicant was not credible. (GE 4 at 18-20, 37)

At the MSPB hearing, Applicant testified that his conduct, at worst, was merely flirtatious, and that flirting was human nature. (GE 4 at 26) Between 2016 and 2019, Applicant completed multiple trainings on sexual harassment in the workplace. (GE 4 at 10)

At the ISCR hearing, Applicant reiterated the positions he took during the work investigation and the MSPB hearing. Also, he testified that he was a good, well-respected employee at the job from which he was terminated in 2019, and provided records, including multiple character references and good annual evaluations. (AE A – AE Q)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing

that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall 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.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by 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 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. Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d).¹

¹ The factors under AG ¶ 2(a) are as follows:

- (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

Analysis

Guideline D: Sexual Behavior

The security concerns about sexual behavior are set forth in AG ¶ 18:

Sexual behavior that involves a criminal offense; reflects a lack of judgment or discretion, or may subject the individual to undue influence of coercion, exploitation, or duress . . . may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information.

Between 2016 and 2019, Applicant either sexually harassed or made inappropriate comments of a sexual nature to multiple colleagues and created a hostile working environment. AG ¶ 13(c), "sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;" and AG ¶ 13(d), "sexual behavior . . . that reflects a lack of discretion or judgment," apply.

Applicant denied the allegations throughout the investigative process leading to his termination. All of the fact finders who either investigated or adjudicated his case concluded, in sustaining the allegations, that he was not a credible witness. Having reviewed the record evidence of these earlier inquiries, and listened to Applicant's testimony, I agree with the conclusions of the earlier fact finders regarding his lack of credibility. Specifically, Applicant's testimony that he was unaware that his employer was investigating him for sexual harassment until June 2019 directly contradicted a sworn statement he executed as part of the expanded investigation of November 2018. Given Applicant's lack of credibility and lack of contrition, exemplified by his outlandish belief that flirting with coworkers on the job is acceptable, I conclude that none of the mitigating conditions applies. Applicant has failed to mitigate the sexual behavior security concerns.

Guideline E, Personal Conduct

Under this guideline, "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."(AG ¶ 15) Applicant's sexual harassment of multiple coworkers, including subordinates between 2016 and 2019, together with his hostile behavior towards his accusers after he learned of the allegations, led to his termination. AG ¶ 16(d)(2), "any disruptive, violent, or other inappropriate behavior," applies.

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.

If Applicant cannot be trusted to be alone with subordinate personnel without engaging in misconduct, as his employer concluded in his termination decision, he certainly cannot be trusted with access to classified information. I conclude that none of the mitigating conditions applies, and that Applicant has failed to mitigate the personal conduct security concerns.

Whole-Person Concept

I considered the whole-person factors in my analysis of the disqualifying and mitigating conditions of the pertinent guidelines, as set forth and discussed above, and they do not warrant a favorable conclusion.

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 D:	AGAINST APPLICANT
Subparagraphs 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Marc E. Curry
Administrative Judge