



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-02451

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel

For Applicant: *Pro se*

June 27, 2016

Decision

MOGUL, Martin H., Administrative Judge:

On February 25, 2015, the Department of Defense (DoD) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E for Applicant. (Item 1.) 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 for SORs issued after September 1, 2006.

Applicant replied to the SOR (RSOR) in writing on March 25, 2015, and he requested that his case be decided on the written record in lieu of a hearing. (Item 1.) On September 28, 2015, Department Counsel issued the Department's written case. A complete copy of the file of relevant material (FORM) was provided to Applicant on October 6, 2015. In the FORM, Department Counsel offered six documentary exhibits. (Items 1-6.) Applicant was given the opportunity to file objections and submit material in refutation, extenuation, or mitigation. A response was due on November 5, 2015. Applicant submitted a letter, which has been identified and entered into evidence without objection as Item A. The case was assigned to this Administrative Judge on

November 10, 2015. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is granted.

Findings of Fact

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the FORM, and the admitted documents, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 61 years old. He is married, and he has one son. Applicant received a Bachelor of Science degree in 1978. Applicant has been employed as a member of the Electronics Engineering staff by his current employer, a defense contractor, since July 1998, and he seeks a DoD security clearance in connection with employment in the defense sector. (Item 2.)

Guideline E - Personal Conduct

The Government alleges in this paragraph that Applicant is ineligible for clearance because he engaged in conduct that exhibited questionable judgement, unreliability, unwillingness to comply with rules and regulations, and untrustworthiness. The following allegations are cited in the SOR as tending to show that:

1.a. It is alleged in the SOR that on or about 2009 or 2010, two female co-workers of Applicant made allegations of sexual harassment against Applicant, and that he was not aware of these complaints until March 2012. In his RSOR, Applicant admitted that he "made comments, in person and by Instant Messaging (IM), that were inappropriate, to one female co-worker." He stated that this co-worker and he worked together, and they "got along O.K. initially. At some point our interaction became strained. After that she did not want to talk to me anymore. I was advised by others to stay away from her, which I did." Applicant also wrote, "I was not aware of the allegations made by the second woman. I was only told, in March 2012, that a second woman complained about me to HR, but not the nature of the complaint." (Item 1.)

1.b. It is alleged in the SOR that from November 2010 to March 2012, at various times, Applicant sent to a third female co-worker IM, Facebook and email messages that were deemed inappropriate, after this co-worker had requested Applicant to cease sending her any further electronic messages. In his RSOR, Applicant admitted this allegation and he wrote, "[The co-worker] and I exchanged IMs starting in fall of 2010. However, at one point, she put in an IM that she 'was not a fan of compliments.' I stopped paying her compliments until the first two months of 2012, when we started working together again. I thought the situation was different but I was wrong. I sent her a number of Facebook messages in January and February of 2012, which led to the reprimand." (Item 1.)

1.c. It is alleged in the SOR that on March 15, 2012, Applicant was issued a Letter of Reprimand after a company investigation substantiated sexual harassment allegations by the co-worker discussed in 1.b., above. In his RSOR Applicant wrote, "I

received the reprimand in March of 2012 and I was quite surprised. The female co-worker had been nice and friendly to me in the project meetings. I admit I totally misread the situation, thinking she wanted to be friends. I should not have sent her the Facebook messages. Since she did not want to be Facebook friends, she took the messages to be harassment.” (Item 1.)

Finally, Applicant wrote, “Since 2012 I have relocated to [a different plant.] I have learned a great deal from the experiences in 2009 - 2012. I am much more careful with what I say and do at work now. I work hard at treating all of my fellow co-workers with the respect they deserve.” (Item 1.) No evidence was introduced to show that there have been any additional sexual harassment allegations against Applicant since March 2012.

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 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 ¶ 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 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 E - Personal Conduct

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation’s secrets. The Government is concerned if an applicant for a security clearance engages in conduct that exhibits questionable judgement, unreliability, unwillingness to comply with rules and regulations, or untrustworthiness.

In reviewing the disqualifying conditions under Guideline E ¶ 16, I conclude that Applicant’s contact with his co-workers through email, IM, and Facebook, in such a manner that he was found to have committed sexual harassment with at least one of his co-workers, exhibits questionable judgment. However, I am convinced that Applicant was not aware that his conduct was sexual harassment, and he has averred that since he became aware, he has attempted not to act in such an egregious manner in the future. The record before me, which shows no further complaints against Applicant for sexual harassment since March 2012, indicates that he has been successful in that attempt. Therefore, I find that mitigating condition ¶ 17(c) is applicable and controlling because “so much time has passed . . . that it [the behavior] is unlikely to recur and does not cast doubt on the individual’s [current] reliability . . . or good judgment.” Therefore, I resolve Guideline E for Applicant.

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. 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 the facts and circumstances surrounding this case. Based on all of the reasons cited above as to why the mitigating condition is applicable and controlling under Guideline E, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns under the whole-person concept.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 1.a.-1.c.: 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.

Martin H. Mogul
Administrative Judge