



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



In the matter of:)
)
) ISCR Case No. 21-00309
)
Applicant for Security Clearance)

Appearances

For Government: Andrew H. Henderson, Esq., Department Counsel
For Applicant: Aileen Xenakis Kozlowski, Esq.

03/21/2023

Decision

LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the security concerns under Guidelines E (personal conduct) and M (use of information technology).

Statement of the Case

On February 17, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E and M. Applicant responded to the SOR on March 14, 2022, and requested a hearing before an administrative judge. The case was assigned to me on October 25, 2022.

The hearing was convened as scheduled on December 8, 2022. Government Exhibits (GE) 1 through 5 were admitted in evidence without objection. Applicant testified and submitted Applicant Exhibits (AE) A through P, which were admitted in evidence without objection. AE A through O were attached to the response to the SOR, and AE P was submitted at the hearing.

Findings of Fact

Applicant is a 52-year-old employee of a defense contractor. He has worked for his current employer since 2019. He has an associate degree earned in 2001, a bachelor's degree earned in 2005, and a master's degree earned in 2013. He is married with two children and a stepchild. (Transcript (Tr.) at 11, 22-25, 55, 105; Applicant's response to SOR; GE 1, 2; AE A, F)

Applicant served on active duty in the U.S. military from 1991 until he was honorably discharged in 1999. He reported that he served in the Iraq War when he deployed with his unit to Kuwait in 1992 as a deterrent to Iraq's aggressive behavior. (Tr. at 11-21, 106-108, 114-115; Applicant's response to SOR; GE 1; AE A-C)

Applicant deployed to Bosnia in 1994 as part of a NATO force. He reported that he rendered first aid to his platoon leader who was shot by a sniper. In a separate incident, a mine exploded as his platoon sergeant attempted to disarm it, killing the platoon sergeant. The mine wounded Applicant and knocked him unconscious. He reported that he was treated for his wounds and a concussion and sent back to work. He was shot on another occasion. His protective vest saved him, but he suffered broken ribs. Applicant stated that he was told that he was not eligible for a Purple Heart for his injuries because they were inflicted in a peacekeeping operation. Finally, he reported that he stepped on a mine, but it did not explode. His command sergeant major came to him and wrapped him in protective explosive gear and heroically remained with him while EOD attempted to disarm the mine. The mine did not have a fuse, which is why it did not detonate. (Tr. at 16-22, 108-110; Applicant's response to SOR; GE 1; AE A-C)

During his military service, Applicant received the NATO Medal, three Army Commendation Medals, four Army Achievement Medals, the Armed Forces Expeditionary Medal, the Armed Forces Service Medal, and other badges and ribbons. He is rated as 100% disabled by the Department of Veterans Affairs for among other things, post-traumatic stress disorder (PTSD) and traumatic brain injury. (Tr. at 76, 105-106, 109; Applicant's response to SOR; AE B, C)

Applicant worked for a defense contractor and then as a civilian employee of the Army after his discharge. He transferred to a new location in 2008. He was counseled in March 2009 for "inappropriate behavior of either making suggestive comments to other female employees or making them feel uncomfortable with his comments." (Tr. at 12, 22; Applicant's response to SOR; GE 2, 3; AE A)

In January 2010, Applicant received a notification of a proposed suspension for 14 days for sexual harassment and causing a disturbance. In April 2010, Applicant received another notification of a proposed suspension for sexual harassment, inappropriate touching, and false statements. This notice was issued by a different supervisor and superseded the January 2010 notice. (GE 3) The alleged conduct was:

- a. On several occasions over the past several months you have initiated sexual banter in the presence of your coworkers including Ms. [A], Ms. [B],

and Ms. [C]. On one of these occasions you have made statements to the effect of “the only temple [you] would ever enter would be someone else’s wife.” On another occasion when someone stated something is really hard you responded to the group “that’s what she said.” On another occasion you stated to Ms. [A] while helping with an IG inspection “do you need me to take care of you in another room.” After that incident you were told that your conduct was not appropriate and asked to stop.

b. On or about 14 December 2009, without justification or invitation, you sat on Ms. [A’s] lap in an attempt to “get her excited.” During this incident you were asked to stop.

c. After the 14 December 2009 incident, you discussed a recent vasectomy with Ms. [A], stating to her that you “only have 10 more times to ejaculate” to be able to have sex, and asking her, “Are you going to help me?” You were told after this incident that this behavior was not appreciated and asked to stop. (GE 3)

In late June 2010, Applicant and his command reached a settlement agreement for the suspension in which Applicant “agreed to accept a five day suspension (5 consecutive calendar days) from his position, two of which days [were] duty/work days and the other three days of which [were] non-duty/work days.” The command agreed to remove the suspension documents from Applicant’s Official Personnel File (OPF) within two years if there were no further infractions, “thereby purging the OPF of this evidence of an adverse personnel action.” The suspension took place in August 2010. Applicant transferred to a different job on the same installation in December 2011. (Applicant’s response to SOR; GE 3; AE L)

Applicant’s supervisor prepared a letter of counseling in about September 2013. The letter is included in a later command investigation (see below). The letter is undated and not signed by the supervisor or Applicant. It reported that Applicant made inappropriate “[c]omments and gestures (licking).” (GE 3) While unsigned, the letter was a factor in the investigation discussed below.

Applicant provided a statement in July 2015 in which he admitted that he took a test for another employee who was having difficulty passing the test. He used the employee’s common access card (CAC) and personal identification number (PIN) to take the test. (GE 4) He wrote:

I felt pressured to assist, but didn’t have time to sit down with him to go through each module and provide mentorship. I informed him that I didn’t have time to help until after all my current field tests have been completed. [Employee] then stated he was running out of time in order to meet the course deadline. I told him to request an extension, and I would then be able to assist in a mentor role maybe by mid-September 2015. [Employee] stated that he already was on an extension and need[ed] this completed ASAP. I told [Employee] that I could only do that on the weekend on my

own time, but I prefer to wait until after my field tests were completed. [Employee] again explained he couldn't wait, so I felt pressured into just "doing" it myself on the weekend. (GE 4)

Applicant provided a different version at his hearing. He stated that his supervisor told him to help the other employee pass the test. He admitted that he helped the other employee while the employee took the test, but he did not take the test for him. He stated that he did not remember the 2015 statement, and he believes the statement may have been altered. (Tr. at 72-75, 103-105, 111-113; Applicant's response to SOR) I did not find his testimony on this and other matters credible. I find that the statement is the more accurate description of what occurred, and that Applicant used another employee's CAC and PIN to take a test for him.

Applicant submitted a Questionnaire for National Security Positions (SF 86) in March 2017. Under Section 13A – Employment Activities, he reported the job that ended in December 2011. He answered "No" to the following question, "For this employment, **in the last seven (7) years** have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?" He failed to report the five-day suspension in late June or July 2010. (GE 1)

Applicant denied intentionally providing false information on the SF 86. He explained that he did not believe he had to report the suspension because in accordance with the settlement agreement, it had been officially removed from his OPF. He stated that he asked the chief of security on his installation how he should answer the question, and he was told to not report the suspension. (Tr. at 38-42, 76-77; Applicant's response to SOR)

In December 2018, a Commander's Inquiry was ordered into allegations of misconduct by Applicant. A supplemental order was issued in January 2019. The report of the investigation was issued in February 2019. The commander and the commander's attorney-advisor reviewed the investigation and found the investigation legally sufficient, the findings and recommendations supported by sufficient evidence, and the recommendations consistent with the findings. The commander summarized parts of the investigation:

The investigating officer, Dr. [A], interviewed a total of 12 women about unwanted attention. Three of the women confirmed stating that [Applicant] had given unwanted attention to them. The attention ranges from comments about his sex life to asking them personal questions about their sex life, and even soliciting sex. Six of the women did not encounter any unwanted attention from [Applicant]. Two told Dr. [A] that they encountered inappropriate comments from [Applicant] but did not find them offensive, and one said that if there was any inappropriate comments by [Applicant], "she would tell [Applicant] that he was going too far" and he would stop. Dr. [A] found that [Applicant's] behavior violated AR 690-12, Appendix D, prohibiting all forms of harassments, including

sexual harassment. Dr. [A] also found that [Applicant's] conduct was pervasive enough as to create a hostile work environment.

Regarding the allegation about potential threats in the workplace, Dr. [A] found that [Applicant] had told numerous employees that he has PTSD. Mr. [B] a co-worker, also told Dr. [A] that [Applicant] had talked to him openly about active shooter on numerous occasions. . . . Although [Applicant] denies ever telling anyone that he has PTSD, Dr. [A] found his denial not credible. Dr. [A's] finding is supported by statements he has from witnesses he interviewed.

Dr. [A] also investigated allegations by [Applicant] against Mr. [B]. The allegations are that Mr. [B] stabbed, threatened to beat up, intimidated [Applicant]; and shoved a Mr. [C] during a verbal altercation. Dr. [A] found that the alleged stabbing was an accident which at the time [Applicant] refused to seek medical attention or to file a police report. Dr. [A] also interviewed Mr. [C] who admitted that Mr. [B] pushed him out of his space when he approached Mr. [B]. This was confirmed by another witness. Both parties reported the incident to their supervisors who felt that no further action was required. As to the alleged verbal intimidation, Dr. [A] found no evidence that the alleged statement was made at [Applicant]. [Applicant] conceded that he did not know who the statement was directed at. (GE 3)

Except for some minor admissions, Applicant has consistently denied committing any of the alleged workplace misconduct that led to his 2010 suspension and as reflected in the 2018 Commander's Inquiry. He stated that he believes multiple individuals lied, and that they were either biased against him, coerced into lying, or offered some compensation such as a promotion for lying. He also felt that some other employees' misconduct against him was "swept under the rug." He submitted documents and letters in support of his position. (Tr. at 27-38, 42-72, 75-103, 117-118; Applicant's response to SOR; GE 2; AE H-K, M, N, P) I considered Applicant's documents and his testimony, but I did not find his testimony credible. I adopt the information in the April 2010 notification of a proposed suspension and the findings in the Commander's Inquiry, as reviewed by the commander and the commander's attorney-advisor.

Applicant resigned from his position and received a deferred retirement in March 2019. He was barred from entering the installation the same day based on allegations of unwanted sexual attention. (Tr. at 53-55; Applicant's response to SOR; GE 2, 5; AE A, O)

Applicant stated that he has learned from the experience, and that "horseplay and banter and joking [are] not appropriate in the work environment." He also pledged to be more diligent when completing security clearance applications. (Tr. at 116-117; Applicant's response to SOR)

Applicant submitted documents and letters attesting to his excellent job performance and strong moral character. He is praised for his trustworthiness, respect, kindness, patriotism, professionalism, courtesy, honesty, responsibility, loyalty, work ethic, dedication, reliability, judgment, leadership, willingness and ability to protect classified information, and integrity. (GE 2; AE D, E, G, H)

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:

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 the national security investigative or adjudicative processes.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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:

(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; 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.

SOR ¶ 1.a

SOR ¶ 1.a alleges the March 2009 counseling letter and the inappropriate conduct referenced in the letter. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations, and it created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(d) and 16(e) are applicable.

SOR ¶ 1.b

SOR ¶ 1.b alleges the January 2010 notification of a proposed suspension. The notice was superseded by a later notice alleged in SOR ¶ 1.c. SOR ¶ 1.b does not allege any conduct that is not also alleged in SOR ¶ 1.c. 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 ¶ 1.b is concluded for Applicant.

SOR ¶ 1.c

SOR ¶ 1.c alleges the April 2010 notification of a proposed suspension and the inappropriate conduct referenced in the notice. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations, and it created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(d) and 16(e) are applicable.

SOR ¶ 1.d

SOR ¶ 1.d alleges the June 2010 settlement agreement. SOR ¶ 1.d does not allege any conduct that is not also alleged in SOR ¶ 1.c. SOR ¶ 1.d is concluded for Applicant.

SOR ¶ 1.e

SOR ¶ 1.e alleges that in February 2019, Applicant was "found culpable by a Commander's Inquiry for giving three female employees unwanted attention with sexually-themed comments." That conduct reflects questionable judgment and an

unwillingness to comply with rules and regulations, and it created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(d) and 16(e) are applicable.

The SOR did not allege the other conduct discussed in the Commander's Inquiry, and that conduct will not be used for disqualification purposes. Any matter that was not alleged in the SOR will not be used for disqualification purposes. It may be used to assess Applicant's credibility, in the application of mitigating conditions, and in the whole-person analysis.

SOR ¶ 1.f

SOR ¶ 1.f alleges that Applicant was barred from entering the installation "for [his] improper conduct toward female employees." SOR ¶ 1.f does not allege any conduct that is not also alleged in SOR ¶ 1.e. SOR ¶ 1.f is concluded for Applicant.

SOR ¶ 1.g

SOR ¶ 1.g alleges that Applicant's security clearance was suspended by the Director of the Defense Counterintelligence and Security Agency. This allegation does not allege conduct by Applicant. It alleges a result of his conduct. SOR ¶ 1.g is concluded for Applicant.

SOR ¶ 1.h

SOR ¶ 1.h alleges Applicant intentionally falsified Section 13A of his March 2017 SF 86 when he answered "No" to the question that asked if in the last seven years he received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy. He failed to report the five-day suspension in late June or July 2010.

Applicant denied intentionally providing false information on the SF 86. He explained that he did not believe he had to report the suspension because in accordance with the settlement agreement, it had been officially removed from his OPF. He stated that he asked the chief of security on his installation how he should answer the question, and he was told to not report the suspension. While I do not believe much of Applicant's testimony, I believe this conversation took place. I am not convinced by substantial evidence that he intentionally falsified this question. AG ¶ 16(b) is not applicable. This allegation is not established, and it 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.

I accept that Applicant committed the misconduct identified in the April 2010 notification of a proposed suspension and in the Commander's Inquiry. I am also convinced that he used another employee's CAC and PIN to take a test for him. Finally, he has been dishonest for years, including at his hearing. Applicant's conduct casts doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated under any of the mitigating conditions.

Guideline M, Use of Information Technology

The security concern for use of information technology 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.

AG ¶ 40 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

(a) unauthorized entry into any information technology system; and

(e) unauthorized use of any information technology system.

The SOR alleges that Applicant used another employee's CAC and PIN to complete a course for the employee. Applicant admitted that he helped the other employee while the employee took the test, but he did not take the test for him. His 2015 statement contradicts that testimony. I did not find his testimony credible. I find that the 2015 statement is the more accurate description of what occurred, and that Applicant used another employee's CAC and PIN to take a test for him. AG ¶¶ 41(a) and 41(e) are applicable.

Conditions that could mitigate the use of information technology systems security concerns are provided under AG ¶ 41. The following are potentially applicable:

(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;

(b) the misuse was minor and done solely in the interest of organizational efficiency and effectiveness;

(c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification to appropriate personnel; and

(d) the misuse was due to improper or inadequate training or unclear instructions.

The incident happened in 2015, almost eight years ago. If Applicant had been honest and accepted responsibility for the conduct, it would have been mitigated. However, he did neither. His conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. None of the mitigating conditions are applicable.

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 M in my whole-person analysis. I also considered Applicant's honorable military service and favorable character evidence.

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 use of information technology 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 |
| Subparagraph 1.a: | Against Applicant |
| Subparagraph 1.b: | For Applicant |
| Subparagraph 1.c: | Against Applicant |
| Subparagraph 1.d: | For Applicant |
| Subparagraph 1.e: | Against Applicant |
| Subparagraphs 1.f-1.h: | For Applicant |
| Paragraph 2, Guideline M: | Against Applicant |
| Subparagraph 2.a: | Against Applicant |

Conclusion

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

Edward W. Loughran
Administrative Judge