



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



In the matter of: )  
 )  
----- ) ISCR Case No. 21-01562  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff Nagel, Esq., Department Counsel  
For Applicant: Daniel P. Meyers, Esq.

03/30/2023

**Decision**

WESLEY, ROGER C. Administrative Judge

Based upon a review of the case file, pleadings, exhibits, and testimony, Applicant did not mitigate personal conduct concerns. Eligibility for access to classified information or to hold a sensitive position is denied.

**Statement of the Case**

On October 21, 2021, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Central Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant detailing reasons why under the personal conduct guidelines, the DCSA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960); DoD Directive 5220.6 *Defense Industrial Personnel Security Clearance Review Program*, (January 2, 1992) (Directive); and Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), effective June 8, 2017.

Applicant responded to the SOR on November 17, 2021, and requested a hearing. This case was assigned to me on August 23, 2022. A hearing was scheduled on January 31, 2023,, via Teams Teleconference Services, and was heard on the scheduled date. At the hearing, the Government's case consisted of six exhibits. (GEs 1-6) Applicant relied on one witness (himself) and two exhibits. (AEs C-D) The transcript (Tr.) was received on February 9, 2023.

### **Summary of Pleadings**

Under Guideline E, Applicant allegedly (a) was debarred by the Army between January 2018 and October 2020 from government contracting and doing business with the government based upon his conspiratorial actions to restrain trade in violation of 18 U.S.C. § 371 and the Sherman Antitrust Act , 15 U.S.C. § 371; (b) failed to notify his employer of his debarment and continued to work on government contracts throughout his entire work period; and (c) falsified material facts during a January 16, 2019 interview with an authorized investigator for the U,s, Department of Defense (DoD) when he denied any knowledge of the debarment covered by subparagraph 1.a, when in truth he received notice of the Army's proposed debarment in September 2017 and the subsequent debarment action in January 2018.

In his response to the SOR, Applicant admitted the Army's debarment actions, but denied his failing to notify his employer of the Army's actions and denied his failing to disclose the Army's debarment actions in his January 2019 personal subject interview (PSI) and with a DoD investigator. Applicant claimed he notified his employer's supervisor of his 2018 debarment. He also claimed he notified his supervisor of his 2019 PSI and substance thereof in January 2019. Applicant further claimed he notified his supervisor of the ending of his debarment in October 2020 and later informed him of a notification in July 2021 for follow-up questions regarding his PSI. And, he claimed he notified his supervisor in October 2021 of his receipt of the SOR regarding his eligibility for holding a security clearance.

### **Findings of Fact**

Applicant is a 53-year-old civilian of a defense contractor who seeks a security clearance. Admitted facts are adopted and incorporated by reference. Additional findings of fact follow.

### **Background**

Applicant married in June 1992 and has three children from this marriage. GE 1) Applicant earned a high school diploma in August 1988. He attended college classes between August 2015 and August 2016, but did not earn a a degree or diploma. (GEs 1 and 5; Tr. 13) Applicant enlisted in his state's Air National Guard (ANG) in February 1989 and served 21 years in his ANG's Inactive Reserve. (GE 1) Following his

retirement from his state's ANG in 2010, he continued to work in his Guard unit's civilian offices for an additional two years. (GEs 1 and 5; Tr. 13)

Since October 2015, Applicant has been employed by his current contractor as a crew chief in the field of aircraft maintenance. (GEs 1 and 5) Between March 2014 and October 2015, he worked for a copper mining company as a diagnostic mechanic. (GE 1) He worked for a volunteer fire department in his local community between October 2002 and January 2015. Contemporaneously, he operated his own small engine repair shop and retail equipment dealership between May 2012 and March 2014. (GEs 1 and 5; Tr. 24) Applicant and his wife owned separate companies between 2008 and 2011, and both were dissolved in 2011. (Tr. 23) Applicant has held a security clearance between February 1990 and March 2012. (GE 1; Tr. 22, 32)

### **Applicant's debarment history**

Between 2008 and 2011, Applicant was president and owner of a government subcontractor for a prime contractor (A Company) of the Government. In 2013, he submitted two bids to the prime contractor of the Government (A Company): one from his company and another from his wife's wholly-owned company. Presumably, he was authorized by his wife to submit a bid on behalf of her company. Following his submissions of the two bids, he was investigated by the FBI about his finances. (Tr. 25-27) Later in 2013, he was interviewed by the FBI again about his finances, (GE 5; Tr. 26-27, 36)

In January 2018, Applicant received a debarment package following his return from overseas civilian deployment. (GE 2; Tr. 30) In the cover letter, Applicant was notified by the Army's suspension and debarment official of the official's debarment of Applicant and his company (effective January 18, 2018 and continuing until October 19, 2020) from conducting business with the Government as representatives or agents of other contactors and from acting as individual sureties. (GE 2) Applicant's debarment also served to exclude him from non-procurement transactions with the Government, such as grants, loans, loan guarantees, subsidies, insurance, payments for specified use, and donation agreements. (GEs 2-3)

The Government's debarment of Applicant and his company from conducting business for the specified two-year period was based on the recited material facts in the debarment official's January 2018 debarment cover letter to Applicant. (GE 2) Summarized, Applicant and his company were debarred for having prepared and submitted two bids to the Army's prime contractor as a subcontractor in 2013 (one from Applicant's company and another from his wife's company) that he knew, or should have known, were not competitive. (GE 2)

By a preponderance of the evidence considered, the Army's debarment official found that Applicant submitted the two bids to the Army's prime contractor to make it appear as though his awarded subcontract was competitively awarded. (GE 2) Such actions of Applicant in the judgment of the debarment official amounted to actions

undertaken in restraint of trade, in violation of 15 U.S.C. § 1 that constituted misconduct warranting debarment pursuant to FAR 9.407-29c). (GE 2)

Based on the Army debarment official's findings and conclusions, the official determined that the debarment of Applicant and his company was in the public interest and for the Government's protection. (GE 2) By his decision, Applicant's debarment became effective January 18, 2018 and continued through October 19, 2020. (GE 2) The administrative record does not contain any administrative appeal of Applicant's debarment or actions taken by any appellate body considering the issues raised in Applicant's official debarment.

Further investigations of the anti-competitive bids submitted by Applicant and his company to the Army contractor confirmed that the prime contractor's overseeing Applicant's bids knew that both estimates came from Applicant and provided false statements to investigators during the course of the combined Department of Justice (DoJ) and DoD investigation of the submitted bids from Applicant. (GE 4) Applicant never appealed the debarment decision issued by the Army's debarment official in January 2018. (Tr. 28)

### **Debarment employer notifications**

By letter of September 23, 2021, Applicant's employer informed DOHA case investigators that its records do not contain any official communications regarding debarment or potential debarment. (GE 6) Based on Applicant's employer's records, Applicant has continued to work on government contracts since the beginning of his employment in September 2017 without any noted breaks in servicing contracts assigned to him. (GE 6)

Applicant assured he did not know of his debarment until he received a heads-up telephonic notice from his wife in September 2017 of the received January 18, 2018 notice of debarment from the Army's debarment official. (Tr. 28-29) Returning from civilian deployment in Iraq on behalf of his employer in the January 15, 2018 timeframe, he reviewed the debarment notice before returning to Iraq in February 2019. (Tr. 29-30) Upon receiving and personally reviewing the debarment notice, Applicant informed his site lead of the notice, but never provided any notification to higher ranking officials in his employer's chain of command. (GE 5 and AE C; Tr. 30-32)

Returning to Iraq in February 2019 to continue working his employer's assigned duties, Applicant never disclosed his debarment to anyone in the employer's hierarchy beyond his site lead. (GE 5; Tr. 32) And, there is nothing documented in the record to indicate his site lead ever communicated Applicant's debarment to officials in the employer's hierarchy responsible for handling debarment decisions. (AE C) Based on Applicant's testimony and his supporting endorsements from his site leaders, Applicant is credited with notifying his site leader of his debarment in January 2018, and with keeping his site leader informed of ongoing developments throughout his debarment process.

In a convened personal subject interview (PSI) with an investigator from the Office of Personnel Management (OPM) in January 2019, Applicant was asked repeatedly if there were any issues arising out of his actions with his self-employed company between 2010 and 2013 that would have led to his debarment in January 2018. In each instance, Applicant told the investigator that he had no knowledge of any issues could impact his employment. (GE 5) In follow-up questioning about issues arising from Applicant's work with the Army's prime contractor between 2010 and 2013, Applicant acknowledged being interviewed by both the FBI and IRS about the prime contractor's activities and what his company did for the contractor. (GE 5) Told of investigation disclosures of debarment actions taken against the prime contractor (A company), Applicant acknowledged his awareness of the prime contractor's being under investigation without offering any further information about the issue. (GE 5) No known criminal charges were ever filed against Applicant as the result of his actions that lead to his DoD debarment.

Considering all of the facts and circumstances in the record, Applicant inferentially was well aware of his facing likely debarment actions from the Army long before official actions were taken against him by the Army's debarment official in January 2018 and failed to disclose his risk exposure to responsible company officials following his employment in 2017. By electing to shield his knowledge of his culpable actions he placed his employer at risk of being implicated in the bidding violations that ultimately led to his debarment in 2018.

## **Endorsements**

Applicant is well regarded by his former direct supervisor and site leads (both current and former). (AEs C-D) Applicant's former direct supervisor averred that he became with Applicant when he and Applicant were co-workers working in a classified environment in Iraq in 2019. (AE D) From this working experience with Applicant, he found Applicant to be consistently trustworthy and reliable. Between 2020 and 2021, he served as Applicant's direct supervisor and reiterated his confidence in Applicant's work ethic and trustworthiness. (AE D) This former supervisor had only limited knowledge of Applicant's debarment issues and could offer no comments on the debarment letter that surfaced as an issue in Applicant's security clearance review. (AE D)

Applicant's site leads both affirmed their awareness of Applicant's security clearance issues. (AE C) Each assured that Applicant made it very clear to them that he could not access, view, or be briefed on any classified information while he was subject to continuing debarment restrictions. (AE C) Applicant assured each of them he was very careful in ensuring that he maintained compliance with his imposed debarment restrictions. (As C)

Expounding on their assessments of Applicant's character, both site leads stressed Applicant's honesty and composure in high-stress situations. Together, the site leads (past and present) described Applicant as honest, trustworthy, loyal, dependable,

and stable in their professional relationships with him over the course of their years of working together. (AE C)

## **Policies**

By virtue of the jurisprudential principles recognized by the U.S. Supreme Court in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), “no one has a ‘right’ to a security clearance.” 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. Eligibility for access to classified information may only be granted “upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The AGs list guidelines to be considered by judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information.

These guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and all of the conditions that could mitigate security concerns, if any. These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. Although, the guidelines do not require judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision.

In addition to the relevant AGs, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial, commonsense decision based on a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant’s life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant’s conduct, the relevant guidelines are to be considered together with the following ¶ 2(d) factors: (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 of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent herein:

### **Personal Conduct**

*The Concern:* Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulation can raise questions about an individual's reliability, and 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 ¶ 15.

### **Burdens of Proof**

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his [or her] security

clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Security concerns are raised over Applicant’s 2018 debarment from federal contracting in January 2018, and his ensuing failures to continue working his employer’s federal contracts without disclosing his debarment and continuing work on his employer’s government contracts while subject to the Government’s debarment restrictions and ongoing FBI and DoD investigations. These actions by Applicant warrant the application of one of the disqualifying conditions (DC) of the personal conduct guideline: DC ¶ 16(c), “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any single guideline, but which, when considered together 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.”

Applicant’s admitted debarment requires no independent proof to substantiate them. See Directive 5220.6 at E3.1.1.14; *McCormick on Evidence* § 262 (6<sup>th</sup> ed. 2006). His admitted debarment is fully documented and creates judgment issues as well over the management of his bid submissions to prime contractors contracting with the Government. See ISCR Case No. 03-01059 (App. Bd. Sept. 24, 2004).

Honesty, trustworthiness, reliability, and good judgment in a person cleared to protect classified information is required precisely to inspire trust and confidence in the holder of a security clearance that entitles the person to access classified information. In Applicant’s case, his two-year debarment precluded him from conducting any business with the Government for the duration of his debarment. Without advising senior officials of his employer of his debarment and restrictions on conducting business on his employer’s federal contracts, he placed his employer at considerable risk to Government oversight and potential debarment penalties as well.

Considering all of the exhibits and testimony in this case, and according weight to Applicant’s expressed remorse, and explanations of his judgment mistakes, none of the mitigating conditions covered by Guideline E have specific application to the facts of Applicant’s case and are not available to Applicant based on the developed facts in the record..

### **Whole-person assessment**

Whole-person assessment of Applicant’s clearance eligibility requires consideration of whether his judgment lapses and candor lapses associated with his 2018 Army debarment are fully compatible with minimum standards for holding a



clearance. Taking into account Applicant's credited defense contributions, his meritorious work with his employer over the past four years is not enough to surmount the adverse consequences associated with his 2018 debarment. Compounding his anti-competitive actions that led to his debarment are the added concerns associated with his ensuing failures to properly notify (a) senior officials with his employer of his debarment and accompanying contracting restrictions and (b) investigating officials conducting his PSI of material information surrounding the debarments of himself and his company's prime contractor known to him at the time. These collective Government concerns prevent Applicant from establishing the requisite trust and reliability levels necessary to meet the minimum DoD standards required for holding a security clearance.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. I conclude personal conduct concerns are not mitigated. Eligibility for access to classified information 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:

Guideline E (PERSONAL CONDUCT):	AGAINST APPLICANT
Subparagraphs 1.a-1.c:	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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Roger C. Wesley  
Administrative Judge