DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 23-00716
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Troy Nussbaum, Esq., Department Counsel
For Applicant: S. Marshall Griffin, Esq.

07/31/2024

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Decision

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BENSON, Pamela C., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E (personal conduct) and Guideline M (use of information technology). National security eligibility for access to classified information is denied.

Statement of the Case

On November 30, 2021, Applicant completed and certified an Electronic Questionnaire for Investigations Processing (e-QIP). On October 2, 2023, the Defense Counterintelligence and Security Agency Consolidated Adjudication Services (DCSA CAS) issued Applicant a Statement of Reasons (SOR), detailing security concerns under Guideline E (personal conduct) and Guideline M (use of information technology). The DCSA CAS acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines implemented by the DOD on June 8, 2017.

Applicant answered the SOR on December 6, 2023, and he provided documentation with his response. He denied and admitted, in part, SOR ¶ 1.a. He admitted SOR ¶ 1.b, and he denied SOR ¶ 1.d. He did not admit or deny SOR ¶ 1.c. Applicant requested a hearing before a Defense Office of Hearings and Appeals (DOHA) administrative judge. (Answer)

On January 18, 2024, Department Counsel issued a Ready to Proceed memorandum for this case. On February 2, 2024, the case was assigned to me. All parties agreed to proceed with the hearing on May 8, 2024. On March 15, 2024, DOHA issued the hearing notice.

On April 10, 2024, an email was issued notifying Applicant and me that another Department Counsel had been reassigned to this case. In addition, the new Department Counsel provided notice that additional information was forthcoming, and that the Government intended to amend the Statement of Reasons (SOR).

During the hearing, Department Counsel offered Government Exhibits (GE) 1 through 5, and submitted a disclosure letter dated January 18, 2024, I marked as Hearing Exhibit (HE) 1. The Government also called two witnesses to testify. Applicant's counsel offered Applicant Exhibits (AE) A through C (and the documents previously provided with the Answer), and four witnesses were called to testify on behalf of Applicant. The hearing was not completed by the end of the day on May 8, 2024, and with all parties in agreement, I continued the hearing to May 14, 2024. All proffered exhibits were entered into evidence without objection. (Transcript (Tr.) 179)

DOHA received the May 8, 2024 hearing transcript (Tr.) on May 15, 2024, and the May 14, 2024 hearing transcript was received on May 21, 2024 (Tr. #2).

Evidentiary Rulings

On April 11, 2024, Department Counsel sent the first amendment to the SOR. The original SOR alleged four allegations under Guideline E, and the amended SOR alleged an additional four allegations under Guideline E, and Guideline M was added with one allegation. Department Counsel stated that due to the new information, the Government would not object if Applicant requested a continuance. No response was received from Applicant, and on April 16, 2024, Department Counsel requested that I issue an order to have Applicant respond to the amended SOR by April 24, 2024. On that same day, I asked Applicant's attorney (Counsel) if his client intended to respond to the Amended SOR by April 24, 2024.

On April 17, 2024, Counsel objected to the Government's proposed amendment to the SOR stating that the Government had ample time to formulate the SOR and unreasonably withheld the supporting evidence for their amended SOR. His position was that the amended SOR did not address new or different acts, but rather it realleged and expounded on conduct already included in the original SOR. In addition, his client did not want to request an extension or continuance in the hearing. Counsel requested I

deny the Government's amendment to the original SOR because it was excessively burdensome, cumulative, and unreasonable.

On April 18, 2024, Department Counsel sent a second amendment to the SOR, which added one new allegation under Guideline M. Department Counsel also stated that he would transmit supporting information to Counsel after I issued a case management order. Counsel objected to the addition of subparagraph 2.b., as it was "the same, word-for-word, as the previously amended [sub]paragraph 2.a." I found Counsel's assertion incorrect. SOR ¶ 2.a. referred to the [*Government Agency* (GA)] issued laptop, and ¶ 2.b. referred to the [*Contractor A* (CA)] issued laptop. The second amendment to the SOR was sent to Applicant's Counsel 20 days before the hearing was held. Applicant had adequate time to answer the new SOR allegations and declined a request for a continuance. There is no reason to conclude that Applicant was prejudiced by any purported changes in the amended SOR.

On April 18, 2024, I issued an Order in this case and directed Department Counsel to immediately send all supporting documents for the second amended SOR to Applicant. Per the DOD Directive, I allowed the second amendment to the SOR, and I ordered Applicant to admit or deny each and every SOR allegation, which I put on the record during the May 8, 2024 hearing. (Tr. 10-12)

On May 5, 2024, three days before the hearing, Counsel reported that one of the Government witnesses had contacted a witness for Applicant and discussed information about a proposed AE, and this misconduct could implicate 18 U.S.C. 1505 and the Privacy Act. Counsel requested I admonish Department Counsel to withhold Privacy Act protected records from Government witnesses, and to advise their witnesses not to contact any other witnesses in the case. Department Counsel responded to Counsel's email and admitted that a document, in which both witnesses' conversations were surreptitiously recorded by Applicant and then made into a transcript, had been provided to the Government witness for hearing preparation. Department Counsel also stated he could not control any witness, and if the witness contacted another witness, it was not by the Government's direction, nor was the Government aware. After learning of the contact, Department Counsel asked the witness not to discuss the matter with others moving forward. He denied the conduct violated 18 U.S.C. 1505 or the Privacy Act, as claimed.

Applicant's counsel also requested that, based on the misconduct of the Government's witness, I accept a list of facts for which Applicant's witness was (but no longer) going to provide in a character reference letter for Applicant. Department Counsel objected to this request and asked that this matter be addressed during the hearing and on the record. I agreed with Department Counsel's request and withheld any ruling until the matter was addressed during the hearing and recorded on the record. During the hearing, Department Counsel also requested that I make an adverse inference against the party whose witness, having learned the full facts, subsequently withdrew their endorsement of Applicant. (Tr. #2 117-119)

At the conclusion of the hearing, I determined that the Government's witness's contact with Applicant's witness was not a violation of 18 U.S.C. 1505 or the Privacy Act. She had contacted the other witness, without the Government's knowledge, to ask if she was aware that Applicant had covertly recorded both of them during Applicant's meeting held in late January 2020, and that he had made a transcript of the meeting. Applicant's witness had no knowledge that she had been recorded without permission, and she was not happy about it. As such, Applicant's witness declined to provide Applicant a letter of recommendation, as previously arranged. The Government witness was not acting in a corrupt or threatening manner to influence, obstruct, or impede a proceeding when she contacted Applicant's witness. I also ruled that I would not agree to make an adverse inference of any witness in the case, nor would I accept as fact what Applicant's witness was purportedly going to provide in her letter of recommendation. (Tr. #2 115-119)

Findings of Fact

Having thoroughly considered the evidence in the record, I make the following findings of fact: Applicant is 28 years old. He is not married and does not have any children. He earned a bachelor's degree in 2018, and a graduate degree in 2022. Shortly after obtaining his undergraduate degree, he was hired by CA as an aerospace engineer. His employment with this government contractor ended in January 2020. His current employer, another government contractor, is currently sponsoring him for a DOD security clearance. (GE 1; AE A)

SOR allegation ¶ 1.d alleges that in about March 2020, Applicant was debarred from government employment with a government agency (GA) for three years after he was found unsuitable based on misconduct and negligence in a prior employment, and falsifying background investigative documents. Applicant admitted this allegation, with the same qualifications as indicated in his Answer. (Tr. 12; Answer)

Applicant testified that while he was in college in 2016, he was working for a restaurant as a server. On his second to last day in this employment, he had served a customer who had not tipped him. Applicant politely told the customer that he had essentially paid money to serve the customer because Applicant had to pay the restaurant support staff a percentage of his net sales at the end of his shift. The customer complained to the restaurant manager, who apologized and gave the customer a gift certificate. At that point, Applicant decided he was going to quit this job because the manager did not support him, and this employer was also unwilling to work with his academic schedule. The next day he met with the manager and was required to fill out an incident report. Applicant then told the manager he quit. When he applied for employment with a GA, he submitted a background investigative application and listed that he had resigned from the restaurant employment position. During the course of Applicant's investigation conducted in 2022 for employment, the GA discovered that he had been fired by this employer, which came as a surprise to Applicant. (Tr.# 2 22-23; Answer)

Applicant said the GA sent him a letter dated March 3, 2020, but he "*never really found out the exact reason*" he was debarred from the GA. He even submitted a Freedom of Information Act request, but it did not offer any clarification. The GA letter, in the record, disclosed there were two reasons why Applicant was considered unsuitable for employment: (1) issues related to a pattern of misconduct or negligence in employment (unemployability), and (2) issues related to dishonest conduct. An enclosure came with the GA letter which stated:

> **Charge #1: In May 2016, you were terminated after a month of employment from [restaurant] for having a disagreement with a customer. In January 2020, you were terminated from CA for an issue that required a confidentiality agreement between you and your leadership. You [Applicant] wrote in your 26 February 2020 OF-306, "On January 29, 2020, I was terminated from my job at [CA]. I was not given a reason for the termination due to [location redacted] or just [location] being an At-Will district. There is a confidentiality agreement from my termination between myself and former employer, and I can only say that the issue was resolved amicably."** (Tr. #2 24, 33; Answer attachment; GE 1)
>
> **Charge #2: You completed an OF-306 on January 30, 2020, and on February 26, 2020. Question 12 asked, "During the last 5 years, have you been fired from any job for any reason, did you quit after being told that you would be fired, did you leave any job by mutual agreement because of specific problems, or were you debarred from Federal employment by the Office of Personnel Management or any other Federal agency?" You responded "Yes" to this question, but only listed your termination from CA. You failed to list that you had been terminated from [restaurant] in May 2016 for having a disagreement with a customer.** (Answer attachment)

Applicant provided an undated response to Charge #1 concerning his server employment with a restaurant, which stated, in part; "***At no point was I told that I was fired, was going to be fired, or left by mutual agreement*** (emphasis added) which is why I did not include this in Question 12 on my OF-306." In his response to Charge #2, he listed, in part; "Due to the terms of the confidentiality agreement I am unable to further elaborate on my employment with [CA] other than my employment dates and that it was an amicable separation for both parties." (Answer attachment)

Although not alleged in the SOR, Applicant listed on his November 2021 e-QIP in response to a question; "Government Debarment – Have you EVER been debarred from government employment?" He answered "yes" and listed that he had been debarred in 2020 for three years. He made a Freedom of Information Act (FOIA) request, but he was unable to find out why he was considered unsuitable for employment with GA. His response contradicts with the March 2020 letter from the GA, listed above, which specifically provided detailed reasons under Charges #1 and #2 the

basis of his three-year employment debarment. I will not use this evidence for disqualification purposes; however, I may use it for credibility, determining mitigation, and in assessing the whole-person factors. (GE 1)

Applicant listed information on his November 2021 e-QIP under the employment section that he was "fired" in May 2016 after he "confronted a customer for leaving no tip." During Applicant's background interview conducted in January 2022, he told the investigator that following that incident, he and his manager had a conversation. Applicant told his manager he quit at the same time ***his manager told him he was fired due to violation of company policy***. (Emphasis added) This information contradicted with Applicant's undated response to the GA employment debarment, in which he stated, "**At no point was I told that I was fired, was going to be fired, or left by mutual agreement…** (emphasis added.) (GE 1, 2; Answer attachment)

SOR allegation ¶ 1.a alleges that Applicant was terminated by CA in January 2020 for engaging in inappropriate conduct and disobeying directions from superiors. Examples of these behaviors include falsifying time and attendance records, engaging in unapproved telework, and displaying disrespectful behavior toward coworkers, clients, and others. Applicant denied this allegation. He did admit, however, that he did engage in unapproved telework. (Tr. 10-11; Tr. #2 55-57; AE A; Answer)

SOR allegation ¶ 1.b alleges that during Applicant's one and one-half years of employment at CA, he engaged in inappropriate conduct and disobeyed directions from superiors. Examples of these behaviors include falsifying time and attendance records, engaging in unapproved telework, and displaying disrespectful behavior toward coworkers, clients, and others. Applicant denied all but the unapproved telework reference, with the same qualifications provided in his original Answer. (Tr. 11; Tr. #2 55-57; Answer)

SOR allegation ¶ 1.c alleges that Applicant was recommended for removal from his assignment with GA during his employment with CA for falsifying his time and attendance and other behavioral issues. Applicant denied this allegation. (Tr.12)

Before graduating from college, Applicant reached out to the chief executive officer (CEO), president and owner of CA, who was also a fraternity brother, and asked about employment opportunities. Applicant was offered employment in approximately June 2018 with a starting salary of $71,000. CA was a company that contracted with a GA to provide support. Although Applicant was hired as an aerospace engineer, he was not performing aerospace engineer job duties working for CA. (Tr. 65, 159, 176; Tr. #2 18-19, 52-54)

Applicant stated that when he was hired at CA, he was allowed to telework on Fridays. He admitted that he would telework, on average, an additional three days a week without authorization. He admitted that he was eventually confronted by his CA supervisor and his GA supervisor for his unapproved telework. He then complained about his travel expenses and CA provided him a travel stipend. He was the only

employee at CA that had been provided a travel stipend. Applicant admitted, however, that he continued to engage in unapproved telework, but less frequently. (Tr. #2 55-57, 158)

P testified as a witness for the Government. She had retired from GA after working 32 years, and then returned to work as a consultant for CA in 2014. She met Applicant when he was hired in June 2018. The president of the company told her she would be Applicant's direct supervisor. Applicant was issued a company laptop. Over time, she found Applicant difficult to work with as he repeatedly complained about the job and failed to follow directions. P believed Applicant had trouble accepting job duties that he thought were beneath him, and he would also argue with CA's customer about his responsibilities. She tried to counsel him since he had just graduated from college and this was new to him, but over time she realized that he was not mature enough to do what was expected of him. At one point he told P that she "wasn't his mother" and he did not like being treated like a child. P believed this comment was demeaning and condescending. (Tr. 86-94)

Applicant admitted that he had told P to stop acting like his mother, but he did not believe it was demeaning or condescending. He said his statement was taken out of context. Applicant is fine when receiving life advice from his own mother, and this statement was made to reassure P that she did not need to fill that void in his life. (Tr.#2 60-62)

P stated that since Applicant was a fraternity brother with the CEO of the company, he would often go around her and take his complaints directly to the CEO. The CEO would then call P and ask her why Applicant was contacting him when he should be reporting to her, Applicant's direct supervisor. P explained to Applicant that he had to report his concerns through the chain of command, which started with her. Despite this guidance, Applicant continued to contact the CEO directly with his complaints and concerns. Before Applicant started employment in 2018, P would generally talk to the CEO once a month or every six weeks to check in. After Applicant was hired, P and the CEO were talking on a weekly basis, "sometimes hours on end into the evening," trying to address the best way to handle Applicant. (Tr. 86-94, 176)

Applicant was assigned to work with "J," an employee of CA's customer. J testified as a witness for the Government. J has worked for the GA for 34 years, and his current job title is program manager. In 2018, J was supporting several contracts, and CA asked him if he would consider using Applicant to support a specific government contract. Applicant was hired to directly support J, and all of Applicant's work-related directions came from J. Applicant was issued a GA laptop. Within the first 90 days of his employment supporting CA's customer, J began to experience problems with Applicant. J sent him emails with *"call me when you get in*" in the subject line so that Applicant would see the message without opening the email. J would expect to receive a return phone call anywhere between 6:00-8:00 a.m., but there were times when Applicant did not return his call at all that day, or it would be noon or later before he made the call. J

was the only customer Applicant had been assigned to support. (Tr. 33-46, 50, 65-68, 70, 72-73, 95-96, 101, 103-104, 106-107, 111-114; GE 3)

J soon discovered that Applicant was not reporting to the CA office for the four days of the week he was supposed to be there. J worked out in the field the majority of the time, but he would occasionally come into the CA office unannounced. Applicant would claim he was working at the CA office when he was not there. J started going to the CA office more frequently to see if Applicant was at the office. There were also times J would call other workers at the CA office and ask them if Applicant was in the building during his scheduled work hours. Frequently he learned that Applicant had not reported to the CA office that day, but Applicant claimed otherwise. J called Applicant's first-line supervisor, P, and reported that Applicant had committed timecard fraud, was taking unapproved telework, and he had falsified government documents. J asked P to have Applicant replaced because he could no longer trust him. P, acting as an intermediary between CA's customer and Applicant, worked to resolve the conflict. A joint decision was made that Applicant would get a second chance, but he was no longer to report to the CA building; he would now report to P's cubicle at the GA building so she could keep an eye on him. Applicant's telework privileges were discontinued for 90 days. For the next 90 days, P saw Applicant on almost a daily basis at work unless she was on travel. Applicant was also required to make regular rounds around the office so that he would be seen by others and could answer any questions about the government contract he was supporting. (Tr. 33-46, 50, 65-68, 70, 72-73, 95-96, 101, 103-104, 106-107, 111-114; GE 3)

J testified that Applicant was also disrespectful and repeatedly failed to follow directions from him. J would upload a file to a specific site, but he later found out that Applicant had taken down the file, made changes to the telecon minutes, and then sometimes reposted the edited file to the site. J told him to immediately "cease and desist" from manipulating any file in which Applicant was not a telecon participant. Applicant continued to disregard J's direction, and J finally sent an email to CA asking them to instruct Applicant to follow his directions. He stated that Applicant also ignored CA's instructions. In addition, Applicant was making changes to slides that he was specifically told not to touch, and he was issuing directions to other government workers, as a support employee to the GA and without copying J on the email. In 2020, P called J to let him know Applicant had filed a complaint against him with the GA Accountability Board. Around that time J also received an email that Applicant was to report directly to J's boss, and J would no longer interact with Applicant. J never heard back from the Accountability Board about Applicant's complaint. J explained that when the board receives a complaint, they review the substance of the complaint, and if it is found to be meritless, no investigation ensues. J provided email communications to support his testimony. (GE 3; Tr. 34, 46-50, 53-60, 66-67, 74-79, 94, 110; GE 3)

Applicant explained the reason he had taken down files J had previously uploaded on a specific site was due to his responsibility to manage that site. Even though he was not a telecon participant in some of the meeting minutes, he had a template and tried to keep all of the minutes in a uniform and consistent manner. He

would change J's minutes to follow the template format. He denied that he had changed the content of the file. He was told not to work on the site again or report to J near the end of his employment with CA. He denied that he was counseled or reprimanded for this conduct. (Tr. 30-32)

P testified that after seeing no improvement in Applicant's work ethic, she recommended to the CEO that Applicant be fired. The CEO eventually agreed it was time to let him go. Applicant's unauthorized deletion of their customer's files from a specific site was the tipping point. The CEO did not want to ruin Applicant's future employment potential, so an agreement was made that his termination was not disciplinary, but rather an amicable separation, which would also allow Applicant to receive unemployment benefits. In late January 2020, Applicant was called into a meeting with three other CA employees to sign a severance package agreement.

Applicant believed he was invited to a January 2020 meeting to go over his job duties. He did not know beforehand that he was going to be terminated from employment with CA. Before the meeting started, he spotted the CA vice president in the hallway. She lived out of state, and since there was no announcement made about the vice president's visit or an office luncheon scheduled, which was the usual protocol, Applicant got a bad feeling about his upcoming meeting. He decided to use his Apple watch to secretly record the meeting for his own protection. When he reported to the meeting, the CA vice president said, "I bet you're surprised to see us here." Applicant's reply was, "No, not really," because he realized the purpose of the meeting. At some point before this hearing, Applicant made a transcript of the meeting that he secretly recorded, and submitted it as AE A. (GE 4; Tr.110, 115-120, 133)

P testified that Applicant was told specifically during the meeting that he was being fired due to not providing good support to their customer, removing without authorization the customer's files from the specific site, insubordination, inappropriate behavior, unapproved telework and for falsifying his timecards and attendance. P, who was present during the meeting, read the transcript and found it to be about 90% accurate. She remembered a few topics that were discussed during the meeting that were not found in the transcript. She noticed the transcript did not fully address the severance package details that were discussed; the transcript lacked discussion of the specific inappropriate interactions Applicant had with J; and she also remembered telling Applicant that he needed to turn-in his CA laptop that day, and "he was not to delete anything on that computer." She believed that information was discussed with Applicant during the January 2020 meeting, but it was not found in the transcript. (AE A; GE 4; Tr.110, 115-120, 122-133, 163-164, 173-174)

At the hearing, Applicant testified that he was not terminated from CA, and he was never counseled for falsifying time. He did engage in unapproved telework because telework was a common practice for CA employees. When he did report to the CA office, he found it was expensive for him to travel there from his residence. He was also in a bad mental state because he had moved from another state and did not know anyone at this new location. His CA desk was isolated in a basement. He much

preferred to be with his dog at his residence than be alone in the CA office. He admitted that he was eventually placed next to P's desk for about four weeks, and that he had been told by her in a conversation, not counseled or reprimanded, that he was not allowed to telework. During cross examination, Applicant admitted that he took the conversation seriously when P told him he was breaking the rules by his continued unapproved telework. (Tr. #2 24-28; 55-58)

The January 2020 meeting transcript, provided as AE A, listed a conversation between the CA vice president and Applicant. It stated:

> **VP:** Okay. So that's the severance package we're offering you. The severance package has to be signed today for it to go through.
>
> **Applicant:** It says I can consult a lawyer.
>
> **VP**: You can take it signed to an attorney. But we need it signed because it's saying that you won't talk to anyone, our clients past or present. I can give it to you with me signing it and making a copy. If you don't want to sign it, I can give you just a memo with the termination. So that choice is yours. (AE A page 3)

From the conversation above, the agreement was provided to Applicant as a resignation in lieu of termination.

SOR allegation ¶ 1.e alleges that Applicant falsified material facts on his November 2021 e-QIP in response to "Section 13A – Employment Activities 5. [CA], Optional Comment;" in which he listed his direct supervisor was ["P"], but he did not have many interactions with her. He mainly interacted with the vice president of CA. In truth, Applicant had regular interaction with P. Applicant denied this allegation. He testified that he may have had one or two dozen conversations with P during the course of 18 months of employment. P testified that as Applicant's direct supervisor at CA, she had regular and continuing contact with Applicant. (Tr. 12, 161; Tr. #2 33-35; AE A)

SOR allegation ¶ 1.f alleges that Applicant falsified material facts on his November 2021 e-QIP in response to "Section 13A – Employment Activities 5. [CA] Reason for Leaving – Summary, 1. Left by mutual agreement following notice of unsatisfactory performance. Provide the reason(s) for unsatisfactory performance," and Applicant listed that "the exact reason for the separation was not provided to [him.] It is still unclear whether or not it was due to performance or misconduct." In truth, Applicant had attended a meeting in January 2020 in which he was told specifically the reasons he was being terminated from CA. Applicant denied this allegation. He testified that during the January 2020 meeting he had asked two or three times the reason why he was being terminated, but he never received a valid response. The participants in the meeting said he was being "separated" for the good of the company and him too, and Applicant agreed with that sentiment. Overall, it was a mutually beneficial and amicable separation. Applicant was asked by Department Counsel why he had selected "left by

mutual agreement following notice of unsatisfactory performance" on the e-QIP and wrote "It is still unclear whether or not it was due to performance or misconduct," if he believed that he had not been terminated for cause. Applicant responded that he was just clarifying on the e-QIP that his departure from CA was neither for performance nor misconduct. He was not provided an "amicable separation" on the e-QIP's drop-down menu. (Tr. 12; Tr. #2 35-37; GE 1)

Applicant participated in a background interview on January 10, 2022, and he falsified material facts when he told the investigator that he could not provide any additional information regarding his departure from CA because he never received any communications as to why his employment at CA ended. Other evidence indicates, Applicant attended a meeting in January 2020 in which he was told the exact reasons why he was being terminated from CA. (SOR ¶ 1.g) Applicant denied this allegation. (Tr. 12) Applicant claimed that he was never provided any personal or work-related reasons for his separation from CA, other than it was for the good of the company and him too. It was a mutually beneficial and amicable separation. (Tr. 11; Tr. #2 37-38; GE 2)

Applicant does not admit that he was fired by CA, however, he does admit they had an amicable separation. When asked if Applicant ever characterized his departure from CA as "laid-off," his response was, "No. I would not." Department Counsel showed Applicant that he had crossed-out the term "fired" from his background interview report and replaced it with "laid-off." Applicant made corrections to the report[s] and then certified that the report[s] were now accurate. When he had met with the investigator, the expression "terminated" was listed multiple times during the background interview. He denied using that word with the investigator and crossed out the majority of those words in the report. Applicant testified that if he mischaracterized "termination" as "laid-off," it was a mistake on his part, but he was only trying to show that there was not a negative connotation associated with the conclusion of his CA employment. Department Counsel pointed out that Applicant had characterized his CA employment as "terminated" in his February 2020 response to another GA's employment suitability letter in which he wrote, "*On January 29, 2020, I was terminated from my job at [CA]*." Applicant response was that there was a confidentiality agreement between him and CA concerning his termination, and he can only say that it was resolved amicably. (Tr. #2 63-67)

> Department Counsel: And it's still your stance, [Applicant], that you were not terminated for cause; is that right?
>
> Applicant: Correct. (Tr. #2 68)

The SOR alleges that Applicant also falsified material facts during a December 2022 background interview when he reported to the investigator that he had no disciplinary actions or misconduct during his employment with CA. In truth, however, he was counseled on various occasions for his misconduct, including his inability to follow instructions, engaging in unapproved telework, and falsifying time and attendance records. (SOR ¶ 1.h) Applicant denied this allegation, however, he did admit that he had

engaged in unapproved telework. (Tr. 11-12; Tr. #2 55-57) He also testified that while employed at CA, he had never been disciplined, or given a "written" counseling or "official" reprimand. He was never told by anyone that he was falsifying time and attendance records or counseled for failing to follow instructions. (Tr. #2 38-39)

SOR allegation ¶ 2.a alleges that Applicant, upon his departure from CA, engaged in unauthorized modification, destruction, or manipulation of data in an information technology system when he deleted data from his GA laptop. Applicant denied this allegation. (Tr. 12)

After Applicant was issued a GA laptop, J stated that he was required to participate in training. There is specific training he would have taken that the deletion of files owned by the government is strictly prohibited and considered a federal crime. After Applicant resigned in lieu of termination in January 2020, J requested IT provide all of the files from Applicant's GA laptop to him. IT reported that there were no files and "the hard drive had been optimized." Any work or any files that had been on the government laptop were no longer obtainable. J testified that Applicant had sent him documents in the past, so, at the very least, those documents should have been on the government laptop. (Tr. 50-52, 77, 167-168)

Applicant testified that he was not aware he was leaving CA until he attended the January 2020 meeting. He had his GA laptop with him at the meeting. He admitted that after the meeting, he accessed his GA laptop to report the contractual time he spent supporting contracts. He stated that he was within "eyeshot" of one the participants at the meeting. He denied that he deleted anything from his GA laptop. (Tr. #2 39-41, 45)

SOR allegation ¶ 2.b alleges that Applicant, upon his departure from CA, engaged in unauthorized modification, destruction, or manipulation of data in an information technology system when he deleted data from his CA laptop. Applicant denied this allegation. (Tr. 12) He testified that he did access the CA laptop at home following the January 2020 meeting. He had some personal files that he wanted to access before turning in the laptop. He said the meeting participants were aware he had personal files on the CA laptop, and they did not object to him looking for those files. He said that shortly after he received his GA laptop, all of the files that he ever stored on his CA laptop were moved, not copied, to the GA's OneDrive, so he could access it on his GA laptop. He primarily used his GA laptop and did not use the CA laptop. After the January 2020 meeting, he received a notification that his access was removed. He reported all of the files, to include personal files, were not on his employer's laptop. (Tr. # 2 41-45)

Just before the January 2020 meeting, P had locked Applicant's computer cloud account. Immediately following the meeting Applicant went home to get his CA laptop, and he returned it to her later with everything completely deleted from that laptop. "There were no folders. There were no files, no icons, nothing." She found that he had logged into the CA laptop an hour earlier that same day and "wiped his computer clean." She did an inventory of his hard drive and found there were previous documents that

were in the cloud from that morning that he could not access to delete, because she had locked him out of the cloud earlier. (Tr. 121-131, 173-174; AE A)

Character References

D, a GA employee and the supervisor of J, testified at the hearing. He admitted that Applicant and J were not getting along well. Applicant met with D to complain about J, and also asked him if there was anything that could be done. D allowed Applicant to work directly for him so that he would not have to interact with J. D found Applicant to have a good work ethic, and his assignments were of good quality and prompt. D said that J is a good employee, but he is better out in the field than in the office. He believed J and Applicant had a difference of opinion about how work should be performed, so he thought it best to separate them. He would hire Applicant if the opportunity ever presented itself. (Tr. 195-201)

A government contractor employee testified that she worked with Applicant in approximately 2019 mainly via telephone contact. They were both working for D as support personnel for the GA. She had been assigned a difficult task and asked Applicant for assistance. He came up with a brilliant plan, and they were able to connect with 98 percent of their assigned contacts when they originally only had email addresses for about 20 percent. She credits Applicant for the success of that assignment. She never found him to be condescending or rude. She testified that she was not called upon to reconstruct missing data on Applicant's GA laptop, but she also admitted that she is infrequently called upon to do those types of tasks. (Tr. 185-192)

Applicant's sister testified for Applicant. She visited Applicant at work. He was happy, professional, and invited her to lunch with him and a colleague. P stated that she witnessed Applicant being demeaning to his sister by introducing her around the office as his "fat sister." P said that another CA employee pulled Applicant to the side to tell him to stop introducing her that way. Applicant's sister testified that at no point was her brother demeaning or condescending to her when he took her around the office. She has never witnessed Applicant be demeaning to anyone. She finds him to be caring and kind. They have a wonderful relationship. (Tr. 175-176, 204-207)

Applicant testified that he is involved in community service. He is a fraternity advisor, and an advisor for his alumni board of trustees. He is also a local high school advisor for a youth group. He estimated that he volunteers between 10 to 15 hours a week between the three positions. He also receives high praise for his work contributions from his current government contractor. He has been recognized for outstanding efforts, earned several bonuses and has been promoted more than once since he started work there. He has matured since he was separated from CA in January 2020. (Tr. #2 46-50)

The fourth witness to testify at the hearing was a manager at Applicant's current place of employment. She works with Applicant frequently - especially when his peer manager is out of the office. She has interacted with him at the workplace for a little

over a year. She finds Applicant to be helpful and professional. He has supported her team and other project managers. She considers Applicant trustworthy, and he has shared with her the security concerns in the SOR. She recommends he be granted a DOD security clearance. (Tr. #2 8-16)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), 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." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.15 an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable security 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 that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that 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

Guideline E: Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

> 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 provide truthful and candid answers during national security investigative or adjudicative processes. …

The following disqualifying conditions under AG ¶ 16 are potentially applicable:

> (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;
>
> (b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official,…in making a recommendation relevant to a national security eligibility determination, …;
>
> (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 wholeperson 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:

> (3) a pattern of dishonesty or rule violations; and
>
> (4) evidence of significant misuse of Government or other employer's time or resources.

The SOR alleges that Applicant falsified or covered-up material and relevant information concerning his job termination in 2016 and 2020, his misconduct in the workplace, and his unauthorized deletion of files from the GA's laptop and his employer's laptop. AG ¶ 16(c) is not perfectly applicable, however, the general concerns about questionable judgment and an unwillingness to comply with rules and regulations contained in AG ¶¶ 15 and 16(c) are established. Applicant's multiple incidents of failing to follow his employer's directions and rules, as well as engaging in deceitful conduct makes AG ¶ 16(d) applicable.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. The following mitigating conditions under AG ¶ 17 are potentially applicable:

> (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
>
> (c) the offense is so minor or so much time has passed, or the behavior is so infrequent, or 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; and
>
> (d) the individual 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.

The established facts concerning the SOR allegations all demonstrate Applicant's questionable judgment, unreliability, lack of candor, and an unwillingness to comply with rules and regulations. In 2016, he confronted a customer who did not leave him a tip, which was a violation of the restaurant's company policy, and this inappropriate behavior resulted in his termination. His inappropriate behavior continued in the CA workplace, where he again showed poor judgment by intentionally ignoring his employer's telework rules. I find his conduct was especially dishonorable after he was confronted about his deception, then granted a travel stipend by his employer, but he continued to engage in unauthorized telework. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations.

The same misconduct is alleged in SOR ¶¶ 1.a and 1.b, so I find in favor of Applicant concerning ¶ 1.a and rule against Applicant on ¶ 1.b. I also find that Applicant lied on the e-QIP and during interviews about the true circumstances of his resignation in lieu of termination from CA following a pattern of misconduct, of which he was fully aware. He also lied on the e-QIP when he listed that P, his direct supervisor at CA, rarely had interaction (possibly two dozen conversations) with him while he was employed at CA for 18 months. He lied when he denied he was removed from working with the GA for work-related misconduct, he lied about receiving any counseling for violating rules and instructions while employed, and he lied when he denied that he had removed files without authorization from both CA and GA's laptops. He admitted, however, that he was debarred from government employment with a GA after being found unsuitable based on misconduct and negligence in a prior employment (CA), and falsifying background investigative documents.

I found both of Applicant's supervisors were credible witnesses. They described several instances of Applicant's inappropriate conduct and insubordination. Applicant denied that he had ever been counseled in the workplace, and he continues to cover-up the fact that he was terminated for a pattern of misconduct. It is clear during that January 2020 meeting that the company was terminating Applicant from employment. He was given two options: 1) He would sign the severance package they offered him, or 2) if he failed to sign the agreement, they would give him a memorandum and fire him on the spot. Again, this is a resignation in lieu of termination. He acknowledged during the meeting that he was not surprised what was taking place, and he covertly recorded the meeting with his Apple watch to protect himself. Had he been honest from the beginning about the circumstances surrounding his resignation in lieu of termination, that conduct would likely have been mitigated. Applicant did not make good-faith efforts to correct his misrepresentations which continued through the hearing. AG ¶ 17(a) does not apply.

Many of Applicant's explanations are contradictory and not credible. His inability to accept responsibility for his behavior continues and shows a lack a rehabilitation. Insufficient time has passed to determine if Applicant has changed his behavior. There is insufficient evidence to determine that the circumstances contributing to his untrustworthy and unreliable behavior no longer exist, or that such behavior is unlikely to recur. AG ¶¶ 17(c) and 17(d) do not apply. Personal conduct security concerns are not mitigated.

Guideline M: Use of Information Technology

The security concern relating to the use of information technology is set out in AG ¶ 39:

> Failure to comply with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to properly protect sensitive systems, networks,

> and information. Information Technology includes any computer-based, mobile, or wireless device used to create, store, access, process, manipulate, protect, or move information. This includes any component, whether integrated into a larger system or not, such as hardware, software, or firmware, used to enable or facilitate these operations.

The following disqualifying condition under AG ¶ 40 is potentially applicable:

> (f) introduction, removal, or duplication of hardware, firmware, software, or media to or from any information technology system when prohibited by rules, procedures, guidelines, or regulations or when otherwise not authorized.

The SOR alleges that Applicant removed files, to include proprietary information files, from his GA laptop and his CA laptop, without authorization. AG ¶ 40(f) applies.

The following mitigating conditions under AG ¶ 41 are potentially applicable:

> (a) so much time has elapsed since the behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
>
> (c) the conduct was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation and by notification to appropriate personnel.

The above analysis under personal conduct also applies here. Applicant turned in the CA laptop completely wiped, but P, who had earlier locked Applicant from the cloud account, found documents in there that he could not access and delete. Applicant's conduct continues to cast doubt on his reliability, trustworthiness, and good judgment. AG ¶¶ 41(a) and 41(c) do not apply.

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), 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

I considered Applicant's current positive employment reviews, his recent promotion, and other favorable acknowledgments from character evidence. However, I also considered that he lied, deceived, and failed to follow established rules on multiple occasions, and still refuses to accept responsibility for his actions. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the personal conduct and use of information technology 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 E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraphs 1.b through1.i:	Against Applicant
Paragraph 2, Guideline M:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

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

Pamela C. Benson
Administrative Judge