



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 14-02981
)
Applicant for Security Clearance)

Appearances

For Government: Rhett L. Petcher, Esq., Department Counsel
For Applicant: Christopher Graham, Esq.

02/22/2016

Decision

CREAN, Thomas M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied. Applicant did not mitigate personal conduct security concerns.

Statement of the Case

On May 23, 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 affirmative findings required to issue a security clearance. DOD issued Applicant a Statement of Reasons (SOR), dated April 1, 2015, detailing security concerns for personal conduct under Guideline E. The action was taken under Executive Order 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) effective in the DOD on September 1, 2006.

Applicant answered the SOR on April 28, 2015. He denied in part and admitted in part the one allegation. He admitted that he was terminated by his employer but denied it was because he falsified his timesheets. Department Counsel was prepared to proceed on October 21, 2015, and the case was assigned to me on October 28, 2015. DOD issued a notice of hearing on November 24, 2015, scheduling a hearing for December 16, 2015. I convened the hearing as scheduled. The Government offered six exhibits that I marked and admitted into the record without objection as Government Exhibits (GX) 1 through 6. Applicant testified and submitted eight exhibits that I marked and admitted into the record without objection as Applicant Exhibits (AX) A through H. I received the transcript of the hearing (Tr.) on December 24, 2015.

Findings of Fact

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant was born in Hong Kong in 1967 and is 48 years old. He immigrated to the United States in 1983 with his family at age 15, and was granted United States citizenship in 1988. He graduated from high school in the United States, and attended a college in the United States, graduating in 1991 with a bachelor's degree in engineering and computer science. He has taken some courses for a master's degree. He served in the Army as an aviation mechanic from June 1993 until March 1998. He was discharged as a sergeant (E-5) with an honorable discharge. He held a top secret security clearance while on active duty. Applicant first married in October 1993, and divorced in September 1998. He married again in 2007 and has three young children. His wife is employed in market research.

After his discharge from the Army, Applicant was employed by a defense contractor from 1998 until he was laid off in May 2002. He was unemployed, but worked as a construction worker until September 2004, when he returned to work as an engineer for a defense contractor. In March 2008, he changed career fields and was a bank manager until August 2008. He returned to work for a defense contractor as a test engineer in November 2008. He was terminated from this position in March 2013. He has been employed by another defense contractor as an engineer since April 2013. He is seeking a security clearance for his employment with this defense contractor. (Tr. 22-25; GX 1, e-QIP, dated May 23, 2013)

The SOR alleges that Applicant was terminated from his employment with a defense contractor because he falsified his timesheets between September 2012 and January 2013. In support of this allegation, Department Counsel presented the employer's adverse report to the DOD Consolidated Adjudications Facility (GX 2, dated April 15, 2013); a Joint Personnel Adjudication System (JPAS) entry concerning the termination (GX 3, dated April 25, 2013); transcript of the OPM personal subject interview (dated July 3, 2013); the employer's Employee Corrective Action memo (GX 5, dated March 14, 2013); and the employer's summary of investigation (GX 6, dated February 22, 2013).

Applicant started employment as a design and analysis test engineer with the employer in November 2008. Applicant had three unit managers during his first few years of employment. Applicant's performance ratings were "meets expectations," which was the usual rating for the overwhelming majority of the company's employees. (Tr. 45-46)

The unit had some performance issues, so a new manager, AB, was assigned as the new supervisor in March 2011. AB was known in the company as a manager who could improve the performance of a poor performing unit. Applicant stated that AB's only concern as the unit manager was to have the unit's engineers meet the unit's assigned schedule, cost, and performance goals. Applicant claims that as soon as AB became the supervisor, he harassed him by "nit picking" his work. Applicant did not like AB's approach to supervision and management. Applicant received a very poor rating on his 2011 performance review. In January 2012, Applicant complained to the company's Human Resources division (HR), but did not allege discrimination. HR did not address Applicant's complaint but placed him on a 45-day Performance Improvement Program (PIP). Applicant met weekly with AB and representatives from HR to discuss his performance. After 45 days, he was advised that he passed all of his performance improvement goals. (Tr. 36-38, 41-45)

In March 2012, Applicant was issued a warning for excessive and non-business related internet use at work. Applicant claims the harassment continued, and he believed AB was looking for reasons to terminate him. Applicant again contacted the HR about AB's treatment. In July 2012, HR convened a meeting with Applicant, AB, and the functional manager of his unit. Applicant did not claim discrimination at the meeting, but did allege unfair and hostile treatment by AB. No action was taken by HR. The alleged unfair and hostile treatment continued. Applicant filed an ethics complaint with the company's ethics division in August 2012. He did not allege unfair treatment based on race, gender, or religion. No action was taken and the harassment continued. Applicant received another poor performance review in December 2012.

Applicant sought assistance and received counseling from a psychologist from the employer's assistance program starting in January 2012. Applicant wrote the psychologist seeking information about his treatment from the psychologist when he was preparing his response to the SOR. His e-mails to the psychologist requesting information indicated that he was depressed during 2012 because of AB's actions. He accused AB of making false statements on his performance evaluation. He claimed he was entrapped by the security investigator to admit the false timesheets. Applicant's medical records show that he was treated for depression in 2012. (AX A, e-mails, dated April/May 2015; AX D, Medical Records dated February 16, 2015)

Applicant had child care issues because he had three minor children and his wife also worked. His children were in daycare, and the daycare closed at 6 pm, and was located at least an hour from his place of employment. Applicant's wife also worked, and it was difficult for her at times to pick up the children on time. Applicant had been advised during the PIP process by AB that he had to work at his desk for the 40 hours

he worked in a week. Applicant was scheduled to work from 9 to 5 each day without a designated lunch. The company had a policy that an employee could perform part of their work at home at the discretion of the manager. Even though most of Applicant's work had to be performed at work, he claims he could complete test plans and reports at home. Applicant asked to work from home, but AB did not approve the request. Applicant claims other engineers were permitted to work from home. (Tr. 26-37)

Applicant's company has a strict policy that employees must accurately report time and attendance data in the company's Employee Timekeeping System (ETS). Since Applicant was a direct-charge employee, his salary was charged against a specific government contract. Accurate data was required to charge the government for his work. In addition, the company required accurate data to determine the amount of work needed on certain projects to assist in preparing bids for future contracts.

In December 2012, AB learned that Applicant was not at his desk for the entire 40-hour work week. AB advised HR that Applicant, on four separate occasions in December 2012, had entered eight hours of work in the ETS when he was only present for seven hours of work on those days. He knew Applicant left early because of child care requirements. In addition, he knew that Applicant left the work site for lunch. Applicant met with AB and the HR staff. Applicant admitted that he was present at work less time than the amount of time he recorded in the ETS. It was agreed that the December inaccurate timesheets would be resolved by allowing Applicant to submit four hours of vacation pay to cover the difference. Applicant was also instructed by HR how to accurately complete the ETS. In January 2013, when Applicant returned to work after the holidays, he continued to leave work early and to record eight hours at work in the v b ETS.

The employer conducted a more detailed investigation of Applicant's work attendance and the information on his hours worked in the ETS. An analysis was made of the times his company pass was swiped on entering and leaving work, and the logoff/shutdown times of his work computer. The analysis disclosed an average of 26-questionable minutes per day recorded during the period October 1, 2012, to January 16, 2013. Applicant was interviewed by a company investigator. He admitted that due to child care problems, he was present at work an average of approximately 7.5 hours per day of the 8 hours that he entered in the ETS from September 4, 2012, to February 2013. This was consistent with the time analysis. He also admitted going off-site 12 times during the period for 30-minute lunches. On those 12 days, he admitted working only seven hours per day of the eight he recorded in the ETS. The investigation concluded that Applicant violated company policies and procedures on attendance at work and timekeeping. (GX 6, Summary of Investigation, dated February 22, 2013) Applicant was discharged from the company on March 14, 2013. (GX 5, Employee Corrective Action Memo, dated March 14, 2013)

Applicant admitted to the security investigator during the personal subject interview that he falsified his timesheets as alleged. However, he felt he was terminated

for complaining about his supervisor, AB. (GX 4, Personal Subject Interview, dated July 3, 2013, at 2-3)

In July 2013, Applicant wrote the commanding generals of two military commands with oversight over the contracts he worked. He also sent a complaint letter to the Inspector General (IG) at the Army post where the Army command with oversight over the contract with his former employer was located. He informed them of his accomplishment on the contracts and complained of AB's behavior. He specifically told them his perception of AB's poor communication skills and condescending manner to subordinates. He provided a list of short comings of his former employer's performance on the contracts that the Government should investigate. He provided a list of other employees that faced the same treatment that he received from AB. He also provided a list of people who could corroborate his information concerning AB. Applicant did not receive a response to his allegations from the two generals or the IG. (AX G, Letter, dated July 3, 2013; AX H, Letter, undated)

In September 2013, Applicant filed a discrimination complaint against his employer alleging that he was terminated because he was a minority. (AX B, Charge of Discrimination, dated September 19, 2013) The Equal Employment Opportunity Commission (EEOC) dismissed Applicant's complaint because it was unable to conclude after an investigation that the information showed a violation of the equal employment statutes. (AX C, Dismissal and Notice of Rights, dated December 2, 2013).

One of Applicant's coworkers testified that he worked with Applicant from 2009 until 2012. AB was also the witness's supervisor. AB had problems with most of the people in the unit. The witness was one of many people who left the unit because of AB. He knows that before AB became the manager, Applicant received satisfactory ratings. AB was very critical of Applicant's performance, and the witness is aware that AB rated Applicant's performance as unsatisfactory at least one time. He was not aware that Applicant was placed on a PIP by AB.

The coworker testified that the company tracks the hours employees worked. Accurate time keeping is important because the government is charged for the hours worked; the company used the data to determine the profit and loss from each contract; and the data was used as a basis for estimating future bids. Each employee's timesheet is signed off at the end of the week by the supervisor. The supervisor is on-site so they can verify that the employee worked the hours claimed on the timesheet. The supervisor should sign off on the timesheet only when they are sure that the employee worked the hours claimed. The witness was not aware that the company accused Applicant of recording hours in the ETS that were not worked. He also verified that a supervisor had the discretion to allow an employee to work from home. The witness was allowed to work from home on occasions. He never observed AB discriminate against Applicant based on his race. He never observed Applicant arrive at work late or leave early. He observed that Applicant was on time for work, did his work, and accurately performed his assigned tests. The witness believed that AB had a "bone to pick" with many people and Applicant happened to be one of those people. (Tr.66-74)

A systems engineer testified that he worked with Applicant for approximately six years. He described Applicant as a very astute, intelligent, and hard-working employee. Applicant, the witness, and others had issues with AB. He described AB's management style as abrupt. He assigned tasks to people just to see how they would do. He did not care about the person's experience and knowledge before assigning a task. The witness, a retired military officer, feels you do not challenge people, but you groom and mentor them to do the job. The witness said he received his lowest performance rating from AB. AB was eventually transferred and a former supervisor was sent to manage the unit. Conditions in the unit improved with the arrival of the new supervisor.

The systems engineer witness was allowed to work from home on occasion. He was not aware that Applicant was not permitted to work from home. The manager could authorize working from home and the employee recorded the work hours in the ETS. It was not necessary to log into a company computer and be on the company's network to work from home. He knows of other employees that were not permitted to work from home so they left the company. He also testified that accurate recording of hours worked was very important for employees working on government contracts. The witness would recommend Applicant for a security clearance. (Tr. 74-89)

Applicant presented two letters of recommendation from design and analysis engineers who worked with him in 2012. One worked with Applicant on the testing procedures for equipment being delivered to an allied nation. Applicant was always pleasant to deal with and always provided quality work. He would seek out other workers to confirm that he correctly understood the issues and his approach to testing was valid. (AX D, Letter, dated May 28, 2015) The other letter was from a design and analysis engineer who worked with Applicant for the employer for over three years. He wrote that Applicant was a well-rounded professional with the knowledge and experience to make good decisions. He is a very diligent employee and maintained the highest professional standards in his work. He delivered high-quality results and set an example for his team members. (AX E, Letter, Undated)

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 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.

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 in seeking 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Personal Conduct

Personal conduct is a security concern 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 and sensitive information. (AG ¶ 15) Personal conduct is always a security concern because it asks whether the person’s past conduct justifies confidence the person can be trusted to properly safeguard classified or sensitive information.

Applicant was required to record the hours he was at work in his company’s employee time keeping system. From at least September 2012 until January 2013, Applicant recorded that he worked eight hours a day when in fact he had left work some days approximately a half-hour early and on some days left the workplace for an unauthorized lunch break. The falsification of the time worked in the company’s employees time system raises personal conduct disqualifying condition AG ¶ 16(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 regulation, 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... (3) a pattern of dishonesty or rules violations; (4) evidence of significant misuse of Government or other employer's time or resources.

I considered 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 it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment:

(d) the individual has acknowledge 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.

None of the mitigating conditions apply. Applicant deliberately provided false information in the company's employee time system. The accuracy of the time worked information was important both to the company and the government agency that contracted with the company. He continuously provided false information so his actions were frequent and ongoing. He continued to provide inaccurate time information after being advised of the need for accuracy so his actions were deliberate. Applicant did have child care issues, but these circumstances were not so unique as to cause him to provide inaccurate information in a data system important to his employer. Since Applicant's actions were deliberate, and he continued to provide inaccurate information after being counseled, it is possible that the actions would happen in the future. The information concerning Applicant's actions have been substantiated by an investigation. Applicant admitted he provided inaccurate information on his timesheet. Applicant failed to provide sufficient information to conclude that we was the victim of discrimination in the way he was treated, rated, and dismissed by his supervisor. Applicant failed to provide sufficient information to mitigate the personal conduct security concern.

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 the complimentary comments of Applicant's coworkers. Applicant admitted to deliberately continuing to falsify his timesheets after being counseled about the need for accuracy. The timesheets were important to the employer and to the government customer. Applicant's deliberate falsification of his timesheets reflects adversely on his judgment, reliability, and trustworthiness. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude that Applicant has not mitigated 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 E:	AGAINST APPLICANT
Subparagraphs 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.

THOMAS M. CREAN
Administrative Judge