



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)
)
) ISCR Case No. 14-00391
)
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esquire, Department Counsel
For Applicant: *Pro se*

March 11, 2015

Decision

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on March 16, 2010. On March 8, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F for Applicant. The action was 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), effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing on April 8, 2014, and requested an Administrative Determination by an administrative judge. Department Counsel issued a File of Relevant Material (FORM) on October 30, 2014. Applicant responded to the FORM (Response) on December 5, 2014. Department Counsel had no objection, and the documents are entered into evidence. The case was assigned to me on January 21, 2015. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is granted.

Findings of Fact

In his Answer to the SOR, dated April 8, 2014, Applicant admitted the factual allegations in Paragraphs 1.a. and 2.a. of the SOR, with explanations.

Guideline J - Criminal Conduct & Guideline D - Sexual Behavior

1.a. and 2.a. Applicant is 33 years of age, married, attended a community college for two years from 1999~2001, and is employed by a defense contractor. (Item 5 at pages 6 and 12, and Item 6 at page 1.) In March of 2013, Applicant, while standing outside next to his car, talking on his cell phone, touched "a random women [sic] . . . in the breast, and behind area as . . . [she] walked by." (Item 6 at page 4.)

As a result of this un-consented to touching, Applicant was charged with Sexual Assault in the 4th Degree. (*Id* and Item 9.) In July of 2013, he pled no contest and received a deferment of the charge. (*Id.*) Applicant was placed on probation "for a period of one (1) year." (Response at page 3.) As part of his probation, he was ordered to "obtain/maintain mental health treatment or services." (*Id.*) Applicant was treated by a "Forensic Clinical Psychologist . . . from March 1, 2014" to "May 31, 2014," a period of three months, as noted by that Clinical Psychologist. She avers the following: "[Applicant] . . . demonstrated he has a strong understanding of appropriate boundaries and adult acceptable behavior and is clinically discharged from treatment." (Response at page 4.)

Most recently in a letter to Applicant, his Probation Officer noted the following:

Pursuant to your full compliance with the conditions of the Deferred Acceptance of Nolo Contendere Plea, a Motion to Discharge and Dismiss; Order was filed on July 18, 2014. As such, your case with the Adult Client Services Branch, District Court was terminated effective July 18, 2014. (Response at page 3.)

Applicant's wife appears to be aware of his conduct. (Response at pages 1 and 5.)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 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 Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph E3.1.15, the Applicant is responsible “to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to 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 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.

Section 7 of Executive Order 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 J - Criminal Conduct

Paragraph 30 of the adjudicative guidelines sets out the security concern relating to Criminal Conduct:

Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(a) provides that “*a single serious crime or multiple lesser offenses,*” may raise security concerns. Applicant inappropriately touched a female pedestrian in March of 2013. However, this is clearly countered by the mitigating condition in Subparagraph 32(d) as “*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity.*” The Applicant’s inappropriate conduct occurred nearly two years ago. He has

successfully completed treatment. His period of probation has passed, and the criminal allegation has been dismissed. I find that such criminal conduct is unlikely to recur.

Guideline D - Sexual Behavior

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 12:

Sexual Behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 13(a), "*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*" may be disqualifying. Again, the Applicant inappropriately touched a female. Under Subparagraphs 13(c) and 13(d), "*sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress,*" or "*of a public nature and/or that reflects lack of discretion or judgment*" may also be disqualifying. However, these are countered by the mitigating conditions in Subparagraphs 14(b) and 14(c). Under 14(b) where "*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 good judgment*" it may be mitigating. This one time occurrence happened nearly two years ago. Under 14(c) where "*the behavior no longer serves as a basis for coercion, exploitation, or duress,*" it may also be mitigating. Applicant's wife appears to be aware of his past misconduct.

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. Under AG Subparagraph 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.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his admitted Criminal Conduct and Sexual Behavior.

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 J:	FOR APPLICANT
Subparagraph 1.a:	For 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 clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Richard A. Cefola
Administrative Judge