



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
	)	ISCR Case No. 17-02906
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel F. Crowley, Esq., Department Counsel  
For Applicant: *Pro se*

10/10/2018

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, personal conduct. Applicant’s eligibility for a security clearance is denied.

**Statement of the Case**

On December 19, 2017, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct. DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective June 8, 2017 (AG).

Applicant answered the SOR on January 24, 2018, and elected to have his case decided on the written record in lieu of a hearing. Department Counsel submitted the Government’s File of Relevant Material (FORM) on March 12, 2018. The evidence

included in the FORM is identified as Items 3-8 (Items 1-2 include pleadings and transmittal information). The FORM was mailed to Applicant, who received it on March 17, 2018. Applicant was given an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not file objections or submit any documentary evidence. Items 3-8 are admitted into evidence without objection. The case was assigned to me on August 28, 2018.

### **Findings of Fact**

In Applicant's answer, he admitted SOR ¶ 1.c and denied the remaining allegations in the SOR. I adopt his admission as a finding of fact. After a thorough and careful review of all the pleadings and evidence, I make the following additional findings of fact.

Applicant is 51 years old. He is married and has four children/stepchildren. He is seeking a position with a federal contractor. He served in the Navy for 20 years and retired with an honorable discharge. He has a bachelor's degree.<sup>1</sup>

The allegations raised in the SOR include: (1) Applicant was laid off by his employer in November 2015 and after an internal investigation he was terminated in December 2015 for misconduct by charging the government for extra hours not worked. (See SOR ¶ 1.a); (2) Applicant falsified his security clearance application (SCA) when he answered "no" to questions concerning whether he left a job by mutual agreement following allegations of misconduct or left a job by mutual agreement following notice of unsatisfactory performance (See SOR ¶ 1.b); and (3) Applicant falsified his SCA when he answered that he was unemployed from May 2011 to December 2015 when he was actually employed during that period. (See SOR ¶ 1.c)

From September 2011 to November 2015, Applicant worked for a contractor (Contractor A). Applicant was laid off from his position in November 2015 (the reason for the layoff is unclear from the record). During November and December 2015, Contractor A initiated an internal investigation into whether Applicant engaged in mischarging his time to a government contract. A final report was issued on December 17, 2015. The investigation determined that Applicant mischarged approximately 29 hours to a government contract from September 10, 2015, to October 30, 2015. Applicant was given an opportunity to explain his actions, but failed to provide a valid explanation. The investigation also noted that Applicant was laid off on November 20, 2015, and recommended that Applicant's job loss be reclassified as a "termination." Contractor A implemented that recommendation and characterized Applicant's departure as a termination for misconduct/rules violation. There is no evidence in the record that Applicant was served with a copy of his revised termination decision, or that he was otherwise made aware of this decision.<sup>2</sup>

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<sup>1</sup> Items 3, 7.

<sup>2</sup> Items 2, 6-7.

In December 2015, Applicant completed his SCA. Question 13A of the SCA asked Applicant to list all of his employment activities within the last 10 years. He listed “unemployment” from May 2011 to the present (December 2015). This information was false since he worked for Contractor A from September 2011 until his termination in November 2015.<sup>3</sup>

Question 13C of his SCA asked Applicant to address his employment record by stating whether in the last seven years he was fired from a job, quit after being told he would be fired, left a job by mutual agreement following allegations of misconduct, left a job by mutual agreement following notice of unsatisfactory performance, received discipline for misconduct in the workplace. Applicant answered “no” to all these questions. He later acknowledged that he was laid off from his job, but he maintained that he was not informed that he was terminated for cause.<sup>4</sup>

### **Policies**

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a careful weighing of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable security decision.”

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<sup>3</sup> Item 3, 6-7.

<sup>4</sup> Items 2-3, 6-7.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk that an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the personal conduct security concern:

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 conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying condition is potentially applicable:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

An internal investigation by Applicant's former employer determined that he engaged in misconduct by charging for hours not properly attributed to a government contract. Applicant provided no acceptable explanation for his action and he was terminated for cause. AG ¶ 16(d) applies.

Applicant's listing of "unemployment," rather listing the employment from which he was terminated on his SCA is a material falsification. AG ¶ 16(a) applies to SOR ¶ 1.c. Since the record is silent as to when Applicant was notified concerning his termination, the evidence is insufficient to determine that his answer to SCA 13C was deliberately false. AG ¶ 16(a) does not apply to SOR ¶ 1.b.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and found the following relevant:

(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.

I considered all of the facts and circumstances of the investigation into Applicant's improper charging of time toward a government contract and his deliberate falsification concerning his failure to list his last employment on his SCA. His actions did not constitute minor offenses. His actions create doubt about his overall trustworthiness, reliability, and good judgment, and ultimately on his worthiness to hold a security clearance. AG ¶ 17(c) does not apply.

### **Whole-Person Concept**

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

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

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered Applicant's military service. However, I also considered that he engaged in serious misconduct on the job and falsified his SCA concerning his most recent employment. Both of these areas of concern involved integrity issues. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the personal conduct guideline.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

### **Conclusion**

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

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Robert E. Coacher  
Administrative Judge