DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 23-01442
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Dan O'Reilley, Esq., Department Counsel
For Applicant: *Pro se*

06/30/2025

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines B (Foreign Influence), K (Handling Protected Information), and E (Personal Conduct). Applicant has refuted the allegations in the SOR. Clearance is granted.

Statement of the Case

On October 5, 2020, a facility security officer (FSO) reported to the Defense Counterintelligence and Security Agency (DCSA) that a person from a foreign country attempted to acquire classified military information through Applicant, a retired military officer. On December 18, 2023, the DCSA sent Applicant a Statement of Reasons (SOR) based on the FSO's report, alleging security concerns under Guidelines B, K, and E. The DCSA acted under Executive Order (Exec. Or.) 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 (AG)

promulgated in Security Executive Agent Directive 4, *National Security Adjudicative Guidelines* (December 10, 2016), which became effective on June 8, 2017.

Applicant answered the SOR on January 5, 2024, denied all the allegations, and requested a hearing before an administrative judge. Department Counsel was ready to proceed on September 10, 2024, and the case was assigned to me on April 2, 2025. On April 11, 2025, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled to be conducted by video teleconference on May 29, 2025. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 3 were admitted in evidence without objection.

Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. The record closed upon adjournment of the hearing on May 29, 2025. DOHA received the transcript on June 11, 2025.

Findings of Fact

Applicant is a 72-year-old retired U.S. military officer. He served on active duty from June 1975 to September 2011. He married in January 1983 and divorced in May 2013. At the hearing, during questioning about his personal history, he disclosed that his divorce occurred because he had an extramarital affair, and he pays his ex-wife monthly alimony of $3,500. (Tr. 16)

Applicant has held various levels of security clearances, including eligibility for sensitive compartmented information (SCI) since about June 1975. He has worked as a self-employed consultant since November 2021.

In June 2019, Applicant was hired by Company A as the chief technology officer. (Tr. 17) He became acting chief executive officer (CEO) in June 2020, after the previous CEO was fired by the Company A's foreign parent company, and he served in that capacity until November 2021. Company A is one of two U.S. subsidiaries of a foreign aerospace company. Company A is incorporated in the United States but owned by the foreign aerospace company. The other U.S. subsidiary is Company B. Competition for business between Company A and Company B is intense and sometimes hostile. (Tr. 11) Before Applicant became CEO of Company A, there was an atmosphere of animosity between Company A and Company B, driven by personalities, primarily at the CEO level.

SOR ¶ 1.a alleges the following conduct under Guideline B and cross-alleges it under Guidelines K and E: "On or about August 18, 2020, while employed with [Company A], you attempted to acquire classified information without official authorization, via [Company B]." The SOR was based on the incident report sent by the Company B's FSO to DCSA on October 5, 2020. (GX 2) The report states:

> On 5 Oct 2020, the FSO for [Company B] reported to DCSA that [a foreign national] attempted to acquire classified military information and technologies through the subject, a non-cleared U.S. person. [Applicant] is a retired [U.S. military officer] and is cleared for SCI, but does not have

> affiliation with [Company A]. [Applicant] is a cleared consultant with another company as well as the [U.S. military], and is also employed by [the foreign aerospace company], a cleared consultant with another company as well as the [U.S. military]. On 18 August 2020, [a program security lead] contacted the FSO of [Company B] regarding a security anomaly. [Applicant] learned of an RFP (request for proposals) being put out to industry suppliers. The VP of Tech Sales for [Company B] requested classified documents, data, information associated to the RFP be sent to [Company B] for [Applicant] to retrieve. The security lead, not understanding [the rules for] FOCI [foreign-owned, controlled, or influenced companies], initially granted [Applicant] access to the classified program information through e-mail. When the security lead learned that [Applicant] is not authorized access to the information, the approval for access was retracted. [Applicant] did not gain access to the information. The FSO indicated that this was the second time that [Applicant] has attempted to access classified information without official authorization. The FSO indicated that [Applicant] presents himself in an unclear manner by allowing recipients to believe that [Company A and Company B] are the same. [Applicant] further attempts to influence interactions and conversations by stating that he is a retired [senior officer] and held a security clearance.

At the beginning of the hearing, and again during his closing statement, Department Counsel announced that he had asked the FSO of Company B, who sent the above report, to testify about the allegations, but the FSO declined to testify. (Tr. 9, 70-71)

Applicant is not employed by the foreign parent company, as alleged in the FSO's report, but by Company A. (Tr. 11) Applicant disputed the FSO's allegation that he used his military rank in his attempts to access classified information. He testified that he usually introduces himself by his first name and not his military rank, as alleged in the incident report. (Tr. 13) His receipts for the SOR and the Notice of Hearing, bearing his first name, middle initial, and last name, with no military rank listed, corroborate this aspect of his testimony. When he visited an air show in France as the representative of Company A, his official badge set out only his first and last names. (Tr. 28) When he interacted with his counterparts, he always made it clear that he represented Company A and not the parent foreign company. (Tr. 28)

Applicant testified that almost all of his communications with the foreign parent company or Company B would have been with his counterpart CEO, and that he typically would not have been involved at the working level for actions like requesting information for an RFP. He believes that if there was a request for information for an RFP, it would have been sent by his vice-president of technical sales, and he ordinarily would not have been aware of the request. (Tr. 12)

Applicant testified that Company A sought contracts for foreign technology that would benefit the U.S. military. Most of the RFPs were an effort to obtain foreign technology that could be "Americanized" by removing foreign parts so that they could market it in the United States. (Tr. 18) In order to "Americanize" the parts, they needed

the detailed design data to find U.S. design and manufacturing companies who could do the work.

One of three directors and a proxy holder of Company A is also a retired military officer, and he was appointed to be the director of the Company A's government security committee, which consists of three members with top secret security clearances. The committee is required by DCSA to oversee the Company A's security program and make sure that the FOCI (foreign-owned, operated, or influenced) rules are followed. The committee director testified that what should have occurred in Applicant's case is that the FSO of Company B should have reported the suspected violation to the security committee, an emergency meeting of the committee would have occurred, and the committee would have appointed a neutral investigating officer to determine what happened and what actions should be taken. The committee would have notified DCSA that it had received a report of a possible violation and, if a violation was found to have occurred, reported it to DCSA. That procedure was not followed in this case. Instead, the FSO of Company B reported directly to DCSA that a suspected violation had occurred. (Tr. 36-39)

The committee director also testified that at the time Appellant took over as acting CEO of Company A, the corporate structure of the company, in both the foreign country and the United States, was in turmoil due to problems dealing with COVID-19, changes in the leadership in Company A and Company B, and changes in the leadership of the foreign parent company. He believes that the incident at issue in this case may have been blown out of proportion because of "personal animosities and that sort of thing." (Tr. 57)

Policies

"[N]o 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 applicants 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 § 2.

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, an administrative judge applies these guidelines 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 and 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 that 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 made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense 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* at 531. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." See ISCR Case No. 17-04166 at 3 (App. Bd. Mar. 21, 2019). It is "less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966). "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. ISCR Case No. 15-01253 at 3 (App. Bd. Apr. 20, 2016).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan* at 531.

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6:

> 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 maybe 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.

The following disqualifying conditions are potentially relevant:

AG ¶ 7(a): contact, regardless of method, with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

AG ¶ 7(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect classified or sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information or technology; and

AG ¶ 7(f): substantial business, financial, or property interests in a foreign country, or in any foreign owned or foreign-operated business that could subject the individual to a heightened risk of foreign influence or exploitation or personal conflict of interest.

The evidentiary issue in this case is whether the FSO's report, standing alone, constitutes "substantial evidence," as defined above. Even though it contains two levels of hearsay, I have concluded that it constitutes "substantial evidence." However, its probative value has been substantially undermined by the refusal of the Company B FSO to testify, the contentious relationship between Company A and Company B, and the FSO's failure to submit his report to the government security committee, which would have triggered a full investigation of the alleged incident.

Applicant denied all the allegations. His testimony was candid, plausible, and credible. He was open and forthcoming during cross-examination, to the extent that he admitted that his divorce in May 2013 occurred because of his extramarital affair. While it is possible that someone submitted a request for classified documents and claimed to be acting on behalf of Applicant, there is no evidence that Applicant was aware of such an attempt.

The theory of the Government's case under Guideline B appears to be that a foreign national attempted to use Applicant to obtain classified information, which would trigger the heightened risk in AG ¶ 7(a), the conflict of interest in AG ¶ 7(b), and the heightened risk of foreign influence or exploitation in AG ¶ 7(f). There is no credible evidence that Applicant had any connection with the foreign national referred to in the FSO's report. Furthermore, the SOR does not allege and the evidence does not reflect that Applicant had any other connections to persons or groups in the foreign country or and financial or property interests in that country that would cause a heightened risk of foreign exploitation, inducement, manipulation, pressure or coercion or that would create

a potential conflict of interest. Accordingly, I conclude that Applicant has refuted the allegation in SOR ¶ 1.a, and none of the above disqualifying conditions are applicable.

Guideline K, Handling Protected Information

SOR ¶ 2.a cross-alleges the conduct alleged in SOR ¶ 1.a under this guideline. The concern under this guideline is set out in AG ¶ 33: "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."

The following disqualifying conditions are potentially relevant:

> AG ¶ 34(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; and
>
> AG ¶ 34(g): any failure to comply with rules for the protection of classified or sensitive information.

Applicant's complicity an effort by a foreign national to obtain classified information without proper authorization, if proven, would establish Guideline K disqualifying conditions in AG ¶¶ 34(a) and 34(g). However, for the reasons set out in the above discussion of Guideline B, I conclude that neither disqualifying condition is established.

Guideline E, Personal Conduct

The security concern under this guideline is set out in AG ¶ 15: "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. . . .

The relevant disqualifying condition is AG ¶ 16(c):

> [C]redible 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.

For the reasons set out in the above discussions of Guidelines B and K, I conclude that this disqualifying condition is not established.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline K, Handling Protected Information:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national security interests of the United States to continue Applicant's eligibility for access to classified information. Clearance is granted.

LeRoy F. Foreman
Administrative Judge