DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 19-01602
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Kelly Folks, Esq., Department Counsel
For Applicant: Greg D. McCormack, Esq.

01/10/2020

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct) and K (Handling Protected Information). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on May 4, 2016. On June 10, 2019, the Department of Defense Consolidated Adjudications Facility (DOD CAF) sent him a Statement of Reasons (SOR) alleging security concerns under Guidelines E and K. 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 July 8, 2019, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 13,

2019, and the case was assigned to me on October 15, 2019. On October 24, 2019, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for November 14, 2019. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through E, which were admitted without objection. DOHA received the transcript (Tr.) on December 3, 2019.

Findings of Fact

In Applicant's answer to the SOR, he admitted the allegations. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 42-year-old work-control analyst and test director employed by a defense contractor since March 2016. He married in June 1998 and has two children, ages 16 and 14. He enlisted in the U.S. Navy in March 1998, rose to the rate of machinist's mate chief (pay grade E-7), and was discharged with a general discharge under honorable conditions in February 2016. (GX 4.) He held a clearance until it was suspended in March 2014. He does not have an active clearance.

In 1998, while Applicant was assigned to nuclear "A" school, he received nonjudicial punishment for falsifying a study log for a friend to cover up the fact that the friend missed two hours of study time. (GX 2 at 7.) Applicant was punished with 30 days in correctional custody, after which he was allowed to resume his nuclear training. (Tr. 60.) This incident was not alleged in the SOR, but Department Counsel submitted the evidence in an effort to show a pattern of dishonest conduct.

In August 2012, Applicant was assigned to instructor duty at a nuclear submarine training command. His assignment required that he pass the engineering watch supervisor (EWS) examination. The command had two moored nuclear submarines that had been converted into training facilities. Part of the training for new instructors was to have on-the-job training by standing watch on one of the moored nuclear submarines. (Tr. 27.) However, when Applicant arrived at the training command, both of the converted submarines were undergoing repairs and could not be used for on-the-job training. (Tr. 27-28.)

In early December 2012, Applicant was notified that he was scheduled to take the EWS examination later in the month. He did not believe he was ready for the examination, and he asked for an extension, which was denied. (Tr. 28-30.) He was concerned about his lack of on-the-job training. He was informed by a fellow chief petty officer that the examination was very difficult to pass and that there was a study guide for the examination called the "pencil box." The fellow chief petty officer told Applicant who could provide the "pencil box" and how many "pencils" he would need for his examination. (Tr. 28-31.) The "pencil box" consisted of unauthorized electronic copies of classified examinations and answer keys. There were five master EWS examinations, given on a rotating basis every other week. The examinations were largely unchanged since 2004 except for minor revisions to reflect changes in operating procedures or

existing equipment. The original copies of the examinations and answer keys contained classified information, but the “pencil” versions did not have classification markings. They were passed around via unclassified personal email accounts, compact discs, thumb drives, and other non-secure means. Before taking the EWS examination, sailors were told which version of the examination they would be taking and received the corresponding “pencil.” (GX 6 at 3.)

Applicant testified that the “pencils” were sent to his personal email account, because he knew that his receipt of the “pencils” before taking the examination was not permitted. (Tr. 68.) He kept the materials in his barracks room without properly safeguarding them until he took the examination, and then he burned them. He admitted at the hearing that he knew he should report the ongoing cheating scheme, but he did not want to be “the person to ruin people’s careers.” (Tr. 73.) He took the examination and passed it. (GX 2 at 6.)

In February 2014, the Navy conducted an investigation into reports of widespread cheating on the EWS examination for enlisted sailors assigned to nuclear submarines. The investigator concluded that the cheating began at some time before 2007. The investigator recommended “disciplinary and administrative action” for 25 sailors who provided the “pencil files” to others, 13 sailors who cheated on their own EWS examinations, and 3 sailors who told others where to obtain the “pencil files.” (GX 6 at 18.) The names of the participants in the cheating scheme were redacted in the copy of the report of investigation submitted in evidence (GX 6 at 8-10). Hence, the record does not reflect whether Applicant was identified by the investigating officer as one of the participants.

Shortly after the investigation of the EWS examination cheating was completed, Applicant was on liberty when his master chief contacted him and told him that everyone who was engineering watch qualified was required to return to the command for an “all chiefs” meeting. Shortly afterwards, a friend texted Applicant and alerted him to a television broadcast about the EWS examination being compromised. Applicant reported early for the “all chiefs” meeting and self-reported his involvement in the cheating to his master chief. When he self-reported, he did not know whether he had been identified as one of the cheaters. (Tr. 33-35; GX 2 at 6.) The evidence indicates that Applicant had not seen the report of investigation when he told his master chief that he was part of the problem, that he was embarrassed, and that he wanted to be part of the solution. (Tr. 35.)

In March 2014, Applicant received nonjudicial punishment from his commander, a Navy admiral, for three violations of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892: (1) dereliction of duty by failing to safeguard classified information by wrongfully downloading it onto his unclassified personal computer and printing it on an unclassified printer; (2) failing to obey a general order by failing to notify his security manager or commanding officer upon discovery of classified information being lost or compromised; and (3) dereliction of duty by cheating on his EWS examination. At the hearing, he testified that he pleaded guilty to all three offenses

because he knew he was guilty. (Tr. 36-37.) His punishment was forfeiture of half of his basic pay for two months. (GX 3.) Applicant testified that he did not exercise his right to request trial by court-martial, because he believed he was wrong and needed to accept his punishment. (Tr. 38.)

Applicant also incurred several collateral consequences of his punishment. The admiral who imposed punishment also suspended Applicant's security clearance. (Tr. 44.) Applicant's nuclear specialty pay of $550 per month was terminated, and he was required to pay back $27,000 of his enlistment bonus, at the rate of $550 per month. When Applicant was discharged, he still owed about $12,000, which has since been paid. (Tr. 46-49; GX 2 at 2.) He has calculated that his discharge two years before being eligible for retirement cost him about $1.1 million in net retired pay after taxes. (AX E(3) at 4-6; Tr. 55.

In August 2014, Applicant appeared before a board convened to recommend whether he should be administratively separated from the Navy because of his involvement in cheating on the EWS examinations. The three-member board, composed of a lieutenant commander, a lieutenant, and a senior chief petty officer, unanimously recommended that he be retained in the Navy. The board found that the material that Applicant downloaded and printed was not classified and that his cheating on the examination was negligent rather than willful. Based on his record of outstanding military service, the board unanimously recommended that he be retained in the Navy.

The commanding officer who convened the administrative board disagreed with the board's findings of fact and recommendation. In November 2014, he initiated action to discharge Applicant "in the best interest of the service." In his action he stated that Applicant admitted in a sworn statement that he tried unsuccessfully to pass the "pencil box" to another sailor. (GX 7 at 3.) However, this statement was erroneous, because Applicant's sworn statement made no mention of efforts to pass the "pencil box" to another sailor. (GX 7 at 13-15.)

In February 2016, Applicant was discharged with a general discharge under honorable conditions. The authority approving his discharge was the Secretary of the Navy. (GX 4.) At the time when the Secretary approved Applicant's administrative discharge, the admiral who had imposed nonjudicial punishment had been promoted and assigned to a position in which he could have advised the Secretary on the decision to discharge Applicant and the characterization of his discharge. (Tr. 51-52.) Applicant submitted no evidence to show that the admiral advised the Secretary or influenced his decision, but his attorney argued at the hearing that his harsh treatment should be considered in determining whether he should have a security clearance. (Tr.101-03.)

During Applicant's active duty, he received the Navy and Marine Corps Achievement Medal four times, the Good Conduct Medal five times, and numerous service awards and qualification badges. (AX A; AX C.) He received solid and sometimes outstanding performance evaluations as a first class petty officer, the last two rating him in the "early promote" category, the highest recommendation. His three

performance evaluations as a chief petty officer, covering the period from September 2013 to September 2015, rated him as "promotable," the middle category. (AX C at 7-12.) The evaluation for September 2013 to September 2013 specifically mentioned the nonjudicial punishment in March 2014. (AX C at 10.)

Applicant has received three performance evaluations since his employment by a defense contractor. His first evaluation for calendar year 2016 rated him as meeting standards. His evaluations for 2017 and 2018 rated him as exceeding standards. (AX B.)

Applicant's current supervisor for the past three years admires him for his natural leadership and dedication to duty, and he is confident that there is "zero chance" of recurrence. He noted that Applicant's duties were limited by the lack of a security clearance, but that he "stepped up on his first day" and worked diligently, performing difficult, strenuous, and dirty jobs. He also noted that Applicant is a devoted husband and father, works long hours, and still finds time to coach youth sports and contribute to his community. (AX D at 5.)

Applicant's wife of 21 years, his mother, several close friends, several co-workers, and several former shipmates submitted statements supporting reinstatement of his clearance. They attested to his devotion to his family and his community, outstanding leadership, loyalty, technical competence, integrity, and selflessness. (AX 1-4, 7-18.)

A retired Navy captain who has known Applicant for almost 15 years testified at the administrative discharge board, acknowledged the seriousness of Applicant's cheating, and testified that he was confident that Applicant could be rehabilitated. He testified, "Knowing [Applicant], I would be extremely comfortable with him mentoring my junior sailors and that this whole ordeal will give him a different perspective on life. . . . I think he would value integrity and honesty even more." (GX 7 at 36.) The captain also submitted a statement at the hearing, attesting to Applicant's reliability and trustworthiness. (AX D at 17.)

At the hearing, Applicant submitted an affidavit declaring that he has been involved in no misconduct or mishandling of protected information since his nonjudicial punishment in March 2014. He included a statement of intent, declaring that if he is granted a security clearance and involved in any further misconduct, he will not challenge any revocation of his clearance. (AX E at 1.)

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 the violations of UCMJ Article 92, described above, for which Applicant received nonjudicial punishment. The security 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:

> 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;
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> 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
>
> AG ¶ 16(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 . . . engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The evidence that Applicant arranged to have sensitive materials sent to him by unclassified personal email, printed them on an unclassified computer, improperly stored them in his barracks room, and used them to cheat on his EWS examination is sufficient to establish all three disqualifying conditions. His participation in a major cheating scheme and concealing it until it became public made him vulnerable to exploitation, manipulation, or duress, and it seriously damaged his personal and professional standing. His falsification of a study log for a friend in 1998, at the beginning of his Navy career, is too remote to constitute part of a "pattern," but the series of events involved in his participation in the "pencil box" scheme, which spanned several days, is sufficient to constitute a "pattern."

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

AG ¶ 17(c) is established. Applicant's conduct was serious, because it undermined the system for insuring that sailors assigned to duties aboard nuclear submarines are technically qualified. It did not occur under unique circumstances. It was not infrequent, because it involved a series of independent acts: actively seeking involvement in the cheating scheme, transmitting sensitive material by insecure means, storing sensitive material in his barracks room, and cheating on the EWS examination. However, it occurred in December 2012, almost seven years before the hearing, and no similar conduct has occurred. He has expressed remorse and established a reputation as a trustworthy and reliable employee of a defense contractor.

AG ¶ 17(d) is partially established. Applicant disclosed his participation in the cheating scheme as soon as he learned that the scheme had been discovered. He acknowledged his guilt during the nonjudicial proceedings and in all subsequent proceedings. He has expressed remorse. There is no evidence of counseling or other measures to "alleviate the stressors, circumstances, or factors" that caused his misconduct. However, his behavior since the incident strongly indicates that recurrence is unlikely.

AG ¶ 17(e) is established. Applicant self-reported his involvement in the cheating scheme, and he has been open and candid about his conduct.

Guideline K, Handling Protected Information

The SOR cross-alleges the conduct alleged under Guideline E. AG ¶ 33 expresses the security concern pertaining to handling protected information:

> 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.

Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information. Once it is established that an applicant has committed a security violation, he or she has a very heavy burden of demonstrating that he or she should be entrusted with classified information. "[B]ecause of the unique position of employers as actual administrators of classified programs and the degree of knowledge possessed by them in any particular case, their determinations and characterizations regarding security violations are entitled to considerable deference, and should not be discounted or contracted without a cogent explanation." ISCR Case No. 10-7070 at 8 (App. Bd. Apr. 9, 2012.)

Security violations strike at the very heart of the industrial security program. Thus, an administrative judge must give any claims of reform and rehabilitation strict scrutiny. *See* ISCR Case No. 03-26888 (App. Bd. Oct. 5, 2006).The frequency and duration of the security violations are aggravating factors. ISCR Case No. 97-0435 at 5 (App. Bd. July 14, 1998).

The evidence that Applicant obtained sensitive information via his unclassified personal email, stored it in his barracks room, and used it to cheat on his EWS examination establishes the following disqualifying conditions:

> AG ¶ 34(c): loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment or medium; and
>
> AG ¶ 34(g): any failure to comply with rules for the protection of classified or other sensitive information.

The following mitigating conditions are potentially relevant:

> AG ¶ 35(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; and
>
> AG ¶ 35(b): the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities.

AG ¶ 35(a) is established for the reasons set out in the above discussion of AG ¶ 17(c). AG ¶ 35(b) is partially established. There is no evidence that Applicant received counseling or remedial training. Nonjudicial punishment and an administrative discharge do not constitute counseling within the meaning of this mitigating condition. However,

Applicant has demonstrated a "positive attitude toward the discharge of security responsibilities" by self-reporting his involvement in the cheating scheme, expressing remorse, and putting himself on probation by agreeing that he will not challenge any revocation of his security clearance for any future violations.

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. An 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.

I have incorporated my comments under Guideline E and K in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment.

Applicant presented evidence and argument suggesting that his administrative discharge from the Navy was unfair. However, the fairness and propriety of the administrative discharge process are outside the jurisdiction of the security clearance process.

I am mindful that "[o]nce a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance." ISCR Case No. 09-01652 at 3 (App. Bd. Aug 8, 2011), *citing Dorfmont v. Brown,* 913 F.2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). I am also mindful that security clearance adjudications are not intended to be punitive. "Just as an unfavorable security clearance decision should not be based on a notion that Applicant should be punished for his past misconduct, a favorable security clearance decision should not be based on a notion that Applicant has been punished enough for his past misconduct." ISCR Case No. 03-24233 (App. Bd. Oct. 12, 2005).

Applicant allowed himself to be sucked into a massive cheating scheme, motivated by his desire for professional advancement. He did not have the courage to decline participation or to reveal it to proper authorities. However, he saw the light when

the cheating scheme was revealed, and he self-reported his involvement. He has shown remorse, and he has demonstrated his potential and determination to his current employer. He has continued to work with dedication and to contribute to the U.S. Navy and the community where he lives. His friends, co-workers, supervisors, and former supervisors are confident that he has put his past bad judgment behind him. He has agreed that, if he is granted a security clearance, he will not challenge any revocation for future misconduct. I am satisfied that he is rehabilitated and that his dishonest and irresponsible conduct will not recur. After weighing the disqualifying and mitigating conditions under Guidelines E and K, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his cheating on the EWS examination and improper handling of protected information.

Formal Findings

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

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

Subparagraph 1.a: For Applicant

Paragraph 2, Guideline K (Handling Protected Information): FOR APPLICANT

Subparagraph 2.a: For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to grant Applicant eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge