



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



In the matter of:)
)
) ISCR Case No. 22-00381
)
Applicant for Security Clearance)

Appearances

For Government: Nicholas Temple, Esq., Department Counsel
For Applicant: *Pro se*

12/01/2023

Decision

GARCIA, Candace Le'i, Administrative Judge:

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

Statement of the Case

On April 26, 2022, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline D (sexual behavior) and 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 on May 17, 2022 (Answer) and requested a hearing. The case was assigned to me on February 16, 2023. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing (NOH) on March 31, 2023, scheduling a video teleconference (VTC) hearing for May 17, 2023. On that date, I

granted a continuance at Applicant's request. DOHA issued another NOH on May 23, 2023, rescheduling a VTC hearing for June 20, 2023.

I convened the hearing as rescheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. Applicant testified. He did not call any witnesses or submit any documentation. At his request, I kept the record open until July 5, 2023, for him to provide documents. He did not do so, and the record closed. DOHA received the hearing transcript (Tr.) on June 30, 2023.

Findings of Fact

In his Answer, Applicant admitted with explanation SOR ¶¶ 1.a and 2.b, and he denied SOR ¶ 2.a. I have construed Applicant's response to SOR ¶ 2.b as a denial of that allegation. He is 35 years old. He married in 2009, divorced in 2018, and remarried in 2019. He has a minor child. He graduated from high school in 2006 and received a professional degree from a vocational school in 2008. (Tr. at 7, 21-22; GE 1-2)

Applicant served in the National Guard from July 2011 to July 2017, and he received a general discharge under honorable conditions. He has worked for various DOD contractors since 2016. He worked for a DOD contractor on a U.S. military base overseas from January 2016 to September 2019, when he was terminated for cause, as further discussed below. He was unemployed from October 2019 to January 2020. As of the date of the hearing, he has worked for his current employer since October 2022. He was first granted a security clearance in approximately 2011. (Tr. at 5, 7-8, 22-26, 55; GE 1-2)

Applicant was accused of sexual harassment for incidents that occurred in May 2019, and he was barred from access to the job site and certain military installations indefinitely because of the substantiated allegations. (SOR ¶ 1.a) A female soldier that he met in May 2019 while working for the above-mentioned DOD contractor overseas on a U.S. military base, whom he saw two or three days a week through work and considered a friend, alleged the following three sexual harassment claims: (1) when he saw her at the post exchange, he walked up to her, ran his fingers through her hair, and asked if he could remove her hair bun; (2) he asked her what she had purchased from a women's lingerie, clothing, and beauty store; and (3) he walked up behind her while at work, touched her shoulder, and started to give her a massage. (Tr. at 26-33; GE 2-4)

Applicant denied these allegations. He acknowledged, in the third incident, only that he walked up behind the soldier at work and touched her shoulder. He discussed the sexual harassment allegations during his July 2020 background interview. He stated in his Answer:

I admit that sexual harassment allegations were made against me and due to those allegations[,] I was barred [from] access to [military] installations. I was never formally given any evidence regarding these allegations. This incident was not intended to be construed as sexual harassment and I has [sic] also denied that 2 of the all[e]gations happened as stated. This is the

only time I have ever been in trouble for this as well and [it] has not happened since. (Tr. at 26-33; GE 2)

On August 21, 2019, Applicant was placed on paid administrative leave. He was then placed on unpaid administrative leave on September 21, 2019. This was the only time he had ever been placed on administrative leave, and he did not view it as a suspension. While on administrative leave, he stated that he was brought into the captain's office due to an investigation into the soldier's claims, and he provided a written statement in response to her allegations. He was unaware of what else was done during the investigation. (Tr. at 26-35, 39-45, 48-56; GE 3-4)

On September 23, 2019, Applicant was terminated for cause due to sexual harassment, and he is not eligible for rehire. (SOR ¶ 2.a; GE 3-4) He acknowledged receipt of an October 2019 letter from the installation commanding officer, indefinitely barring him access to the job site and certain military installations because of the substantiated sexual harassment allegations. An April 2020 email from his then-employer's human resources director states:

[Applicant] was accused of sexual harassment towards a soldier. A formal investigation was performed by the government, and the findings were that [Applicant's] actions were in violation of Army Regulation 600-20, Army Command Policy, para. 7-5 and Army Sexual Harassment/Assault Response and Prevention (SHARP) Policy. It was also concerning that [Applicant] was in a building to which he did not have authorized access. The final recommendation by the investigating officer was for [Applicant's] Camp . . . base access authorization to be revoked. (Tr. at 34, 39; GE 3-4)

Applicant stated in his Answer, "I was unaware of being terminated/fired and not eligible for rehire as I was only told that I was released from contract. So therefore[,] I deny knowing that I was terminated/fired prior to my video interview." He reiterated these sentiments during his July 2020 background interview and at the hearing. He stated that no-one informed him that he was suspended, and he was only asked to turn his DOD Common Access Card into his site lead. He was not required to formally out-process and return to the United States, and he was not barred from all installations around other command locations. He remained in country until early 2020, when he returned to the United States to seek employment. (Tr. at 33-45, 48-56; GE 2, 4)

When Applicant completed his February 2020 SCA, in response to "Section 13A - Employment Activities," he listed his January 2016 to September 2019 employment with the above-mentioned DOD contractor overseas, and he disclosed that he had been "[r]eleased from contract" by this employer in September 2019. He marked "No" in response to two questions in this section and failed to disclose for this listed employment that information as set forth in SOR ¶ 1.a. (SOR ¶ 2.b) Those two questions inquired:

Reason for Leaving Question

For this employment have any of the following happened to you **in the last seven (7) years?**

- Fired
- Quit after being told you would be fired
- Left by mutual agreement following charges or allegations of misconduct
- Left by mutual agreement following notice of unsatisfactory performance for his listed employer . . .

Received Discipline or Warning

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? (GE 1)

Applicant stated in his Answer, "I admit to choosing No on this question due to not knowing that I was fired from [this employment]. I was only told I was released from contract. This was an honest mistake and was not intentional." He also maintained, during his July 2020 background interview and at the hearing, that he did not view his placement on administrative leave as a suspension. (Tr. at 33-47, 49-50; GE 2, 4)

Applicant had no previous unfavorable incidents, and he has not had any unfavorable incidents since, to include with his current employer. He was not arrested or charged with any offense. He expressed remorse for his actions and stated that he learned his lesson. His spouse is aware of the allegations. (Tr. at 26, 34, 47-48)

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 D, Sexual Behavior

AG ¶ 12 expresses the security concern for sexual behavior:

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. I considered the following relevant:

(d) sexual behavior of a public nature or that reflects lack of discretion or judgment.

Sexual harassment allegations stemming from incidents that occurred in approximately May 2019, between Applicant and a soldier that he met while working for a DOD contractor overseas on a U.S. military base, were substantiated. ¶ 13(d) applies.

I have considered all the mitigating conditions under AG ¶ 14. I considered relevant AG ¶ 14(b), “the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or judgment.” This was an isolated incident that occurred over four years ago. Applicant was not arrested or charged with any offense. He was remorseful and learned his lesson. AG ¶ 14(b) is established.

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; 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.

Applicant was terminated from employment in approximately September 2019 due to substantiated allegations of sexual harassment, and he is not eligible for rehire. AG ¶ 16(e)(1) is established for SOR ¶ 2.a. However, Applicant credibly testified that he did not deliberately falsify his responses under section 13A of his 2020 SCA that inquired about his “Reason for Leaving . . .” and whether he “Received Discipline or Warning.” He disclosed his employment from January 2016 to September 2019 with the above-mentioned DOD contractor overseas, and he disclosed that he had been released from contract by this employer in September 2019. He was never told he was fired, and he did not understand that his placement on administrative leave and his subsequent release from the contract constituted a discipline or warning, despite being informed that the sexual harassment allegations were substantiated and receiving notice that he had been consequently barred from access to the job site and certain

military installations. AG ¶ 16(a) is not established for SOR ¶ 2.b and I find that allegation in Applicant's favor.

I have considered all the mitigating conditions under AG ¶ 17. I considered relevant AG ¶ 17(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 AG ¶ 17(e) "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." Applicant's termination from employment in 2019 due to substantiated allegations of sexual harassment was an isolated incident that occurred over four years ago. Applicant had no previous unfavorable incidents, and he has not had any unfavorable incidents since, to include with his current employer. He was not arrested or charged with any offense. He expressed remorse for his actions and stated that he learned his lesson. His spouse is aware of the allegations. AG ¶¶ 17(c) and 17(e) are established for SOR ¶ 2.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 have incorporated my comments under Guidelines D and E in my whole-person analysis. The record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant mitigated the sexual behavior and 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 D:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

Candace Le'i Garcia
Administrative Judge