



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



In the matter of:)
)
) ISCR Case No. 21-01882
)
Applicant for Security Clearance)

Appearances

For Government: Carroll J. Connelly, Esq., Department Counsel
For Applicant: *Pro se*

02/06/2024

Decision

HARVEY, Mark, Administrative Judge:

Security concerns arising under Guidelines K (handling protected information), B (foreign influence), and I (psychological conditions) are mitigated; however, security concerns under Guideline E (personal conduct) are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On May 5, 2018, Applicant completed and signed an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SCA). (Government Exhibit (GE) 1) On June 15, 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 Guidelines B, I, K, and E. (HE 2) On July 4, 2023, Applicant provided a response to the SOR and requested a hearing. (HE 3) On August 24, 2023, Department Counsel was ready to proceed.

On September 15, 2023, the case was assigned to me. On September 20, 2023, the Defense Office of Hearings and Appeals (DOHA) issued a notice, setting Applicant's hearing for November 16, 2023. (HE 1) The hearing was held as scheduled.

Department Counsel offered four exhibits into evidence; and Applicant did not offer any exhibits into evidence. (Transcript (Tr.) 12, 16-18; GE 1-GE 4) There were no objections, and I admitted all proffered exhibits into evidence. (Tr. 18) On November 30, 2023, DOHA received a transcript of the hearing. Applicant provided two post-hearing exhibits, which were admitted without objection. (AE A; AE B) The record closed on January 16, 2024. (Tr. 71, 74)

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, he admitted the allegations in SOR ¶¶ 4.c, 4.d, 4.h, 4.i, 4.j, 4.l, 4.m, and 4.n with clarifications. He denied the SOR allegations in ¶¶ 1.a, 2.a, 2.b, 2.c, 3.a, 4.a, 4.b, 4.e, 4.f, 4.g, 4.k, and 4.o. (HE 3) He also provided mitigating information. His admissions are accepted as findings of fact. Additional findings follow.

Applicant is a 51-year-old aircraft mechanic who has worked for a government contractor in that position for almost six years. (Tr. 7, 10, 34) In 1991, he graduated from high school. (Tr. 7) He served in the Navy from 1993 to 2013; his specialty was avionics technician; and he honorably retired as a chief petty officer. (Tr. 8; SOR response) He has a 100 percent disability rating from the Department of Veterans Affairs (VA). (Tr. 8) Seventy percent of his disability rating is for bipolar disorder. (Tr. 8, 60) In 2018, he received a bachelor's degree. (Tr. 8)

Applicant's first marriage was from 2000 to September 2011. (Tr. 9) In March 2012, he married Ms. G; however, he said he has not seen Ms. G since June of 2013. (Tr. 9) He was unsure whether Ms. G had filed for divorce. (Tr. 9, 36) He did not take any action to obtain a divorce. (Tr. 37) He believed she has been with another man since 2016. (Tr. 9) He has two children with his first wife who are ages 11 and 23, and he said he did not have any children with Ms. G. (Tr. 9-10, 38)

Personal Conduct

Foreign Influence

SOR ¶ 1.a alleges Applicant is married to Ms. G, who a citizen and resident of Peru. He repeatedly and deliberately failed to disclose this relationship to the government,

as required. SOR ¶ 4.b alleges he failed to disclose his intimate relationship with a Peruvian national (Ms. G) to his command while enlisted in the Navy.

In July 2010, Applicant met Ms. G when he was in Peru. (Tr. 41) In September 2012, he informed the Navy of his marriage to Ms. G. (Tr. 21-22) The marriage was documented in his Navy personnel records. (Tr. 35, 53; SOR response, Attach. 2)

The last time Applicant was in Peru was in 2013, and the last time he saw Ms. G was in 2013. (Tr. 38-40) He did not communicate with her from 2016 to 2018. (Tr. 29-40) From about 2018 to 2021, he talked to her about twice a week, and the last time he talked to her was in 2021. (Tr. 39-41) He denied her requests for funds during the 2018 to 2021 time period. (Tr. 41)

Psychological Conditions

SOR ¶ 2.a alleges on March 9, 2021, Dr. E, a psychologist, evaluated Applicant and concluded he had “demonstrated a pattern of rule-violating behavior, poor judgment, and dishonesty that could reasonably and significantly diminish his trustworthiness and judgment in a national security context.”

Dr. E evaluated Applicant as requested by the DOD Consolidated Adjudications Facility (CAF), which is the predecessor organization for the DCSA CAS. (GE 4) He diagnosed Applicant with Bipolar I Disorder, severe, in partial remission, most recent episode manic; Other Specified Anxiety Disorder (with symptoms of agoraphobia and panic); and Alcohol Use Disorder, moderate, in sustained remission. (*Id.* at 7) Dr. E listed the materials he considered for his evaluation of Applicant; however, he did not mention consideration of VA treatment records or other recent records of mental-health treatment. Dr. E provided a detailed description of Applicant’s mental health and professional history, which was primarily based on Applicant’s statements, the Naval Criminal Investigative Service (NCIS) report, and Office of Personnel Management (OPM) interviews. Dr. E concluded:

[Applicant] went on trips to Peru with the attitude of “Screw it! What are they going to do to me?” His view is that all the allegations pertaining to him lying about various matters were “trumped up stuff.”

It is possible that [Applicant’s] command was not supportive of him and developed a negative view of him due to his medical and behavioral problems. However, based on the totality of the information available to me, my impression is that [he] is [a] person who is willing to violate rules if he believes he can do so without being discovered and if doing so helps him attain an objective. If he is discovered, he seems to be a person who adopts unsophisticated tactics to avoid trouble, including denial in the face of obvious evidence and dishonesty. While I acknowledge that most of the evidence of his bad judgment, poor decision making, and rule-violating behaviors occurred almost a decade ago, there are indications that he omitted information on his SF 86 in 2018 (e.g., overlooking his present marriage) and that he provided misleading information during the present

evaluation (e.g., denying problems while in the Navy until confronted). This suggests that he continues to rely on omissions, counteraccusations, and denials to resolve problem situations (e.g., security clearance investigation). It seems likely he would still lie to cover his mistakes—a serious concern if he holds a security clearance and/or works as an aircraft mechanic.

CONCLUSIONS: Based on available data, [Applicant's] mental health conditions do not presently impair his willingness or ability to safeguard classified information. Additionally, given the data he reported is accurate, the risk of an exacerbation of symptoms seems to be low at this point in time. However, [he] has a demonstrated pattern of rule-violating behavior, poor judgment, and dishonesty that could reasonably and significantly diminish his trustworthiness and judgment in a national security context. (GE 4 at 9-10)

SOR ¶¶ 2.b and 2.c allege in November 2012, Applicant was involuntarily committed for mental-health treatment, and in January 2013, Applicant was voluntarily admitted for mental-health treatment. At his hearing, Applicant said he had suicidal ideations. (Tr. 69) He was an inpatient for about 14 days in November 2012, and he said his treatment was outpatient in January 2013. (Tr. 68)

In 2012, Applicant was diagnosed with ulcerative colitis, and he lost about 35 pounds. (Tr. 22) He was unable to complete physical activity, and his former spouse was not letting him see his children. (Tr. 23) He became extremely depressed. (Tr. 23) Applicant's father called Applicant's supervisor and insisted that he receive help. (Tr. 24) The VA is currently treating him for bipolar disorder. (Tr. 60) He sees a VA psychiatrist once every three months. (Tr. 60) He takes lithium twice a day. (Tr. 61) He did not provide any VA medical treatment records to corroborate his statements about consistently receiving counseling and treatment.

I note that Applicant told Dr. E that he had a three-year-old daughter with Ms. G. (Tr. 38) At his hearing, he said he misspoke. (Tr. 38) He said Ms. G had a daughter, and he was not her father. (Tr. 39) He told Dr. E that he was accepting her as his daughter. (Tr. 39)

Applicant did not submit any documentation contradicting Dr. E's opinions and conclusions. In support of his denial of SOR ¶¶ 2.a, 2.b, and 2.c in his SOR response, he asserted he supported his inpatient treatment when he asked his father for help, and therefore, it was not really involuntary. He said Dr. E's conclusions were probably based on the allegations of others and probably incorrect. He is feeling much better now than he felt in 2012.

Handling Protected Information and Personal Conduct

SOR ¶ 3.a alleges Applicant improperly stored sensitive aircraft information on his personal computer in about July 2010. He left the computer in the unsupervised custody of a Peruvian national. On October 25, 2012, a special agent from the NCIS questioned

him, and he said he could not remember whether any information on his computer was classified; however, he confirmed his computer had sensitive aircraft information on it. SOR ¶ 4.a cross-alleges the allegation in SOR ¶ 3.a under Guideline E.

On August 25, 2012, Applicant made a sworn written statement to the NCIS which states Ms. G had a friend from Miami. (GE 3 at 6) He said:

Her friend spoke English, German, and Spanish. I don't remember her name. I never took her to the base. I left a personal [laptop computer] in her custody. On that laptop was aircraft maintenance records . . . and email traffic pertaining to the aircraft. I don't think that the maintenance records were classified but I am not sure about some of the emails. (GE 3 at 6)

At his hearing, Applicant said he gave his laptop computer to Ms. G, and he never tried to get it back from her. (Tr. 61) There was one Navy maintenance status report and one email on his computer; however, the documents were not sensitive or classified. (Tr. 58, 61-62, 70)

On November 7, 2012, the NCIS briefed a legal officer about Applicant's alleged actions relating to Article 92, Uniform Code of Military Justice (UCMJ) for violation of an order and Article 107, UCMJ for making a false statement. (GE 3 at 4) The NCIS report indicates Applicant would be offered a captain's mast. (*Id.*) The NCIS report also indicates Applicant had been "Baker acted and spent 10 days in [a] mental health facility." (*Id.* at 3)

Applicant said in January 2013, a summary court-martial (SCM) acquitted him of violations of Article 92, UCMJ for disobedience of an order and Article 107, UCMJ for making a false statement. (Tr. 27-28, 62, 66) After his hearing, Applicant made a diligent effort to locate information from the SCM; however, he was unable to obtain any documentation from his SCM. (Tr. 63; AE B) Section 15 Military History-- Discipline of his May 5, 2018 SCA asks, "In the last 7 years have you been subject to court-martial or other disciplinary procedure under the Uniform Code of Military Justice (UCMJ), such as Article 15, [c]aptain's mast, Article 135 Court of inquiry, etc.?" (GE 1 at 21) He answered, "No." (*Id.*) However, he did disclose on his SCA that he "went to a disciplinary review board" based on issues stemming from ulcerative colitis and physical fitness training. At his hearing, he did not know why he failed to list his SCM in his 2018 SCA. (Tr. 63-65) The failure to disclose information about his SCM in his 2018 SCA and his OPM PSI were not alleged in the SOR. (GE 1 at 21; GE 2 at 10)

Personal Conduct

SOR ¶ 4.c alleges Applicant deliberately failed to disclose his personal travel to Peru to his command while he was on active duty.

The NCIS investigation states Applicant, "disclosed he has been taking secret trips to Peru to see his wife, [Ms. G], and that he had failed to report his close relationship to a foreign national to his security manager." (GE 3 at 4) In his sworn statement to NCIS he said:

Since JUL 10, I have been to Peru three times. I went in DEC 10, MAR 11, DEC 11, and most recently on 27 MAR 12 which is when I married her. On all of these occasions I just took leave and left the country. I did not notify my command or my security officer. I did not get a threat brief nor was I debriefed upon my return. (GE 3 at 6)

Later in his sworn statement he said a special agent showed him a list of his seven trips to Peru, Applicant said "That appears accurate. I did not tell my command about any of these trips. They were personal trips, and I used my blue passport." (GE 3 at 7)

Applicant said he did not inform one command that he was traveling to Peru. (Tr. 42) He said he submitted leave papers to his squadron that he was going to Peru, and he received a threat briefing from that command before traveling to Peru. (Tr. 42-46) He said he told the NCIS he did not inform his command or security of his travel to Peru on those four occasions. (Tr. 43; GE 3 at 6) He said he made this statement to NCIS because he "had no fight left [in] me," and he was "beaten down." (Tr. 43-44, 46) He did not provide copies of the leave forms to corroborate his claims that he informed his command of his trips to Peru before he took them.

SOR ¶ 4.d alleges Applicant made a false statement to his command on October 25, 2012, when he said he was married to a Peruvian national over the telephone by the America Embassy. In fact, he flew to Peru for the wedding. He admitted to the NCIS that he made a false statement to his command about getting married over the telephone. (GE 3 at 8) He said he "thought [he] would get in trouble if the command found out [he] had gone to Peru without going through the proper procedures." (Tr. 53; GE 3)

SOR ¶ 4.e alleges Applicant made a false statement to military investigators during his October 25, 2012 personal subject interview (PSI). He falsely said he was being extorted by a Peruvian national (Ms. G). He subsequently admitted this was false. He said he had married this individual, and he was voluntarily sending her money.

Applicant's October 25, 2012 statement to NCIS investigators indicates he told two senior petty officers that Ms. G threatened him by telling him that unless he provided funds to her she would get a friend of hers from another part of the state where he lived to come to his location and hurt him and his family. (GE 3 at 8) He told the NCIS that Ms. G demanded \$2,000 from him, and when he expressed reluctance to give her the money, "she said that she had friends [living in the same state where he lived] and they could find [him] which [he] understood to be a threat." (*Id.* at 6) The NCIS statement states, "Also in the above paragraphs I was not truthful with Agents . . . about being extorted by [Ms. G]." (*Id.* at 8) Applicant admitted that his story about being extorted was a lie. (*Id.*)

At his hearing, Applicant said a senior chief petty officer (SCPO) suggested to him that he was being extorted by a woman in Peru, and Applicant said he told the SCPO this was incorrect. (Tr. 49) The SCPO or possibly someone else evidently told the NCIS about the extortion. (Tr. 49, 51-52) Applicant initially told the NCIS that Ms. G attempted to extort

money from him; however, he said his sworn statement to the NCIS about his making the initial claim to the senior petty officers was incorrect. (Tr. 47-49)

SOR ¶¶ 4.f through 4.j alleges Applicant falsified material facts on his May 5, 2018 SCA in five different places:

¶ 4.f—In Section 17, Marital/Relationship Status, Applicant stated his current marital status was “Divorced/Dissolved” (which referred to his first wife, not Ms. G) and thereby deliberately failed to disclose he was married to a Peruvian national (Ms. G). In Section 17 of his SCA, Applicant disclosed his first marriage and divorce. (GE 1 at 23) He indicated his current marital status was “Divorced/Dissolved.” (*Id.*)

¶ 4.g—In Section 19, Foreign Contacts, Applicant listed Ms. G as a former friend who he last contacted in June 2016, and he failed to disclose his marriage and birth of his child. (GE 1 at 26-27) In response to the question “Personal (such as family ties, friendship, affection, common interests, etc.),” he said “Friendship.” (*Id.* at 27) Applicant admitted he failed to disclose his marriage to Ms. G; however, he said he had not communicated with her for about two years at the time he completed his SCA. (Tr. 54) The question did not specifically ask whether he had ever been married to Ms. G, and this allegation is found for Applicant.

¶ 4.h—Section 20A, Foreign Activities, asked Applicant, “Have you EVER provided financial support for any foreign national?” (GE 1 at 28) Applicant answered, “No,” and he failed to disclose sending about \$21,000 to a Peruvian national (Ms. G) between September 2011 and October 2012.

Applicant admitted sending \$600 to \$700 monthly to Ms. G starting in September 2011. (Tr. 46) In 2012, he sent about \$17,000 to Ms. G, and she gave some of it to family and friends. (Tr. 47, 50; GE 3 at 6) Applicant had to work a second job to afford his payments to Ms. G. (Tr. 51) He said he did not know why he failed to disclose the funds he sent to Ms. G on his SCA. (Tr. 55)

¶ 4.i—Section 20C, Foreign Travel, asked Applicant about foreign travel in the previous seven years (the SCA is dated May 5, 2018). Applicant disclosed a single foreign trip to Peru in May to June 2013, and he failed to disclose four additional foreign trips to Peru in December 2011, and March 2012. (GE 1 at 30) At his hearing, he admitted he traveled to Peru during December 2011, and March 2012, and he said he should have disclosed the trips. (Tr. 42, 55) He said he did not remember why he failed to disclose the trips two to Peru on his SCA. (Tr. 56-57)

¶ 4.j—Section 21, Psychological and Emotional Health – Hospitalized, asked “Have you EVER been hospitalized for a mental health condition?” (GE 1 at 32) Applicant answered, “No.” (*Id.*) He admitted that he failed to disclose the hospitalization in November 2012 for his mental health condition. At his hearing, he said he did not remember why he did not disclose his hospitalizations for psychological and emotional health on his SCA. (Tr. 56)

SOR ¶ 4.k alleges Applicant falsified material facts during his July 16, 2018 OPM PSI, and SOR ¶¶ 4.l through 4.o allege he falsified material facts during his October 12, 2018 OPM PSI in four different ways:

¶ 4.k states Applicant said he had no contact with Ms. G since “shortly after” his May 2013 trip to Peru. Applicant told the OPM investigator that he broke up with Ms. G shortly after May 2013 and he had not had any contact with her since this time. (GE 2 at 6) In the follow-up OPM PSI on October 12, 2018, he said he had “not had any contact with her since 6/2016.” (GE 2 at 11)

¶ 4.l states Applicant denied that he failed to report his personal travel to Peru, as required, and thereby deliberately failed to disclose that information in SOR ¶¶ 4.c and 4.d. His OPM PSI states that he did not bring his passport to the interview. (GE 2 at 10) The OPM PSI states:

Subject was confronted with failing to report leaving the country and going to Peru to visit a Peruvian woman to his security manager (Discrepant). Subject denies this failure and stated he listed Peru, the only trip that he had was in 2010 and 2011 for short trips with the military on official government business. (GE 2 at 10)

At his hearing, he said he should have reported the additional trips to Peru; however, he was only thinking about the trip in January 2013. (Tr. 55) He also said he did not remember why he failed to disclose the trips to Peru. (Tr. 56-57)

¶ 4.m states Applicant repeatedly denied his March 2012 marriage to Ms. G. Applicant’s July 16, 2018 OPM PSI states:

Subject was confronted with 9/2011 sending money to a Peruvian associate who he married in 3/2012 in the amount \$600-\$700 and after they were married, he increased the amount to \$2,000-\$3,000. Subject stated he did send listed foreign contact [Ms. G] money to help her family. But never felt this was reason to report because he looked at it as helping a friend and not supporting a foreign national. He did not know there was an issue with helping a friend who was a foreign national. He continued to deny that he was ever married to her or any foreign national.

At his hearing, he admitted that he failed to disclose his marriage to Ms. G. to the OPM investigator during his PSI. (Tr. 54) He said he could not remember what he was thinking at the time he made that statement to the investigator. (Tr. 58)

¶ 4.n states Applicant denied having ever been involuntarily committed to a mental-health facility. The OPM PSI indicates he volunteered for mental health treatment, and he denied that he received involuntary treatment or that he was “Baker acted.” (GE 2 at 11) He said he was diagnosed with bipolar disorder since September 2011, and he was seen at the VA hospital. (*Id.* at 14) He was not prescribed any medication and he did not regularly see a provider or counselor. (*Id.*)

¶ 4.o states Applicant denied having ever “been involved in, suspected of, or accused of the improper handling or compromise of sensitive, classified, or proprietary information.” The OPM PSI indicates he said:

[He] has never provided anyone with anything which was not entirely in keeping with regulations. [He] has not had any occasions in which his actions could have possibly resulted in a compromise of his duties or a compromise of sensitive or classified information. [He] has never been involved in, suspected of, or accused of the improper handling or compromise of sensitive, classified, or proprietary information. (GE 12 at 13)

Applicant’s father is a retired Air Force colonel who completed 30 years of service. (Tr. 23) His father’s statement indicates Applicant was diagnosed with leukemia when he was three years old and received chemotherapy on multiple occasions for 32 months. (AE A) When Applicant was 19 years old, he attempted to join the Air Force; however, he was unable to enlist in the Air Force because of his previous medical history. (*Id.*) He successfully enlisted in the Navy. He served in the Navy for 20 years, and on April 30, 2013, he honorably retired after being acquitted at a SCM in January 2013.

His father said that Applicant “is currently in a good mental place. Clearly, the meds are working . . . [I]n mid-2018, he quickly improved from his mental position, because he was being treated by the VA. And during that treatment, he really rapidly improved.” (Tr. 25) He concluded Applicant’s mistakes in his statement to the NCIS occurred because “He was both mentally and physically, absolutely wiped out. And, when you’re in those situations, you’re not thinking clearly. And he was not thinking clearly. And, based on Dr. [E’s] comments, it’s clear to me that he believes [Applicant] has moved beyond that state of mind.” (Tr. 31) His mental health has dramatically improved since the time he was receiving inpatient mental-health treatment. (Tr. 33) His father said, “he’s completely in a different state of mind than he was at that point in time.” (Tr. 33)

Applicant received the following Navy awards: Navy Achievement Medal (6); Joint Meritorious Unit Award (2); Good Conduct Medal (6); National Defense Service Medal (2); Navy “E” Ribbon; Armed Forces Expeditionary Medal (2); Global War on Terrorism Service Medal; Global War on Terrorism Expeditionary Medal; Armed Forces Service Medal; Sea Service Deployment Ribbon (6); Navy Recruiting Ribbon; United Nations Medal; Rifle Marksmanship Ribbon; and EAWS Insignia. (SOR response, DD Form 214)

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, *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 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 Director of National Intelligence 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 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

Handling Protected Information

AG ¶ 33 expresses the security concern relating to handling protected information as follows:

Deliberate or negligent failure to comply with rules and regulations for handling protected information-which includes classified and other sensitive government information, and proprietary information-raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 lists conditions that could raise a security concern and may be disqualifying in this case including:

- (a) deliberate or negligent disclosure of protected information to unauthorized persons, including, but not limited to, personal or business contacts, the media, or persons present at seminars, meetings, or conferences;
- (b) collecting or storing protected information in any unauthorized location;
- (c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling protected information, including images, on any unauthorized equipment or medium; and
- (g) any failure to comply with rules for the protection of classified or sensitive Information.

AG ¶¶ 34(a), 34(b), 34(c), and 34(g) are established. Further discussion is in the mitigating condition, *infra*.

AG ¶ 35 lists conditions that could mitigate security concerns including:

- (a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities;
- (c) the security violations were due to improper or inadequate training or unclear instructions; and

(d) the violation was inadvertent, it was promptly reported, there is no evidence of compromise, and it does not suggest a pattern.

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).

Applicant made a statement to NCIS about giving his laptop computer to Ms. G or Ms. G's friend from Miami. The August 25, 2012 NCIS statement was written and under oath. Applicant said Ms. G had a friend from Miami. Applicant further said in his NCIS statement:

Her friend spoke English, German, and Spanish. I don't remember her name. I never took her to the base. I left a personal [laptop computer] in her custody. On that laptop was aircraft maintenance records . . . and email traffic pertaining to the aircraft. I don't think that the maintenance records were classified but I am not sure about some of the emails. (GE 3 at 6)

Applicant's statement at the hearing that there was no sensitive information on the computer is not credible. However, Applicant's compromise of sensitive and possibly classified information occurred more than 10 years ago, and he disclosed the compromise to the NCIS in 2012. The compromise is not recent, it is unlikely to recur; and it does not cast doubt on his current reliability, trustworthiness, or good judgment. Handling protected information security concerns are mitigated.

Psychological Conditions

AG ¶ 27 articulates the security concern for psychological conditions:

Certain emotional, mental, and personality conditions can impair judgment, reliability, or trustworthiness. A formal diagnosis of a disorder is not required for there to be a concern under this guideline. A duly qualified mental health professional (e.g., clinical psychologist or psychiatrist) employed by, or acceptable to and approved by the U.S. Government, should be consulted when evaluating potentially disqualifying and mitigating information under this guideline and an opinion, including prognosis, should be sought. No

negative inference concerning the standards in this guideline may be raised solely on the basis of mental health counseling.

AG ¶ 28 provides conditions that could raise a security concern and may be disqualifying in this case:

(a) behavior that casts doubt on an individual's judgment, stability, reliability, or trustworthiness, not covered under any other guideline and that may indicate an emotional, mental, or personality condition, including, but not limited to, irresponsible, violent, self-harm, suicidal, paranoid, manipulative, impulsive, chronic lying, deceitful, exploitative, or bizarre behaviors;

(b) an opinion by a duly qualified mental health professional that the individual has a condition that may impair judgment, stability, reliability, or trustworthiness;

(c) voluntary or involuntary inpatient hospitalization; and

(d) failure to follow a prescribed treatment plan related to a diagnosed psychological/psychiatric condition that may impair judgment, stability, reliability, or trustworthiness, including, but not limited to, failure to take prescribed medication or failure to attend required counseling sessions.

AG ¶¶ 28(b) and 28(d) do not apply. AG ¶¶ 29(a) and 29(c) have some application and will be discussed in the mitigating section, *infra*.

AG ¶ 29 lists conditions that could mitigate security concerns as follows:

(a) the identified condition is readily controllable with treatment, and the individual has demonstrated ongoing and consistent compliance with the treatment plan;

(b) the individual has voluntarily entered a counseling or treatment program for a condition that is amenable to treatment, and the individual is currently receiving counseling or treatment with a favorable prognosis by a duly qualified mental health professional;

(c) recent opinion by a duly qualified mental health professional employed by, or acceptable to and approved by, the U.S. Government that an individual's previous condition is under control or in remission, and has a low probability of recurrence or exacerbation;

(d) the past psychological/psychiatric condition was temporary, the situation has been resolved, and the individual no longer shows indications of emotional instability; and

(e) there is no indication of a current problem.

None of the mitigating conditions apply. On March 9, 2021, Dr. E, a psychologist, evaluated Applicant and said:

CONCLUSIONS: Based on available data, [Applicant's] mental health conditions do not presently impair his willingness or ability to safeguard classified information. Additionally, given the data he reported is accurate, the risk of an exacerbation of symptoms seems to be low at this point in time. However, [he] has a demonstrated pattern of rule-violating behavior, poor judgment, and dishonesty that could reasonably and significantly diminish his trustworthiness and judgment in a national security context. (GE 4 at 9-10)

Dr. E diagnosed Applicant with Bipolar I Disorder, severe, in partial remission, most recent episode manic; Other Specified Anxiety Disorder (with symptoms of agoraphobia and panic); and Alcohol Use Disorder, moderate, in sustained remission.

At his hearing, Applicant said he had suicidal ideations. He was an inpatient for about 14 days in November 2012, and his treatment was outpatient in January 2013. He was extremely depressed. The VA is currently treating him for bipolar disorder. He sees a VA psychiatrist once every three months. He takes lithium twice a day.

Dr. E did not indicate a causal relationship between Applicant's mental-health issues and his multiple false statements and refusals to accept responsibility for his conduct. In USAF-M Case No. 23-00056-R at 4 n. 1 (App. Bd. Aug. 31, 2023), the Appeal Board rejected the contention that AG ¶ 28(a) was a catch-all provision for conduct alleged under Guideline E, personal conduct. The Appeal Board said:

The language of these two disqualifying conditions is not only tailored to their specific Guideline but is also linguistically distinct – AG ¶ 28(a) considers behavior “not covered under any other guideline and that may indicate an emotional, mental, or personality disorder,” while AG ¶ 16(d) considers information “not *explicitly* covered under any other guideline.” (Emphasis added). Moreover, the language of AG ¶ 16(d) is inclusive in nature and provides a basis to allege information that “may not be sufficient by itself for an adverse determination.” As discussed further herein, the language of AG ¶ 28(a) is designed to exclude allegations of conduct, which are otherwise fully addressed elsewhere in the Guidelines, and prevent unnecessary duplication.

Applicant's impatient mental-health treatment in 2012 was more than a decade ago. His credibility issues are discussed under the personal conduct guideline, *infra*. The record does not establish that his mental-health issues continue to be a security concern. Psychological conditions are mitigated.

Foreign Influence

AG ¶ 6 explains the security concern about “foreign contacts and interests” stating:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern if they result in divided allegiance. They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.

AG ¶ 7 lists one condition that could raise a security concern and may be disqualifying in this case, “(c) failure to report or fully disclose, when required, association with a foreign person, group, government, or country.”

SOR ¶ 1.a alleges and the record establishes that Applicant is married to Ms. G, who a citizen and resident of Peru. He repeatedly and deliberately failed to timely disclose this relationship to security officials, as required. AG ¶ 7(a) is established. Additional discussion is in the mitigating section, *infra*.

AG ¶ 8 lists six conditions that could mitigate foreign influence security concerns including:

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the United States;

(b) there is no conflict of interest, either because the individual’s sense of loyalty or obligation to the foreign person, or allegiance to the group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the United States, that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest;

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation;

(d) the foreign contacts and activities are on U.S. Government business or are approved by the agency head or designee;

(e) the individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons, groups, or organizations from a foreign country; and

(f) the value or routine nature of the foreign business, financial, or property interests is such that they are unlikely to result in a conflict and could not be used effectively to influence, manipulate, or pressure the individual.

In July 2010, Applicant met Ms. G when he was in Peru. In September 2012, he informed the Navy of his marriage to Ms. G. The marriage was documented in his Navy personnel records. The last time Applicant was in Peru was in 2013, and the last time he saw Ms. G was in 2013. From about 2018 to 2021, he talked to her about twice a week, and the last time he talked to her was in 2021. He denied her requests for funds during the 2018 to 2021 time period. It is unlikely that he will resume his relationship with Ms. G. AG ¶¶ 8(a) and 8(c) are established.

The falsification and integrity elements in the disqualifying condition in SOR ¶ 1.a are cross-alleged in SOR ¶ 4 and are thoroughly addressed under the personal conduct guideline. Foreign influence security concerns are mitigated.

Personal Conduct

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

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 two personal conduct disqualifying conditions that are relevant in this case. AG ¶¶ 16(a) and 16(b) read:

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

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

SOR ¶ 4.a cross-alleges the allegation that he gave a laptop computer containing sensitive Navy information to a foreign national. As indicated under the handling protected information guideline, this conduct is not recent, is isolated, and is unlikely to recur. SOR ¶ 4.a is mitigated for the reasons stated under the handling protected information guideline, *supra*.

SOR ¶¶ 4.b through 4.o allege 14 instances where Applicant failed to disclose or provided false information to his command, in his 2018 SCA, and in 2018 in during OPM PSIs. SOR ¶ 4.g was found for Applicant because the SCA question did not specifically ask about Applicant's marriage to Ms. G.

"Applicant's statements about his intent and state of mind when he executed his 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.*

The most accurate description of Applicant's relationship with and payments to Ms. G, his release of sensitive Navy information to Ms. G's friend from Miami, failures to disclose trips to Peru, and his false claims of extortion payments to Ms. G were in his sworn statement to the NCIS in 2012. In response to questions about false information in his SCA and during OPM PSIs, he said he could not remember his state of mind. He deliberately failed to disclose or provided false information to his command or security officials or both about the following issues: (1) getting married to Ms. G over the telephone; (2) some of his trips to Peru; (3) payments to Ms. G; (4) extortion by Ms. G; (5) the recency of his contacts with Ms. G; and (6) mental-health treatment. AG ¶¶ 16(a) and 16(b) are established.

AG ¶ 17 includes six conditions which could mitigate personal conduct 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; and

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

Applicant did not disclose a summary court-martial on his 2018 SCA or his 2018 OPM PSI. At his hearing, Applicant lied when he falsely claimed he did not have sensitive Navy information on the computer he gave to Ms. G or to Ms. G's friend from Miami. He also lied at his hearing when he said he informed his command about his trips to Peru and received threat briefings. 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); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). These non-SOR allegations will not be considered except for the five purposes listed above.

Applicant's lies and failures to accept responsibility show a lack of rehabilitation. I have lingering concerns that his lapses in judgment may recur and continue to cast doubt on his reliability, trustworthiness, and 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(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 a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline B, I, K, and E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines but some warrant additional comment.

Applicant is a 51-year-old aircraft mechanic who has worked in that position for a government contractor for almost six years. He served in the Navy from 1993 to 2013; his specialty was avionics technician; and he honorably retired as a chief petty officer. He has a 100 percent VA disability rating. Seventy percent of his disability rating is for bipolar disorder. In 2018, he received a bachelor's degree.

Applicant had a successful Navy career, and he received numerous Navy medals and awards. He has had a successful career working for the government contractor as shown by his continued employment. In 2012, Applicant was depressed, expressed suicidal ideation, and was diagnosed with bipolar disorder. In 2012 and 2013, he received inpatient and/or outpatient mental-health treatment. Dr. E concluded his "mental health conditions do not presently impair his willingness or ability to safeguard classified information. Additionally, given the data he reported is accurate, the risk of an exacerbation of symptoms seems to be low at this point in time." (GE 4 at 10)

The reasons for revocation of Applicant's security clearance are more persuasive. He repeatedly lied, and his credibility is poor. His lies to security officials, including his lies at his hearing, and to his command when he was in the Navy are serious. They cast doubt on his current reliability, trustworthiness, and judgment. I do not have confidence that he would follow orders or comply with rules unless he personally agrees with them. His series of judgment lapses cause unmitigated security concerns. Applicant is not an honest, candid, and forthright person. His multiple misstatements raise a serious concern that he would not voluntarily and honestly report a breach of security if reporting that breach of security would risk his own personal reputation, employment, or continued access to classified information.

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 mitigated handling protected information, foreign influence, and psychological conditions security concerns; however, he failed to mitigate personal conduct security concerns.

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 B:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline I:	FOR APPLICANT
Subparagraphs 2.a through 2.c:	For Applicant
Paragraph 3, Guideline K:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	For Applicant
Subparagraphs 4.b through 4.f:	Against Applicant
Subparagraph 4.g:	For Applicant
Subparagraphs 4.h through 4.o:	Against Applicant

Conclusion

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

Mark Harvey
Administrative Judge