



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-00269
)	
Applicant for Security Clearance)	

Appearances

For Government: Michelle Tilford, Esq., Department Counsel
For Applicant: Richard L. Morris, Esq.

05/09/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

Applicant has mitigated the security concerns raised under Guideline E (Personal Conduct) by his record of counseling for substandard performance of duty and punishment for dereliction of duty. Eligibility for access to classified information is granted.

Statement of the Case

On September 8, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline E. The DOD CAF acted under Executive Order (Exec. Or.) 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) promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), for all adjudicative decisions on or after June 8, 2017.

Applicant answered the SOR on September 27, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October

31, 2017, and the case was assigned to me on January 16, 2018. On February 6, 2018, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for February 26, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, presented the testimony of three witnesses, and submitted Applicant's Exhibits (AX) A through J, which were admitted without objection. DOHA received the transcript (Tr.) on March 5, 2018.

Findings of Fact¹

In Applicant's answer to the SOR, he denied the allegation in SOR ¶ 1.a and admitted the allegations in SOR ¶¶ 1.b and 1.c. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 42-year-old help-desk technician employed by a defense contractor since February 2016. He served on active duty in the U.S. Navy from 1998 to 2001, completed college and received a bachelor's degree, and then reenlisted in 2004. (Tr. 50.) In November 2015, he was honorably discharged as an information system technician second class (IT2). (AX A.) While on active duty, he was awarded the Navy and Marine Corps Achievement Medal four times, along with numerous service medals, ribbons, and qualification badges. He held a security clearance while on active duty.

Applicant served in several shore-based assignments, including one overseas deployment as an information system technician first class (IT1) before being assigned to sea duty in July 2014 as a work center supervisor. His early performance evaluations as an IT1 rated him as a top performer. (AX B at 11-16.) His evaluation report for November 2012 to November 2013 rated him as "above standards" in all traits except one, for which he was rated as "greatly exceeds standards." This report rated him as "must promote" and includes the comment: "strongly recommended for advancement to chief petty officer, promote immediately." (AX B at 9-10.) In September 2013, he applied for a commission as a limited duty officer. His application was strongly supported by his commanding officer. (AX D.) The record does not reflect the status of his application.

Applicant's evaluation report for November 2013 to July 2014, before reporting to his ship, rated him as "meets standards" in one performance trait, "above standards" in two traits, and "greatly exceeds standards" in two traits. This report rated him as an "early promote." (AX B at 7-8.) His evaluation report for July to November 2014, his first report aboard his ship, rated him as "meets standards" in all performance traits and rated his promotion potential as "promotable." This report commented that he "hit the deck plates running" and his value to the command was limited only by his time aboard. (AX B at 5-6.)

¹ Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

Applicant testified that he found that his new ship was severely undermanned, with the radio shack at half-manning. Although the leading petty officer (LPO) position called for a chief petty officer (E-7), the LPO was another IT1. (Tr. 58.) Applicant was assigned as the information assurance manager from November 2014 to July 2015. He was formally counseled on six occasions in April, May, and June 2015 for the following instances of substandard performance of duty:

April 17, 2015: failed a spot check because he failed to complete a maintenance requirement card (MRC)² as required and failed to take appropriate action as work center supervisor when subordinates reported maintenance issues. (GX 4 at 1.)

May 12, 2015: failed to perform a spot check during his watch as directed by his work center supervisor. (GX 4 at 2.)

May 17, 2015: sent inaccurate access information to shore-based units, causing the ship to lose connectivity. (GX 4 at 3.)

June 16, 2015: failed to perform a maintenance check properly. (GX 4 at 4.)

June 19, 2015: failed to inform chain of command about reconfiguration of classified offsite backup, causing the backup system to be erased. (GX 4 at 5.)

June 26, 2015: failure to notify chain of command and obtain permission to conduct maintenance affecting ship-wide operations, causing a two-day delay in troubleshooting during an operationally demanding underway.

Applicant testified that the counseling was from a first class petty officer, a second class petty officer, and his division officer. (Tr. 58-59.) The counselors' names on the counseling sheets are illegible, and the position of the counselor is not listed.

On July 15, 2015, Applicant received non-judicial punishment (NJP) for dereliction of duty when he "negligently failed to follow procedural compliance to wit: Did not utilize an MRC while conducting 3M preventative maintenance IAW NAVSEAINST 4790.8C SEC 2-4.6." There were two aspects to this allegation: (1) that he failed to obtain permission from the work center supervisor before rebooting an unclassified server; and (2) that he did not use the MRC in the work center, but instead relied on his personal copy of the MRC. His actions caused the server to be out of service for several hours. He was reduced in rate to IT2. (GX 3.) He appealed his punishment, and his appeal was denied. His reduction required that he be discharged under the Navy high-tenure rules. His security clearance was suspended while he was aboard the ship, but it was not revoked.

At the hearing, Applicant testified that he had asked for and received permission from the work center supervisor to reboot. (Tr. 55.) When the work center supervisor was

² An MRC lists the steps and tools need for various kinds of preventive maintenance. Classification of the MRC depends on the equipment to which it applies. (Tr. 57.)

interviewed by Applicant's LPO, he denied giving Applicant permission to reboot. The investigative file on which the NJP was based included written statements from Applicant and the LPO, but none from the work center supervisor. The investigation into the incident revealed that Applicant made a personal copy of the MRC for systems in the work center. (GX 3.) His division officer regarded his unauthorized copy of the MRC to be a breach of cyber security. Applicant testified at the hearing that his personal copy of the MRC was identical to the original and was always kept in the work center, a secure area cleared for open use of classified material. He denied writing down passwords on his copy of the MRC, but admitted that he kept a personal list of passwords. (Tr. 77.)

Applicant's last evaluation report before his discharge from the Navy, for July to December 2015, rated him as "meets standards" in all performance traits and rated him as "promotable," with favorable comments about his drive, persistence, ingenuity, and attitude. (AX B at 1-2.)

When Applicant reported for duty in his first job as a civilian, he made an appointment with his security manager to discuss the status of his security clearance. He knew that his security clearance was suspended after his NJP. He was not aware of the incident report regarding the events leading up to his NJP until he applied for a job as a civilian and learned that the incident report had not been closed out. According to the summary of an interview with a security investigator in September 2016, he admitted that he did not provide the security manager with the full details about his nonjudicial punishment and did not disclose his record of counseling, because he did not believe he was required to provide more details than necessary, did not want to be viewed negatively, and was concerned about keeping his job. (GX 2 at 7.)

At the hearing, Applicant testified that the summary of his security interview was accurate. He testified that he gave his security manager a copy of the record of NJP and copies of his performance evaluations about two weeks after he was hired. He did not mention the counseling chits because he did not believe that they were related to the suspension of his security clearance and were not mentioned in the incident report. Counseling chits are filed in local command files, do not become part of the official personnel record, and do not follow an individual from command to command. Applicant testified that when he received the SOR, which alleged the counseling chits, he provided the security manager with the information about them. According to Applicant, the security manager commented that she was not surprised that he had been counseled for earlier incidents before he received NJP. (Tr. 81-85.)

The security manager submitted a statement in which she stated that Applicant never withheld information or attempted to mislead her about his NJP and counseling. She noted that Applicant's NJP recited that he was occupying two positions, information assurance manager and network systems administrator, which are usually separate positions, and that he was given a very short time to assume those roles before being given NJP. In her statement, she commented, "As the Chief Security Officer for [her organization] for the past 15 years and a retired Navy Intelligence Chief, it feels like something is not right with this picture." She has worked with Applicant for two years, with

almost daily contact, and she strongly supports continuation of his security clearance. (AX E.)

A long-term friend of Applicant, who served as an enlisted sailor and an officer in the U.S. Navy for about 17 years, has known him since 1995 and considers his honesty, integrity, and reliability “impeccable” and his judgment “irreproachable.” (Tr. 20-21.) A co-worker who has worked with Applicant since December 2016 considers him honest and trustworthy. He regards Applicant as “very to-the-T,” making sure that everything is done correctly. (Tr. 38-39.) Applicant’s direct supervisor, who served in the U.S. Air Force for 23 years, regards Applicant as truthful and honest, and his integrity “beyond reproach.” (Tr. 41-47.) Two former co-workers from Applicant’s overseas assignments, a senior member of the staff currently supported by Applicant, and two former fellow college students (one a retired U.S. Air Force officer) submitted letters attesting to Applicant’s skill, worth ethic, integrity, dedication, and positive attitude. (AX F-J.)

Policies

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to “control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865 § 2.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available and reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 15-01253 at 3 (App. Bd. Apr.20, 2016).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531.

Analysis

Guideline E, Personal Conduct

The SOR alleges that Applicant admitted to a security investigator in September 2016 that he failed to disclose the complete details of his NJP and his prior counseling sessions for poor work performance (SOR 1.a); that he had approximately five counseling sessions for poor work performance (SOR ¶ 1.b); and that he received NJP in July 2015 for dereliction of duty by failing to follow procedural guidance (SOR ¶ 1.c). The concern under this guideline is set out in AG ¶ 15:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. . . .

The following potentially disqualifying conditions are relevant:

AG ¶ 16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

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 individual may not properly safeguard classified or sensitive information; and

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 regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: . . . (3) a pattern of dishonesty or rule violations.

The SOR does not allege what “complete details” Applicant omitted when he disclosed his NJP to his current security manager. The document he provided alleged that he failed to comply with U.S. Navy instructions. If he had provided additional details, he likely would have disclosed that his violation was an omission rather than a deliberate act and that he believed that he complied with the required procedure. He did not mention the allegation of creating a copy of the MRC, because he was not counseled about it, and it was not included in the NJP.

The SOR also alleges that he failed to disclose his counseling sessions. He credibly testified that he believed the suspension of his clearance was due to the NJP and that the counseling sessions were not relevant. There is no evidence that the security manager asked him any questions about his performance of duty, although the security manager surmised that there probably were prior incidents that led up to NJP and a career-ending reduction in rate. When Applicant received the SOR and saw that his counseling sessions were alleged, he promptly and voluntarily provided the additional information to his security manager. It is notable that the security manager submitted a letter supporting continuation of Applicant’s clearance and asserted that Applicant had not withheld any information or attempted to mislead her.

Based on the foregoing discussion, I conclude that SOR ¶ 1.a is not established by substantial evidence. However, Applicant admitted SOR ¶¶ 1.b and 1.c, and his admissions are corroborated by the documentary evidence in the record.

The following mitigating conditions are potentially relevant:

AG ¶ 17(a): the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

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.

Even if there were substantial evidence that Applicant withheld information during his initial meeting with his security manager, AG ¶ 17(a) would be applicable, because Applicant provided additional information when he learned that the SOR alleged his counseling sessions.

Applicant's derelictions were not "minor," because they seriously disrupted the operations of a ship underway. They were not infrequent. However, they occurred almost three years ago and were the product of Applicant's inexperience in simultaneously holding two demanding positions with an undermanned crew. His LPO was another IT1, and he did not have an experienced mentor to help him learn how to do a demanding job. During his past two years as a civilian, he has gained a reputation as a dependable, responsible, trustworthy employee. I conclude that AG ¶ 17(c) is established.

Whole-Person Concept

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. In applying the whole-person concept, an 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 and applying the adjudicative factors in AG ¶ 2(d).³

I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline, but some warrant additional comment. Applicant had a stellar performance record before April 2015, when his performance apparently fell short of what his command expected. Within three months, his career abruptly ended. His current security manager concluded that "something is not right with this picture." Since December 2015, he has established himself as a talented, dedicated, responsible, and trustworthy employee. After weighing the disqualifying and mitigating conditions under Guideline E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his personal conduct.

³ The factors are: (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.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct): FOR APPLICANT

Subparagraphs 1.a-1.c: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge