



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



In the matter of:)
)
) ISCR Case No. 20-01776
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Phillip Stackhouse, Esq.

August 18, 2023

Decision

TUIDER, Robert, Administrative Judge:

Applicant failed to mitigate security concerns regarding Guideline E (personal conduct). Clearance is denied.

Statement of the Case

On April 5, 2018, Applicant submitted a Questionnaire for National Security Positions (SF-86). On March 31, 2022, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E. The SOR detailed reasons why the DOD CAF was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On August 21, 2022, Applicant submitted his Answer to the SOR through his counsel. He further supplemented that Answer through counsel by letter dated February 1, 2023.

On March 27, 2023, the Defense Office of Hearings and Appeals (DOHA) assigned the case to another administrative judge; and on April 18, 2023, DOHA reassigned the case to me. On April 27, 2023, DOHA issued a notice of hearing

scheduling the hearing for May 24, 2023. The hearing was convened as scheduled. Department Counsel submitted Government Exhibits (GE) 1 through 5, which were received into evidence. Applicant testified and did not submit any exhibits. [Note – Applicant submitted four character letters, one personal statement, and family photographs with his SOR Answer.] On June 5, 2023, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 38-year-old engineer technician employed by a defense contractor since 2021. (Tr. 11-12, 35-37; GE 1) He seeks a Secret security clearance, which is a requirement of his continued employment. (Tr. 12) Applicant was previously denied a security clearance in 2017, which was reported in his June 26, 2019 Office of Personnel Management (OPM) interview. (GE 2, p. 6)

Applicant received his high school diploma in May 2002. (Tr. 12-13) He married in February 2019. [Note – Applicant testified at his hearing that he married in 2021. However, during his OPM interview, he reported his marriage took place in 2019. (GE 2, p. 10)] Applicant's wife works as a recruiter for his current employer. Applicant stated that he has four children, ages 21, 14, 6, and 2. [Presumably, the two oldest children are stepdaughters.] He stated that his children are all dependent on him and his wife for financial support. (Tr. 13-14; GE 3, p. 20)

Personal Conduct

SOR ¶ 1.a alleged that Applicant was fired from his former employment for misconduct and misuse of company property in about August 2015; after a company investigation revealed that he abused his company-issued mobile device during non-working hours, engaged in personal activities during work hours, and falsified his time sheet by staying clocked in at the jobsite, when GPS locator verification proved he was at his residence or other nonwork-related locations. Applicant is not eligible for rehire.

Applicant denied this allegation. He disputes the claim of his former employer that he was fired for misconduct. Applicant explained that in 2015 he learned that, as a subcontractor, he was not paid the prevailing wage that employees of the prime contractor were being paid. Rather than seeking legal advice, Applicant stated that he brought this discrepancy to the attention of his employer. He continued to work his 40 hours with the understanding that he would be made whole. (SOR Answer) Applicant claims that he was "let go" versus being fired as a result of complaining to his employer about the wage discrepancy. (SOR Answer; Tr. 24-26)

Applicant further stated, based on his information and belief, that his former employer had not published employee standard operating procedures, a manual, or rules. He was supervised by the prime contractor and his use of the employer-issued cell phone was very informal. He claimed that he received no counseling or reprimands

and was never told he was fired. Applicant added that he did not commit any crimes, let alone drug crimes, or seeing women on Craigslist in light of the fact that he was recently married with his wife being pregnant. [Note – as described *supra*, he married in 2019 and he was fired in 2015.] Applicant added that his former employer had every reason to disparage his character after he left the company because if he reported this pay discrepancy it would undermine any claim his employer might make of being unaware of the pay discrepancy, and his employer's state taxes would not increase if Applicant were fired for cause. (SOR Answer) The following contains references to Applicant's SOR Answer as well as references from the transcript.

Applicant claims he "did not get the impression he was fired for misconduct or abuse of company property." He stated that he was neither counseled nor written up for misuse of company property nor for any other misconduct. Applicant remembers being told that he was being "let go" in part because his employer was having financial difficulty and could not afford to pay the prevailing wage to everyone. Applicant's employer gave him a check for "around \$3,000," which he did not agree with and walked out, not the other way around. He claimed that if he had been fired for cause, his employer would not have given him a check for the amount they alleged was the pay difference. (SOR Answer; Tr. 30-35, 38-41)

A letter dated July 19, 2016, from Applicant's former employer to the state employment development department (EDD) signed by their vice president states:

This is in response to the claim filed by [Applicant] stating (that) his termination was due to, "Employer OK for me to work through my break and leave 20 min early and clock out later but fired me for this." [Applicant] was terminated from our company for misconduct of company property by using his company issued mobile device to engage in personal activities during work hours, abuse of mobile device during non-working hours and falsifying time sheet records by staying clocked in at the jobsite when GPS locator verification proved he was at his residence or other non-work related location. As a field technician he is working at different jobsites each week. He does not come into the office to clock in for his shift, but instead has a company issued mobile device with our time tracking platform installed. This is how he clocks in and out for his shift and lunch period. At no point in his employment with our company that it has been approved to "skip" or work through such lunch or break periods.

Attached to this letter are a few incidents of proof we found of his activities of misconduct during work hours and misuse of his company issued mobile device, as well as location and time stamps of when he stated he was at work but in fact left hours prior. Unfortunately, we have over 500 pages of proof showing misconduct. (GE 4)

Applicant stated that he did not tell the EDD that he had been fired. (Tr. 50-52) He found out that EDD denied his application for unemployment benefits when he

contacted them by telephone. (Tr. 51-52) Applicant maintained that he was allowed, and it was customary to clock out early if he worked through his lunch hour. (Tr. 53-54)

Applicant claimed that he was authorized to use the company-issued mobile phone during non-working hours. He further claimed that all employees used their company-issued mobile phones for personal use during and after working hours (SOR Answer; Tr. 27-29)

As to “personal activities” during working hours, his employer referred to text messages between Applicant and female friends in a different state. Some of those texts were during working hours, but his employer alleged these were Craigslist girls he met for “interludes.” Applicant asserts this allegation is “unequivocally false and denied.” He concedes he engaged in personal conduct during working hours but denied that it ever interrupted his commitment to his job and that it was minor and likely during breaks. (SOR Answer; Tr. 28)

Applicant acknowledged that his employer provided employees with GPS capabilities on their cell phones to help track them on the jobsite. He added “that wasn’t up front of what it was for” With company-issued cell phones, employees were able to clock in and out of work. Employees would typically report directly to the jobsite. (Tr. 41-43)

Applicant testified that it would not surprise him that his former employer’s vice president told the OPM investigator that when he turned his company cell phone in, they discovered ads for Craigslist and Backpage. This would not surprise him because at the time he was dating and that was nothing to lie about. (Tr. 43) When asked whether it would surprise him that the vice president told the OPM investigator that they were able to see that Applicant was meeting up with these individuals at his residence during the workday, Applicant replied, “I would say that’s B.S.” (Tr. 44-45) Applicant testified that he thought the vice president’s reporting his Craigslist activity during working hours to the OPM investigator was “[a] hundred percent” untruthful. (Tr. 44) Applicant stated his interaction with the company vice president was “very minimal.” (Tr. 44) Applicant does not recall being shown proof of his Craigslist meetings at home during working hours when he was fired by his employer, stating, “At the time, it was a little heated at that time.” (Tr. 44-46) He does not remember the vice president walking him to the door on the day he was fired. (Tr. 46)

When asked whether he was told he was being let go, Applicant responded, “Yeah. And they literally tossed me a check in an envelope and said, here, we’re letting you go.” (Tr. 47) When queried further after acknowledging the foregoing and asked how he was not under the impression he was not being fired that day, Applicant responded, “I mean, I’ve never been fired before, but usually – I mean, when someone hands you a check and says, we’re letting you go – I mean now that maybe I look back onto it and as I’m older, yeah. But then, no. I mean I didn’t take it as being fired. I mean, I’ve never been in that situation where someone hands you money and said, here. Here’s you know, three or five grand. We’re letting you go. You have our reasons. You

have your reasons. No, I didn't take it as that, you know. Then, I didn't. No." (Tr. 48) Applicant acknowledged the check he received was his final paycheck. (Tr. 48)

As to falsifying time sheets, Applicant claimed that he was authorized to remain clocked-in if the deviation from work was minor or not significant enough in time or manner to require clocking in or out. Applicant stated that he was authorized to work off-site, and when he was off-site, he was working. He claimed that his employer told employees to put 7.5 hours into the system unless they were directed otherwise. (SOR Answer: Tr. 31-32)

As to the allegation that Applicant exchanged marijuana in the workplace, he claims to be "taken aback and shocked" by this allegation. He "wholeheartedly denied doing so." As marijuana was illegal in his state of residence in 2016, Applicant opines that this allegation undercuts his employer's allegation that they did not report it and kept him employed. (SOR Answer; Tr. 29-30) When questioned during his hearing about reports of him exchanging marijuana on the jobsite, Applicant stated that he had no idea of how such reports could be made. It would surprise him to learn that his employer's vice president overheard him telling the receptionist that he liked to smoke marijuana. Applicant stated that if the vice president told the OPM investigator that, she would be lying. (Tr. 49-50)

SOR ¶ 1.b alleged that when Applicant completed his April 5, 2018 SF-86, he falsified his answer to Section 13C – Employment Record by answering "no" when asked whether in the last seven years had he been fired from a job. Applicant denied this allegation. (SOR Answer)

SOR ¶ 1.c alleged that when Applicant completed his April 5, 2018 SF-86, he falsified his answer to Section 13A – Employment Activities # Name of Employer Reason for Leaving Question for this employment by answering "no" when asked whether in the last seven years he had received a written warning, been officially reprimanded, suspended or disciplined for misconduct in the workplace, such as a violation of security policy. Applicant denied this allegation. (SOR Answer)

With regard to these falsification allegations, Applicant stated that unfortunately he rushed to complete his SF-86 because he was "on the clock" at his employer and hastily responded thinking his unique circumstances did not fit neatly into the parameters of the question. He conceded that he should have asked someone and as a result answered no. Applicant testified that he thought he was being truthful when he stated that he had never been fired. (SOR Answer; Tr. 37-40)

Character Evidence

Applicant submitted four work-related character letters from individuals who lauded his performance and supported him being granted a clearance. He also submitted a personal statement that provided biographical information and family photographs. (SOR Answer)

Policies

This case is adjudicated 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), which became effective on June 8, 2017.

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 to be 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, administrative judges apply the guidelines in conjunction with the factors listed in AG ¶ 2 describing 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 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."

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 the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain a favorable clearance 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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that adverse 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

Personal Conduct

AG ¶ 15 explains why personal conduct may be 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.

AG ¶ 16 includes disqualifying conditions that could raise a security concern and may be disqualifying in this case:

(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;

(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; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: (1) untrustworthy or unreliable behavior . . . ; (2) any . . . inappropriate behavior; and (3) a pattern of dishonesty or rule violations.

The SOR alleges that Applicant engaged in a series of misconduct in 2015 that led to him being terminated, i.e. being fired, and later falsified his 2018 SF-86 regarding him being fired. Having reviewed the case record and Applicant’s explanations

surrounding his being terminated, as well as observing him during his testimony, I did not find him to be credible. On one hand he acknowledged being “let go” and given severance pay but does not acknowledge being “fired.” Applicant’s grasp of the English language and situational awareness is such that it was implausible for him to conclude that being “let go” was anything other than being fired for misconduct. Furthermore, to accept Applicant’s versions of the facts, his employer would have had to have gone through great lengths to create a false record as justification for firing him for misconduct. This misconduct was later reported to the state EDD and OPM.

When Applicant completed his 2018 SF-86, he claimed that he was on the clock and rushed. He had prior experience completing an SF-86 when he was denied a clearance in 2017. Applicant persisted in perpetuating the false narrative surrounding his 2015 termination throughout the entire security clearance application process to include his OPM interview, SOR response, and his hearing testimony. AG ¶¶ 16(a), 16(b), and 16(c) are established, as well as the general concern discussed in AG ¶ 15. As noted, I find Applicant’s explanations are not credible with regard to the allegations he denied. Accordingly, I further find that SOR ¶¶ 1.a, 1.b, and 1.c are established.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), 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, [App. A] ¶ 2(b).

AG ¶ 17 lists conditions that could mitigate security concerns:

- (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;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

The Appeal Board has explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a *prima facie* case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). In August 2015, Applicant was terminated from his employment for misconduct. His misconduct is described in further detail *supra*. In April 2018, Applicant responded to the questions on his SF-86 about whether he had ever been fired in the last seven years, and he claimed that he had not been fired. He deliberately failed to disclose a truthful account, i.e. that he was fired, and he failed to list any of the circumstances surrounding his being fired. He provided false information when he verified the accuracy of the false information he provided on his April 2018 SF-86, and again during his 2019 OPM interview.

The SOR does not allege that Applicant failed to provide accurate information during his 2019 OPM interview, when he confirmed information in his SF-86 that he was not fired or surrounding circumstances about being fired. Applicant's provision of false information during his OPM interview will not be considered for disqualification

purposes; however, it will be considered for the five purposes cited, *infra*. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). See also ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014)). The non-SOR-alleged falsification will not be considered except for the five purposes listed above.

A false statement during the security clearance process increases the risk that an applicant will not provide accurate information about other issues of security concern or rehabilitative efforts. See ISCR Case No. 22-00657 at 3-5 (App. Bd. Apr. 18, 2023) (discussing impact of false statements on SF-86s in assessment of credibility of applicant's statements about current and future marijuana use). Applicant knowingly and intentionally falsified his SF-86 with intent to deceive. None of the mitigating conditions were established. Personal conduct security concerns are not mitigated.

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), "[t]he ultimate determination" of whether to grant or continue national security eligibility "must be an overall common sense judgment based upon careful consideration" of the guidelines and the whole-person concept. My comments under Guideline E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 38-year-old engineer technician seeking a Secret security clearance. He had previously applied for a clearance in 2017, which was denied. He is a high school graduate. Applicant produced favorable employment evidence since he was fired in 2015, has married, and has four children for whom he provides financial support. It appears that he has made considerable headway in advancing his career since 2015.

The evidence against grant of a security clearance is more persuasive at this time. In August 2015, Applicant was fired for misconduct. In 2018, he completed and falsified an SF-86 denying that he was fired in 2015 and failed to describe the reasons for the firing. He persisted in that false narrative during his 2019 OPM interview, in his 2023 SOR Answer, and during his hearing testimony.

An honest and candid self-report of security-relevant personal information is an important indication that, if granted security clearance eligibility, the individual would disclose any threats to national security, even if the disclosure involves an issue that might damage his or her own career or personal reputation.

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. "[A] favorable clearance decision means that the record discloses no basis for doubt about an applicant's eligibility for access to classified information." ISCR Case No. 18-02085 at 7 (App. Bd. Jan. 3, 2020) (citing ISCR Case No. 12-00270 at 3 (App. Bd. Jan. 17, 2014)).

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, the AGs, and the Appeal Board's jurisprudence to the facts and circumstances in the context of the whole person. Applicant failed to mitigate personal conduct security concerns.

Formal Findings

The formal findings on the allegations set forth in the SOR are as follows:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a – 1.c:	Against Applicant

Conclusion

In light of all of the circumstances in this case, it is not clearly consistent with the interests of national security to grant or continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

Robert Tuidier
Administrative Judge