



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



In the matter of:)
)
) ISCR Case No. 17-01964
)
Applicant for Security Clearance)

Appearances

For Government: Nicole A. Smith, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2018

Decision

MURPHY, Braden M., Administrative Judge:

Applicant mitigated the security concerns under Guideline E, personal conduct. While the events at issue occurred over a 20-year period, they are also not recent, as the most recent incident occurred four years ago. Applicant acknowledged his wrongdoing, accepted the consequences of his behavior, and participated in appropriate work-related educational programs to prevent recurrence. His security-significant behavior is unlikely to recur. He established that it is clearly consistent with the interests of national security that he be granted access to classified information. Applicant's eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) in February 2016, in connection with his employment in the defense industry. (GE 1) On August 15, 2017, following a background investigation, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline E, personal conduct. The action was taken 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 *National Security Adjudicative Guidelines* (AG), which became effective on June 8, 2017.

Applicant answered the SOR on September 12, 2017, and requested a hearing. The case was assigned to me on March 20, 2018. On March 23, 2018, a Notice of Hearing was issued scheduling the hearing for April 24, 2018. The hearing convened as scheduled. At the hearing, Department Counsel submitted Government's Exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified but did not submit any exhibits. I left the record open after the hearing to allow Applicant the opportunity to submit additional evidence. Applicant timely submitted five documents, which were marked as Applicant's Exhibits (AE) A through E, and admitted without objection.¹ The transcript (Tr.) was received on May 3, 2018. The record closed on May 15, 2018.

Findings of Fact

In his Answer to the SOR, Applicant admitted all the allegations (SOR ¶¶ 1.a-1.e). His admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 58 years old. He and his wife have been married since 1990. They have two grown children. Applicant has a high school diploma. With limited exception, he has been employed in the defense industry, at a naval shipyard, since 1980. He has had a security clearance since the early 1980s. (Tr. 11, 22-26; 47; GE 1)

Applicant worked for a large defense contractor from 1980 until July 2014, when he was terminated following an allegation of sexual harassment. (SOR ¶ 1.a) He was then unemployed until September 2014, when he began working for his current employer, another defense contractor at the shipyard. (GE 1)

Applicant reported his termination on his 2016 SCA, and discussed the circumstances in his background interview. (GE 1 at 10; GE 2). Applicant became friends with a female co-worker who worked for another contractor at the shipyard. They would sometimes greet each other with hugs, and an occasional kiss on the cheek or neck. (Tr. 38-39; GE 2 at 2-3) Applicant testified he would speak with this particular co-worker when he saw her in the workplace, they would visit each other at their respective work sites, and they had a flirtatious relationship. (Tr. 38)

¹ AE A is a recommendation letter from Applicant's supervisor. AE B (Drug-Free Workplace) and AE C (Sexual Harassment) are Certificates of Completion from September 2014. AE D and AE E are Applicant's Performance Reviews, from February 2017 and January 2016, respectively.

Applicant testified that the last time he saw the woman,

I asked her if she needed help adjusting her bra. And she didn't say anything, so I walked to her, and I did, I made a motion to her, like this, on her shirt. And I thought everything was okay.²

Applicant testified that he later learned that the woman was upset by what he did, and that she had accused him of groping her. He was initially suspended for three to five days without pay. When he returned to work, in July 2014, he was told he was being terminated. (Tr. 24; GE 2 at 3) Applicant acknowledged touching the woman as he had described, but denied that he had groped her. (Tr. 39)

During his background interview, Applicant disclosed a previous allegation of sexual harassment, in 1995, and that he had been suspended from work without pay for four months as a result. (SOR ¶ 1.e) Applicant testified that at the time, he played on a basketball team at work. The coach of the team (the complainant) would often "check" or guard him closely during practices. He testified that, "a couple of times, just coincidentally, I guess, [she] had kept hitting me in my private parts." (Tr. 27) This happened "on the court. Her hands, twice, in practice made contact with my private parts." (Tr. 27) Applicant also testified that he was unsure if such contact was "incidental, or purposely, but it happened." (Tr. 28)

In his background interview, Applicant stated that he and the woman had a consensual sexual relationship. Applicant ended the relationship because he wanted to remain married to his wife. The woman filed a sexual harassment complaint against him. At hearing, Applicant acknowledged that he and the woman had engaged in flirtation and touching in the workplace, but he denied that they ever became sexually involved. (Tr. 26, 28, 37-38, 41-42)

Applicant had no further issues with workplace sexual harassment until July 2014. (Tr. 38) He testified that he had promised himself after the first incident in 1995 that it would never happen again. He said the 2014 incident "came out of nowhere." He said it was "another flirting-type thing and I let my guards down." (Tr. 38)

Applicant said that his wife was aware of the sexual harassment incidents, and he acknowledged that they had caused problems in his marriage. He described his current relationship with women at work as "distant." He no longer hugs or kisses female co-workers. (Tr. 38-39)

On or about January 1, 1998, Applicant was arrested and charged with one count of misdemeanor domestic assault. (SOR ¶ 1.d) Applicant disclosed the arrest on his SCA. (GE 1 at 31) According to his interview, Applicant had been out very late the night before, and his wife "gave him a hard time" about it when he got home. Applicant felt that she was "in his face" and he pushed her. Applicant's wife called the police and he

² Tr. 23-24.

was arrested. He spent several hours in a holding cell and was released. Applicant was later ordered to complete a 26-week anger-management program, which he did. The record does not indicate a disposition of the charge. Applicant has had no further criminal charges. (Tr. 28) SOR ¶ 1.d is the only SOR allegation supported by evidence from a source other than Applicant himself.

Applicant also disclosed on his 2016 SCA that in July 2010, within the previous seven years, he used cocaine one time while at a party. He also disclosed that his use of cocaine occurred while he possessed a security clearance. (GE 1 at 32-33)

Applicant had a few beers at the party. He wanted to see what it was like to try illegal drugs, and to see what it was people liked about it. The day after the party, Applicant got sick and went to the hospital. He said trying cocaine was a “bad experience” and acknowledged that he made a bad decision. He had not used cocaine or any other illegal drug before, and has not done so since. He attributed his one-time drug use to a midlife crisis. (Tr. 28-29, 34-35) Applicant acknowledged being aware that he was subject to drug testing at work, at least if he got hurt on the job. (Tr. 34)

Applicant did not inform anyone at work that he had used cocaine, and did not think he had an affirmative duty to do so. He reported his drug use on his SCA because he was asked about it, and he knew he was “supposed to tell the truth.” (Tr. 29-32)

The Government alleged in SOR ¶ 1.c that Applicant had failed to report his cocaine use to his employer’s security office, “as required.” Notwithstanding Applicant’s admission to SOR ¶ 1.c, as alleged, the Government did not produce evidence that Applicant in fact had an affirmative duty to do so. Though the allegation was not withdrawn, Department Counsel conceded at hearing that SOR ¶ 1.c was not a security concern, especially since Applicant disclosed his drug use on his SCA. (Tr. 52-56)

Applicant expressed remorse during his testimony for his actions, including engaging in sexual harassment and for using cocaine. (Tr. 52-53) After the hearing, he submitted certificates of completion for workplace training courses he attended in September 2014 (the month he began working for his current employer). He provided certificates related to “Drug-Free Workplace” training and a class on “Sexual Harassment – Promoting Appropriate Behavior.” (AE B; AE C)

Applicant’s supervisor for the last two years regards him as an exceptional worker, and as a valuable and dependable team member. Applicant gets along with others and adheres to all rules and regulations at his job. (AE A) Applicant is rated in his performance reviews as an employee who exceeds expectations. He is a reliable, experienced worker with a high level of expertise. He is regarded as having a high level of integrity. He is well respected by peers and superiors. (AE D; AE E)

Policies

It is well established that no one has a right to a security clearance. As noted the Supreme Court noted in *Department of the Navy v. Egan*, “the clearly consistent standard indicates that security determinations should err, if they must, on the side of denials.”³

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 are used 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(a), 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 national security eligibility will be resolved in favor of the 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 not drawn 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, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

³ *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(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

(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: . . .

(2) any disruptive . . . or inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(g) association with persons involved in criminal activity.

Applicant associated with individuals involved in criminal activity when he went to a party and used cocaine. AG ¶ 16(g) applies. More generally, Applicant's cocaine use including while possessing a security clearance; his 1998 domestic violence arrest; and his two instances of sexual harassment, leading to a lengthy suspension from work (in 1995); and 19 years later (in 2014) to a termination by a longtime employer, are all instances of poor judgment and lack of impulse control that call into question his overall suitability for a security clearance. Applicant's actions satisfy the general personal conduct security concern (AG ¶ 15) as well as the "catch-all" disqualifying conditions of AG ¶¶ 16(c), 16(d)(2) and (3).

As noted above, the record evidence did not establish that Applicant had, or knew whether he had, an affirmative duty to disclose his 2010 cocaine use to his employer's security office. The Government therefore correctly conceded that SOR ¶ 1.c was not a security concern. SOR ¶ 1.c is therefore found for Applicant.

AG ¶ 17 sets forth potentially applicable mitigating conditions under Guideline E:

(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; and

(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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt on the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Following an allegation of sexual harassment in 1995, Applicant was suspended from work for several months while the matter was investigated. After a similar incident in 2014, he was fired. That ended Applicant's 24-year career with that employer. Given the impact on Applicant's career, and the seriousness with which his employer treated these two incidents, they cannot be considered minor. However, the fact that they occurred almost 20 years apart suggests that they are isolated incidents, rather than pervasive conduct. Applicant also participated in a work-related sexual harassment awareness and prevention program when he began his new job in September 2014. He acknowledged his wrongdoing towards female co-workers and has taken steps to maintain appropriate, professional distance from women in the workplace. Given what has already happened to Applicant's career as a result of his actions, he is unlikely to risk further negative impact on his career by engaging in similar conduct again.

Applicant had one altercation with his wife 20 years ago which led to a domestic violence arrest. He subsequently completed a lengthy court-ordered domestic-violence program. He and his wife remain married, and no further domestic offenses or incidents are indicated.

Applicant used cocaine on one occasion, in 2010. He did so while holding a security clearance. Given his full maturity and his longtime status as a cleared employee of a defense contractor at a naval shipyard, this was a serious error in judgment. However, there is nothing to indicate that this was anything but a one-time incident. Applicant regretted his actions immediately (particularly when he became quite

ill). He participated in a drug-free workplace program in 2014, and has a better understanding that any illegal drug use is incompatible with his position and career. There is no indication that he has engaged in similar conduct before or since. AG ¶ 16(g) applies.

Applicant is also credited with candidly disclosing and discussing all the SOR allegations at issue. He disclosed his 2014 termination, his 2010 drug use (with a clearance) and his 1998 arrest, as required, on his SCA. He voluntarily, and appropriately, disclosed his 1995 sexual harassment incident to the interviewing agent. This also weighs in his favor, and adds to the credibility of Applicant's testimony and his expressions of remorse. AG ¶¶ 17(c) and 17(d) apply to mitigate the SOR allegations in this case.

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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

(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. I have incorporated my comments under Guideline E in my whole-person analysis. I have also considered the total pattern of Applicant's behavior and poor judgment, not just in a piecemeal fashion as a series of unrelated incidents.⁴ While the events at issue occurred over a 20-year period, they are also not recent, as the most recent incident occurred four years ago. Applicant also acknowledged his wrongdoing, accepted the consequences of his behavior and participated in appropriate work-related educational programs to prevent recurrence. His security-significant behavior is unlikely to recur. Overall, the record evidence leaves me with no questions or doubts as to Applicant's eligibility for access to classified information.

⁴ See, e.g., ISCR Case No. 03-22563 at 4 (App. Bd. Mar. 8, 2006) (regarding the need to avoid a piecemeal analysis).

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.e: For Applicant

Conclusion

In light of all of the circumstances, presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant access to classified information. Eligibility for access to classified information is granted.

Braden M. Murphy
Administrative Judge