DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: David Hayes, Esq., Department Counsel
For Applicant: *Pro se*

03/30/2016

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny him eligibility for access to classified information. His inappropriate behavior in the workplace is mitigated by the passage of time without recurrence. He also provided sufficient evidence to rebut and explain that allegations that he made false and misleading statements during the security clearance process. Accordingly, this case is decided for Applicant.

Statement of the Case

This case has been pending for some time. Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 Format) on December 1, 2012.[1] In doing so, he disclosed in detail that in July 2010 he left a job by mutual agreement following charges or allegations of misconduct. About two years later on December 23, 2014, after reviewing the application and information gathered during a background

[1] Exhibit 1 (this document is commonly known as a security clearance application).

investigation, the Department of Defense (DOD)[2] sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant him eligibility for access to classified information.[3]

The SOR is similar to a complaint. It detailed the reasons for the action under the security guidelines known as Guideline D for sexual behavior and Guideline E for personal conduct. Applicant answered the SOR on January 17, 2015; he admitted the allegations (except one), and provided an explanation for each admission; he denied an allegation that he grabbed a female coworker's rear end; and he requested a decision based on the written record in lieu of a hearing.

Department Counsel then reviewed the case and made a timely request for a hearing.[4] Department Counsel was ready to proceed on August 28, 2015. The case was assigned to me on September 18, 2015. The hearing was held as scheduled on November 13, 2015. Department Counsel offered Exhibits 1–2, and they were admitted. Applicant elected to rely on the government exhibits and offered no exhibits of his own. Other than Applicant, no witnesses were called. The hearing transcript (Tr.) was received on November 24, 2015.

At the close of the hearing, the record was kept open until November 30, 2015, to allow Applicant to provide documentary information concerning his employment record and job training. Applicant made a timely submission, and those matters are made part of the record as Exhibits A, B, C, and D.

Procedural Matters

At the start of the hearing, Department Counsel withdrew the Guideline D sexual behavior allegations, as set forth in SOR ¶¶ 1.a–1.f.[5] They took that action because they concluded that the allegation in SOR ¶ 1.a was misplaced, and that the allegations in SOR ¶¶ 1.b–1.f were more appropriately addressed as workplace misconduct as cross-alleged under Guideline E for personal conduct. In addition, SOR ¶ 2.a was amended to

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[2] The SOR was issued by the DOD Consolidated Adjudications Facility, Fort Meade, Maryland. It is a separate and distinct organization from the Defense Office of Hearings and Appeals, which is part of the Defense Legal Services Agency, with headquarters in Arlington, Virginia.

[3] This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply here. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

[4] Appellate Exhibit I.

[5] Tr. 15–17.

delete a reference to SOR ¶ 1.a, with the cross-allegation focused on the matters described in ¶¶ 1.b–1.f, as noted above.

Findings of Fact

Applicant is a 36-year-old employee who is seeking to retain a security clearance, at the top-secret level, that he has held since about 2006. He is employed as a network security engineer for a consulting firm. He has worked for that consulting firm since December 2010, and he has a good employment record in that job.[6] His educational background includes a bachelor's degree in computer information systems awarded in 2002. In addition, he has obtained eight certifications attesting to his knowledge, skills, and abilities in the field of information technology.[7] He married in 2005; he divorced in 2011; and he shares custody of a nine-year-old daughter. He remarried about two years ago. His spouse works for the same firm and she also holds a security clearance.

Applicant was first granted eligibility for access to classified information for his job as a technician during 2006–2008. He received a top-secret security clearance as well as eligibility for access to sensitive compartmented information (TS/SCI) by another governmental agency (AGA). He had a good employment record in that job, including recognition as the company's outstanding new employee in 2007.[8] For this employment, there were no issues involving discipline, misconduct, or security matters. He left in March 2008 for a better opportunity for advancement with an employer seeking someone with a TS/SCI clearance.

Applicant was employed as a principal systems engineer with a federal contractor from March 2008 to July 16, 2010, when he left by mutual agreement following charges or allegations of misconduct. It is this period of employment that serves as the basis for the allegations in SOR ¶¶ 2.a and 2.b. Until shortly before his resignation, Applicant believed he was in good standing with the company. Indeed, he stated that he was offered a management position with the company as well as federal employment with the customer, both of which he declined.[9] A job performance appraisal, for the period ending December 31, 2009, gave Applicant an overall rating of "exceptional performance," noting that he was a "central figure" in leading a particular project.[10]

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[6] Exhibit C.

[7] Exhibit D.

[8] Exhibit A.

[9] Tr. 52.

[10] Exhibit B.

In mid-July 2010, the company informed Applicant he was under investigation for allegations of misconduct. At the same time, the company, in a July 13, 2010 letter, informed the AGA that Applicant was under investigation.[11] The company met with Applicant, informed him of the allegations, and told him that he could resign without repercussions.[12] The allegations consisted of inappropriate workplace behavior that Applicant readily admits, with the one exception previously noted. The admitted allegations consist of the following: (1) in December 2009, he lit the corner of a piece of letter-sized paper on fire, and then placed it in a freezer when it would not extinguish; (2) in about March 2010, he rested or placed his head on a female coworker's breast, an older woman considered the office mother, who took no offense at the time; and (3) also in 2010, he spayed compressed air on a female coworker's lower back or rear end.

Applicant admits his actions were childish, sophomoric, and immature.[13] He also indicated his actions were part of a workplace environment that was very casual, the typical office dress was jeans and T-shirts, and inappropriate humor, including practical jokes and jokes of a sexual nature, was commonplace. He described the workplace environment as toxic, and he regrets that he did not leave sooner on his own terms.[14] Nevertheless, he blames no one else but himself for his actions.

Applicant asked if the matter would affect or impact his security clearance and company officials replied in the negative, indicating he could treat the matter as if it never happened.[15] Accordingly, Applicant resigned. His company, in a September 21, 2010 letter, informed the AGA that their human-resources department had determined that Applicant had engaged in inappropriate behavior in violation of company policy; that Applicant had resigned on July 16, 2010; and that his employment record reflected termination by mutual consent.[16]

Following his resignation, there was a series of events that resulted in allegations that Applicant provided false or misleading information about his resignation during the security clearance process. Those events are set forth in SOR ¶¶ 2.c–2.f, and they are discussed below.

Applicant was unemployed for several months before beginning his current job in December 2010. In the interim, he sought employment with another company. (SOR ¶

[11] Exhibit 2.

[12] Tr. 53.

[13] Tr. 26.

[14] Tr. 51–52.

[15] Tr. 57–59.

[16] Exhibit 2.

2.c)[17] As part of that process in September 2010, he was asked to submit a security clearance application, a copy of which is not in evidence. In doing so, he did not disclose his resignation following charges of allegations of misconduct. He omitted that information based on his understanding that his resignation was voluntary, without repercussions, and that no security-related actions were taken by his former employer. Shortly thereafter, the company facility security officer (FSO) informed Applicant there was an issue with his security clearance application, at which point he informed the FSO of the circumstances of his resignation. The FSO then asked him to complete an addendum to address the resignation. The addendum was never submitted, however, because the company was rushing to fill the position and elected to discontinue sponsoring Applicant for a clearance. The FSO also advised Applicant to disclose the circumstances surrounding his resignation the next time he completed a security clearance application.

In about October 2010, Applicant applied for the job with his current employer, but the consulting firm did not ask him to submit a security clearance application at that time. (SOR ¶¶ 2.d and 2.e)[18] Nor did Applicant submit the addendum to the consulting firm's FSO. Nevertheless, Applicant disclosed the circumstances of his resignation when he completed an application for employment with the consulting firm. In addition, Applicant explained in detail the many steps he has taken to keep the firm's FSO informed as well as working with the FSO in completing and submitting the 2012 security clearance application.

In January 2011, Applicant had an interview with the AGA, as the consulting firm was sponsoring him for eligibility for SCI access. (SOR ¶ 2.f)[19] He was accused of making a false statement during that interview by stating the previous FSO told him not to disclose the circumstances of his resignation in the September 2010 security clearance application. The allegation appears to be based on a misunderstanding by or confusion of Applicant. At the hearing, Applicant explained he submitted the September 2010 security clearance application without disclosing the circumstances of his resignation. But the FSO did not advise him to omit information. The FSO did not talk to him about the application until a problem arose. He then followed the FSO's instruction to create an addendum, which he did not submit because the process ended prematurely.

Several months later in August 2011, the AGA denied Applicant eligibility for SCI access based on his inappropriate behavior in the workplace and his failure to disclose the circumstances of his resignation in the September 2010 security clearance application.[20] Applicant, with the assistance of legal counsel, appealed the adverse

[17] Tr. 56–66.

[18] Tr. 66–75.

[19] Tr. 77–85.

[20] Exhibit 2.

decision without success. As part of that process, Applicant, at the direction of legal counsel, obtained a psychological evaluation from a licensed psychologist in 2012 and a second or follow-up evaluation by another psychologist in July 2012. Those matters were disclosed to the AGA during the appeal process.[21]

In December 2012, he submitted the security clearance application that is now under review.[22] In response to a question in section 21 of the application, Applicant denied, in the last seven years, having consulted with a health-care professional regarding an emotional or mental health condition or were you hospitalized for such a condition.[23] (SOR ¶ 2.g) He did not disclose the two consultations mentioned in the previous paragraph. Applicant explained he answered the question in the negative because he thought he fit into the exception for "strictly marital, family, grief not related to violence by you." He interpreted grief to cover the grief he experienced as a result of his workplace misconduct and resulting loss of employment. His interpretation, although misplaced, is consistent with his disclosure of the mental-health consultations during the AGA appeal process, which certainly put the Government on notice.

Outside of work, Applicant's personal interests are largely focused on family and church.[24] He and his wife are involved in his daughter's school activities, and he attends a blended-family group on Tuesday nights and a Bible-study group on Wednesday nights. He is also involved in his church's security committee.

Looking backward, Applicant has learned several lessons.[25] Those lessons include the practice of full disclosure during the security clearance process; to stay true to yourself and not to follow the behavior of others; and to avoid frivolity at the workplace. As an example of his changed behavior, Applicant has worn a shirt-and-tie to work every day, except one, since he resumed employment in December 2010. [26]

At the hearing, Applicant impressed me as contrite and intelligent, he was polite and respectful throughout, he answered questions in a direct manner, and I found him to be a credible source of information.

[21] Exhibit 2.

[22] Exhibit 1.

[23] Tr. 85–87.

[24] Tr. 88–90.

[25] Tr. 95–96.

[26] Tr. 99–100.

Law and Policies

It is well-established law that no one has a right to a security clearance.[27] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[28] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[29] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[30]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[31] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[32] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[33] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[34] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[35] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[36]

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense

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[27] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[28] 484 U.S. at 531.

[29] Directive, ¶ 3.2.

[30] Directive, ¶ 3.2.

[31] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[32] Directive, Enclosure 3, ¶ E3.1.14.

[33] Directive, Enclosure 3, ¶ E3.1.15.

[34] Directive, Enclosure 3, ¶ E3.1.15.

[35] *Egan*, 484 U.S. at 531.

[36] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

decision based upon consideration of the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.[37] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

Personal conduct under Guideline E[38] is a concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly handle and safeguard classified information. The suitability of an applicant may be questioned or put into doubt when an applicant engages in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with the rules and regulations. And "of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."[39]

The deliberate omission, concealment, or falsification of a material fact in any written document or oral statement to the Government when applying for a security clearance or in other official matters is a concern. It is deliberate if it is done knowingly and willfully. An omission of relevant and material information, for example, is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or thought the information did not need to be reported.

In analyzing the facts of this case, I have considered the disqualifying and mitigating conditions at AG ¶¶ 16(a), (b), and (d), and AG ¶¶ 17(c) and (d), respectively.

Concerning the inappropriate behavior in the workplace, Applicant became caught up in office hijinks and shenanigans. He recognizes that he exercised poor judgment during that period, and he has adjusted and corrected his behavior. In addition, he has since remarried to a woman who also holds a security clearance, and he appears to have a stable lifestyle outside of work focused on family and church activities. I am persuaded that Applicant's misconduct is mitigated by the passage of time without recurrence. His misconduct happened so long ago in 2009–2010 and was such an aberration from an otherwise excellent employment record, that his misconduct no longer rises to a level that justifies revocation of his security clearance.

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[37] Executive Order 10865, § 7.

[38] AG ¶¶ 15, 16, and 17 (setting forth the concern and the disqualifying and mitigating conditions).

[39] AG ¶ 15.

Concerning the multiple allegations of making false or misleading statements during the security clearance process, as far as I can determine, he made one deliberately false statement. It occurred when he omitted the circumstances of his resignation from his September 2010 security clearance application. His omission was largely caused by the misinformation, if not deliberately misleading information, provided by his former employer. But for that information, it is probable Applicant would have disclosed the resignation in the first place. In addition, his false statement happened under such unusual circumstances that it is unlikely to recur.

In addition, I am not persuaded that Applicant made deliberately false statements or omissions during the security clearance process in 2010–2011 for the reasons outlined in the findings of fact. Concerning the allegation that he falsified his 2012 security clearance application when he failed to disclose the mental-health consultations, I am persuaded that Applicant misunderstood the question and thought he did not have to report the consultations.

The concern over Applicant's personal conduct does not create doubt about his current reliability, trustworthiness, good judgment, and ability to protect classified information. In reaching this conclusion, I considered the whole-person concept.[40] I also weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa.* Accordingly, I conclude he met his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline D:	Withdrawn
Subparagraphs 1.a–1.f:	Withdrawn
Paragraph 2, Guideline E:	For Applicant
Subparagraphs 2a.–2.g:	For Applicant

Conclusion

In light of the record as a whole, it is clearly consistent with the national interest to grant Applicant eligibility for access to classified information.

Michael H. Leonard
Administrative Judge

[40] AG ¶ 2(a)(1)–(9).