



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



In the matter of:	)	
	)	
	)	ISCR Case No. 21-01949
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Brian L. Farrell, Esq., Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

03/21/2023

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, personal conduct, and Guideline J, criminal conduct. Applicant’s eligibility for a security clearance is denied.

**History of the Case**

On December 20, 2021, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines E and J. The DOD acted under Executive Order (EO) 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) implemented by the DOD on June 8, 2017.

Applicant answered the SOR on January 19, 2022, and requested a hearing. The case was assigned to me on September 2, 2022. The Defense Office of Hearings and

Appeals (DOHA) issued a notice of hearing on October 28, 2022, and the hearing was held as scheduled on November 14, 2022. The Government offered exhibits (GE) 1-7, which were admitted into evidence without objection (GE 7 was offered post-hearing ). The Government's exhibit list was marked as hearing exhibit (HE) I. Applicant testified and offered exhibits (AE) A-O, which were all admitted without objection. Applicant's exhibit list was marked as HE II (AE O was admitted post-hearing). The record remained open until November 22, 2022, and I received the additional exhibits noted above. DOHA received the hearing transcript (Tr.) on November 28, 2022.

### **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a and 2.a-2.d, with explanations, and denied SOR ¶ 1.b. His admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and exhibits submitted, I make the following additional findings of fact.

Applicant is 39 years old. He is divorced (married from November 2006 to June 2010) and has one child. He works for a civilian security firm. He is also a member of his state's Army National Guard (NG). He joined the NG in August 2022. He equivocated as to whether he disclosed the information about his Marine Corps actions described below to the NG upon his enlistment. He was awarded an associate's degree in 2014 and a bachelor's degree in 2020. He is also pursuing a master's degree. (Tr. 19-21, 65-69; GE 1, 7; AE N; SOR answer)

Applicant previously served in the U.S. Marine Corps. He was on active duty from 2005 to 2013, and then served in the Marine Reserve from 2013 to 2018. He was out of the military from February 2018 until he enlisted in the NG in August 2022. While on active duty, he deployed to both Iraq and Afghanistan where he earned Combat Action Ribbons for service in those locations. He achieved the rank of sergeant (E-5) and was honorably discharged. He received a Department of Veterans Affairs (VA) disability rating of 90%, primarily for his diagnosis of Post-Traumatic Stress Disorder (PTSD). (Tr. 20-22, 27-28; AE F)

The SOR alleged, under Guideline E, that Applicant falsified six military orders by forging the authorizing military official's signature and submitted those orders to two employers in order to receive paid military leave. (SOR ¶ 1.a). It also alleged that his actions, described above, caused his termination by one of those employers. (SOR ¶ 1.b). I find that this allegation is duplicitous with SOR ¶ 1.a in that the underlying conduct is the same. SOR ¶ 1.b just alleges the consequences of that conduct. I find in favor of Applicant regarding SOR ¶ 1.b.

Under Guideline J, the SOR alleged that in December 2015, Applicant was issued a written warning from his employer and placed on probation for using excessive force in performing his duties (SOR ¶ 2.a); that in February 2016, Applicant was counseled for missing movement (Uniform Code of Military Justice (UCMJ) Article 87) when he failed to have a proper uniform for duty (SOR ¶ 2.b); that in July 2017,

Applicant was counseled for a violation of UCMJ Article 107, for providing false statements to the Marine Corps with regard to his forged military orders described above (SOR ¶ 2.c); and that in January 2018, Applicant was charged with a felony offense of tampering with records by submitting the forged military orders to his civilian employers, as described above (SOR ¶ 2.d).

Applicant admitted in his statements to a background investigator in June 2017 and November 2018, in his January 2022 SOR answer, and during his hearing testimony, that at various times from 2015 through 2016, he forged six military training orders representing that he would be performing military training with his Marine Reserve unit and submitted those orders to two civilian employers he worked for at the time so that he could financially benefit by classifying that time as military leave, for which he was paid. He did not perform military duties during the days indicated on the forged orders. One civilian employer was a state agency and the other employer was a county sheriff's department. He submitted five forged orders to the state agency and one order to the sheriff's department. (Tr. 23; GE 2; SOR answer)

He accomplished the forgeries in the following manner:

1. He searched Google for examples of Marine Corp training orders;
2. Having found the orders, he supplied his name as the subject of the order, although he fraudulently listed his rank as either a first lieutenant or captain, when he was actually a sergeant;
3. He forged or fraudulently supplied the name of the order authorizing official on the orders;
4. He submitted these forged orders five times to his state agency employer and once to his sheriff's department employer;
5. GE 6 contains three examples of the orders Applicant admitted forging;
6. He benefitted financially by receiving "military leave" from his civilian employers for those days and he did not perform any military duties for his Marine Reserve unit for the days indicated on the forged orders;
7. He did not pay back either employer for the military leave benefit he received. He did not disclose his actions until after he was caught through his employer's investigation. (Tr. 31-34, 40-44-51, 69-70; GE 5-6)

Applicant justified his forging of the orders because he believed both his civilian employers were not properly paying employees for overtime hours they worked. He was also having financial difficulties during that time frame arising from his spousal and child support obligations, which were about \$2,000 per month. (Tr. 24-25, 41-42; SOR answer)

At some point in 2016, his sheriff's department became suspicious of Applicant's military orders. He was investigated and charged by the state with the felony charge of tampering with a record in January 2018. The charge was dismissed in April 2018 and an expunction order was issued in September 2020. In July 2017, Applicant's Marine commander was made aware of the forged orders and disciplined Applicant by issuing him a formal written letter of counseling for making false official statements in connection with the orders he forged, in violation of UCMJ Article 107. He quit performing Marine Reserve duties shortly after this counseling. (Tr. 61, 64; GE 3, 5, 7; AE E; SOR answer)

In December 2015, Applicant was given a written warning by his state-agency employer and placed on probation because he used excessive force on an inmate by spraying the inmate with a full can of pepper spray while he was inside his cell. Applicant explained his action was in self-defense because he believed the inmate was trying to secure a tool that was potentially dangerous as Applicant was attempting to serve the inmate his meal. The inmate was trying to access the tool through the cell tray opening slot. Applicant was not criminally charged with an offense. (Tr. 73-74; GE 2; SOR answer)

In February 2016, Applicant reported for his Marine Reserve duty weekend. He forgot his physical training (PT) uniform. His home was located approximately five hours from his duty location. He informed his first sergeant about forgetting his PT gear and was given two options. He could go back home and retrieve his PT gear and miss a day of drill (and the payment for it), or he could stay and be formally counseled for not showing up for drill with the proper uniform, in violation of UCMJ Article 87. Applicant chose the latter option and was counseled. He admitted this conduct. (Tr. 30; GE 2; SOR Answer)

Applicant presented awards and commendations from his Marine Corps service; performance evaluations from his civilian employer in 2022 and 2021, which reflect overall evaluations of "exceeding standards;" letters documenting his community service as a volunteer; and a letter of appreciation from his Marine commander in 2009 recognizing Applicant's outstanding contribution to the battalion. (AE F-M, O)

Any misconduct described above that was not specifically alleged in the SOR will not be used for disqualification purposes. It may be used to assess credibility, determine the applicability of mitigating conditions, and in making my whole-person determination.

## **Policies**

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 used 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 overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a careful weighing 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, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and 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 an 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 EO 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**

AG ¶ 15 expresses the personal conduct security concern:

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. . . .

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(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.

The record evidence is sufficient for an adverse determination under the criminal conduct guideline, nevertheless, as a whole, Applicant's actions put into issue his judgment, trustworthiness and overall personal conduct, as expressed in the general security concern in and the specific concern expressed in AG ¶ 16(c). Applicant's forgery of military orders for his personal benefit on multiple occasions, involving two separate employers, raises questions about his reliability, trustworthiness, and judgment. AG ¶15 and AG ¶ 16(c) apply to SOR ¶ 1.a, but as noted above, SOR ¶ 1.b is duplicitous, and I find for Applicant on that allegation.

I have also considered all of the mitigating conditions for personal conduct under AG ¶ 17 and considered the following relevant:

(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; and

(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.

Appellant's crimes of forging military orders in 2015-2016 were not minor events nor were they infrequent. They involved a calculated plan by Applicant to defraud his civilian employers of military leave benefits, which he did not earn. Although Applicant acknowledged his behavior, he did not come forward on his own, but only disclosed his crimes once he had been caught. He equivocated on whether his NG unit is aware of his previous crimes forging military orders. His reliability, trustworthiness, and good judgment are still in question. Applicant receives some credit under AG ¶ 17(d), but AG ¶ 17(c) does not apply.

## Guideline J, Criminal Conduct

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The allegation describing Applicant's use of excessive force on the job was in the nature of a job performance issue, not a criminal offense. I find for Applicant regarding SOR ¶ 2.a. Additionally, while Applicant's failure to bring PT gear on his drill weekend may have technically been a criminal offense, I find that it does not rise to the level of having security significance and find for Applicant regarding SOR ¶ 2.b.

Applicant's actions in forging military orders on multiple occasions was charged under state law, where he was formally charged with tampering with a record; and under the UCMJ, where he was disciplined for making false official statements. AG ¶ 31(b) applies to both SOR ¶¶ 2.c and 2.d.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

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

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

See earlier discussion under AG ¶ 17 as also applying here. AG ¶¶ 32(a) and 32(d) do not fully apply.

## 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), 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's combat service, his apparent diagnosis of PTSD, his awards and decorations, the passage of time since his actions, his letter of recommendation, and his community involvement. However, he also used his military position to benefit himself in a premeditated plan to defraud two different employers by forging orders that allowed him to receive military leave benefits. His trustworthiness, reliability, and good judgment are very much in question.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns under Guidelines E and J.

## 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:	Against Applicant
Subparagraph 1.b:	For Applicant



Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	For Applicant
Subparagraphs 2.c – 2d.:	Against Applicant

**Conclusion**

In light of all of the circumstances presented by the record 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.

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Robert E. Coacher  
Administrative Judge