DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Name Redacted]	)	ISCR Case No. 15-00319
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

8/24/2015

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to revoke a security clearance to work in the defense industry. Applicant engaged in workplace misconduct as a federal employee during 2013–2014 that ultimately resulted in her resignation in lieu of termination. The totality of facts and circumstances reflect a recent pattern of questionable judgment, untrustworthiness, irresponsibility, and failure to comply with rules and regulations. Accordingly, this case is decided against Applicant.

Statement of the Case

The Department of Defense (DOD), on January 30, 2015, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was clearly consistent with the national interest to grant her eligibility for access to classified

information.[1] The SOR is similar to a complaint.[2] It detailed the reasons for the action under the security guidelines known as Guideline K for handling protected information, Guideline M for use of information technology systems, and Guideline E for personal conduct. With assistance of counsel, she answered the SOR on February 18, 2015, and requested a hearing. Subsequently, on March 26, 2015, Department Counsel amended the SOR by adding language to SOR ¶ 3.c, and by striking the language in SOR ¶ 3.d and adding new language. Applicant answered the amended SOR on August 5, 2015.[3]

The case was assigned to me on July 1, 2015. A prehearing conference call was held on July 17, 2015. The hearing was held as scheduled on August 11, 2015. Department Counsel offered Exhibits 1–7, and they were admitted. Applicant offered Exhibits A–M, and they were admitted. Applicant and five witnesses testified on Applicant's behalf. The hearing transcript (Tr.) was received on August 19, 2015.

Findings of Fact

In general, the SOR, as amended, alleged the following: (1) Applicant engaged in misconduct in the federal workplace in 2013 by having an unprofessional relationship with her supervisor; (2) she engaged in misconduct in the federal workplace in 2014 by wrongfully accessing a governmental information technology system for the purpose of providing two sensitive but unclassified nonpublic reports to her husband; and (3) she twice made false statements during the course of the official investigation into the 2014 misconduct. Applicant's answers to the SOR and amended SOR were mixed: (1) she admitted the 2013 workplace misconduct; (2) she admitted the 2014 workplace misconduct in that she gave her husband the first report, and she denied providing the second report to her husband; and (3) she denied making false statements during the 2014 investigation. Applicant's admissions are incorporated into the findings of fact.

Applicant is a [redacted] employee of an organization that does research and development for the federal government. She is seeking to retain a security clearance previously granted to her while she was employed by the [redacted]. She has worked for her current employer since October 2014. Her first marriage ended in divorce. She met her second husband at work, as he was employed by the same [redacted]. They

---

[1] 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.

[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] In addition, at hearing, SOR ¶ 1.a was amended to correct a minor drafting error that did not alter the substance of the allegation.

eventually began dating and then married in 2009. She and her husband have [redacted]. Her educational background includes a bachelor's degree and a master's degree.

After receiving her bachelor's degree in 1998, Applicant began her federal employment with the [redacted]. She worked hard, performed well by all accounts, and rose through the ranks. She was promoted to a senior-level management position at [redacted] headquarters in 2009.

Applicant had difficulties in her personal and family life. By September or October 2012, she determined it was necessary to stage an intervention to persuade her husband to enter an inpatient treatment program to address his addiction to pain medication and abuse of alcohol. She was then pregnant with [redacted] born prematurely later in the year. Her husband completed inpatient treatment and returned to work, but had time-and-attendance issues.[4] He resigned from federal employment in February 2013 in lieu of facing termination for timecard fraud.[5]

A few months later in May–June 2013, Applicant engaged in conduct unbecoming a federal employee by having intimate text exchanges and other personal contacts with her direct supervisor who was then a member of the senior executive service.[6] This was discovered when her husband found an inappropriate text message on her phone. Before this incident, Applicant and the same employee (who was then her peer) had a sexual relationship during a business trip in 2011.

Both Applicant and her supervisor self-reported the texting incident to a senior official, it was investigated by the [redacted] Inspector General (IG), and the [redacted] took disciplinary action against both Applicant and her supervisor. The proposed action against Applicant included a reduction in pay to the next lower grade, but that did not occur.[7] Instead, in November 2013, she was suspended from duty for 14 days without pay for unprofessional conduct. In addition, in about early 2014, she was laterally transferred from a supervisory position to a non-supervisory position in a different section of the headquarters.

During this same period, Applicant's husband was laid off from his private-sector job in November 2013, and he was having difficulty obtaining employment. In April 2014, her husband successfully completed a phone-screen interview with a federal contractor and was pending an in-person interview. During a conversation at home one evening, he asked Applicant to provide him with a report on [redacted] that was stored on a [redacted] database. She did so the next day.

---

[4] Tr. 126.

[5] Tr. 146.

[6] Exhibit 2.

[7] Exhibit 3.

On about April 25, 2014, Applicant accessed, viewed, and printed two reports from a governmental information technology system for the unauthorized purpose of providing the reports to her husband.[8] She was an authorized user of the system, but her actions were a misuse of her position because her actions had no official purpose and were for personal reasons. Both reports concerned the [redacted].[9] Both reports contained sensitive but unclassified nonpublic information. Both reports were for official use only (FOUO). The first report concerned the [redacted] assessment of the [redacted]. The second report contained a [redacted], which included personally identifiable information (PII) of certain [redacted].

Applicant admits that she gave the first report to her husband when she returned home from work that day. She denies, as does her husband, that she gave the second report to her husband, and the evidence does not establish otherwise. Instead, the evidence establishes that she initially disposed of the second report by placing it in a burn bag in her office. Then, sometime thereafter, she removed the second report, along with other documents, from the burn bag and shredded them as part of her normal practice of maintaining the burn bag. Additional details are discussed below.

[Redacted] officials became concerned during the job interview with Applicant's husband, and they reported their concerns to the [redacted] on May 1, 2015.[10] According to two [redacted] employees, her husband brought with him and referenced during the job interview two documents, one of which was identified with certainty as the first report, which was clearly marked FOUO, and a document that might have been the second report but was not clearly marked.[11] In other words, they could not identify the second document with certainty. The [redacted] employees reported that the husband implied that he could significantly improve the [redacted]. When asked how he obtained the documents, the husband stated that his wife was an employee of the [redacted], that she had connections, and so he had connections.

During the evening of May 1, 2014, Applicant and her husband discussed the job interview. She learned that her husband mentioned her employment with the [redacted] as well as the first report. It was then that she realized the seriousness of her situation and that she needed to report the matter to her supervisor, which she did the following day. She admitted to her supervisor that she provided the first report to her husband for his preparation for the job interview. She was not asked at the time if she gave her husband a second report. Her supervisor then initiated an informal inquiry to determine which documents she had accessed from the database over the last six months. The informal inquiry was overtaken by events when the incident was referred to the

[8] Exhibit 4.

[9] Exhibit 4, Enclosure 10.

[10] Exhibit 4, Enclosure 2.

[11] Exhibit 4, Enclosures 2, 11, and 12.

[redacted] insider threat working group, which in turn referred it to the IG for investigation.

The IG investigation concluded that Applicant misused a governmental information technology system and allowed the improper use of nonpublic information to further her own interest or that of her husband in violation of various regulations.[12] The IG investigators met with her three times, the first time informally on May 6. There is no record in evidence of the conversation that took place that day.

The second interview occurred on May 9, Applicant was placed under oath, and the interview was transcribed verbatim.[13] She stated that she met with her supervisor on May 2 because she wanted to disclose that she gave her husband the first report. She was unaware of the [redacted] complaint at that time but thought it might come up. She referred to the May 6 meeting when she stated that she provided the first report but denied providing the second report. She also denied giving him any other documents that were marked FOUO in the past. The IG investigators did not ask her if she had accessed and printed the second report. The second interview was relatively brief, less than seven double-spaced pages of transcript.

Subsequently, the IG investigation discovered that Applicant had accessed and printed two reports on April 25.[14] As a result, Applicant was interviewed for a third time on May 20, this time telephonically, and the interview was transcribed verbatim.[15] When asked about accessing and printing the second report, she readily admitted doing so, but she denied providing the second report to her husband. She explained that she printed the report and looked at it, but then "trashed it" by placing it in her burn bag and then shedding it. She further explained she shredded it because it contained PII and other information. The third interview was brief, less than two double-spaced pages of the transcript.

The IG investigation then turned to Applicant's burn bag.[16] A May 20 examination of the burn bag, which was about 25 days after the reports were printed, determined that the second report was not in the burn bag. Other documents, going back as far as August 2013, were found in the burn bag, including similar documents containing PII as well as other sensitive and classified information that Applicant did not shred as she explained she did with the second report. At the hearing, she explained that her practice was to periodically remove items from the top of the burn bag and shred them. As a

[12] Exhibit 4.

[13] Exhibit 4, Enclosure 14.

[14] Exhibit 4, Enclosures 8 and 9.

[15] Exhibit 4, Enclosure 14.

[16] Exhibit 4, Enclosure 15.

result, the second report was destroyed when she disposed of it in the shredder, which accounts for its absence from the burn bag.

In light of the circumstances, the [redacted] took adverse action against Applicant. Initially, on May 12, 2014, she was relieved of her duties and placed on paid administrative leave pending the outcome of the ongoing IG investigation and any subsequent action. About a month later on June 13, 2014, the [redacted] notified her of its intent to remove her from the federal service due to (Charge 1) misuse of a governmental information technology system and (Charge 2) improper use of nonpublic information to further her private interest or that of her husband.[17] The former charge specified that she wrongfully accessed, viewed, and printed the first and second reports for no official purpose and for personal use. The latter charge specified that she wrongfully disclosed nonpublic information by giving the first report to her husband. Neither charge specified that she gave the second report to her husband. Likewise, neither charge specified that she made false statements during the IG investigation.

In proposing the removal, the [redacted] noted Applicant's 15½ years of federal service with numerous performance awards as well as her suspension from duty without pay for 14 days in November 2013 for unprofessional conduct. Concerning the latter matter, the [redacted] noted that the suspension had not impressed upon her the legitimate expectation that as a senior-level federal employee, she must conduct herself in an exemplary manner.

Initially, Applicant contested the proposed removal. She responded in writing on July 18, 2014, and met with the deciding official on July 29, 2014.[18] In both instances, she accepted responsibility for her actions and expressed remorse. She admitted accessing and printing the first and second reports as well as giving the first report to her husband. She explained that she gave the first report to her husband to try to help him. She thought if he obtained employment, he would feel better about himself, and that might improve their marital relationship. She stated she was desperate. She described her conduct as an incredibly poor and stupid decision that was an anomaly.

Applicant resigned on September 3, 2014.[19] Her resignation was in lieu of termination in that she resigned after receiving written notice of a proposed action to remove her from the federal service for misconduct.

Other than the 2013–2014 workplace misconduct, Applicant had a good if not outstanding employment record with the [redacted]. Her good employment record is established by documentary evidence, written declarations, and the testimony of four

[17] Exhibit 5.

[18] Exhibits B and C.

[19] Exhibits 6 and D.

witnesses.[20] In addition, the four written declarations and the testimony of four witnesses were uniform or consistent in vouching for Applicant's reliability, trustworthiness, and suitability for a security clearance. Moreover, those assessments came from people with decades of experience working at senior levels in [redacted]. Overall, the opinions expressed by the declarants and witnesses were impressive and speak highly for Applicant.

Throughout the hearing, Applicant was respectful and she appeared contrite. She was also teary eyed or cried during most of a lengthy hearing. I assessed her demeanor as an indication of her regret and remorse. I also assessed her demeanor as an indication of her grieving the loss of her federal employment as well as concern about her current predicament.

Law and Policies

It is well-established law that no one has a right to a security clearance.[21] 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."[22] 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.[23] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[24]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[25] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[26] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate

---

[20] Exhibits A, E–L.

[21] *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).

[22] 484 U.S. at 531.

[23] Directive, ¶ 3.2.

[24] Directive, ¶ 3.2.

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

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

facts that have been admitted or proven.[27] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[28]

In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[29] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[30]

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 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.[31] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Discussion

The evidence here raises obvious concerns under Guideline K for handling protected information, Guideline M for use of information technology systems, and Guideline E for personal conduct.[32] But I am not persuaded that Applicant made deliberately false statements during the IG investigation, and those matters are discussed below. Nevertheless, the remaining matters in the SOR are proven and raise serious concerns.

First, the evidence is circumstantial and does not support a factual finding that Applicant gave the second report to her husband. To find otherwise would require me to engage in speculation or conjecture. Therefore, the falsification that allegedly took place during the IG investigation, alleged in SOR ¶ 3.c, is not proven.

Second, the evidence does not support a conclusion that Applicant deliberately failed to disclose that she had accessed and printed the second report during the IG

---

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

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

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

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

[31] Executive Order 10865, § 7.

[32] AG ¶¶ 34(a), (d), (f), and (g); AG ¶¶ 40(a) and (e); and AG ¶¶ 16(c) and (d).

investigation. The evidence shows that she readily admitted doing so when she was asked the pertinent question. Therefore, the falsification allegation in SOR ¶ 3.b is not proven.

Turning to the evidence in disqualification, I have looked closely at the evidence in an effort to assess the progression of events and connect the dots, such as they are. Her unprofessional conduct with her then supervisor in 2013 would be of little consequence if it occurred in isolation. These things happen. But the various events—(1) the texting episode with her then supervisor during May–June 2013, (2) her suspension from work without pay for 14 days in November 2013 for unprofessional conduct, (3) her reassignment from a supervisory position to a non-supervisory position in early 2014, and (4) about four months later in April 2014, her misuse of her official position to access a governmental database—are circumstances that should be taken together and viewed as a whole. Those circumstances form part of a single or overall narrative that reflect a recent pattern of questionable judgment, untrustworthiness, irresponsibility, and failure to comply with rules and regulations.

Applicant's case is one of a high-achieving employee who was under substantial stress at home ([redacted] and a difficult marital situation) when she engaged in risky, self-destructive behavior on more than one occasion. It may also be a case of a disgruntled employee (in 2013, the [redacted] suspended her without pay and pushed her husband to resign) who abused her position of trust to access sensitive but unclassified nonpublic information to help her husband obtain employment. Viewed in that light, it is an example of an insider threat that the government is so concerned about these days. Or it may be a simple case of a well-meaning employee who exercised exceptionally poor judgment. It's entirely probable that it is a combination of the three. Regardless, the narrative that emerges militates against a favorable decision.

There are a number of extenuating or mitigating circumstances to consider in Applicant's case. First, she had a good if not outstanding employment record with the [redacted]. Her rise through the ranks to a senior-level management position is persuasive evidence of her competence. Second, a number of well-regarded people, via written declarations or in-person testimony, vouched for Applicant's overall suitability for a security clearance. Again, their assessments of Applicant were impressive. Third, she was under substantial stress at home, and she has since engaged in both personal counseling and marital counseling.[33] Fourth, she self-reported both the 2013 and 2014 incidents of workplace misconduct once she realized the gravity of her mistakes. Although it is likely these matters would have otherwise come to light, it appears she self-reported because she believed it was the proper course of action. She is credited with self-reporting, as that is the expectation of a person who is currently eligible for access to classified information. Fifth, she has, throughout this process, accepted responsibility and expressed regret and remorse for her actions, and her demeanor during the hearing was the same. Sixth, her motivation for her conduct in the 2014

[33] Applicant referred to the counseling in her testimony, but did not present any direct evidence of it, such as written assessments or reports from the counselors.

incident was to help her husband obtain employment, hopefully improve their marital relationship, and improve the stability of her family. Although misguided, her motivation is understandable. It is certainly less culpable or blameworthy than seeking to unjustly enrich herself or otherwise profiting by selling or trading the protected information.

I also considered the formal mitigating conditions under the three security guidelines at issue here, and none, individually or in combination, is sufficient to mitigate the concerns raised by Applicant's workplace misconduct during 2013–2014.[34] I also considered the cases cited by Applicant's counsel in closing argument.[35] Those cases are decisions from other DOHA administrative judges, not the DOHA Appeal Board, and are therefore persuasive but not controlling authority. Because security clearance cases are decided on a case-by-case basis with particular attention to the unique facts of each case, I do not give the cited cases much weight. Moreover, the persuasive authority of the cites cases is outweighed by the seriousness of Applicant's misconduct.

In conclusion, I weighed the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa.* I also gave due consideration to the whole-person concept.[36] I am convinced that Applicant accepts responsibility for her actions, and I accept her statements that she has learned from the 2014 incident. But given her age, experience, and senior-level management position with this particular [redacted], it was a lesson that she should have already recognized. Her evidence in explanation and mitigation is simply not strong enough to overcome the nature, extent, and seriousness of her workplace misconduct. Although this case does not involve deliberate mishandling or disclosure of classified information, which are federal crimes, this is a serious case of a then federal employee abusing her position to obtain protected information and then provide it to an unauthorized third party to benefit the third party or herself, or both. And at this point, it is too soon to determine if her workplace misconduct in 2013–2014 was a mid-career aberration or is part of her character. Accordingly, I conclude that Applicant did not meet her ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant her eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline K:	Against Applicant
Subparagraph 1.a:	Against Applicant

[34] AG ¶¶ 35, 41, and 17.

[35] Tr. 248–249.

[36] AG ¶ 2(a)(1)–(9).

Paragraph 2, Guideline M:	Against Applicant
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	Against Applicant
Subparagraphs 3.a and 3.d:	Against Applicant
Subparagraphs 3.b and 3.c:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for access to classified information. Eligibility is denied.

Michael H. Leonard
Administrative Judge