



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



In the matter of: )  
 )  
 ) ISCR Case No. 17-03446  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Andrew Henderson, Esq., Department Counsel  
For Applicant: Michael J. Harris, Esq.

11/01/2018  
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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 October 17, 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).

On November 6, 2017, Applicant answered the SOR and requested a hearing. The case was assigned to me on February 5, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on June 11, 2018, and the hearing was

convened as scheduled on August 8, 2018. The Government offered exhibits (GE) 1 through 3. Applicant objected to all the Government exhibits. I sustained the objection to GE 3 (Applicant's personal subject interview dated August 28, 2017) and it was not considered, but overruled the objections to GE 1 and 2. The Government's exhibit list was marked as a hearing exhibit (HE I).<sup>1</sup> Applicant testified and offered exhibits (AE) A through G, which were admitted without objection. Applicant's exhibit list was marked as a HE II. DOHA received the hearing transcript (Tr.) on August 16, 2018.

### **Procedural Issue**

Department Counsel moved to amend the allegation to substitute the word "record" for the word "card." Without objection, the motion was granted.<sup>2</sup>

### **Findings of Fact**

In Applicant's answer, he denied the sole SOR allegation. After a thorough and careful review of all the pleadings and evidence, I make the following findings of fact.

Applicant is 49 years old. He has worked for his current government contractor employer since September 2016. Previously, he worked for a different government contractor from January 2000 to April 2016. He is single, never married, with no children. He has a bachelor's degree.<sup>3</sup>

The allegation raised in the SOR stated that in April 2016, Applicant resigned from his employment in lieu of termination for falsifying his time record.

In October 2015, while working for his previous employer as a project manager, Applicant was informed that he would be laid off. He was extended twice and his lay off date was pushed to May 2016. During the extension periods, he "hustled" to find work on different IT projects. He found IT work with a software development group, within the company, from approximately October 2015 until his resignation at the end of March 2016. He believed the group was happy with the work he performed.<sup>4</sup>

On either March 30 or 31, 2016 (Applicant initially testified it was April 1, but documentation supports the March dates), Applicant was called into a meeting with the local human resources representative (HR) and an unspecified person from the company's corporate office (Corporate) who participated in the meeting telephonically. Applicant testified that at this meeting he was questioned by Corporate about the

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<sup>1</sup> HE I was misplaced and is not included in the record. It was not a substantive document, but merely listed the three Government exhibits, which are included in the record.

<sup>2</sup> Tr. 60.

<sup>3</sup> Tr. 20, 56; GE 1.

<sup>4</sup> Tr. 21-25; GE 1.

allocation of his work hours to the project on which he was working. Specifically, significant hours (496) were allegedly worked at night on the IT project he was working. Applicant stated that while he had core hours where he was required to work from his office, he claims he was also given the flexibility by his supervisor to work out of the office and outside core hours. He did not provide any written documentation to support this claim. Applicant claims he resigned after hearing about the time mischarging accusations, although he said he was not threatened with termination at the meeting. He felt he had no future with the company and that he had been betrayed. He documented his resignation with an email dated March 31, 2016, to HR.<sup>5</sup>

A letter from the company's security manager, dated February 21, 2017, reflects the Applicant resigned in lieu of termination as a result of an internal investigation that found Applicant mischarged his time during 2015 and 2016 for a total of 496 hours. These findings were based upon a review of Applicant's badge access records, witness interviews, and his 2015 performance review. The details of the investigation are not in the record.<sup>6</sup>

Applicant presented letters from a former supervisor and a current supervisor. His former supervisor stated that Applicant took his work seriously and never attempted to manipulate the system for his personal gain. His current supervisor characterized Applicant as a stellar performer and his reliability has never been called into question. Applicant also provided his 2013 and 2014 performance appraisals which had overall ratings of "achieves expectations."<sup>7</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.

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<sup>5</sup> Tr. 26, 28-29, 31-35; GE 1; AE F.

<sup>6</sup> GE 2.

<sup>7</sup> AE A-B, D-E.

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.”

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:

(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.

Applicant's mischarging of time, as determined by his company's investigation, supports the application of the above disqualifying condition.

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; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant did not acknowledge his time mischarging. Instead he claimed, without corroboration, he had the authority to do so. His action of resigning from a position he held for 16 years immediately after being confronted by HR about his time mischarging creates a reasonable inference that he did so to avoid termination for cause. His denial of wrongdoing is not credible. His action casts doubt on Applicant's reliability, trustworthiness, and good judgment. AG ¶¶ 17(c) and 17(f) do 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 years of contractor service, his supervisors' statements, and his performance appraisals. However, I also considered that he engaged in fraudulent time charging. 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 he failed to mitigate the security concerns arising under the Guideline E, personal conduct.

### **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

### **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