



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



In the matter of: )  
)  
) ISCR Case No. 19-03384  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Nicole Smith, Esq., Department Counsel  
For Applicant: Troy Nussbaum, Esq.

03/28/2022

**Decision**

Curry, Marc E., Administrative Judge:

Applicant mitigated the psychological conditions security concerns and the personal conduct security concerns. Clearance is granted.

**History of the Case**

On May 18, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline I, psychological conditions, and Guideline E, personal conduct, and explaining why it was unable to find it clearly consistent with the national interest to grant security clearance eligibility. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive) and the National Security Adjudicative Guidelines (AG), effective June 8, 2017.

On March 12, 2021, Applicant answered the SOR, denying the allegations. He requested a hearing, and the case was assigned to me on June 2, 2021. On July 19,

2021, the Defense Office of Hearings and Appeals issued a notice of hearing, scheduling Applicant's case for August 2, 2021. The next day, the hearing was continued at the request of Applicant's counsel. On August 24, 2021, the hearing was rescheduled for August 31, 2021.

The hearing was held as rescheduled. At the beginning of the hearing, Department Counsel amended subparagraph 2.a to read, as follows:

You were terminated from [your employer] in about December 2011 after you conducted yourself in an inappropriate manner, specifically making inappropriate comments which caused other employees to feel uncomfortable working with you. (Tr. 7)

I then received six Government exhibits (GE 1 – GE 6), nine Applicant exhibits (AE 1 – AE 9), and considered the testimony of Applicant and a psychologist who evaluated him. At the close of the hearing, the parties made a joint motion to hold the decision in abeyance to allow the Government to schedule another mental health evaluation of Applicant. Applicant's counsel also moved to allow for additional time for Applicant to obtain a mental health evaluation from a psychologist of Applicant's choice. I granted both motions.

On February 2, 2022, Department Counsel informed me via e-mail that the new psychologist evaluation had been conducted. (I have incorporated the parties' post-hearing e-mail correspondence into the record as Hearing Exhibit (HE) 1) On February 9, 2022, Applicant's counsel responded, noting that he had no objection to its admissibility and did not desire to *voir dire* the psychologist. Moreover, Applicant's counsel moved that his client's independent evaluation, obtained after the hearing, be admitted into the record. (HE 1)

On February 10, 2022, Department Counsel responded to Applicant's counsel's motion. She did not object to the admissibility of the psychological report prepared by Applicant's psychologist. In addition, she moved to amend the Statement of Reasons (SOR) to add subparagraph 1.b, which states, as follows:

In December 2021, you were evaluated by a licensed psychologist and were diagnosed with (1) social pragmatic communication disorder vs. autism spectrum disorder, (2) bipolar II disorder, per documentation, and (3) unspecified anxiety disorder, per documentation. This psychologist determined that you have not had appropriate treatment for any of the potential conditions apparent from the available history and this psychologist's evaluation of you (to include mood disorder, autism spectrum disorder, or otherwise). Based on this information, the psychologist determined that: (1) your judgment, reliability, and trustworthiness are questionable, (2) you pose a risk to national security if you possess a security clearance, and (3) your prognosis is guarded.

Applicant's counsel did not object to Department Counsel's proposed amendment, whereupon, I granted Department Counsel's motion.

Counsel for Applicant moved to dismiss SOR subparagraph 1(a), or in the alternative, find for applicant "for being an incorrect/stale/unreliable finding." In a post-hearing Order, I reserved judgment on this motion until the issuance of the Decision. (HE 1) Before issuance of the Decision, Department Counsel contacted me to inform me that she had no objection to striking SOR subparagraph 1.a. Consequently, I granted Applicant's Counsel's motion, and struck subparagraph 1.a from the record. The transcript (Tr.) was received on October 26, 2021.

### **Findings of Fact**

Applicant is a 31-year-old, single man. He earned an associate's degree in electrical engineering and computer engineering in 2014, and he earned a bachelor's degree in computer networking in 2016. (Tr. 78) Since 2017, he has been working for a defense contractor as a technical writer. (GE 2 at 7) In August 2010, Applicant received a two-year appointment to the position of student trainee at a government agency. (GE 5 at 1) Per the terms of the appointment, Applicant was eligible to be hired full time after completing the internship.

On July 21, 2011, at an off-site party that Applicant's agency organized for their interns, Applicant and some fellow interns discussed the imminent visit to a local college by the President of the United States (POTUS). (GE 4 at 1) During the conversation, Applicant said that security would not be stringent enough to protect the president because there were multiple ways to make homemade bombs that could be used against him. He then retrieved his personal laptop to show the other interns a manual about how to make explosives. (GE 4 at 1)

The following month, the base police where Applicant and the interns worked received a complaint about Applicant's comments at the party, which prompted an investigation. (GE 4 at 1) The U.S. Secret Service were briefed on the incident. The base investigators interviewed Applicant who advised that he was not threatening the base, the president, or anyone else, and was just interested in chemistry and explosives. Applicant agreed to a forensic examination and review of his laptop computer. The subsequent inspection found several files related to weapons, but "no notable files . . . identified which indicate[d] an aspiration to construct explosive devices or indicate a threat against a person or structure." (GE 4 at 2)

The investigator also interviewed the student interns at the party who had engaged in the conversation with Applicant. (GE 4 at 1) Per the investigator, "no one perceived [Applicant's] comments or actions as threatening or as a specified threat to POTUS or a government facility." (GE 4 at 2) Applicant's supervisor was interviewed. He told the investigator that Applicant "was not believed to be a threat, due to his involvement in conducting mathematical data and inert explosives after testing as part of his work

assisting . . . various programs” at work. (GE 4 at 1) Subsequently, in October 2011, the investigation determined that no threats that had been made against a person or facility, nor had any criminal violations occurred, and the case was closed. (GE 4 at 2)

Applicant completed the internship that summer. (GE 2 at 7) In November 2011, Applicant e-mailed his employer and asked about work over the holiday break. (GE D) In an e-mail response, Applicant’s employer replied, “I just want to inform you that we don’t have any work for you this winter[,] and that we would not be able to bring you back at this time.” (GE D) Applicant then received a closeout packet with instructions on transferring his thrift savings plan, and instructions on how to return his CAC card. (Tr. 85) Applicant’s former supervisor then called him. During their conversation, the supervisor did not say anything to give Applicant a reason to think that he was terminated for any reason other than that which was stated in the email. (Tr. 86)

Six years later, during an investigative interview, the investigative agent confronted Applicant about the circumstances of his departure from the 2011 internship, alleging that he was terminated for making inappropriate comments which caused other employees to feel uncomfortable working with him. (GE 2 at 6) Applicant denied this allegation, contending that he did not recall making any inappropriate comments to coworkers, and that he never received any follow-up correspondence about the circumstances of his termination after receiving the November 2011 e-mail, as referenced above. (GE 2 at 6; Tr. 87) He has come to understand since the 2017 investigative interview that the comments that precipitated the base police investigation contributed to his dismissal. (Tr. 110)

The record evidence contains a termination letter, dated December 1, 2011, referencing inappropriate comments to other employees. (GE 5) Its certification of receipt block is unsigned and undated. (GE 5 at 2)

The Government initiated Applicant’s current security clearance investigative process in 2017. (GE 1 at 1) As part of the process, Applicant was referred to a psychologist for an evaluation “to clarify his current mental health status.” (GE 3 at 5) After a one-hour interview, she characterized him as “an eccentric, self-absorbed man with poor social skills.” (GE 3 at 5) Moreover, when he denied making inappropriate comments at his internship, she characterized him as “blindly unaware and uncritical of any faults or imperfections,” and concluded that this was “extremely concerning.” (GE 3 at 6) Ultimately, she concluded that his behavior cast doubt on his judgement, reliability, and trustworthiness. (GE 3)

The psychologist also criticized Applicant for being “extremely guarded about the details of his internship” during the evaluation. (GE 3 at 5) She interviewed Applicant in a café at a bookstore with several patrons sitting at tables nearby. (Tr. 53, 55) Failure to conduct psychological evaluations in a private setting is a violation of a psychologist’s ethical obligation to ensure privacy and confidentiality during consultations. (GE A at 15)

Applicant has been attending therapy in the two years since the psychologist evaluated him. (Tr. 43) When asked on direct examination if this changed her opinion, the psychologist responded that “a lot can change psychologically in two years,” and that her assessment was “a snapshot of the individual at the time” it was conducted. (Tr. 43)

In August 2021, two years after Applicant was evaluated by the psychologist at the bookstore café, he was evaluated by a licensed clinical social worker (LCSW). (GE A) She conducted the evaluation in a secured, encrypted, video teleconference platform to ensure confidentiality. (AE A at 2) The session lasted four hours. She concluded that Applicant had “a strong indication of Asperger’s syndrome, a neurodevelopmental disorder characterized by significant difficulties in social interaction and nonverbal communication. (AE A at 10) Being homeschooled, without the benefits of typical childhood socialization and group dynamics, may have exacerbated his problems with social interactions. (AE A at 10) She concluded that his disorder “does not have any medical, psychological, psychiatric, emotional, or substance use conditions which would impair his judgment, reliability, or trustworthiness.” (AE A at 15) She recommended that he attend therapy to work on his conversational skills. (Tr. 120) Applicant followed her advice, and has been attending therapy once per week since the social worker’s evaluation. (Tr. 101, 104)

At the Government’s request, Applicant was examined by another psychologist on December 11, 2021. After reviewing the available records and analyzing psychological test results the psychologist diagnosed Applicant with the following:

Social pragmatic communication disorder vs. autism spectrum disorder;  
Bipolar II disorder . . . [and];  
Unspecified anxiety disorder. (GE 7 at 6)

Based on this information, the psychologist determined that Applicant’s judgment, reliability, and trustworthiness are questionable, that he posed a risk to national security if granted a security clearance, and that his prognosis was guarded. (GE 7 at 6) In reaching this conclusion, she relied, in part, on controverted allegations, not included in the SOR, from unidentified coworkers on a job where he worked more than ten years ago. Moreover, her report does not reflect the conclusion of the base police investigation because she never received it.

On December 31, 2021, Applicant was evaluated by a psychologist that he retained. (AE L) Before the evaluation, she conducted a comprehensive, three-day assessment on November 1, November 2, and December 31, 2021. The psychologist diagnosed Applicant with bipolar disorder and unspecified anxiety disorder. She recommended that he participate in weekly individual therapy for managing depressive episodes, and in role-playing or practicing conversational skills. (AE L at 8)

According to Applicant’s company’s human resource director, with whom he has worked since 2017, he is “an extremely intelligent, loyal, and appreciated part of [the]

team [who] understands business rules and policy, asks questions when unsure of something, and never hesitates to contribute where he can or educate himself if it benefits the company and/or the client.” (AE I) Applicant has received multiple verbal commendations and e-mail commendations from persons involved with projects that he has worked with over the years since beginning his current job in 2017. (Tr. 82)

SOR subparagraph 2.b alleges that Applicant falsified Section 13A of his 2017 security clearance application by not providing the reason for leaving the internship in 2011. Applicant testified that he was never informed that he was fired for cause. (Tr. 85),

SOR subparagraph 2.c alleges that Applicant falsified the circumstances surrounding the base police investigation. Applicant told the investigator that two base police officers came to his place of employment two days after the intern party, and asked to search his laptop. (GE 2 at 8) Also, they interviewed him and asked if he had an interest in any terrorist activity or other improper behavior. Subject answered, “no,” and the subsequent laptop search revealed nothing derogatory, whereupon, it was returned. (GE 2 at 9)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required to be considered in evaluating an applicant’s eligibility for access to classified information. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department

Counsel. . . .” The applicant has the ultimate burden of persuasion to obtain a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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. Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline E: Personal Conduct**

Under this guideline, “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.” Moreover, of special interest is any failure to provide truthful and candid answers during the national security investigative process. (*Id.*)

The SOR originally alleged that Applicant was terminated from his internship in 2011 for implying a threat to kill the POTUS and showing employees how to make bombs on his laptop computer. This allegation proved to be unsupported by the Government’s record evidence, as an investigation concluded that no threats had been made, nor had any criminal violations occurred. This prompted the Government to strike from the SOR any references to threats or bomb making, and to amend the SOR to allege that Applicant was terminated from his job for conducting himself in an inappropriate manner, and making inappropriate comments that caused his coworkers to feel uncomfortable working with him.

This amended SOR allegation is problematic for two reasons. First, although SOR allegations do not have to be drafted with the specificity of criminal pleadings, they must, at minimum, be drafted in such a manner that the applicant can prepare a response. (ISCR Case No. 00-0633.a1 (October 23, 2003) at 3) Subparagraph 2.a does not meet this threshold because it does not specify the allegedly inappropriate conduct or comments that are at issue. Secondly, these allegations are controverted, as Applicant admits making the comments that triggered the investigation, but was unaware of any comments he made while working at his internship made others feel uncomfortable.

Under these circumstances, subject to exceptions that are not present in this case, the Government must identify the witnesses who made these alleged statements and make them available for cross examination. (Directive ¶ E3.1.22; ISCR Case No. 05-10921 (April 19, 2007 at 1) Applicant not only was not afforded this opportunity, the Government has not specified the allegations or otherwise given him notice of what the allegations were, or who made them.

Assuming for the sake of argument that subparagraph 2.a is a tenable allegation, and that the termination letter in the record evidence is sufficient to establish the Government's initial burden of proof, AG ¶ 16(d)(2), "any . . . inappropriate behavior," applies, but is mitigated by AG ¶ 17(f), "the information was unsubstantiated or from a source of questionable reliability." I resolve SOR subparagraph 2.a in Applicant's favor.

As for subparagraph 2.b, Applicant received an email from his supervisor that the agency would not be bringing him back for the following summer, but never received any notice that he was being terminated. Under these circumstances, I conclude that he did not intentionally make a false statement as alleged in subparagraph 2.b, and I resolve it in his favor.

Subparagraph 2.c alleges that Applicant deliberately failed to disclose the reason for the 2011 investigation when an investigative agent from the Office of Personnel Management interviewed him in 2017, "thereby deliberately fail[ing] to disclose that information as set forth in subparagraph 2.a, above." Applicant did tell the investigator that the NCIS agent asked him if he was interested in any terrorist activity. Moreover, Applicant's security clearance interview occurred after NCIS had cleared him of any wrongdoing related to comments made at an intern party in 2011. Consequently, there was no intent to mislead or deceive the investigator. I resolve subparagraph 2.c in Applicant's favor.

In sum, I conclude that Applicant has mitigated the personal conduct security concerns.

### **Guideline I: Psychological Considerations**

Under this guideline, "certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness." (AG ¶ 27) A psychologist in December 2021 evaluated Applicant and diagnosed him with social pragmatic communication disorder vs. autism spectrum disorder; bipolar II disorder . . . [and]; an unspecified anxiety disorder. (GE 7 at 6) Based on this information, the psychologist determined that Applicant's judgment, reliability, and trustworthiness were questionable, he posed a risk to national security if granted a security clearance, and his prognosis was guarded. (GE 7 at 6) This evaluation triggers the application of AG ¶ 28(b), "an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness."



In reaching this conclusion, the psychologist relied, in part, on controverted allegations, not included in the SOR, from unidentified coworkers on a job where Applicant worked more than ten years ago. Moreover, her report does not reflect the conclusion of the base police investigation because she never received it. Consequently, the probative value of the report is limited.

Applicant has been working for the same employer since 2017. There is no record of any negative job history in that time, and he is, in fact, well-respected by his colleagues and clients. Applicant acknowledges that he has a mental health disorder and is in ongoing therapy to address this issue. Under these circumstances, the mitigating condition set forth in AG ¶ 29(e), “there is no indication of a current problem,” applies.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must consider the totality of an applicant’s conduct and all relevant circumstances in light of the nine adjudicative process factors in AG ¶ 2(d). They are as follows:

- (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; and
- (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

The Government did not specify the inappropriate conduct and comments that Applicant made, and he denies them. Conversely, although Applicant was initially unaware that he was terminated for cause, he now does not dispute this. Nevertheless, his termination and its corresponding surrounding circumstances occurred more than ten years ago when Applicant was in college. Since then, he has earned an associate degree, a bachelor’s degree, and he has gained a full-time job where he is currently excelling. In sum, there is no indication of a current problem. Under these circumstances, I conclude Applicant has mitigated the security concerns.

## **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 I:	FOR APPLICANT
Subparagraphs 1.a – 1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a – 2.c:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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Marc E. Curry  
Administrative Judge