DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 22-00426
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Adrienne Driskill, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

03/29/2024

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Decision

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TUIDER, Robert, Administrative Judge:

Applicant mitigated security concerns regarding Guideline E (personal conduct). Clearance is granted.

Statement of the Case

On June 17, 2019, Applicant submitted a Questionnaire for National Security Positions (SF-86). On August 29, 2022, the Defense Counterintelligence and Security Agency (DCSA) Consolidated Adjudication Services (CAS) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E. The SOR detailed reasons why the DCSA CAS was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On October 18, 2022, Applicant submitted his Answer to the SOR. On March 2, 2023, Department Counsel was ready to proceed.

On March 14, 2023, the Defense Office of Hearings and Appeals (DOHA) assigned the case to me. On March 21, 2023, DOHA issued a notice of hearing scheduling the hearing for April 17, 2023. The hearing was convened as scheduled.

Department Counsel submitted Government Exhibits (GE) 1 through 7, which were received into evidence. Applicant testified, called one witness, and submitted Applicant Exhibits (AE) A through H, which were received into evidence. I held the record open until April 21, 2023, to afford the Applicant an opportunity to submit additional evidence. Applicant did not submit any additional evidence. On April 27, 2023, DOHA received the hearing transcript (Tr.).

Findings of Fact

Background Information

Applicant is a 63-year-old systems engineer, who has been employed by a defense contractor since February 2019. (Tr. 36-37; GE 1) He seeks to retain his Secret security clearance that he has successfully held since the "mid-80's" or about "35 years." Maintaining his clearance is a requirement of his continued employment. (Tr. 37-38, 43, 50, 61) Applicant has spent the majority of his adult working life in the defense industry. (Tr. 64; GE 1; AE E)

Applicant received his high school diploma in June 1977. He was awarded an Associate of Science Degree in General Studies in June 1986, and was awarded a Bachelor of Science Degree in Information Technology with Honors in September 2004. (Tr. 38-39; AE B, AE D, AE E) Applicant was previously married from August 1986 to February 2010, and that marriage ended by divorce. He remarried in June 2014. (Tr. 40-41; GE 1) He has two adult children from his first marriage and two minor daughters from his second marriage. (Tr. 41-42) Applicant's wife is not employed outside the home. (Tr. 42)

Personal Conduct

I found Applicant's testimony to be credible. He was candid in his description of his security-relevant conduct. A coworker, CJ, corroborated his statement about events while employed overseas.

During the time that Applicant was employed by his previous defense contractor employer starting in June 2007, he deployed five times to different sites in the Mideast until March 2014. After returning to the United States, he continued to work for the same employer until he was terminated in November 2018 for purported timecard fraud in 2013 while deployed to a Mideast location, discussed below. (GE 1; AE E)

SOR ¶ 1.a alleged that in about February 2013 Applicant received a written warning from his defense-contractor employer, for time mischarging. (GE 5)

In his SOR Answer, Applicant admitted that he received a written warning from his employer for time mischarging. However, he denied that he was mischarging his time. He added that this written warning was given to all personnel supporting their unit at their location in the Mideast. This warning was in response to "new and ever-changing time charging guidelines." (SOR Answer)

During his testimony, Applicant acknowledged receiving the warning letter and added that his employer did not suspend his clearance "even though there [were] allegations of time-card fraud." Furthermore, he was allowed to keep his Common Access Card (CAC) and had continued access to his job site and military installations, which are secure locations. (Tr. 43-44) "[A]fter almost four years of working overseas back and forth," he returned to the United States after learning that his mother was ill. She passed away after he returned home. After his mother's passing, he returned to the Mideast on two occasions at the request of his employer. During this entire time period he was allowed to retain his CAC and have continued access to his various secure job sites and military installations. (Tr. 44-45)

Applicant received a warning letter in February 2013. The warning stated that he had "inaccurately recorded time to the [Site X] program while OCONUS. Specifically, you were charging time directly to the contract for hours in which you did not perform work." The warning letter does not contain any specific examples of inaccurately recorded time. When cross-examined, Applicant denied that he recorded inaccurate time. Applicant inquired whether he could "could appeal (the warning letter) or submit any kind of rebuttal or anything" and was informed by management that he could not do anything about it. (Tr. 59-60; GE 3, GE 5)

SOR ¶ 1.b alleged that in about November 2018 Applicant was terminated from his employment by a defense contractor for evidence of time mischarging and that he is not eligible for rehire. While the Government evidence clearly documents that an investigation was conducted regarding significant timecard fraud that occurred at a Mideast location where Applicant was deployed, it does not provide specifics that implicate Applicant. (GE 1-4, 6-7)

In his SOR Answer, Applicant admitted to being terminated from his employment and reiterated his denial that he was mischarging his time. He explained that his employer:

> . . . as part of a settlement with the Government paid 30 million dollars on 31 October 2018, to make the U.S. Department of Justice investigation to go away [sic]. As part of the settlement [defense contractor] said they would terminate everyone who was at [unit working in the Mideast]. Most were still working at [defense contractor], some 8 years later. Approximately 20 people were terminated, eight years later, while still being employed at [defense contractor] on November 1, 2018. I was one of them. When I had my Security Clearance investigation, 2019, all these facts were brought to the attention of the investigator. I was granted my Security Clearance which I have held since the mid 1980's. [Defense contractor] has never presented any factual evidence that I had mischarged my time. (SOR Answer)

When Applicant was terminated in November 2018, he was provided with a generic letter with little explanation other than he was being terminated for mischarging his time and that incidents went back to 2011 and no specific dates were provided.

Applicant was not provided with other documentation or information, and there was no way to determine if there was one or multiple incidents of mischarging. (Tr. 32-34, 45-46; GE 3-5) Applicant was one of 16 employees terminated by his former employer for alleged timecard fraud, and 5 of those 16 employees are now working for Applicant's current defense contractor. (Tr. 32, 62-63)

The Mideast location (Site X) where the timecard issues arose was unique in the sense that the contractors assigned there did not live on base but lived on the local economy. In Applicant's case, he lived in a hotel apartment. Travel time from employees' living quarters to the work site "was a billable event when [he] first showed up at the site." When that practice changed, Applicant changed his practice to comply with the company rules. Remote working from one's hotel room was also a billable event. When that was no longer allowed, Applicant again changed his practice to comply with the company rules. In short, Applicant "complied with all the changes as they came out." (Tr. 48-50) Applicant is doing work for his current employer similar to what he did for his previous employer. (Tr. 50) His current employer is "fully aware" of the SOR allegations against him and the circumstances that led to his termination. (Tr. 51, 62-63; GE 3)

Applicant reiterated during cross-examination that whatever he was charging on his timecard was "in line with [former employer's] policy." At the time and at Site X location, it did not strike him as unusual that management instructed him to include travel time or remote work time. When management told employees that they could no longer charge travel time at Site X, Applicant complied. He added that ". . . part of that travel time is not just driving; it's getting into the base. You have to go through the [base security] checkpoint and sometimes that would take forever." (Tr. 52-56; GE 1) As part of the investigation surrounding the timecard charging issue, Applicant was not interviewed by any federal or military law enforcement agency. He was interviewed by attorneys employed by his former employer and the questions they asked him were directed "about other people . . . nothing directed to [him]." (Tr. 57)

Applicant called a co-worker (CJ) as a witness. CJ has known Applicant since "around the end of – December of 2011, maybe early 2012." CJ worked for the same defense contractor as a field engineer at Site X in the Mideast at the same time as Applicant. CJ also received a warning letter and was terminated like Applicant. CJ is currently employed as a systems engineer for the same defense contractor as Applicant. CJ has a Secret security clearance and has successfully held a clearance since 2006 except for "a gap around 2018 to 2019." (Tr. 18-22, 32)

CJ described the timecard charging issue, "They (former defense contractor) were blanketing across pretty much any employee that worked overseas during 2010 to 2013 time frame. They just blanketed and covered pretty much every employee with a warning in their personnel records." CJ stated it was never proven that he and/or Applicant had committed timecard fraud. CJ was never required to repay any money for overcharged time. (Tr. 20-21) When asked why it took five years to terminate him and the other employees, CJ answered, ". . . that's the – in my mind – (the) million-dollar question." (Tr. 22) CJ stated that his former employer was "constantly re-shifting and

evolving their time-charging policy throughout the five or six years between 2011 or 2013 or 2018." (Tr. 34) CJ was not aware that he could appeal his termination from his former employer, and when terminated, he started looking for other work. (Tr. 35)

CJ confirmed that while he was at Site X in the Mideast it was company policy to bill for travel time and remote working. (Tr. 22-23, 25) He added that timekeeping at his former employer "changed multiple times over the course of seven, maybe eight years that [he] was involved with the overseas operation. Those early 2011 to 2013 years, you were allowed – the policy was we'd charge for travel, remote work from hotel, and on-call, as long as you're available." These policy changes created confusion among the employees. (Tr. 23, 25) CJ discussed some individuals at Site X who were committing timecard fraud and were terminated at the beginning of 2013. (Tr. 24) CJ stated that he did not believe there was any deliberate mischarging of time by Applicant based on his own personal knowledge. (Tr. 24) CJ stated the number of people working at Site X varied from 12 to 20 depending on the mission. It was the managers of these 12 to 20 people who gave the direction to charge for travel time. (Tr. 27)

CJ is aware that his name as well as Applicant's name, among other names, are on a settlement agreement between his former employer and the U.S. Attorney. CJ described this settlement "as to what they speculate that we did in violation of time-charging." CJ reiterated that management knew where he was at all times. (Tr. 28-29; GE 7) CJ is aware that his former employer "agreed to pay roughly $25 million back to the U.S. Government in restitution for the time-charging issue." CJ is unaware of how his former employer and the Government reached this settlement amount. (Tr. 29-30) CJ's clearance was renewed and favorably adjudicated in the "summer of 2019." At the time of Applicant's hearing, CJ's application for a Top Secret/Sensitive Compartmented Information Clearance was pending. (Tr. 31)

Character Evidence

Applicant submitted his performance evaluation reviews for 2020 to 2022. His employee evaluations were very favorable, with his 2022 overall employee rating being "4.99 – Outstanding." An element of his evaluations which was part of his overall rating was "Company Values – Do the right thing – Integrity, honesty, and transparency in all our dealings." It is clear from Applicant's evaluations that he is a top performer, who is a valued employee and contributes to his company's mission and the national defense. (Tr. 63; AE A, AE B)

Applicant submitted five reference letters: (1) Director of Programs (MD) from his current employer; (2) Director of Test and Integration and his manager (TH); (3) Co-worker (CJ) – has known Applicant for ten years and worked with him for the same previous employer at Site X in the Mideast during the timecard issue; (4) Co-worker (PD) has known Applicant for 15 years and works for Applicant's previous employer; and (5) husband and wife neighbors (KR and DR), who have known Applicant for 30 years. All of these individuals submitted favorable comments in support of Applicant maintaining his clearance, and vouched for his integrity and honesty. (Tr. 64-65; AE C) Applicant was an assistant scout master for his son's scout troop for four years and has

been a baseball umpire for youth and high school teams for over six years. Applicant also submitted a biography and family photographs. (Tr. 65-66; AE E-H)

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:

> (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: . . . (4) evidence of significant misuse of Government or other employer's time or resources.

The Government's evidence met the threshold to establish SOR ¶¶ 1.a and 1.b requiring further review to determine the applicability of any mitigating conditions.

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.

AG ¶ 17(f) is fully applicable. The Government's evidence clearly established that he was given a written warning letter in 2013 for purported time mischarging, and that his employer terminated him in 2018 for time mischarging. The termination in 2018 was

for timecard fraud five years earlier, and was based on a global settlement agreement between the DoJ and his employer which entailed termination of multiple employees for timecard fraud without regard for the individual employee's conduct. There is no specific or sufficient credible evidence to support the inferences that Applicant's warning and termination by his former employer were based on actual misconduct or dishonesty by him. Lastly, I found Applicant to be a credible witness whose testimony was corroborated by his co-worker CJ. I find in Applicant's favor for Guideline E.

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 63-year-old systems engineer who seeks to retain his Secret security clearance. He has successfully held a clearance for the past 35-plus years and has been employed as a defense contractor for the majority of his adult working life.

It appears that Applicant was caught up in an unfortunate situation that was not of his own making. Applicant was employed by his previous employer from 2007 to 2018, and during that 11-year period his performance met company standards. In fact, his company thought enough of him to send him on five deployments to the Mideast and kept him on the company payroll for five years after his 2013 warning letter for mischarging time.

Applicant's clearance was renewed in 2019. Applicant's co-worker CJ also renewed his clearance in 2019. I accept Applicant's explanation that he complied with his former employer's ever-changing timekeeping requirements and followed management's direction. A point that came through in Applicant's performance evaluations and reference letters was his honesty and integrity.

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 *Department of the Navy v. Egan*, 484 U.S. 518 (1988), 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 personal conduct security concerns.

Formal Findings

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

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a – 1.b:	For Applicant

Conclusion

In light of all of the circumstances in this case, it is 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 granted.

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Robert Tuider
Administrative Judge