



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



In the matter of:)
)
) ISCR Case No. 14-02723
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

12/18/2014

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is granted. Applicant presented sufficient information to mitigate security concerns for personal conduct under Guideline E.

Statement of the Case

On July 9, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for a position with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Department of Defense (DOD) could not make the preliminary affirmative findings required to issue a security clearance. On July 14, 2014, DOD issued a Statement of Reasons (SOR) to Applicant detailing security concerns for personal conduct under Guideline E. These actions were taken under Executive Order 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).

The SOR alleges that Applicant was terminated from his employment at a nuclear power facility for violating of company policy (SOR 1.a); that he violated his parole for the driving offense listed at SOR 1.c (SOR 1.b); that he was convicted of reckless driving by excess speeding in February 2012, and that he was still on probation (SOR 1.c); that he was reprimanded in 2012 for violating company safety policies at the nuclear power facility (SOR 1.d); that he was reprimanded in 2009 for violating company policy at the nuclear power facility for excess computer usage at work (SOR 1.e); and that he was convicted of reckless driving for excessive speeding in 2005 and his license was suspended for 30 days (SOR 1.f). Applicant acknowledged receipt of the SOR on July 16, 2014.

Applicant answered the SOR on July 23, 2014. He admitted SOR allegation 1.a that he was reprimanded but explained that the company policy was not clearly stated. He admitted allegations 1.c, 1.d, and 1.f. He denied allegations 1.b and 1.e. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on September 23, 2014, and the case was assigned to me on September 26, 2014. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on October 23, 2014, for a hearing on November 17, 2014. I convened the hearing as scheduled. The Government offered three exhibits that I marked and admitted into the record without objection as Government exhibits (GX) 1 through 3. Applicant and three witnesses testified. Applicant offered one exhibit that I marked and admitted into the record without objection as Applicant Exhibit (AX) A. DOHA received the transcript of the hearing (Tr.) on November 25, 2014.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact. Applicant's admissions are included in my findings of fact.

Applicant is 34 years old, and has been employed as a nuclear engineering systems tester for a defense contractor since July 2013. His work is on nuclear equipment in a Navy shipyard. He served on active duty in the Navy for eight years from 2000 to 2008 as a nuclear electricians mate aboard nuclear submarines and aircraft carriers. He received an honorable discharge as a petty officer third class (E-4) when he left active duty. He was eligible for access to classified information during his active duty tour. He is married with no children. (Tr. 11-13, 66-67; GX 1, e-QIP, dated July 9, 2013)

After leaving the Navy with education and training in nuclear operations, Applicant started working in July 2008 at a nuclear power facility as a control room operator. As part of his employment, he received a company clearance to work in and around the nuclear power facility. Applicant worked a 12-hour shift. There was down-time on the job that did not require the full attention of the personnel in Applicant's position. The company policy permitted non-excessive computer internet use during this time. The term "excessive" was not further defined in the company policy. While Applicant was considered a good worker who always completed his job assignments,

he was known to question details of his assignments with his supervisors. He was taught in the Navy to question an assignment if he was unsure of the guidance. His questioning was not appreciated by his supervisors.

In April 2013, there was an incident of misconduct during one of Applicant's shifts. The company brought in an outside investigator to determine the cause of the incident. Applicant was investigated since he was on duty at the time. However, the investigation concluded that Applicant was not involved in the misconduct because he was working in another part of the plant using the company internet for personal use. The investigator concluded that Applicant had excessive company internet computer use. Applicant was terminated by his employer for the excessive company internet computer use. Applicant stated that his personal use of the company internet was no more than any other employee. Applicant appealed his termination but the company upheld the termination. (Tr. 13-18)

Applicant admits that he was reprimanded in January 2012 for a safety violation. Applicant climbed over a fence to shut off a valve rather than go through a swing gate. He told his supervisor he climbed over the fence because of time restraints and he had been trained to do the job that way. Applicant was required to read the safety manual and be cleared by a psychologist. Applicant was cleared to return to work. (GX 2, Interview, dated September 25, 2013, at 3)

One of Applicant's co-workers from the nuclear power facility, a 22-year Navy veteran who was an electrician's mate on submarines, testified that he worked with Applicant for five years at the power facility. He was the union shop steward when the incident took place and Applicant was terminated. He was present when Applicant and other workers were questioned by the investigator. Applicant was professional during the investigation. The investigator was accusatory to Applicant during the questioning and investigation. The witness was working with Applicant in another part of the facility when the incident under investigation happened. He testified that Applicant could not have been involved in the incident, and Applicant was cleared of the incident. Applicant is very intelligent and knows his job requirements. He considers Applicant to be reliable, trustworthy, and exercises good judgment. (Tr. 26-30)

The witness also testified that the power facility company policy states that the company internet can be used for "limited" personal use. The term "limited" is not defined in the policy. Workers are on a 12-hour shift and there is no option to leave the facility when no work is required. The plant is required by regulations to have a minimum staffing level. Since there is downtime during work assignments, workers have time to use the company internet for personal reasons. Most employees use the internet "quite a bit." The witness has seen Applicant use the company internet but his use is no more than the average worker. Applicant always performed his duties at the plant. He asked questions and raised issues but that was part of what the workers were supposed to do. Applicant always performed his tasks after his questions were answered. The witness knows that some of the senior operators did not appreciate Applicant asking

questions. But all of the senior operators told him they knew Applicant would do the job correctly. (Tr. 30-41)

Applicant's present government supervisor, a Navy Reservist for over ten years with sea duty, testified that Applicant has worked as a direct report for him for approximately a year. He believes Applicant is trustworthy, having handled confidential material with proper respect and deference. He is fully aware of the reasons Applicant's access to classified information is being questioned. However, he still has a high regard for Applicant. He wants to have Applicant continue working for him since he is one of the hardest working, most knowledgeable, and highest producing test engineers in their section. (Tr. 42-48)

The vice-president of the defense contractor that employs Applicant testified that he is the maintenance support services division manager for the company. His job is to provide the best qualified workers for the shipyard. He retired from the Navy as a lieutenant commander after 27 years of enlisted and commissioned service as a nuclear reactor operator. He is qualified to operate and maintain five different types of Navy nuclear reactors. He served aboard nuclear carriers, cruisers, and submarines.

The witness hired Applicant for his company because of Applicant's Navy background, experiences, and qualifications. He knew Applicant was terminated from the nuclear power plant. He understands the climate at the power plant and found that those that were terminated were good employees. He knew of the circumstances of Applicant's termination and still hired Applicant. Applicant has exceeded his expectations of him. He knows that Applicant brought real value to the Navy shipyard customer. Applicant brought a high level of expertise to the building of the new nuclear aircraft carrier. He is highly qualified for the work and his inability to work on the job because of a lack of a security clearance would be a loss for the company and the shipyard. The witness has technical oversight over Applicant. He discussed Applicant's performance with his supervisors and the feedback is that he performed in a stellar manner. His direct supervisors are happy with his performance. He added value to the shipyard which makes Applicant a good employee. Applicant has demonstrated that he is trustworthy. (Tr. 49-63)

Applicant denied SOR allegation 1.b. The Government did not present any evidence that Applicant violated his probation as alleged. That allegation is found for Applicant. (Tr. 63)

Applicant denied the SOR 1.e allegation that he received a reprimand from his supervisor in 2009 for excessive computer use while at work in violation of company policy. Applicant did admit he was reprimanded in his OPM interview. He denied the allegation because he believed the company policy was not clearly stated. (Tr. 63-64; GX 2, Personal Interview, dated September 25, 2013)

Applicant was cited twice for reckless driving. The state where the two citations were issued considers speeding more than 20 miles over the speed limit as reckless

driving. Applicant admits that he was driving a sports car in 2005 in excess of 80 miles per hour, which was more than 20 miles over the speed limit. His license was suspended for 30 days. Applicant admits he was cited in June 2011 for driving a motorcycle more than 20 miles over the speed limit. He was convicted in February 2012, and placed on probation until February 2014. His probation has ended. Applicant provided his department of motor vehicle record which shows that he has a valid current driver's license with a motorcycle endorsement. (Tr. 68-69; AX A, Driving Record, dated July 21, 2014)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must 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 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 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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 for obtaining 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 protect or protect

classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Analysis

Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. (AG ¶ 15) Personal conduct is always a security concern because it asks the central question: Does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information.

Applicant admits to several instances of misconduct involving a termination from employment, two work-related reprimands, and two reckless driving offenses. These incidents raise the following Personal Conduct Disqualifying Conditions under AG ¶ 16:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

(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 indicting that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rule violations.

Applicant raised facts to explain and mitigate the misconduct allegations, raising the following Personal Conduct Mitigating Conditions under 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 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; and

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

These mitigating conditions apply. The two reckless driving offenses were seven years apart, are minor in that they were basically speeding offenses. They do not establish a pattern of misconduct. Applicant admitted the offense and completed all aspects of his sentencing. His probation for the last offense ended and he has a current driver's license. The termination from the nuclear power facility is questionable. While he was in fact terminated, Applicant presented witnesses that testified that the nuclear facility's policy on computer use at work was not clearly defined, and that Applicant did not use the computer at work more than any other employee. His present senior supervisor testified that the work climate at the power plant was not conducive to good employment. He found that workers terminated from the facility were reliable and trustworthy. The safety violation in 2009 was minor, happened a long time ago, and is infrequent since there is only one safety violation. It is unlikely another safety violation would occur. This one safety violation does not cast doubt on Applicant's reliability, trustworthiness, or good judgment. Applicant presented sufficient information to mitigate the personal conduct security concerns. The incidents do not show Applicant has questionable judgment and an unwillingness to comply with rules and regulations. The alleged misconduct has been mitigated and does not raise questions concerning Applicant's reliability, trustworthiness, and ability to protect classified information.

Whole Person Analysis

Under the whole-person concept, the administrative judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all relevant circumstances. An 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 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 considered Applicant's eight years of honorable active duty Navy service, and that he had held a security clearance with no incidents while in the Navy. I also considered that he was cleared, similar to a security clearance, by his employer to work at the nuclear power facility. I considered the favorable information concerning Applicant provided by his coworker and supervisors. Applicant presented sufficient information to explain and mitigate the security concerns for misconduct. The established facts do not show questionable judgment, lack of candor, dishonesty, and an unwillingness to comply with rules and regulations. His actions were not reckless or irresponsible, and do not show poor judgment. Accordingly, Applicant mitigated the behavior that could indicate he may not be concerned or act responsibly in regard to classified information. Overall, the record evidence leaves me without questions and doubts as to Applicant's judgment, reliability, trustworthiness, and eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has mitigated security concerns arising under personal conduct guideline. Eligibility for access to classified information is granted.

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: FOR APPLICANT

Subparagraphs 1.a-1.f: 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 eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge