



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



In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 17-03884
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Moira Modzelewski, Esq., Department Counsel  
For Applicant: John V. Berry, Esq.

05/10/2019

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

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

**Statement of the Case**

On December 10, 2018, 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).

Applicant answered the SOR on January 4, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 12, 2019, and the case was assigned to me on February 28, 2019. On March 4, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was

scheduled for March 28, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified, presented the testimony of three other witnesses, and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection.<sup>1</sup> DOHA received the transcript (Tr.) on April 11, 2019.

### **Findings of Fact<sup>2</sup>**

In Applicant's answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a and 1.b and denied the allegations in SOR ¶¶ 1.c and 1.d. At the hearing, I granted Department Counsel's motion to withdraw SOR ¶ 1.c. (Tr. 8.) Applicant's admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 47-year-old employee of a defense contractor. He has been married for 21 years and has two daughters, ages 12 and 7. (Tr. 14.) He has been employed by defense contractors since 2015, working as a lead test engineer, acquisition analyst, and a U.S. Navy subject-matter expert on a contract supporting the U.S. Army. (AX D; Tr. 18.) He served on active duty in the U.S. Navy from August 1994 to August 2014, when he retired as a lieutenant commander. (AX A-9.) During his active-duty service, Applicant received the Defense Meritorious Service Medal, four awards of the Navy and Marine Corps Commendation Medal, two awards of the Navy and Marine Corps Achievement Medal, and various service medals and qualification badges. (GX A-8.)

In March 2006, while Applicant was attending a one-year course of instruction at a mid-level service school, he was found to have plagiarized a one-page book report. According to Applicant, he completed reading the book two days before the book report was due and began working on the book report on the evening before it was due. He came home from an off-duty masters-degree course at about 9:30 p.m., was involved in a long argument with his wife, and did not begin working on the book report until midnight.<sup>3</sup> He found two online summaries of the book, and he copied one of them into his book report without footnoting it. He paraphrased the other summary. When he was confronted with the apparent plagiarism, he admitted it. (Tr. 24-26.) Although Applicant completed all the academic requirements for the course, he was not allowed to graduate. (GX 3 through 6.) However, he was able to use the academic credits from the service school to earn a master's degree from a civilian university. (AX C; Tr. 28-29.)

After his tour of duty at the service school, Applicant was assigned overseas for one year in an area where his wife, who was then pregnant, and his daughter could not

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<sup>1</sup> AX A-2 through A-7 are duplicates of statements submitted with Applicant's answer to the SOR.

<sup>2</sup> Applicant's personal information is extracted from his security clearance application (GX 1) unless otherwise indicated by a parenthetical citation to the record.

<sup>3</sup> Applicant and his wife were having marital difficulties due to her unhappiness about being uprooted for a one-year assignment and his work schedule, which consisted of about eight hours a day in military classes and four and a half hours in the evening in master's degree classes. (Tr. 23-24.)

accompany him. He was depressed by his experience at the service school and the family separation, and he drank heavily. Nevertheless, he worked hard to overcome the negative information in his service record so that he could remain in the Navy and be entrusted with a good assignment. (Tr. 51.) An Air Force major general, for whom he worked, submitted a letter describing Applicant's performance as "stellar." He stated that Applicant was embarrassed, deeply remorseful, had served with distinction, and had "demonstrated the character required of leadership and the moral fortitude to serve." (AX A-2.)

After completing his one-year unaccompanied assignment, Applicant was reassigned to a major Navy command in another foreign country. He began binge drinking in September 2008, and in November 2008, he was detained by local police for drunk driving. The local police turned him over to U.S. military authorities. A Navy admiral imposed nonjudicial punishment, which consisted of a letter of reprimand. (GX 2.)

Applicant was required to complete a six-week Substance Abuse Rehabilitation Program. (Tr. 33.) He began attending Alcoholics Anonymous (AA) meetings twice a week while overseas, and he attended them daily for a year and a half after he returned to the United States. He reduced his attendance to once a month and now attends when he needs it. As of the date of the hearing, he had abstained from alcohol since September 30, 2009. (Tr. 33-37.) His marriage is strong, and his wife is now his "sounding board" and part of his support structure. (Tr. 79.)

In April 2010, Applicant was reassigned to duty in the United States. He anticipated the periodic review of his security clearance, and he contacted his security officer to ensure that the information in the Joint Personnel Adjudication System (JPAS) was correct. He noted that the nonjudicial punishment for drunk driving was not reflected, and he self-reported it. (Tr. 39.)

After Applicant's retirement, he was employed by a defense contractor until he was terminated in August 2015. The notice of termination states that he was terminated for "failure to uphold the firm's time reporting policy." (GX 7.) It does not recite any specific failures or the nature of the failures. The termination notice stated that he was not eligible for rehire.

An audit of Applicant's time reporting was triggered after he used a mobile application to report his time. He found the mobile application difficult to use because it was hard to see and use the keys. On one day, he accidentally entered nine hours of work when he worked only eight, and on another day in the same pay period he entered eight hours of work when he should have entered eight hours of leave. His supervisor caught the errors but could not change them because the time card had already been submitted. Instead, his supervisor reported the discrepancies, and an investigation of Applicant's time reports followed. (Tr. 41.)

In Applicant's answer to the SOR, he stated that he was informed that an audit of badge records showed that he worked 205.5 hours less than what he claimed to have worked during January to July 2015. He requested an opportunity to review the badge

records. His employer declined his request but informed him that he could obtain the badge records from the Navy. Although it appears that the badge records were considered by the employer's disciplinary committee, they were not included in the evidence submitted by Department Counsel or Applicant. The record contains no documentary evidence of the badge records or any other documentation of the basis for his employer's decision to terminate him.

Applicant testified that he obtained the badge records from the Navy, and he concluded that there was a problem with the badging system in the Navy building where he worked. He testified that he asked his employer about an opportunity to respond to the allegations, and he was informed that he would not have an opportunity to appear before the disciplinary committee or to present evidence. (Tr. 44-45.) He testified that he had only three days from when he received the badge records until he was summoned to the meeting at which he was informed of his termination. He did not have sufficient time to compile evidence showing that he was at work on the days which the badge records showed him as absent. He was working on a high-profile, voluminous war-game handbook that required long hours, and he is confident that his absence would have been noted if he had been absent for over 200 hours. (Tr. 74-77.)

After Applicant was terminated, he was hired as a subcontractor for the former employer who terminated him. Applicant was able to retain his security clearance because his former employer approved his employment as a subcontractor and sponsored him for a clearance. (Tr. 21.) He worked as a subcontractor for his former employer from mid-November 15, 2015 to October 31, 2016. (Tr. 49.)

When Applicant applied for unemployment benefits, the state employment commission determined that his former employer had failed to provide sufficient evidence to support a finding of willful misconduct. The commission's written decision does not address whether the evidence supported a "failure to uphold the firm's time reporting policy" (the language used in the notice of termination) based on conduct not amounting to willful misconduct. The commission determined that Applicant was qualified for unemployment benefits. (Applicant's Exhibit A-10.)

A close friend of Appellant who has known him for more than 30 years testified and submitted a statement on his behalf. The friend noticed that Applicant was drinking heavily before the plagiarism and DUI incidents, and the DUI was the trigger for changing his drinking habits. Now that Applicant has stopped drinking, he has become more positive and more involved with his family. The friend considers Applicant trustworthy, honest, and a "solid guy." (AX A-3; Tr. 83-88.)

The owner of the company for which Applicant was an acquisition analyst testified and submitted a statement. Applicant told him about the incidents in the SOR. This witness described Applicant as an "exceptional employee." He regards Applicant as direct, honest, and loyal. He has no hesitation in recommending that Applicant retain his security clearance. (AX A-5; Tr. 90-95.)

A retired Navy captain, who is a defense contractor for whom Appellant previously worked, testified and submitted a statement. The Navy captain was instrumental in persuading the employer who terminated Applicant to accept him as a subcontractor and sponsor him for a clearance. The Navy captain has no concerns about Applicant's character, integrity, or trustworthiness. He regards Applicant as a "straight arrow" and he would trust him with his life. He testified that "common sense" would suggest that Applicant could not have been absent for almost five weeks with no one noticing. He also found it "remarkable" that the employer who fired Applicant accepted him as a subcontractor and facilitated the continuance of his security clearance. (AX A-6; Tr. 96-109.)

A retired Navy chief petty officer submitted a statement describing how Applicant persuaded him to enlist in the Navy and how Applicant helped him gain control of his alcohol problems in later life. He considers Applicant straightforward, honest, and trustworthy. (AX A-4.)

A long-time friend of Applicant, who has known him since high school and has been employed as an attorney for a government agency since 2010, submitted a statement. She is aware that Applicant is a recovering alcoholic. She considers him straightforward, honest, and trustworthy. (AX A-7.)

### **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 was guilty of plagiarism in 2006, while a student at a military school, and he was not allowed to graduate (SOR ¶ 1.a). It also alleges that he received nonjudicial punishment for drunk driving in November 2008 (SOR ¶ 1.d). Finally, it alleges that Applicant was terminated from employment by a defense contractor for falsifying his time card (SOR ¶ 1.d).<sup>4</sup>

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 relevant disqualifying conditions are:

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<sup>4</sup> For reasons not reflected in the record, the SOR is more specific than the notice of termination.

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

Applicant's plagiarism alleged in SOR ¶ 1.a and the DUI alleged in SOR ¶ 1.b are established by the evidence and are sufficient to establish AG ¶¶ 16(c) and 16(d). The plagiarism and DUI were previously considered and favorably adjudicated.

The trigger for revoking Applicant's clearance was his termination for failing to follow his employer's time-reporting requirements. The record does not reflect what evidence the employer considered to support termination. After Applicant obtained the Navy's badge records, he did not dispute that they showed more than 200 hours less than the work he reported, but he asserted that it was a badging problem that generated inaccurate information. He produced no evidence supporting his assertion. However, it is significant that the state employment commission investigated the basis for Applicant's termination and found insufficient evidence to warrant a finding of willful misconduct. It is also significant that the employer who fired him allowed him to work as a subcontractor and facilitated the reactivation of his security clearance. While Applicant may have been careless or inept in submitting his time reports, the evidence is insufficient to establish intentional falsification, as alleged in SOR ¶ 1.d. An unintentional or innocent falsification would not raise a security concern.

The following mitigating conditions are relevant:

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;

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; and

AG ¶ 17(f): the information was unsubstantiated or from a source of questionable reliability.

AG ¶ 17(c) is established for the plagiarism and the DUI, which are mitigated by the passage of time. AG ¶ 17(d) is established for the DUI, because Applicant obtained counseling, became involved in AA, and has abstained from alcohol for more than nine years. AG ¶ 17(f) is established for Applicant's termination for falsifying his time card, which is unsubstantiated.

### **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).<sup>5</sup>

I have incorporated my comments under Guideline E in my whole-person analysis and applied the factors in AG ¶ 2(d). I found that Applicant was remorseful, candid, sincere, and credible at the hearing. 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.

### **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.b, and 1.d:	For Applicant
Subparagraph 1.c:	Withdrawn

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<sup>5</sup> 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.



## **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