



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



In the matter of:

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ISCR Case No. 18-01656

Applicant for Security Clearance

Appearances

For Government: Eric Price, Esq., and Andre M. Gregorian, Esq.

For Applicant: *Pro se*

06/05/2019

Decision

HARVEY, Mark, Administrative Judge:

In 2008, Applicant negligently took a classified document home and stored it in a file box in his garage. In 2011, he discovered the document and shredded it. Later in 2011, he disclosed his negligent handling of the classified document. His negligent handling of the classified document is not recent. Guideline K (handling protected information) security concerns are mitigated. However, in 2016, he used countermeasures to attempt to manipulate a counterintelligence-polygraph test. Security concerns under Guideline E (personal conduct) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On April 19, 2016, Applicant completed and signed a Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 29, 2018, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued an SOR to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017. The SOR set forth security concerns arising under Guidelines E and K. (Hearing Exhibit (HE) 2)

On July 23, 2018, Applicant provided a response to the SOR. (HE 3) Department Counsel requested a hearing. (Transcript (Tr.) 13) On March 13, 2019, the case was assigned to me. On April 22, 2019, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for May 2, 2019. (HE 1) The hearing was held as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant offered two exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 17-20; GE 1-4; Applicant Exhibit (AE) A-B) On May 15, 2019, DOHA received a copy of the hearing transcript.

Findings of Fact¹

Applicant's SOR response admitted the facts alleged in SOR ¶¶ 1.a, 1.b, and 2.a. (Tr. 21-22; HE 3) He also provided mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 39-year-old Air Force mission planner employed by a government contractor. (Tr. 6-7; GE 1) In 1998, he graduated from high school. (Tr. 6; GE 1) In 2018, he received a bachelor of science degree in liberal arts. (Tr. 6) He served in the Air Force from 1998 to 2008. (Tr. 7, 22) He left active duty as a staff sergeant (E-5), and he received an honorable discharge. (Tr. 7) His Air Force specialty was cable-antenna technician, and he cross-trained as an airborne cryptologic linguist. He held a top secret clearance with access to sensitive compartmented information (SCI) starting in 2006. (Tr. 7, 23) He has worked for his current employer since September 2017. (Tr. 8) In 1997, Applicant married, and his children are ages 16, 18, and 20. (Tr. 8)

Removal of Classified Document from a SCI Facility (SCIF)

Applicant received routine training about handling of classified information. (Tr. 24-25, 27) In 2008, Applicant attended training inside a SCIF, which involved his use of classified documents. (Tr. 28) He unintentionally brought a document classified at the secret level to his home, and he stored it in a file box in his garage. (Tr. 28-29; SOR response) The document was clearly marked as secret. (Tr. 29)² In about March 2011, he discovered the classified document in his garage. (Tr. 28; 63) He transported the classified document to an Air Force unit where he was working, and he shredded the document. (Tr. 30) He did not have authorization to transport classified documents outside of the SCIF. (Tr. 61) He did not timely disclose his possession at home and subsequent destruction of the classified document because he did not want to get in

¹ Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

² In Applicant's April 19, 2016 Questionnaire for National Security Positions (SF 86) or security clearance application (SCA), Applicant said the document he erroneously took home was "protected information" not classified information. (Government Exhibit (GE) 1) At his hearing, he acknowledged that it was a classified document, and he conceded it was possible that he was trying to minimize what he had done in his SCA by not characterizing the document as classified. (Tr. 58-59) No adverse inference is made because of Applicant's incorrect description of his handling of the classified document in his SCA.

trouble. (Tr. 30-31) Several months after he destroyed the classified document, Applicant was interviewed before his counterintelligence polygraph examination. (Tr. 31, 63) He disclosed to the polygrapher that he mishandled the classified document in 2008, and destroyed it in 2011. (Tr. 31-32, 63-65) He passed the counterintelligence polygraph examination in 2011. (Tr. 65) His security clearance was suspended for about three months after his 2011 polygraph due to his mishandling of the classified document. (Tr. 32, 57-58)

Polygraph Countermeasures

Prior to 2016, Applicant had done some research on methods of manipulating the polygraph-test result. (Tr. 45-46, 55-56) In 2016, Applicant was scheduled for a routine counterintelligence-polygraph examination. (Tr. 35) The polygrapher discussed the test questions and polygraph procedures with Applicant during the pre-polygraph interview. (Tr. 36-37) Applicant was aware that his rate of breathing could affect the polygraph-test results. (Tr. 66) Before a polygraph examination, the polygrapher tells the person being tested to give false answers to control questions about mundane topics such as the number of times the test taker drove in excess of the speed limit or the number of times the test taker caused a family member to be angered. These control questions are considered “known lies.” The physiological responses, including rate of breathing, to the control questions are compared to the responses to the questions relevant to counterintelligence issues. (Tr. 38-39, 49-50) To pass the polygraph, there should be more of a physiological response to lying to a control question than telling the truth on a relevant question.

During the polygraph examination, the polygrapher accused Applicant of attempting to manipulate the polygraph-test results. (Tr. 37) Applicant admitted that he was “breathing faster and kind of tricked [himself] into being scared” during the control questions. (Tr. 38) He attempted to magnify or exaggerate his responses during the control questions. (Tr. 38, 45, 48-49) He said he believed his physiological responses to the control questions were too low, and he became scared. (Tr. 39-40) He was just trying to ensure he had the “desired response” to enable him to pass the polygraph. (Tr. 39-40) He admitted to the polygrapher that he was trying to manipulate the polygraph test through fast breathing. (Tr. 45) He subsequently told an Office of Personnel Management (OPM) investigator that he wanted his answers to the control questions to “light up like a Christmas tree.” (Tr. 43) He admitted that he intentionally attempted to manipulate the polygraph-test results. (Tr. 44)

Applicant claimed that during the polygraph he did not understand that his manipulative efforts could cause an erroneous polygraph-test result. (Tr. 50) He believed he was helping the polygrapher receive an accurate test result through his enhancement of his responses to the control questions. (Tr. 54) In other words, he did not believe there was any reason to suspect himself of being a counterintelligence concern, and his manipulation was designed to ensure the polygrapher did not erroneously find a counterintelligence issue. He understands now that his efforts to “assist” the polygrapher by breathing faster during the control questions did not actually help the polygrapher. (Tr. 54-55) Applicant has not taken a counterintelligence polygraph after the 2016 test was terminated due to his countermeasures. (Tr. 62)

Applicant said he accepted responsibility for his decisions, and if he had an opportunity to make the same decisions that he made in 2011 and 2016 now, he would choose differently and scrupulously comply with security requirements. (Tr. 67) He had no fear of providing answers to the counterintelligence questions, and he would timely report security violations. (Tr. 67)

Character Evidence

An Air Force captain and a program manager described Applicant as careful about compliance with security requirements. (AE A; AE B) Applicant has sound judgment and is loyal to the United States. Applicant has an excellent reputation and contributes to mission accomplishment. They support continuation of Applicant's security clearance.

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.

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, these guidelines are applied 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, 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 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 "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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. 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 articulates 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. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required.

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

(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:

- (1) untrustworthy or unreliable behavior . . . ;
- (2) any disruptive, violent, or other inappropriate behavior;
- (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

SOR ¶ 1.a alleges and Applicant admits that he knowingly increased his rate of breathing on the control questions of his 2016 counterintelligence-polygraph test as a countermeasure to manipulate the test result.

SOR ¶ 1.b alleges and Applicant admits that in 2008, he negligently took a classified document from the SCIF to his home, and he stored it in a file box in his garage until he discovered it in 2011. He transported the classified document to an Air Force unit and shredded it in 2011. He disclosed his negligent handling of a classified document during a pre-polygraph interview in 2011.

Applicant's conduct in SOR ¶¶ 1.a and 1.b establishes AG ¶¶ 15(a), 16(d)(1), and 16(e). Additional inquiry about the possible applicability of mitigating conditions is required.

Six personal conduct mitigating conditions under AG ¶ 17 are potentially applicable in this case:

- (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 advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. 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 contributed to 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; and

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

The DOHA Appeal Board in ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

AG ¶ 17(c) applies to Applicant's negligent handling of the classified document in 2008 and his improper destruction of the document in 2011. His negligent conduct is not recent. It occurred on two occasions, and it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on Applicant's reliability, trustworthiness, or good judgment.

None of the mitigating conditions apply to Applicant's attempted manipulation of his polygraph test in 2016. His manipulation was premeditated and intentional. It was designed to mislead the polygrapher. His attempted countermeasures are relatively recent, serious, and not mitigated.

Handling Protected Information

AG ¶ 33 articulates the security concern for drug involvement:

Deliberate or negligent failure to comply with rules and regulations for handling protected information-which includes classified and other sensitive government information, and proprietary information-raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 lists two conditions that could raise a security concern and may be disqualifying in this case:

(b) collecting or storing protected information in any unauthorized location;
and

(g) any failure to comply with rules for the protection of classified or sensitive information.

SOR ¶ 2.a cross alleges the same conduct described in the personal conduct section under SOR ¶ 1.b. The record establishes AG ¶¶ 34(b) and 34(g).

AG ¶ 35 lists conditions that could mitigate security concerns:

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;

(c) the security violations were due to improper or inadequate training or unclear instructions; and

(d) the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

AG ¶ 35(a) is established for the same reasons AG ¶ 17(c) is established as discussed in the personal conduct section. Handling protected information security concerns are mitigated.

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(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), “[t]he ultimate determination” of whether to grant a security clearance “must be an overall commonsense judgment based upon careful consideration of the guidelines” and the whole-person concept. My comments under Guidelines K and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 39-year-old Air Force mission planner employed by a government contractor. In 2018, he received a bachelor of science degree in liberal arts. (Tr. 6) He served in the Air Force from 1998 to 2008. He left active duty as a staff sergeant, and he received an honorable discharge. He held a top secret clearance with access to SCI starting in 2006.

Applicant’s supervisor and program manager lauded his loyalty, judgment, diligence, and contributions to mission accomplishment. They supported continuation of his access to classified information.

In 2016, Applicant knowingly and intentionally attempted to manipulate his physiological responses to polygraph-control questions during a counterintelligence polygraph examination. AG ¶ 15 indicates, “Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.” Applicant’s actions raise serious security concerns. The protection of national security relies on applicants to cooperate with and not to mislead or intentionally jeopardize security clearance processes. Applicant did not establish his reliability, trustworthiness, and ability to protect classified information.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, and the AGs, to the facts and circumstances in the context of the whole person. Guideline K security concerns are mitigated; however, Guideline E security concerns are not mitigated.

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Paragraph 2, Guideline K:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark Harvey
Administrative Judge