



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



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| In the matter of: |) | |
| |) | |
| |) | ISCR Case No. 22-02563 |
| |) | |
| Applicant for Security Clearance |) | |

Appearances

For Government: Jeff Nagel, Esq., Department Counsel
For Applicant: *Pro se*

12/07/2023

Decision

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, personal conduct. Guideline D, sexual behavior, concerns were not established. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On January 23, 2023, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E. DOD acted 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 implemented June 8, 2017. (AG).

Applicant answered the SOR on June 8, 2017, and requested a hearing before an administrative judge. On March 21, 2023, Department Counsel moved to amend the

SOR to add one allegation under Guideline D. (Hearing exhibit (HE) I) The Applicant answered the amended SOR allegation on March 28, 2023. (HE IV)

The case was assigned to me on July 11, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 25, 2023, and the hearing was convened as scheduled on September 12, 2023. The Government offered exhibits (GE) 1-2. All offered exhibits were admitted without objection. The Government's discovery letter and exhibit index were marked HE II and III respectively. Applicant testified, but did not offer any exhibits. DOHA received the hearing transcript (Tr.) on September 22, 2023.

Findings of Fact

In Applicant's answer, he admitted the Guideline E allegations in the SOR, with explanations. In his written answer to the amended SOR, Applicant admitted the allegation, however, during his hearing testimony, when asked about what his response to the amended SOR allegation was, he denied it. I take from the evidence that he was trying to explain that he admitted that he was accused of the conduct, but he denied engaging in the conduct. That is the manner in which I will consider this admission under Guideline D. As to the Guideline E admissions, I adopt them as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact. (Tr. 11-12; HE I, IV)

Applicant is 61 years old. He is married and has 10 children. He works in information technology for his current employer. He holds two bachelor's degrees. (Tr. 6; 34; GE 1)

Under Guideline E, The SOR alleged Applicant falsified material facts on his October 2021 security clearance application (SCA) when he answered "no" when asked if in the last seven years he had been fired from a job, quit after being told he would be fired, or left a job by mutual agreement following allegations of misconduct when he failed to disclose that he left his employment in May 2017 by mutual agreement after he was accused of masturbating in his employer's bathroom. (SOR ¶ 1.a)

The SOR also alleged that Applicant made false statements to an investigator in February 2022, during his background interview. Those statements included: that he left his employment in May 2017 because he secured a job elsewhere; that the reason he left his employment in May 2017 was not related to conduct or disciplinary action; and that he left his employment in May 2017 due to personality differences with the new manager. (SOR ¶ 1.b)

Under Guideline D, the amended SOR alleged in May 2017, Applicant was accused of masturbating in the bathroom of this employer, a church. (SOR ¶ 2.a)

From August 2013 to May 2017, Applicant worked as a network engineer for a local church. He and his family were also members of this church. He stated that before

he was employed he had to sign a morals cause. While he did not provide the specific language of this clause, he stated that it was very strict. His interpretation of the clause was that an allegation of misconduct alone was sufficient to trigger the clause and end his employment. In May 2017, he was called to a meeting of the church elder's and told he had been accused of masturbating in the church's bathroom. He denied this act before the elders. His accuser(s) was not made known to him and he was unaware if an investigation took place because of the allegation. If one did occur, he was not apprised of it. Based upon the allegation, the church terminated his employment. (Tr. 23-24, 28, 36; GE 2)

Applicant claims that the terms of his termination were that if he chose not to dispute the termination, he would receive several weeks of paid insurance after he left and a small severance payment. Applicant stated that he did not want to fight the termination or cause any trouble for the church. He also believed that he and the church agreed that if either was asked about the circumstances of his leaving, they would state that he left for another job rather than advance the true reason he left, i.e., the masturbation allegation. (Tr. 23)

In October 2021, Applicant completed a SCA while working for his current employer. In response to questions about his employment record (Section 13C), Applicant was asked whether he had been fired from a job, quit a job after being told he would be fired, or if he left a job by mutual agreement following allegations of misconduct. He answered "no" to this question. Earlier in the SCA, in Section 13A, Applicant listed his former employment with the church. He listed two reasons for leaving this employment. Those reasons were that he received another job offer and that his contract with the church had ended. He also answered "no" under this section to the question of whether he left this employment because he had been fired from the job, quit the job after being told he would be fired, or if he left the job by mutual agreement following allegations of misconduct. Applicant admitted he answered this way because of the agreement he had with the church where both parties would conceal the true nature of his termination. He claimed he was trying to protect the church's reputation as well as his. (Tr. 23-24; GE 1; SOR answer)

In February 2022, Applicant was interviewed as part of his background investigation. He was asked why he left the church's employment, and he told the investigator that he "received a job elsewhere." He was then asked if he had any conduct issues or disciplinary actions when he was employed by the church, to which he said "no." He was then told that the investigation revealed that he left the church by mutual agreement due to specific reasons. Applicant responded to this by stating that he decided to leave the church by mutual agreement because of personality differences with his new manager. Applicant then admitted to the investigator that he left by mutual agreement because he was accused of masturbating in the bathroom at work. Applicant admitted that it was only after being confronted by the investigator about the true nature of his termination and his realization that the church had not lived up to their agreement not to disclose the true reason for his termination that he disclosed the truth to the investigator. (Tr. 24; GE 2; SOR answer)

Applicant further explained his actions during his hearing testimony as follows:

I understand that in black and white it would look like I lied about how I left [the church], but I did answer in the way the church asked me to and the way I assumed the adjudicator [sic] would get similar responses from them. They promised me only the best recommendations. They, in fact, gave me recommendations to several other jobs that I had on the list. So I was surprised when the adjudicator [sic] presented me with the information that they had answered differently then they told me they would. (Tr. 25)

Applicant admitted the allegation that he was accused of masturbating in the bathroom of the church, but he denied that he actually did the act itself. No other evidence was offered by the Government establishing this allegation under Guideline D.

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 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, these guidelines are applied 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." 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 an 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 EO 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).

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. 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; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

Applicant's admissions to deliberately providing false information on his October 2021 SCA and during his February 2022 background interview with an investigator satisfy both disqualifying conditions. The deliberateness of his action is established by his belief that he and the church made a sub rosa agreement not to disclose the true nature of his termination. It was only after he was confronted by the investigator and learned that the church did not honor the sub rosa agreement that he disclosed the true circumstances of his termination. AG ¶¶ 16(a) and 16(b) apply.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (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 admitted that he did not reveal the true circumstances about his termination from the church until he was confronted by the investigator during his background interview. AG ¶ 17(a) does not apply.

Deliberately providing false information on a SCA and during a background interview is not a minor offense and his action occurred as recently as 2022. A more troubling aspect of Applicant's actions is his willingness enter and abide by a sub rosa agreement with the church not to disclose the true nature of his termination. His actions in this regard cast doubt on his current reliability, trustworthiness, and judgment. AG ¶ 17(c) does not apply.

Although Applicant acknowledged his behavior by admitting his past falsifications, he failed to provide any information that shows he has taken positive steps to change that behavior. There is insufficient evidence to indicate that such behavior is unlikely to recur. AG ¶ 17(d) does not apply.

Guideline D, Sexual Behavior

The security concern relating to the guideline for sexual behavior is set out in AG ¶ 12:

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. These issues, together or individually, may raise questions about an individual's judgment, reliability, trustworthiness, and ability to protect classified or sensitive information. Sexual behavior includes conduct occurring in person or via audio, visual, electronic, or written transmission. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

AG ¶ 13 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) sexual behavior of a criminal nature, whether or not the individual has been prosecuted;
- (c) sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress; and
- (d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

The allegation under Guideline D alleges that Applicant was accused of masturbating in the bathroom at church where he worked. That allegation, if true, would certainly fall under the above listed disqualifying conditions. However, Applicant denied the conduct and there is no evidence in the record except for an anonymous allegation made to church officials. No investigation concerning the allegation was disclosed to Applicant. Based upon the record evidence, I conclude that the Guideline D allegation was not established.

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 the 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 guideline and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under Guideline E, personal conduct. The guideline D allegation was not established.

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:

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| Paragraph 1, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 1.a-1.b: | Against Applicant |
| Paragraph 2, Guideline D: | FOR APPLICANT |
| Subparagraph 2.a: | For 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 grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert E. Coacher
Administrative Judge