DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 15-05714
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Rhett Petcher, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

09/22/2017

Decision

HARVEY, Mark, Administrative Judge:

Applicant received 31 suspensions, reprimands, or warnings from his employer from 2011 through 2015 for violating various rules. His July 18, 2014 electronic Questionnaire for National Security Positions (SF 86) or security clearance application (SCA) did not include the negative information about his employer's disciplinary actions against Applicant; however, Applicant did not intentionally omit this information from his electronic SCA with intent to deceive. Personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

On July 18, 2014, Applicant completed and signed his SCA. (Government Exhibit (GE) 1) On March 15, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine

whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under the personal conduct guideline.

On March 28, 2016, Applicant responded to the SOR. (Hearing Exhibit (HE) 3) Applicant requested a hearing. (Tr. 6) On August 11, 2016, Department Counsel was ready to proceed. On April 7, 2017, the case was assigned to me. On April 25, 2017, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for May 31, 2017. (HE 1) Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered three exhibits; Applicant offered four exhibits; there were no objections; and all proffered exhibits were admitted into evidence. (Tr. 10-12, 51-52; GE 1-3; Applicant Exhibits (AE) A-D) On June 8, 2017, DOHA received a hearing transcript. On September 21, 2017, Applicant provided a legible copy of Applicant's DD Form 214, which was admitted without objection. (Tr. 71; AE C)

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.[1]

Findings of Fact[2]

In Applicant's SOR response, he admitted the SOR allegations in SOR ¶¶ 1.a through 1.ii, and he denied the allegation in SOR ¶¶ 1.jj. (HE 3) Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is 54 years old, and he has been employed in security at a U.S. Government agency for 10 years. (Tr. 14) He is authorized to carry a firearm as part of his security duties. (Tr. 15, 26) He has held a security clearance since 2007, and a security clearance is required for his employment. (Tr. 15) He is a high school graduate, and he has not attended college. (Tr. 27) In 2005, he married, and in 2008, he divorced. (Tr. 49) He has a 17-year-old son. (Tr. 27) He served in the Army from 1982 to 1985, and in the Marine Corps from 1985 to 1989. (Tr. 49-50) He received honorable discharges. (Tr. 50) Applicant has assisted high-level government officials including senators and congressmen as part of his security duties. (Tr. 16)

[1] Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at http://ogc.osd.mil/doha/5220-6_R20170608.pdf.

[2] Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

Personal Conduct[3]

Applicant received 17 suspensions from employment from 2011 to 2015 for violations of his employer's disciplinary policy, non-medical call-off policy, or other policies: ¶ 1.a on January 13, 2011, for two days (GE 2 at 228); ¶ 1.f on November 25, 2011, for two days (GE 2 at 196); ¶ 1.i on June 5, 2012, for two days (GE 2 at 77); ¶ 1.l on July 25, 2012, for five days (GE 2 at 65); ¶ 1.n on December 26, 2012, for two days (GE 2 at 28-29); ¶ 1.o on February 19, 2013, for one day (GE 2 at 191); ¶ 1.p on March 26, 2013, for two days (GE 2 at 186); ¶ 1.q on May 13, 2013, for one day (GE 2 at 180); ¶ 1.s on July 1, 2013, for one day (GE 2 at 173); ¶ 1.w on December 9, 2013, for one day (GE 2 at 141); ¶ 1.x on December 30, 2013, for one day (GE 2 at 156); ¶ 1.y on January 3, 2014, for one day (GE 2 at 134); ¶ 1.z on February 28, 2014, for one day (GE 2 at 149); ¶ 1.aa on March 27, 2014, for two days (GE 2 at 127); ¶ 1.ee on November 17, 2014, for two days (GE 2 at 118); ¶ 1.ff on January 20, 2015, for one day (GE 2 at 112); and ¶ 1.hh alleged on June 2, 2015, actually May 26, 2015, for one day (GE 2 at 104). Some of his suspensions were for multiple rule violations.

Applicant's employer issued 14 memoranda for record about violations of policy or letters of reprimand for violations of various rules: ¶ 1.b on March 10, 2011 (GE 2 at 222); ¶ 1.c on April 20, 2011 (GE 2 at 216); ¶ 1.d on May 25, 2011 (GE 2 at 210); ¶ 1.e on June 29, 2011 (GE 2 at 204); ¶ 1.g on April 4, 2012 (GE 2 at 40); ¶ 1.h on June 2, 2012 (GE 2 at 102); ¶ 1.j on June 15, 2012 (GE 2 at 72); ¶ 1.m on December 12, 2012 (GE 2 at 55); ¶ 1.u on September 4, 2013 (GE 2 at 167); ¶ 1.v on November 1, 2013 (GE 2 at 162); ¶ 1.dd on August 27, 2014 (GE 2 at 123); ¶ 1.gg alleged on May 25, 2014, actually June 2, 2014 (GE 2 at 102); and ¶ 1.ii on July 1, 2015 (GE 2 at 107).

Applicant's SOR indicates he received counseling on five occasions regarding violations of various rules: ¶ 1.k on July 22, 2012 (GE 2 at 64); ¶ 1.r on May 13, 2013 (GE 2 at 179); ¶ 1.t on July 12, 2013 (GE 2 at 172); ¶ 1.bb on April 18, 2014 (GE 2 at 126); and ¶ 1.cc alleged on April 25, 2014, actually March 25, 2014 (GE 2 at 148) These counseling statements advise Applicant, for example, that he was late on an unspecified date, and he will receive a one or two day suspension, on an unspecified date. The counseling statements are duplications of the suspensions or other disciplinary actions listed in the SOR.

Some of the reprimands and suspensions were issued for minor violations for clothing or equipment violations and also for chewing gum or having a breath mint in his mouth. (Tr. 17-20) Most violations were for failure to be on time for work, leaving his post without permission, or failing to call in when he went to a medical or other appointment. Some supervisors had "issues" with Applicant and tended to write him and others up for minor violations. (Tr. 17-18) For example, one supervisor wrote up Applicant for wearing his uniform home, even though Applicant had worn his uniform home on numerous occasions over the previous four years. (Tr. 18-19) Applicant said he was allowed to wear

[3] The SOR indicates all dates are approximate. Applicant was unsure about the dates of events. Applicant's personnel documentation is extensive, and in the event of a conflict between the dates in the SOR or his personnel documentation, his personnel documentation is accepted as accurate. (GE 2)

his uniform home under agency regulatory standards. (Tr. 19) He did not provide copies of the regulations or policies that permitted him to wear his uniform when traveling home. Sometimes when he received an on-the-spot correction from a sergeant, he responded with inappropriate comments about the person making the correction. (Tr. 29-30; GE 2 at 231)

Mostly Applicant was suspended for being late for work or for not going to work. (Tr. 30-31) Once his employer may have suspended him for not responding to a security alarm. (Tr. 31-32) When a supervisor corrected him for not responding to the security alarm, he responded with obscenities and was told to leave the facility. (Tr. 32-33) He accused the sergeants of wanting to play "grab ass" with the attractive female security guard who was on duty. (Tr. 33, 58-59) He was unsure about whether he was cleared of failing to respond to the alarm because the three-to-seven day suspension listed several rules violations. (Tr. 60, 63)

When he was reprimanded or suspended, his employer required him to sign an acknowledgement of receipt of the adverse documentation. (Tr. 20) He had the option of submitting a rebuttal to the adverse documentation; however, he often elected not to write a rebuttal because he could not remember the events from several days previously, and some offenses were so minor he elected not to respond to them. (Tr. 22) He never compromised security or classified information. (Tr. 22) He denied that some of the alleged violations were legitimate. (Tr. 35) He received notice of why he was suspended from duty. (Tr. 37-38)

Applicant made a complaint against one sergeant for improperly changing Applicant's schedule, and the sergeant was fired. (Tr. 22-23) Applicant noted there were not any adverse actions in evidence that were taken against him after July 2015. (Tr. 23) He believed the adverse actions stopped because some of the sergeants that generated adverse actions left employment with the contractor. (Tr. 23-26) The new sergeants have recognized Applicant for doing his job. (Tr. 24, 26) Applicant received the maximum score in weapons training. (Tr. 24) In January 2017, a U.S. government agency extended his guard credential to 2019 and his firearms credential to 2018. (Tr. 25)

Applicant admitted that he received several adverse non-SOR personnel actions after January 2016. (Tr. 28) His employer did not suspend him from duty after January 2016. (Tr. 28) He could not remember how many adverse actions he received after January 2016. (Tr. 29) None of the adverse actions taken against Applicant that were not listed in the SOR will be considered in this case.

Falsification of July 18, 2014 SCA

Applicant's July 18, 2014 SCA asked in the last seven years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of security policy. (SOR ¶ 1.jj; GE 1) Applicant answered, no, and did not provide any information about adverse actions taken against him by his employer. (SOR ¶ 1.jj; GE 1)

Applicant said he completed his SCA on paper, and then other employees typed the information into the computer. (Tr. 40, 61; GE 3) Applicant's SCA was electronically produced on July 18, 2014. (GE 1) He signed the signature page for his SCA on August 26, 2014, using pen and ink. (GE 1) He was unsure about whether he certified the SCA in July 2014. (Tr. 42-43) Prior to his hearing, he asked his employer for the paper copy of his SCA that he submitted; however, he did not receive it. (Tr. 45-47) He said he disclosed his suspensions from employment on the paper copy of the SCA he submitted. (Tr. 45-46) He was "pretty sure" he put the correct information on his SCA, and he could not understand how the SCA at his hearing lacked accurate employment information. (Tr. 60)

On December 15, 2017, Applicant volunteered to the Office of Personnel Management (OPM) investigator that his employer imposed suspensions against him for violations of rules on two occasions. (Tr. 51-54; GE 3) He did not discuss other reprimands or suspensions because the OPM investigator did not ask him about them. (Tr. 51-55)

Character Evidence

Applicant provided two letters from colleagues. (AE D) The general sense of their letters is that Applicant is professional, honest, helpful, enthusiastic, highly motivated, reliable, and trustworthy. (AE D)

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no 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 applicant's 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.

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, these guidelines are applied 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, 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 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 "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant's allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI 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*, 484 U.S. at 531. "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. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

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 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). The burden of disproving a mitigating condition never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

AG ¶ 16 describes four conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, . . . determine security clearance eligibility or trustworthiness. . . . ;[4]

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of: (1) untrustworthy or unreliable behavior . . . ; (2) any disruptive, violent, or other inappropriate behavior; and (3) a pattern of dishonesty or rule violations; and . . . .

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

Applicant's July 18, 2014 SCA asked in the last seven years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as violation of security policy. Applicant answered, no, and did not provide any information about adverse actions taken against him by his employer.

Applicant said he completed his SCA on paper, and then other employees typed the information into the computer. His SCA was electronically produced on July 18, 2014. He signed the signature page on August 26, 2014, using pen and ink. He was unsure

[4] The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

about whether he certified the SCA in July 2014. He said he disclosed his suspensions from employment on the paper copy of the SCA he submitted. He was "pretty sure" he put the correct information on his SCA, and he could not understand how the SCA at his hearing lacked accurate employment information.

On December 15, 2017, Applicant volunteered to the OPM investigator that his employer imposed suspensions against him from violations of rules on two occasions. *See also* AG ¶ 17(a) ("the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts."). He was open and honest with the investigator about his negative employment history. Applicant is not sophisticated about forms and computer generated questionnaires. I am convinced that he did not intend to deceive security officials about his negative employment history. He refuted the disqualifying conditions in AG ¶¶ 16(a) and 16(b), and SOR ¶ 1.jj is resolved for Applicant.

Applicant received 17 suspensions from employment from 2011 to 2015 for violations of his employer's disciplinary policy, non-medical call-off policy, or other policies. He also received 14 memoranda for record about violations of policy or letters of reprimand for violations of various rules. AG ¶¶ 16(d) and 16(e) are established.

AG ¶ 17 lists four conditions that could mitigate security concerns in this case:

> (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
>
> (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
>
> (f) the information was unsubstantiated or from a source of questionable reliability.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

> Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the

> applicant to rebut or mitigate those concerns. *See* Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan*, *supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 17(e) mitigates the concern raised in AG ¶ 16(e) because security officials and Applicant's employer are well aware of his behavior problems. There is no possibility that information about his employment history could be used to coerce or manipulate him into violation of national security.

Applicant is credited with mitigating the allegations in SOR ¶¶ 1.k, 1.r, 1.t, 1.bb, and ¶ 1.cc. These counseling statements advised Applicant, for example, that he was late on an unspecified date, and he will receive a one or two day suspension, on an unspecified date. The counseling statements are duplications of the suspensions or other disciplinary actions listed in the SOR. The fact that his employer counseled him not to continue to engage in certain behavior, and then he failed to adequately correct his behavior weighs against mitigating personal conduct concerns.

None of the other mitigating conditions apply. Applicant was suspended from employment 17 times, and some of the suspensions were based on violations of multiple rules. Applicant cannot be trusted to conscientiously comply with security rules. Personal conduct security concerns are not mitigated.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), "[t]he ultimate determination" of whether to grant a security clearance "must be an overall commonsense judgment based upon careful consideration of the guidelines" and the whole-person concept. My comments under Guideline E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guidelines but some warrant additional comment.

Applicant is 54 years old, and he has been employed in security at a U.S. Government agency for 10 years. He is authorized to carry a firearm as part of his security duties. He has held a security clearance since 2007, and there is no evidence of security violations. He served in the Army from 1982 to 1985, and in the Marine Corps from 1985 to 1989. He received honorable discharges. As part of his security duties, Applicant has assisted high-level government officials including senators and congressmen. Two of Applicant's colleagues indicated that Applicant is professional, honest, helpful, enthusiastic, highly motivated, reliable, and trustworthy.

The evidence against mitigation of security concerns is more substantial. Applicant's employer issued 14 memoranda for record about violations of policy or letters of reprimand for violations of various rules. He also received 17 suspensions from employment from 2011 to 2015 for violations of his employer's disciplinary policy, non-medical call-off policy, or other policies. Some of his suspensions were for multiple rule violations. His failure to comply with his employer's rules and policies demonstrates "questionable judgment . . . or unwillingness to comply with rules and regulations [and raises unresolved] questions about an [his] reliability, trustworthiness, and ability to protect classified or sensitive information." *See* AG ¶ 15.

I have carefully applied the law, as set forth in *Egan,* Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are not mitigated.

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:	FOR APPLICANT
Subparagraphs 1.a through 1.j:	Against Applicant
Subparagraph 1.k:	For Applicant
Subparagraph 1.l through 1.q:	Against Applicant
Subparagraph 1.r:	For Applicant
Subparagraph 1.s:	Against Applicant
Subparagraph 1.t:	For Applicant
Subparagraph 1.u through 1.aa:	Against Applicant
Subparagraph 1.bb and 1.cc:	For Applicant
Subparagraph 1.dd through 1.ii:	Against Applicant
Subparagraph 1.jj:	For Applicant

Conclusion

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

_____

Mark Harvey
Administrative Judge