



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



In the matter of: )  
)  
) ISCR Case No. 22-02543  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Brian Farrell, Esq., Department Counsel  
For Applicant: *Pro se*

11/15/2023

**Decision**

HARVEY, Mark, Administrative Judge:

Guideline E (personal conduct) security concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 12, 2021, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On March 29, 2023, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; 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. (Hearing Exhibit (HE) 2)

The SOR detailed reasons why the DCSA CAS did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for Applicant and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline E. (HE 2) On

April 28, 2023, Applicant provided her response to the SOR and requested a hearing. (HE 3) On June 28, 2023, Department Counsel was ready to proceed.

On July 11, 2023, Applicant's case was assigned to me. On July 26, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for September 7, 2023. (HE 1) The hearing was held as scheduled.

Department Counsel offered three exhibits into evidence, and Applicant did not offer any exhibits into evidence at her hearing. (Transcript (Tr.) 10-11, 14-15; GE 1-GE 3) There were no objections, and all proffered exhibits were admitted into evidence. (Tr. 15) On September 15, 2023, DOHA received a transcript of the hearing. No post-hearing documents were received.

Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits and transcript.

### **Findings of Fact**

In Applicant's SOR response, she admitted or denied in whole or part some or all of the SOR allegations. (HE 3) She also provided extenuating and mitigating information. (*Id.*) As to the allegations of falsification of her SCA, she said when she completed her SCA she believed she could explain her answers to the investigator. (SOR response) She was honest with the investigator who conducted the follow-up interview. (*Id.*) Her admissions are accepted as findings of fact.

Applicant is a 44-year-old semi-tractor trailer driver, and she has held this employment with her current employer for two years. (Tr. 6, 8) The week before her hearing she received a safety award from her current employer. (Tr. 46) In 1997, she graduated from high school, and in 2007, she received an associate degree in human services. (Tr. 6-7) In 2010, she received bachelor's degrees in criminology and psychology. (Tr. 7) She has not served in the military. (Tr. 7) She was married from 1999 to 2001, and in 2010, she was married, and she was divorced that same year. (Tr. 8) She said her first marriage was invalid because he was married to someone else when they married. (Tr. 8) Her three children are ages 21, 22, and 27. (Tr. 8) She has had a relationship with her fiancée, who is also a semi-tractor trailer driver, for about six years. (Tr. 9)

Applicant said: She has ensured that sensitive information is safeguarded throughout her employment history. (Tr. 47) She was honest about admitting "the lies that [she] put" on her SCA. (Tr. 47) Her mistakes as indicated on the SOR do not define her as a person. (Tr. 47) She promised to carry out her assigned duties. (Tr. 47-48) Her difficulties with her employers are not recent, and they do not establish a pattern. (Tr. 49) She will carefully and accurately fill out her SCAs in the future. (Tr. 49)

## **Personal Conduct**

### **Employment with Employer A**

SOR ¶ 1.a alleges Applicant received written warnings from Employer A in 2015 and 2016 for failing to provide documentation for employee benefits and failing to work her assigned shift. SOR ¶ 1.b alleges she was terminated from her employment by Employer A for dating a parolee in violation of prison policy.

In March of 2014, Applicant started working for Employer A, a correctional facility. (Tr. 18) She assisted inmates by providing counseling, assigning them to classes, and teaching classes. (Tr. 19) She knew she was not supposed to date the inmates, and at some point, she learned the dating prohibition included persons on parole because they were being supervised by her employer. (Tr. 20-21) She was unaware that the person she was dating was a former inmate. (Tr. 22) She knew him when she was in high school, and she knew he had recently completed an 18-month drug-rehabilitation program. (Tr. 22) At most, he had six months left on his parole. (Tr. 23) She was terminated from her employment with Employer A for dating a person who was on parole. (Tr. 25) She is not currently involved with the person. (Tr. 24)

In her SOR response for SOR ¶ 1.a, Applicant said her employer's warnings were over seven years ago, and "considered verbal warnings." However, they were noted in her personnel file. (SOR response) For SOR ¶ 1.b, the correct termination date for her employment with Employer A was April 11, 2016. (*Id.*) At the time of her relationship with a parolee, she was unaware that it violated policy. (*Id.*) She knew the person from high school, and he was not part of her caseload. (*Id.*)

### **Employer B**

SOR ¶ 1.c alleges Applicant received written warnings from Employer B, in January, June, and December 2019, and February 2020 for issues that included lack of communication, not checking or responding to emails, not clocking in and out, not meeting productivity goals, and/or not meeting with clients. SOR ¶ 1.d alleges Employer B terminated her employment in April 2020 for unsatisfactory job performance and absence without permission of supervisory staff.

Employer B employed Applicant from 2018 to 2021. (Tr. 34) She received multiple warnings from Employer B, and she was placed on probation. (Tr. 35) She said the warnings contained "made up stuff." (Tr. 35) She went on an out-of-state trip on a weekend, and she did not inform Employer B of her travel plans. (Tr. 36) Employer B terminated her for making the trip without providing advance notification. (Tr. 37)

In her SOR response for SOR ¶ 1.c Applicant admitted that she "received reprimands that due to [her] understanding were not congruent with company policy." (SOR response) For SOR ¶ 1.d, she admitted that she was separated from her employment with Employer B in April 2020. (*Id.*)

## **Alleged Falsifications of June 12, 2021 SCA**

SOR ¶¶ 1.e through 1.j allege Applicant deliberately falsified material facts on her June 12, 2021 SCA in her response to the questions in Section 13A, Employment Activities:

SOR ¶¶ 1.e and 1.f asked in the last seven years, in connection with her employment with Employer B, whether she had: (1) been fired; (2) quit after being told she would be fired; (3) left by mutual agreement following charges or allegations of misconduct; or (4) left by mutual agreement following notice of unsatisfactory performance? She answered “no,” and said on her SCA that she left due to downsizing. She deliberately failed to disclose that she was terminated for the reason set forth in SOR ¶ 1.d, *supra*.

In her SOR response for SOR ¶ 1.e, Applicant said she “was bullied by [an] incoming supervisor.” (SOR response) For SOR ¶ 1.f, she said she “mistakenly believed that the official record was revised after [an] unemployment ruling” which supported her from the state unemployment office. (*Id.*)

At her hearing for SOR ¶ 1.f, Applicant said she provided an incorrect answer on her SCA, and her answer on her SCA was false. (Tr. 42) She said:

I thought that I would be able to explain it if I needed to further explain it better if that happened. . . I also thought since my unemployment which I submitted had been approved and they had like, I sent them everything that I had and they did their investigation and talked to [Employer B] and agreed that it was a wrongful termination and approved it. (Tr. 43)

On July 20, 2020, the state unemployment agency wrote “The claimant was not discharged for just cause. Insufficient information has been provided to establish that the employer had just cause to discharge the claimant.” (Tr. 43; SOR response) She agreed that she was still supposed to disclose the termination from her employment with Employer B on her SCA. (Tr. 43-44)

SOR ¶¶ 1.g and 1.j asked in the last seven years, in connection with Applicant’s employment with Employers A and B, whether she had received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy? She answered “no,” and did not disclose her written warnings as set forth in SOR ¶¶ 1.a and 1.c, *supra*.

In her August 10, 2021 Office of Personnel Management (OPM) personal subject interview, Applicant said she did not list her disciplinary actions by Employer A on her SCA because she felt embarrassed about the situation, and she preferred to explain it in person, and she did not disclose her disciplinary actions by Employer B because they “were fraudulent in nature.” (GE 2 at 6, 7) At her hearing, she clarified that she did not tell the OPM investigator that her reason for not disclosing information on her SCAs was due

to embarrassment; however, she may have said something about being embarrassed in relation to her employment with Employers A and B.

In her SOR response for SOR ¶ 1.g, Applicant denied that she violated any security policy for any employer. (SOR response) She said the “unemployment office ruled [she] was not terminated for just cause.” (*Id.*) For SOR ¶ 1.j, she said “I affirm this employment activity is over 7 years old.” (*Id.*)

SOR ¶¶ 1.h and 1.i asked in the last seven years, in connection with her employment with Employer A, whether she had: (1) been fired; (2) quit after being told she would be fired; (3) left by mutual agreement following charges or allegations of misconduct; or (4) left by mutual agreement following notice of unsatisfactory performance? She said she left due to downsizing and deliberately failed to disclose that she was terminated for the reason set forth in SOR ¶ 1.b, *supra*.

In her SOR response for SOR ¶ 1.h, Applicant said:

This employment was over 7 years ago and as such has aged out of importance, respectively. Request that this information be deemed moot and removed from this case. I affirm that I poorly chose to answer in this manner and was very candid with the investigator. (SOR response)

At her hearing, Applicant said she answered “no,” and she explained her answer as follows:

[b]ecause I thought that was the only way I would get to explain it, which is not what I should have done. . . I felt like I needed to explain it other than just a piece of paper. Also, I didn't know, it was really bad . . . Because it made people think that I'm not trustworthy.” (Tr. 26)

Applicant admitted that she put the statement that she left due to downsizing on her SCA, which was not the real reason she left her employment with Employers A and B. (Tr. 30-31, 33-34)

In her SOR response for SOR ¶ 1.j, Applicant said “I affirm this employment activity is now over 7 years old.” (SOR response) At her hearing, she said she believed she made a good faith effort to correct the concealment when she told the OPM investigator on August 10, 2021, about the incorrect answers on her SCA. (Tr. 16-17, 32-33)

## **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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. The President

has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865.

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 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. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI have established for issuing a clearance.

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 (4th Cir. 1994). "The Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's security eligibility. Direct or objective evidence of nexus is not required." ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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

### 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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. . . .

AG ¶ 16 provides one personal conduct condition that could raise a security concern and may be disqualifying in relation to her provision of inaccurate information on her SCA:

(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.

Applicant did not disclose on her June 12, 2021 SCA that she received written warnings or reprimands and she was terminated from employment with Employers A and B. The questions about termination of employment and receipt of reprimands or warnings are straight forward and easy to understand. She knew her answers were false at the time she provided them. She provided a false reason for leaving the employment of Employers A and B, that is, she falsely said she left due to downsizing.

"Applicant's statements about [her] intent and state of mind when [she] executed [her] Security Clearance Application were relevant evidence, but they [are] not binding on the Administrative Judge." ISCR Case No. 04-09488 at 2 (App. Bd. Nov. 29, 2006) (citation omitted). In ADP Case No. 17-03932 at 3 (App. Bd. Feb. 14, 2019), the Appeal Board recognized the importance of circumstantial evidence of intent in falsification cases:

When evaluating the deliberate nature of an alleged falsification, a Judge should consider the applicant's *mens rea* in light of the entirety of the record evidence. See, e.g., ADP Case No. 15-07979 at 5 (App. Bd. May 30, 2017). As a practical matter, a finding regarding an applicant's intent or state of mind may not always be based on an applicant's statements, but rather may rely on circumstantial evidence. *Id.*

Applicant elected not to disclose negative information on her SCA. The record evidence establishes AG ¶ 16(a) in relation to SOR ¶¶ 1.e through 1.j.

AG ¶ 16 has two disqualifying conditions that are relevant in this case to Applicant's warnings or reprimands and terminations from her employment with Employers A and B. AG ¶¶ 16(d)(3) and 16(e)(1) read:

(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 person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . . .

AG ¶¶ 16(d)(3) and 16(e)(1) apply to Applicant's reprimands or warnings and terminations from employment by Employer A. AG ¶¶ 16(d)(3) and 16(e)(1) apply to her reprimands or warnings during her employment by Employer B, but not to her termination from employment with Employer B.

None of the disqualifying conditions apply to Employer B's termination of Applicant's employment. On July 20, 2020, the state unemployment agency wrote, "The claimant was not discharged for just cause. Insufficient information has been provided to establish that the employer had just cause to discharge the claimant." (SOR response) The allegation that her termination from employment with Employer B was due to her unsatisfactory performance is refuted.

AG ¶ 17 provides conditions that could mitigate security concerns in this case:

(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.

In ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013), the DOHA Appeal Board 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).

Applicant's reprimands or warnings, and her termination from employment from Employer A in June 2016 for dating a parolee constitute rule violations. Those errors have not recurred for more than seven years. She does not work with inmates or parolees. She has a fiancée. The judgment errors occurred "under such unique circumstances that [they are] unlikely to recur and [do] not cast doubt on [her] reliability, trustworthiness, or good judgment." AG ¶ 17(c) applies to the conduct in SOR ¶¶ 1.a and 1.b, and they are mitigated.

Applicant's reprimands or warnings during her employment with Employer B resulted from a personality conflict with her supervisor. The offenses are minor and "happened under such unique circumstances that [they are] unlikely to recur and [do] not cast doubt on [her] reliability, trustworthiness, or good judgment." AG ¶ 17(c) applies to the conduct in SOR ¶ 1.c, and it is mitigated.

On June 12, 2021, Applicant completed her SCA, and on August 10, 2021, she disclosed the information in SOR ¶¶ 1.a through 1.d to an OPM investigator. Applicant believes that waiting 58 days to report accurate information on her SCA is sufficiently prompt to mitigate security concerns under AG ¶ 17(a). I disagree. Her false statements on her SCA continue to cast doubt on her reliability, trustworthiness, and good judgment. 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(a):

- (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 have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 44-year-old semi-tractor trailer driver, and she has held this employment with her current employer for two years. The week before her hearing, she received a safety award from her current employer. In 2007, she received an associate degree in human services. In 2010, she received bachelor's degrees in criminology and psychology.

Applicant said she has ensured that sensitive information is safeguarded throughout her employment history. She was honest to the OPM investigator, in her SOR response, and at her hearing about admitting "the lies that [she] put" on her SCA. (Tr. 47) Her mistakes as indicated on the SOR do not define her as a person. She promised to carry out her assigned duties. Her difficulties with her employers are not recent, and they were not a pattern. She promised to carefully and accurately fill out her SCAs in the future. There is no evidence of employment problems at her current employment.

The factors weighing against granting her security clearance are more substantial than the mitigating circumstances. Applicant deliberately falsified material facts on her June 12, 2021 SCA in her response to the questions in Section 13A, Employment Activities. In addition to denying receipt of warnings or reprimands during her employment with Employer A and B, she said her terminations from those employments were the result of downsizing. She is credited with revealing the truth to the OPM investigator 58 days later. This belated truthful disclosure was not soon enough to qualify as a prompt disclosure under AG ¶ 17(a).

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a

security clearance. See *Dorfmont*, 913 F. 2d at 1401. Unmitigated security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without conduct raising a serious concern, she may well be able to demonstrate persuasive evidence of her security clearance worthiness.

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 at this time.

### **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 through 1.d:	For Applicant
Subparagraphs 1.e through 1.j:	Against Applicant

### **Conclusion**

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

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MARK HARVEY  
Administrative Judge