



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



In the matter of: )  
)  
) ISCR Case No. 20-03070  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Daniel O’Reilly, Esq., Department Counsel  
For Applicant: *Pro se*  
12/16/2022

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant’s evidence is insufficient to mitigate the Guideline E (personal conduct) and Guideline K (handling protected information) security concerns. Clearance is denied.

**Statement of the Case**

Applicant submitted his most recent security clearance application (SCA) on September 12, 2019 (Government exhibit (GE) 1). Government investigators interviewed him in January, February, and March 2020 (GE 2), and he answered a set of interrogatories from the Defense Office of Hearings and Appeals (DOHA), in November 2020. (GE 3).

After reviewing the information gathered during the background investigation, the Defense Counterintelligence and Security Agency Consolidated Adjudications Facility (DCSA CAF) issued Applicant a Statement of Reasons (SOR) on March 12, 2021, alleging security concerns under Guidelines E and K. Applicant answered the SOR on April 5, 2021, and requested a hearing before a DOHA administrative judge.

The scheduling of the hearing was delayed by COVID-19 health concerns and travel restrictions. DOHA assigned the case to me on November 2, 2021, and issued a

notice of hearing on August 16, 2022, setting a video teleconference hearing for August 30, 2022. I cancelled the hearing because Applicant lost his clearance sponsor and DOHA lacked jurisdiction. Another federal contractor picked up Applicant's sponsorship on August 30, 2022 (See Hearing exhibit (HE) 1; Tr. 23), and I rescheduled the hearing for September 7, 2022.

At the hearing, the Government offered nine exhibits (GE 1 through 9). All exhibits were admitted into the record without any objections. GE 10, the Government's discovery letter, dated June 30, 2021, was marked and made part of the record, but it is not substantive evidence.

Before his hearing, Applicant submitted Applicant exhibit (AE) 1 (curriculum vitae or resume) to me via email, dated September 1, 2022. I marked and made AE 1 part of the record, without objections. Applicant testified on his own behalf as reflected in a transcript (Tr.) received by DOHA on September 14, 2022. He submitted no documentary evidence during or after the hearing, except for AE 1.

### **Findings of Fact**

The SOR alleges under Guideline E that Applicant received a letter of reprimand in February 1999 (¶ 1.a) and was charged with battery and fighting in public in May 2002 (¶ 1.c). His employment with different federal contractors was terminated in March 2001 (¶ 1.b), June 2013 (¶ 1.d), February 2015 (¶ 1.e), September 2018 (¶ 1.f), and November 2019 (¶ 1.g). It further alleges that he falsified his 2019 SCA when he deliberately denied and failed to disclose that he was terminated from his employment as alleged in ¶¶ 1.d, 1.e, and 1.f (¶¶ 1.h, 1.i, and 1.j). Under Guideline K, the SOR alleges that he failed to comply with rules and regulations for handling protected information as alleged under ¶ 1.f (¶ 2.a).

In his answer, Applicant denied all of the factual allegations in the SOR, except for ¶ 1.d, which he admitted with comments. Applicant's SOR admission and those at his hearing are incorporated into my findings of fact. After a thorough review of all the record evidence, I make the following additional findings of fact:

Applicant, 70, graduated from a military academy in 1974. He served on active duty as an officer between 1974 and December 1979, and was honorably discharged with the rank of captain (O-3). (Tr. 9) He was granted a security clearance while in the military academy in 1971. (Tr. 16) As an officer, he held a clearance during his service, which was continued or renewed throughout his many years working for multiple federal contractors. He has a long history of working for federal contractors since 1981. (AE 1) He testified that during his career he has held positions of trust, and clearances at the secret level and higher. He completed a master of science degree in computer science in 1980, and a master in business administration (MBA) in finance in 1986. (Tr. 9) He has never married and has no children. (Tr. 23)

Applicant testified he has done well in his areas of expertise. He believes that he has established a good reputation and is respected by peers and employers for his acumen and ability to resolve complicated issues within his areas of expertise. (AE A)

Applicant received a letter of reprimand in February 1999, for unprofessional conduct and demonstrating poor judgment in the workplace. (SOR ¶ 1.a) He denied he ever received the letter of reprimand. At hearing, when confronted with the letter of reprimand bearing his signature, he claimed he forgot about it because the incident occurred 23 years ago. (Tr. 47 – 48; GE 4)

Applicant denied that he was terminated from his employment with different federal contractors in March 2001 (due to argumentative behavior towards his workers (SOR ¶ 1.b)), June 2013 (inaccurate time cards (SOR ¶ 1.d)), February 2015 (unprofessional conduct and insubordination (SOR ¶ 1.e)), September 2018 (attempted security violations (SOR ¶ 1.f)), and November 2019 (unprofessional conduct (SOR ¶ 1.g)).

Applicant claimed that he was never told he was terminated from any of these employment positions, except for the termination alleged in SOR ¶ 1.d. He claimed he was informed that he was being laid off. He argued that he could not have been terminated because he was allowed to file for and received unemployment benefits from the state. He contends that if he had been terminated, under state law he would have been precluded from receiving unemployment benefits. He failed to provide documentary evidence to show he received unemployment benefits after any of the alleged terminations. Documentary evidence in the record and his testimony show that he received unemployment benefits even though he was terminated from his employment in 2013 and 2019. (GE 7; Tr. 85)

Applicant admitted he was convicted of a misdemeanor battery charge and fighting in public in May 2002 (SOR ¶ 1.c). He slapped and pushed a woman at a gas station when she approached him while screaming at him. (Tr. 28)

Concerning SOR ¶ 1.d, Applicant admitted that he submitted inaccurate time cards in violation of his company's policy. However, he denied that he submitted the inaccurate time cards to defraud the Government. He claimed that he only charged for the hours he worked. He averred that he worked longer hours during the week, and on Fridays, he would take off early. However, he submitted inaccurate time cards showing that he was working eight hours every day. He submitted no documentary evidence to show that he asked for and received permission to submit inaccurate time cards or to work a flexible schedule. (Tr. 29 – 31; 60 - 61) Applicant admitted that, although his employer terminated his employment, he filed for and the state paid him unemployment benefits. (Tr. 61)

Applicant testified:

I figured it wouldn't hurt anything to cut a little time off for Friday. And let's face it, I'm a professional. I'm not an hourly employee. Okay? So, as far as

I'm concerned, as long as I put in honestly, the number hours I work per week, which days I work them and all, that's my business, not theirs. I'm supposed to have flex time. And they promised me that. And from here, they're telling me that I don't get it. (Tr. 31)

Applicant admitted that in March 2014, his employer gave him a written warning for viewing pornographic and dating websites using his company-issued laptop and for receiving personal phone calls from recruiters during work hours, in violation of company policy. (SOR ¶ 1.e) Applicant claimed that at the time his employer issued him the phone and the laptop, his employer told him he could use both the computer and phone freely for his personal use. He complained that his company did not inform him that it would monitor his use of the equipment, and that it reneged on the promise that he could use the equipment freely. (Tr. 64 – 65) He admitted he visited dating sites, denied he was watching pornography (although, some of the dating sites showed women in bikinis), and admitted that he would get calls during duty hours from recruiters about possible job opportunities. (Tr. 31 – 33)

Applicant was terminated from his employment in February 2015 for unprofessional conduct and insubordination. (GE 7; Tr. 68) He explained that his supervisor sent him a nasty email criticizing his work that was shared with others in the company. Applicant replied with a nasty email of his own, also shared with others, correcting and confronting the supervisor. (Tr. 32 - 33) The letter of termination specifically informs Applicant that he was eligible to apply for unemployment compensation benefits. (GE 7)

Applicant admitted that his employer removed him from working on a contract after the customer asked the employer to do so in September 2018. He denied that his employer informed him of the reasons for his removal. (SOR ¶ 1.f) Applicant denied that he asked to take home classified software or to use classified software in an unclassified desk environment. (Tr. 33 – 38) Notwithstanding, the Defense Security Service Suspicions Contact Report (GE 9), indicates that Applicant's team members expressed concerns about his handling of classified information several times.

Applicant was terminated from his employment with a federal contractor because of unprofessional conduct in November 2019. (GE 8 – termination letter) He explained that he was in the company building working late at night. A woman he did not know and had not seen before approached him and spoke to him. He ignored her and walked away. When confronted, he told her that he believed she had been talking on the phone and not to him. He then told her that it was late, that he was going home, and walked away. The next day, his employer informed him that he had been terminated. (Tr. 39 – 40; GE 8)

Applicant denied that he falsified his 2019 SCA when he answered “No” to questions in Section 13A-Employment Activities, and failed to disclose that he received a written warning and was terminated from his employment, as alleged in ¶¶ 1.d, 1.e, and 1.f. (¶¶ 1.h, 1.i, and 1.j). (Tr. 40 – 45) I find that Applicant deliberately falsified his 2019

SCA when he answered “No” to the questions and failed to disclose that he received a letter of reprimand in 1999, a written warning in 2014, and was terminated from his employment in 2013, 2015, and 2018.

Under Guideline K, SOR ¶ 2.a alleged that Applicant failed to comply with rules and regulations for handling protected information as alleged under SOR ¶ 1.f. The record evidence is insufficient to establish that Applicant failed to comply with rules and regulations for handling protected information. GE 9 states that Applicant “has not yet committed a security violation because team members have stopped violations before they occurred,” and that they often have to remind him of security requirements. (GE 9) The main concern stated in GE 9 – the heart of the document – appears to be management dissatisfaction with Applicant’s work performance, general behavior, self-management skills, and lack of technical skills. All of which should have been better handled under the human resources umbrella, either for the federal contractor or the Government.

Notwithstanding, insider threat is defined as the threat that an insider will use his or her authorized access, wittingly or unwittingly, to do harm to the agency’s mission, resources, personnel, facilities, information, equipment, networks, or systems. This threat can manifest as damage to the agency through, among other things, as the unauthorized disclosure of information. (See DOD Directive 5205.16, *The DOD Insider Threat Program* (September 30, 2014, Incorporating Change 2, August 28, 2017)) Based on the evidence presented, Applicant may unwittingly disclose classified information.

Applicant noted that he has a history of over 40 years of keeping and protecting Government’s secrets and not disclosing classified information. He claimed he has always been very careful to protect and secure classified information. He follows established procedures and exceeds the protection standards put in place by the Government to ensure the protection of classified information. He stated that there are no leaks attributed to him. (Tr. 45, 86)

Applicant highlighted his time in the service and his work for federal contractors. He loves the United States and has supported this country and protected the country’s secrets since he was 18. He believes he should be allowed to have a clearance at any level. He also believes that he has earned a clearance and should keep it. He does not consider himself an insider threat. (Tr. 87, 92- 93)

## **Policies**

The SOR was issued under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

Eligibility for access to classified information may be granted “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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch 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).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in SEAD 4, App. A ¶¶ 2(d) and 2(f). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant’s security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest as their own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

## **Analysis**

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

AG ¶ 15 explains why personal conduct is a security concern stating:

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: . . . (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination. AG ¶ 15 sets forth the security concern as follows:

Applicant received a letter of reprimand in February 1999 (¶ 1.a); he was convicted of a misdemeanor (battery of a woman) in May 2002 (¶ 1.c); and his employment with different federal contractors was terminated in March 2001 (¶ 1.b), June 2013 (¶ 1.d), February 2015 (¶ 1.e), September 2018 (¶ 1.f), and November 2019 (¶ 1.g). Moreover, he falsified his 2019 SCA when he deliberately denied and failed to disclose that he was terminated from his employment as alleged in ¶¶ 1.d, 1.e, and 1.f (¶¶ 1.h, 1.i, and 1.j).

Applicant's behavior raises the following disqualifying conditions under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities 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 . . .

The record establishes the above disqualifying conditions, requiring additional inquiry about the possible applicability of the mitigating conditions. I considered the following mitigating conditions set forth by AG ¶ 17:

(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 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).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions are applicable. Applicant's personal conduct and misconduct occurred frequently, it is recent, and it is likely to recur. His personal conduct cast doubts on his current reliability, trustworthiness, and judgment. Personal conduct security concerns are not mitigated.

The SOR alleged under Guideline K that Applicant failed to comply with rules and regulations for handling protected information as alleged under ¶ 1.f (¶ 2.a). The record evidence is insufficient to establish that Applicant failed to comply with rules and regulations for handling protected information. Notwithstanding, based on the evidence,



Applicant may unwittingly disclose classified information. I find the Guideline K allegation against Applicant.

### **Whole-Person Concept**

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶¶ 2(a) and 2(d). I have incorporated my comments under Guidelines E and K in my whole-person analysis. Some of these factors were addressed under those guidelines, but some warrant additional comment.

Applicant, 70, is a service academy graduate. He served almost six years on active duty as an officer and received an honorable discharge. He was first granted clearance eligibility back in 1971. His eligibility has been continued throughout his many years of work for federal contractors. He has been working for federal contractors since 1981.

Applicant attested to his own professionalism, skills, and knowledge. He noted that he loves the United States and would not compromise the safety of this nation. He believes he should be allowed to have a clearance at any level. He believes that he has earned his eligibility for a clearance and should keep it. He does not consider himself an insider threat.

Nevertheless, Applicant's evidence is insufficient to mitigate the serious security concerns raised by his deliberate falsification of his 2019 SCA and his frequent and recent misconduct. His overall pattern of poor judgment over more than 20 years shows a lack of reliability and trustworthiness. It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against granting a security clearance. *See Dorfmont*, 913 F. 2d at 1401. Unmitigated personal conduct security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are not mitigated. Clearance is denied.

### **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

Subparagraphs 1.a-1.j: Against Applicant

Paragraph 2, Guideline K:

AGAINST APPLICANT

Subparagraph 2.a:

Against Applicant

**Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to grant Applicant's eligibility for a security clearance. Clearance is denied.

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JUAN J. RIVERA  
Administrative Judge