



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



In the matter of:)
)
) ISCR Case No. 14-00114
)
Applicant for Security Clearance)

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: Brett K. Williams, Esq.

07/17/2014

Decision

DUFFY, James F., Administrative Judge:

Applicant failed to mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

Statement of the Case

On October 28, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On February 26, 2014, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E (personal conduct). DOD CAF took that action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented on September 1, 2006.

On March 28, 2014, Applicant answered the SOR. The case was assigned to me on May 9, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 5, 2014. The hearing was convened as scheduled on June 30, 2014. At the hearing, Department Counsel offered Government's Exhibits (GE) 1 through 4. Applicant testified and offered Applicant's Exhibits (AE) A and B. Applicant objected to GE 2, a Joint Personnel Adjudications System (JPAS) record, on the grounds of hearsay, and the objection was overruled. The remaining proffered exhibits were admitted into evidence without objection. DOHA received the hearing transcript (Tr.) on July 8, 2014.

Findings of Facts

Applicant is a 52-year-old managing engineer who works for a defense contractor. He has worked for his current employer since June 2013. He earned a bachelor's degree in 1991. He has been married for the past 25 years and has two children, ages 19 and 22. He has held a security clearance without incident since about 2001. He is pending a promotion that is contingent on him holding a security clearance.¹

The SOR listed one Guideline E allegation that asserted Applicant was terminated from a job for providing false information during an employer's investigation into a subordinate's complaint of harassment and for maintaining an inappropriate relationship with that subordinate. In his Answer to the SOR, Applicant denied that allegation.²

From about June 1990 to June 2013, Applicant worked for a defense contractor (hereinafter referred to as "Company X"). In his last position at Company X, he was the director of a department. Between January and March 2013, he had an inappropriate relationship with a subordinate female employee (hereinafter referred to as "Employee Y"). Employee Y did not work directly for him, but she worked within his department. On three occasions, they met at parking lots away from the workplace after working hours. They kissed and had other sexual contact, but did not engage in sexual intercourse.³

In June 2013, officials at Company X became aware of information that led them to suspect Applicant had an inappropriate relationship with Employee Y. An investigation was initiated into that suspected relationship. During the investigation, Applicant was asked whether he had exchanged text messages with Employee Y's husband, and he reportedly said, "No." Employee Y's husband was asked that same question, indicated that he had such communications with Applicant, and supplied a string of text messages that were exchanged between him and Applicant on May 31, 2013. In the text messages, Employee Y's husband was seeking to get a pay raise for

¹ Tr. at 26-27, 34, 41-45; GE 1.

² Applicant Answer to the SOR.

³ Tr. at 27-36, 38, 86-89. At the hearing, Applicant admitted that his relationship with Employee Y was inappropriate.

his wife. The text messages did not directly mention the inappropriate relationship, but referred indirectly to it.⁴

On June 21, 2013, Applicant signed a disciplinary action notice that advised him that his employment with Company X was terminated. The notice contained the following excerpts:

Details of Incident:

You were interviewed during the course of an investigation into whether you had engaged in an inappropriate and personal relationship with a subordinate employee. During the course of the investigation, you repeatedly denied the relationship and made other statements in support of the denial. The investigation revealed, however, that these denials and other statements that you made were knowingly and intentionally false.

Expected Improvement:

None. Effective immediately, your employment with the company is terminated. You are being terminated for Dishonesty and Misrepresentation of Fact based on the false statements and totality of the circumstances of the same.⁵

On June 24, 2013, the facility security officer at Company X made a JPAS entry regarding Applicant that stated:

[Applicant] was interviewed during the course of an investigation into whether he had engaged in an inappropriate and personal relationship with a subordinate employee. During the course of the investigation, he repeatedly denied the relationship and made other statements in support of the denial. The investigation revealed, however, that these denials and

⁴ Tr. at 27-36, 52-70, 79-83, 87-89; GE 4. In one text message, Employee Y's husband indicated that Employee Y was hysterical when she found out Applicant "told" another female employee. This other female employee later complained that Employee Y might get a promotion because of her inappropriate relationship. In another text message, the husband stated,

It's for that reason that we really might go to management because [its] not fair for her life to be ruined over this and there be no action ... You are her director and should have stayed professional ... She told me you urged her to meet more and get "away" for a few hours ... She made excuses and did not do it[.] [S]he said that's why it ended ... I am telling you [Applicant] I don't know what to do[,] my life is in peril and you have put the stature of my family at risk with your indiscretions.

* * *

Give me one good reason why I shouldn't tell your wife and give her pictures and show her all of the emails.

⁵ Tr. at 46-52, 92; GE 4.

other statements that he made were knowingly and intentionally false. Because of these false statements [Applicant] was terminated.⁶

In his Answer to the SOR, Applicant indicated that he advised the investigators (personnel from Company X's Human Resources (HR) Department) that Employee Y's husband called him in early June 2013. He noted the husband was upset, informed Applicant that his wife had an affair in the past, and stated the husband was concerned that she doing so again. Applicant further stated:

I told him that I was not having an affair with his wife, but he insisted otherwise. He called me again approximately one week later and left a message on my phone apologizing and crying stating that he talked to some people in the department and they told him that there was nothing going on that involved me. I still have the voice mail and played it to the Human Resource personnel.⁷

Applicant further stated that Employee Y had been authorized to work from home for about two years due to medical issues, but that steps were taken to bring her back to work in the office because of increased workload demands. When Employee Y's husband learned that his wife would be working more from the office, he complained that she was sick and that Applicant did not appreciate her work ethic.⁸ Applicant also indicated:

[The investigators] asked me when was the last time I had heard from the husband. I was not exactly sure and said something like "Tuesday of last week". Human Resources asked me if I was sure and I said "I think so" or "I guess".

I was called back in the Human Resources' office two days later on Friday. They informed me that I was terminated for having an inappropriate relationship with a subordinate and not being honest in the investigation. They told me that they had telephone records that showed the husband tried to contact me on Wednesday and I had told them that the last time I thought I had heard from him was on Tuesday. This honest mistake certainly does not rise to the level of "providing false information."⁹

At the hearing, Applicant stated that he admitted during Company X's investigation to having an inappropriate relationship with Employee Y and denied

⁶ Tr. at 38-42, 83-85; GE 2.

⁷ Applicant's Answer to the SOR. The phone message from the Employee Y's husband was not presented as evidence at the hearing.

⁸ Tr. at 29-32, 70-77; GE 4; Applicant's Answer to the SOR.

⁹ Applicant's Answer to the SOR.

providing false or misleading information during that investigation. He denied stating during the investigation that he never exchanged text messages with Employee Y's husband. He continued to claim that the "false information" he provided during Company X's investigation merely consisted of him mistakenly telling investigators the wrong day of the week he last had contact with Employee Y's husband. He stated that, when he was later called into the HR department to be terminated, he was informed that the company's legal department decided that him telling Employee Y that she would have to work 40 hours a week from the office, instead of at her home, was a form of harassment, and the legal department recommended he be terminated for that conduct. He also stated that a HR employee told him that "we wouldn't be here today if you'd been more honest in the investigation" and informed him the dishonesty involved his statement about which day of the week he last had contact with Employee Y's husband. He stated that he did not read the disciplinary action notice when he signed it and did not obtain a copy of it at that time.¹⁰

Applicant stated that he told his wife, parents, and friends about the inappropriate relationship. However, he provided no proof to substantiate that his wife, parents, and friends know about that relationship. In general, I did not find Applicant to be a credible witness.¹¹

Applicant's current supervisor endorsed him for a security clearance. A representative in the state legislature who has known Applicant for 23 years indicated he is a skilled, dedicated, and productive employee and citizen.¹²

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(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.

¹⁰ Tr. at 27-33, 35-52, 80-83, 87-92; Applicant's Answer to the SOR.

¹¹ Tr. at 88-89.

¹² AE A, B.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of 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 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, as follows:

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

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

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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 evidence 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 person may not properly safeguard protected 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 other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rule violations; (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, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing

In early 2013, Applicant had an inappropriate sexual relationship with Employee Y, a subordinate within his department. He acknowledged that his employment at Company X was terminated, in part, because of that inappropriate relationship. He also stated that the company's legal department decided that his actions regarding Employee Y amounted to harassment. AG ¶¶ 16(d) and 16(e) apply to such conduct.

Applicant denied providing false or misleading information during Company X's investigation into his inappropriate relationship. He testified that he told investigators about the inappropriate relationship and that he told them the he had exchanged text messages with Employee Y's husband. He claimed that his employment was terminated for mistakenly providing investigators with the wrong day of the week that he last had contact with Employee Y's husband. I did not find Applicant's testimony credible. Substantial evidence was presented to show that he repeatedly denied to investigators that he had an inappropriate relationship with Employee Y and that he denied exchanging text messages with Employee Y's husband. The evidence established that he deliberately provided false and misleading information concerning relevant facts during Company X's investigation. AG ¶¶ 16(b) and 16(e) applies to his false statements.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide information, the individual cooperated fully and truthfully;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

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

Applicant engaged in an inappropriate relationship with a subordinate employee and then lied about it. At the hearing, he denied providing false statements to the investigators. His misconduct is recent and demonstrates a lack of honesty, trustworthiness, and good judgment. After examining all of the applicable mitigating conditions, I find that none apply.

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(a):

(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 relevant facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has worked for defense contractors for about 24 years. He has held a security clearance for a number of years without incident. He is pending a promotion to a high-level position. A member of the state legislature endorses him. Nevertheless, his questionable conduct and false statements continue to raise serious questions about his reliability, trustworthiness, and good judgment. He has failed to present sufficient evidence to conclude such wrongdoing is unlikely to recur. 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 has not mitigated the personal conduct security concerns.

Formal Findings

Formal findings 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

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 eligibility for a security clearance. Eligibility for access to classified information is denied.

James F. Duffy
Administrative Judge