



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



In the matter of:	)	
	)	
XXXXXXXXXXXX, XXXXX	)	ISCR Case No. 14-06625
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Chris Morin, Esq., Department Counsel  
For Applicant: Jacob Ranish, Esq.

02/22/2016

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns pertaining to Guideline E (personal conduct). Clearance is granted.

**Statement of the Case**

On November 8, 2011, Applicant submitted a Questionnaire for National Security Positions (SF-86). On February 17, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG), which became effective on September 1, 2006.

The SOR alleged security concerns under Guideline E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted or continued.

On March 3, 2015, Applicant responded to the SOR. On April 10, 2015, Department Counsel was ready to proceed. On June 1, 2015, DOHA assigned Applicant's case to me. On June 11, 2015, the Defense Office of Hearings and Appeals (DOHA) issued a hearing notice, setting the hearing for July 8, 2015. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 through GE 7, which were received into evidence without objection. Applicant testified, called three witnesses, and offered Applicant Exhibits (AE) A through AE M, which were received into evidence without objection. I held the record open until July 24, 2015, to afford the Applicant an opportunity to submit additional evidence. Applicant timely submitted AE N through AE R, which were received into evidence without objection. On July 16, 2015, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

Applicant admitted in part and denied in part SOR ¶¶ 1.a and 1.f, with explanations, and admitted SOR ¶¶ 1.b through 1.e, with explanations. Applicant's answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

### **Background Information**

Applicant is a 32-year-old systems engineer employed by a defense contractor since July 2009. He seeks to retain his top secret security clearance as a requirement of his continued employment. Applicant has held a security clearance since 2006. (GE 1; Tr. 17-18, 47-55)

Applicant graduated from high school in May 2000. He was awarded a bachelor of science degree in information systems in May 2009. (GE 1; Tr. 18-20, 51) Applicant married in July 2008, and has three children – a six-year-old daughter, a three-year-old daughter, and a one-year-old son. His wife is not employed outside of the home. Applicant served in the Army National Guard from August 2002 to August 2010, and was honorably discharged as a private first class (pay grade E-3). (GE 1; AE R; Tr. 20-23, 51)

### **Personal Conduct**

The misconduct<sup>1</sup> under this concern came to the Government's attention after Applicant self-reported it during or after a 2012 polygraph examination. (GE 5 – GE 7; Tr. 47-48, 67-71) The following events span a 13-year period beginning when Applicant was 12 years old and ending when he 26 years old. Summarized, the misconduct is as follows: (1) in approximately 1996, at age "12 or 13," Applicant stole "roughly five action figures" valued at \$10 to \$15 "once or twice" from a hobby store in approximately 1996; (2) in approximately 1996 or 1997, at age "roughly 12 or 13,"

---

<sup>1</sup> The misconduct findings consist of a compilation derived from the SOR allegations, Applicant's SOR answer, hearing exhibits, and the hearing transcript.

Applicant lied to a delivery service claiming that he did not receive paintball equipment that he had in fact received resulting in the delivery service refunding him approximately \$50 to 150; (3) between approximately 1998 and 1999, at “roughly age 15,” Applicant used a credit card – that his older brother had stolen -- on at least one occasion to withdraw money from an ATM and to purchase approximately \$300 to \$400 worth of merchandise; (4) between approximately 2000 and 2001, at age “16 or 17,” Applicant used an ATM card that someone accidentally left to withdraw the maximum amount of cash allowed, “either \$300 to \$400, from that individual’s account;” (5) in 2006, at age 22, Applicant made five or six on-line sports bets between \$25 and \$200 and when he lost one bet, he called the credit card company to dispute the charge at his brother’s urging; and (6) while shopping in 2009, at age 26, on one occasion while leaving a department store, Applicant placed items on the bottom of his shopping cart and realized the clerk had not charged him for the items after he left the store. (SOR ¶¶ 1.a – 1.f; SOR answer; GE 7; Tr. 28-34, 36-47, 59-67, 76-79)

Applicant is the youngest of three children of immigrant parents. He has an older brother and a sister. He described his parents as hard working, who were often times absent, leaving Applicant at home with his older siblings and grandparents. Applicant described himself as a “shy kid” and “liked hanging around with my brother and sister when they would let me.” However, when his brother and sister were in high school, they “would start to act out and do some bad things” and Applicant “became the tattler and [would] always tell on them.” From that point on, his older siblings did not want to “hang out” with him. The bad things included stealing their parents’ car, sneaking out, stealing, and drug use. (Tr. 23-26)

Applicant stated he has changed significantly from his middle school and high school years to the person he is today. He described himself as unpopular in school, immature, and having no responsibility. Applicant described his misconduct as “[f]oolish, irresponsible and just overall lack of judgment.” He also came under the negative influence of his older brother “[b]ecause that was the only way I could get to spend time with him.” When Applicant engaged in misconduct with his older brother, “[his older brother] was willing to hang out with me and he would include me in the activities that he was doing.” (Tr. 27-34, 55, 67, 70-71)

Applicant sees his older brother about one or two times a year during family visits and primarily communicates with him by e-mail. His older brother has no influence on his decision making or behavior. Applicant’s focus is on taking care of his family. (Tr. 36-43, 41-42) Applicant’s older brother is employed full-time in the information technology field, is married, and has his own family. (Tr. 72-76)

Applicant is ashamed about what he has done in the past. He stated that he is not the same person who exercised a lack of judgment and who engaged in irresponsible and immature behavior. He is married, has three children, and no longer needs to seek the approval of his older brother. He knows the difference between right and wrong. It is very important for Applicant to serve as a role model for his children. It

was very difficult for Applicant to explain to his six-year-old daughter why he was going to a security clearance hearing. In short, he wants his children to look up to him. (Tr. 34-36, 55-57, 67)

### **Character Evidence**

In addition to testifying on his own behalf, Applicant called three witnesses: (1) a life-long friend, who has known Applicant for 27 years (LLF); (2) Applicant's wife of seven years (W); and (3) a co-worker (CW) of three years.

LLF is a Government contractor, has deployed to Iraq and Afghanistan to provide logistics support for the troops, holds a high-level security clearance, and is familiar with security clearance requirements. LLF is very familiar with Applicant's character and dedication to his family. LLF is aware of the allegations against Applicant and continues to support Applicant for a security clearance. (Tr. 81-87)

W has known Applicant for 15 years and has been married to him for seven years. The three most important qualities she seeks in her husband are honesty, respect, and loyalty. Applicant is a "great father... cares for his kids... teaches his kids ... supports them really well ... (and) is there for them." The SOR allegations do not reflect the kind of person that Applicant is today. Applicant does not associate with his older brother, he has matured, and he has embraced the responsibilities of being a good husband and father. Otherwise, W would not be with him. (Tr. 88-93)

CW is a systems engineer employed by the same company as Applicant since April 2011, and has known him since early 2014. CW holds a security clearance and is familiar with security clearance requirements. CW considers Applicant to be one of his "good friends" and knows him not only in the workplace, but also off-duty. CW considers Applicant to be a good employee, a good co-worker, and a good family man. CW is familiar with the SOR allegations against him, and they do not represent the person Applicant is today. CW recommends Applicant for a security clearance. (Tr. 94-99)

Applicant submitted 12 reference letters from a range of individuals to include senior company managers, co-workers, family members, and long-time friends. The collective sense of these letters conveys that Applicant is an individual who has significantly matured and who is reliable, trustworthy, a family man, an excellent worker, making a substantial contribution to the national defense, and is an overall "standup guy." All reference letters strongly endorse continuation of Applicant's security clearance. (AE A – AE H, AE N – AE Q) He also submitted 15 awards and commendation certificates acknowledging his work performance and contribution to the national defense. (AE I(1) – AE I(7), AE J(1) – AE J(6), AE L – AE M)

Lastly, Applicant submitted a psychological evaluation report dated April 17, 2015. The evaluation was thorough and detailed and co-signed by two licensed psychologists. The report stated that Applicant has expressed appropriate remorse

and guilt for his past actions. Applicant has taken full responsibility for his actions and clearly modified his behavior and thinking. Test results do not indicate that poor judgment and past adolescent thought patterns would impact his current level of functioning. The psychologists recommended that Applicant be granted his security clearance. (AE K)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 Applicant’s 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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, 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 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See *a/so* Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It 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 (4<sup>th</sup> 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. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Personal Conduct**

AG ¶ 15 articulate the security concern pertaining to 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

(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 person may not properly safeguard protected 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 person may not properly safeguard protected information. This includes but is not limited to consideration of:

(3) a pattern of dishonesty or rule violations.

The evidence supports application of AG ¶¶ 16(c) and 16(d) as a result of Applicant's 13-years of periodic misconduct. Details in the findings section such as dates and frequency of offenses vary somewhat from those alleged in the SOR.

AG ¶ 17 lists seven mitigating conditions under this security concern:

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

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

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

It was particularly helpful to hear Applicant's testimony and observe him. This case came about as a result of Applicant's self-reporting his past misconduct following a 2012 polygraph examination. Throughout the process, Applicant accepted responsibility for his actions, showed considerable maturity, and expressed sincere remorse. He submitted a thorough and favorable psychological examination. Applicant's witnesses and reference letters provided compelling evidence that he has embraced the role of parent, husband, law-abiding citizen, and conscientious employee.

Applicant is no longer under the influence of his older brother nor does he seek his approval. At least six years has elapsed since the last misconduct and the majority of misconduct occurred when Applicant was a juvenile. That is not to say that Applicant's past conduct is not serious. Perhaps most compelling is that Applicant does not want to be known as a thief to his children. This, as well as the positive changes that Applicant has made and time elapsed warrants full application of AG ¶¶ 17(c), 17(d), and 17(e).

### **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. The discussion in the Analysis section under is incorporated in this whole-person section. However, additional comments are warranted.

Applicant has been and is willing to maintain the conduct expected of one entrusted with a security clearance. His employment history is indicative of stability and a strong work ethic. Applicant is making a positive contribution to the national defense. His 15 witnesses and character references provided compelling evidence of an individual who has turned his life around. This support and self-introspection should ensure his continued success. Applicant demonstrated the correct attitude and



commitment to avoiding further misconduct. Considering his demeanor, testimony, and evidence presented, I believe Applicant has learned from his mistakes, and his misconduct and poor judgment are unlikely to recur. I find Applicant has presented sufficient evidence of rehabilitation.

In sum, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole-person factors”<sup>2</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

### **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 to 1.f:               For Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is granted.

---

Robert J. Tuider  
Administrative Judge

---

<sup>2</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).