



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



In the matter of:)	
)	
[Redacted])	ISCR Case No. 17-02356
)	
Applicant for Security Clearance)	

Appearances

For Government: Brittany Muetzel, Esq., Department Counsel
For Applicant: *Pro se*

09/07/2018

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline E (Personal Conduct). Eligibility for access to classified information is denied.

Statement of the Case

On October 11, 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), 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 November 6, 2017, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on December 14, 2017, and the case was assigned to an administrative judge on February 14, 2018. It was reassigned to me on May 17, 2018. On May 22, 2018, the Defense

Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for June 13, 2018. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified, but did not present the testimony of any other witnesses or submit any documentary evidence. DOHA received the transcript (Tr.) on June 25, 2018.

Findings of Fact¹

In Applicant's answer to the SOR, he admitted the facts alleged in the SOR but denied that the facts raised questions about his integrity, judgment, candor, honesty, and willingness to comply with rules and regulations. His admissions are incorporated in my findings of fact.

Applicant is a 40-year-old employee of a defense contractor. He has worked for his current employer since the spring of 2017, and he worked for another defense contractor for about two years before being hired for his current job. (Tr. 18.) He was a civilian employee of the U.S. Government (GS-12) from September 2009 until he was terminated for cause in November 2014. He was employed by defense contractors from September 1997 until he was hired as a government employee in 2009. His termination of government employment and the basis for it is alleged in SOR ¶ 1.a. He has held security clearances from the DOD and other government agencies since 1996.

In early 2014, Applicant was assigned as an information technology specialist in a new organization that was in transition and not fully functional. He and about 20 co-workers had no assigned office space, work stations, telephones, or computers. There were only four computers available for their use, and they were instructed that they could work in another organization's workspace and borrow the four computers when they were not being used by the other organization. Applicant found a small work space on a lower floor where he and eight co-workers tried to work. This space also was noisy, and Applicant began using his truck as his work space. (Tr. 26-27.) He testified that he spent most of the day in his truck. (Tr. 29.) He admitted that he did not "do due diligence" by swiping his common access card (CAC) and going into the building so that there would be proof that he actually came to work. (Tr. 34.) He admitted that he sometimes left his assigned work space in the building because he was bored. (Tr. 42.)

Applicant was given the specific task of completing an online course of instruction required for his new assignment. He had no other duties. (Tr. 19.) Applicant informed his first-line supervisor about their lack of computers and the noisy workspace that made concentration impossible, but she did nothing to resolve those problems. (Tr. 24.)

In early February 2014, Applicant began working in his truck and using his cellphone and flash cards to complete the online instruction. He certified his time cards

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

reflecting that he had worked eight hours every day, even though he was outside the assigned work space and his supervisor could not verify that he was present for duty. On February 21, 2014, Applicant was counseled by his first-line supervisor (a civilian) and his second-line supervisor (a Navy lieutenant commander) about his absence from the designated work location, and he was instructed to check in daily with his first-line supervisor or a designated alternate. Applicant was absent from a visual muster on April 23, 2014, in preparation for a scheduled fire drill later in the day, because he was in his truck outside the building. On April 24, 2014, he was counseled by his first-line and second-line supervisors about his absence on April 23, 2014.

On May 1, 2014, an investigator was appointed to address allegations that Applicant was not working his assigned hours and had falsely certified that he had worked eight-hour days. (GX 2, Attachment 1.) The investigator concluded that Appellant had a history of reporting for work late and leaving early but certifying that he had worked an eight-hour day. The investigator also concluded that Applicant, despite repeated counseling, continued to work in his truck for repeated and extended periods. The investigator recommended that Applicant be removed, or at least be suspended without pay, for failure to follow instructions, failure to report for work and complete work as required, and falsifying his time cards. The investigator also recommended that Applicant's supervisor be placed on a performance improvement plan because of her substandard supervision.

In early May 2014, Applicant was given a desk and a computer. He testified that he reported for work on time every day after he was given a place to work. (Tr. 55.) In July 2014, a security inspector discovered that Applicant was using his own personal wireless mouse and a thumb drive on a government computer. He told the inspector that he was using his personal hardware because the government mouse was not working well. In September 2010, during a security briefing, he had been informed that personal thumb drives were prohibited. In February 2014, he completed cyber-security training and signed a certificate acknowledging that he was not permitted to use personally owned software, firmware, or hardware on any government computers with express written authorization. (GX 2, Attachment 3 at 23.)

Applicant received a notice of proposed removal on July 18, 2014. (GX 2, Attachment 3.) The notice included the following allegations:

Failure to follow instructions. Failure to report and muster with his supervisor daily at about 8:00 am; failure to complete a training course; and violation of rules by using a personal wireless mouse on a government computer.

Unexcused tardiness. Reporting to work late on 25 occasions between February 3 and May 2, 2014.

Unexcused absences. Failure to report for work on 13 occasions between February 14 and April 17, 2014, and submitting a time card claiming a full workday on those occasions.

Leaving work during working hours without proper authorization. Leaving work without authority on 29 occasions between February 3 and April 30, 2014.

Inaccurate time and attendance reports. Arriving late, leaving early, or not reporting for work on 40 occasions between February 3 and April 16, 2014, without requesting leave.

Applicant, represented by an attorney, responded orally and in writing to the proposed removal action on September 3, 2014. On October 30, 2014, he was notified of his removal. (GX 2, Attachment 4.) He did not appeal the decision to remove him.

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 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. . . .” The evidentiary basis for the decision to remove him from federal service also establishes the following potentially disqualifying conditions under this guideline:

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;

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; and (4) evidence of significant misuse of Government or other employer's time or resources

The following mitigating conditions are potentially applicable:

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; and

AG ¶ 17(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.

AG ¶¶ 17(a) and 17(d) are not established. Some of Applicant's infractions, such as arriving late for work, were arguably "minor," but in the aggregate they reflect a total disregard for the time and attendance requirements of his job. His misconduct occurred more than four years ago, but he has provided no evidence of a change in attitude or an improved sense of duty since his removal from government service.

The lack of effective first-line leadership in his organization was a major factor in creating an unacceptable and inadequate work environment. When Applicant complained to his first-line supervisor, a civilian, she was unresponsive. When his first-line supervisor failed to respond to his complaints, he did not pursue the matter further. When Applicant failed to comply with his first-line supervisor's directive to check in with her every morning, she did not react. The lack of leadership was not addressed until Applicant's second-line supervisor became concerned about Applicant's repeated absences from his workplace.

Although Applicant admitted at the hearing that his behavior was inappropriate, he blamed his supervisors for creating the environment in which it occurred. However, his irregular work habits and falsification of time and attendance reports were not the result of youth and inexperience. At the time, he was a 36-year-old GS-12 with a long history of employment by defense contractors. Instead of addressing the problem, he took advantage of it. In light of the frequency, duration, and nature of his misconduct, I am not convinced that his derelictions are unlikely to recur.

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).²

I have incorporated my comments under Guideline E in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). 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 not mitigated the security concerns raised by his personal conduct.

Formal Findings

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

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

Subparagraph 1.a: Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is denied.

LeRoy F. Foreman
Administrative Judge

² 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.