DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
REDACTED	)	ISCR Case No. 18-02316
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: Tod E. Stephens, Esq.

08/09/2019

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Decision

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MATCHINSKI, Elizabeth M., Administrative Judge

Applicant was convicted by court-martial of larceny for accepting $67,301 in government overpayments between August 2013 and February 2014, and of conduct unbecoming an officer for falsely claiming illness to his then civilian employer so that he could perform military duties between August 2013 and April 2014. He denies the risk of recurrence, but concerns persist about his personal conduct. Clearance is denied.

Statement of Case

On October 12, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline E, personal conduct, which explained why it was unable to find it clearly consistent with the national interest to grant or continue security clearance eligibility for him. The DOD CAF took the action under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the National Security Adjudicative Guidelines (AG) effective June 8, 2017, to all adjudications for national security eligibility or eligibility to hold a sensitive position.

On November 7, 2018, Applicant answered the SOR allegations and requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA). On April 10, 2019, the case was assigned to me to conduct a hearing to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. On April 15, 2019, I scheduled a hearing for May 6, 2019. Counsel for Applicant entered his appearance on May 2, 2019.

At the hearing, before the introduction of any evidence, the SOR was amended at the Government's motion without any objection from Applicant, as set forth below. Seven Government exhibits (GEs 1-7) and 18 Applicant exhibits (AEs A-R) were admitted into evidence. A January 17, 2019 letter forwarding copies of the proposed Government exhibits (GEs) and a list of the GEs were marked as hearing exhibits (HEs I-II) for the record, but not admitted in evidence. Applicant and two witnesses testified (the witnesses by telephone), as reflected in a transcript (Tr.) received on June 4, 2019.

Procedural Rulings

Before the introduction of any evidence, the Government moved to amend the SOR under ¶ E3.1.17 of the Directive to conform to Applicant's Answer to the SOR and the evidence to be presented at the hearing. Applicant had no objection. Accordingly, I granted the motion and amended SOR ¶ 1.b to allege as follows:

> b. You resigned in lieu of termination from your employment at [employer name omitted] in March 2015, after your employer discovered that you were calling in sick in order to perform military duties, as set forth in subparagraph 1.a, above.

At the hearing, Applicant's counsel requested that the testimony of Applicant's witnesses be taken by telephone. Neither Applicant nor his attorney had alerted me beforehand about any planned witness testimony or about any issue with the hearing's location, which was well within 150 miles of Applicant's residence. The Government had not been notified about an issue with the witnesses' availability on the hearing date, and objected if they were to be fact witnesses. The Government had no objection if they were to be character witnesses. I allowed the testimonies to proceed after indicating that I would consider a request to reconvene the hearing for in-person testimony, if necessary. After hearing their direct testimonies, the Government exercised its right of cross-examination and did not request a continuance.

Findings of Fact

Under the amended SOR, Applicant is alleged under Guideline E (SOR ¶ 1.a) to have been convicted by court-martial of larceny in violation of Article 121 of the Uniformed Code of Military Justice (UCMJ) for theft of government funds between August 1, 2013, and February 28, 2014, and for conduct unbecoming an officer and a gentleman in violation of Article 133 of the UCMJ for calling in sick to his civilian employer so that he could perform his military duties between August 1, 2013, and April 30, 2014. Applicant is

separately alleged to have resigned in lieu of termination in March 2015 from his civilian employment with a commercial airline after the company discovered that he was calling in sick to perform military duties (SOR ¶ 1.b). In his response to the SOR, Applicant acknowledged and expressed regret for the conduct, for which he was convicted at a court-martial proceeding. He explained that he resigned from his employment with a commercial airline in lieu of being terminated for using accrued "Paid-Time-Off (PTO) to fulfill his other obligations." Applicant submitted in mitigation that he reimbursed the overpayments of military pay when he learned of them, and indicated that both his military and subsequent civilian employers have been made aware of the legal proceedings and continue to trust him to protect classified information. (Answer.)

After considering Applicant's Answer, the exhibits, and the hearing transcript, I make the following findings of fact:

Applicant is a 48-year-old employee of a defense contractor with a bachelor's degree earned in June 1993 from a U.S. military academy. He met his spouse at the academy, and they married shortly after she graduated in June 1994. They have an 18-year-old daughter and a 16-year-old son. They have owned their present residence since June 2013. (GE 1; AE C; Tr.37.)

Applicant held a DOD Secret clearance, which was granted to him in 1989. On his graduation from the military academy, his clearance was upgraded to Top Secret. He served on active duty as an officer in a branch of the U.S. military from June 1993 through December 2002. He distinguished himself as a pilot assigned to a fighter squadron, and was awarded achievement or commendation medals in 1996, 2000, and 2002. In January 2003, he was transferred in the active reserve to the Air National Guard (ANG), serving part-time as a traditional reservist initially, in state X's ANG through July 2013. He received an achievement medal in 2006 for sustained meritorious achievement as a pilot for state X's ANG from September 2003 to November 2004. He transitioned to drone pilot in 2006. In July 2010, he was awarded achievement medals with a third oakleaf cluster for completing 20 combat missions in support of Operation Enduring Freedom and Operation Iraqi Freedom between July 2008 and October 2008 and a fourth oakleaf cluster for surveillance and reconnaissance as a drone pilot in support of Operation Iraqi Freedom between May 2010 and July 2010. (GEs 1, 7; AEs A, D; Tr. 38, 44.) In January 2009, Applicant was promoted to the rank of lieutenant colonel. (AE A.)

Applicant worked in the civilian sector as a part-time airline pilot for a commercial airline starting in May 2003. His base airport was a distant state (state Y). In June 2013, Applicant and his family relocated, to be closer to his civilian employment. He and his spouse bought a fixer-upper and began remodeling the house at a cost of approximately $213,000. From August 2013 through December 2013, Applicant or his spouse wrote multiple checks to various contractors working on their home. In September 2013, his parents loaned him $183,032 to help pay for the renovations. (GEs 1, 3; Tr. 44, 87-88.)

In August 2013, Applicant underwent a transfer of duty station to an ANG base in state Y. He was on Title 10 active-duty orders from August 19, 2013, through April 17,

2014. He continued to pilot for the commercial airline, and at times called in sick to the airline so that he could perform military duties. He continued to be paid by state X's ANG through direct deposit into his checking account through February 2014, even though he was performing and being compensated for duty in state Y under Title 10 active-duty orders. He received government overpayments of $67,301 from August 2013 through February 2014 before the error was discovered in February 2014, during an annual audit to determine whether military members were collecting compensation from both the active duty and reserve duty compensation systems. (GEs 3-5, 7; AE B; Tr. 44, 87-89.) Applicant did not self-report any overpayment to the government before being confronted.[1] Applicant attributes the overpayment to "a glitch" in the military's finance department. He denies that he took an affirmative action to cause the overpayment. (Tr. 47-48.)

The military conducted a special investigation into the suspected fraudulent collection of an estimated $73,713 in government overpayments by Applicant. In early April 2014, Applicant was interviewed by a special agent. He waived his right to legal counsel and in writing stated in part:

> I am not sure how this happened or was I aware that this happened. I do pay attention to our finances, but my wife runs the checking account and over the last 10 months . . . we have been doing some significant remodeling. In order to accomplish this remodel we took a loan from my parents in September of 2013. It was a significant amount to get the home back into shape. Approximately $150,000 was loaned to us in order to complete the remodel, then we would refinance the home and pay my parents back. Since there were sufficient funds in our account and that I was still paid on the 1st and 15th, I assume this is why my wife did not say anything, except at one point she mentioned a large amount and I thought it was from my first TDY payment. Obviously, I am in a shocked and stressed state of mind. (GE 2.)

Applicant admitted to the special agent that he and his spouse were in the process of remodeling their home, and that he did not have the $73,713 available for repayment. He subsequently provided documentation showing thousands of dollars in checks written to remodeling contractors and a wire transfer confirmation showing his receipt of $183,032 from his mother. A review of records showed that he had viewed each instance of overpayment by accessing his leave and earning statements online. (GE 3.) After an audit by Defense Finance and Accounting Service (DFAS), he was found to have received $67,301 in overpayments. Applicant asserts that he satisfied the debt in December 2014. (Tr. 46, 55.) Available documentation from DFAS dated November 2, 2017, corroborates satisfaction of a $67,301 debt (AE B), but it does not indicate any payment dates. (Tr. 93.)

The military notified Applicant's civilian employer that he had, at times between August 1, 2013, and April 30, 2014, performed ANG duties while being on paid leave from

[1] Applicant self-reported the information on his SF 86, but there is no evidence that he brought the overpayment itself to the attention of the military. It was somewhat disingenuous of Applicant to claim that "everything from my understanding that has come from this was due to my telling the government about everything." (Tr. 40.)

the airline due to claimed illness. (GE 7.) Applicant testified that he "got caught up in a little bit of the mentality personally, if, if [he] need[ed] a day off, [he] just need[ed] to call in sick." (Tr. 50.) In March 2015, Applicant resigned from the airline in lieu of being terminated. (GEs 1, 7; Tr. 99.) In August 2015, Applicant began working for a defense contractor as a drone instructor pilot. Applicant testified that he disclosed to his new civilian employer "everything that happened." (GE 1; Tr. 64-66.)

In July 2015, Applicant was charged by the military with violating Article 121 of the UCMJ, for "steal[ing] money, military property, of a value exceeding $500, the property of the United States" between August 1, 2013, and February 28, 2014. Applicant was also charged with conduct unbecoming an officer and a gentleman, in violation of Article 133 of the UCMJ, for wrongfully and dishonorably representing, on diverse occasions between August 1, 2013, and April 30, 2014, to his commercial airline employer that he could not report to work due to illness when he was performing military duties. Applicant pleaded not guilty to the charges. (GEs 4-7; Tr. 45-46, 53-55.) Article 121 of the UCMJ (10 U.S.C. § 921) provides:

> (a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—
>
> (1) with intent to permanently deprive or defraud another person of the use and benefit of property or to appropriate it to its own use or the use of any person other than the owner, steals that property and is guilty of larceny; or
>
> (2) with intent temporarily to deprive of defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other person other than the owner, is guilty of wrongful appropriation.
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> Article 133 of the UCMJ (10 U.S.C. § 933) provides:
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> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Applicant was convicted of both charges at a general court-martial proceeding in September 2016. The elements for larceny (Article 121(a)(1)) are that the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person; the property belonged to a certain person (here the U.S. government); the property was of a certain value, or of some value; and the taking, obtaining or withholding was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner. (GE 6.) Applicant was sentenced to serve 15 days confinement; to pay a fine of $25,000; and to receive an official reprimand. Applicant served five days in a local jail, apparently two days in a psychiatric ward and then three days in solitary confinement for his own protection, which was determined sufficient

to satisfy the jail sentence. (GEs 4, 7; Tr. 53, 56.) In November 2016, his commanding major general issued an official reprimand to Applicant, stating in part:

> You are hereby reprimanded. As an officer in the United States [military] you are held to the highest standards of personal and professional conduct – both on and off duty. You must serve as the epitome of integrity, setting a standard of conduct and professionalism that can be followed by others. Your conviction for stealing over $79,000 [sic] from the [U.S. military] and claiming sick leave with your civilian employer while performing military duty is shocking, not only for an officer, but for anyone wearing the uniform. The deliberate, repetitive and selfish nature of your conduct displayed a total disregard for [military] standards and for the law. Your behavior is reprehensible, and it cannot and will not be tolerated. (GE 5.)

At his security clearance hearing held on May 6, 2019, Applicant testified, "I take 100 percent responsibility that the court-martial findings were accurate." (Tr. 73.) However, he also maintained that he did not realize he received the overpayments exceeding $10,000 each month for about six months until he was confronted by the military investigators. He cited several factors: multiple changes in his military orders; pay from the commercial airline that was never the same; changes in his ANG pay because of times in transition and times in training; TDY expenses; and "quite a bit of money flowing through [his and his spouse's] checking account going to contractors and coming in from multiple sources." (Tr. 45.) He denied that he had any intention to steal the money or withhold the overpayments. (Tr. 47.) He asserted that his mistake was that he got too busy, too out of control to where he failed to pay attention. (Tr. 49.) On cross-examination, he was asked to explain how he could have failed to notice the overpayments, given he had viewed his LES for each pay period. He responded in part:

> So when I saw [state X's] pay, I understood that to be [state Y's] pay, and the [state Y] pay was accurate pay but it wasn't pay on the 1st and 15th, like you get paid in the military. [State Y's] pay was [at] different times of the month because of those changing of orders. At the same time, I was getting TDY pay, I was getting [commercial airline] pay. So even though I had looked at DFAS, I didn't gather that one was from [state Y] and one was from [state X]. And so you're right, I mean, how would anybody not know, but with that large check from my mother in the account with multiple sources of income coming in, I didn't focus . . . . (Tr. 89.)

He testified that he was focused on the outlays for the contractors. (Tr. 90.) When asked about his LES, Applicant explained that he was "going through training, so there was temporary duty pay and other pay also." However, he also admitted that TDY pay would not have been reflected on the LES. (Tr. 102.)

At his security clearance hearing, Applicant estimated that he called in sick to the commercial airline to perform military duties "three to five times." (Tr. 95.) He acknowledged that his employer would have allowed him time off to permit military duty.

Instead of notifying his employer at the last minute as military duty obligations arose, Applicant admitted it was easier to do what he did. (Tr. 96-97.) He was aware that it was against company policy. (Tr. 97.) Applicant recognized that there was a problem with him lying to the commercial airline in telling them that he was ill and unable to fly (Tr. 99), but he wanted the Government to know that had used accrued PTO. (Tr. 51.) About it being common practice, he responded, "I know multiple friends of mine and people that have done that. Again, it's a culture that I let myself slide into." (Tr. 52-53.) He expressed regret for the behavior. (Tr. 53.)

Applicant's security clearance eligibility was suspended in October 2018 because of the conduct that led to the court-marital. (Tr. 36; AEs G-H.) Applicant was allowed to remain in the U.S. military as a traditional reservist, and he was on duty one weekend a month and two weeks a year. (Tr. 86.) In mid-February 2018, he was released from active duty, having completed required active service. His service was characterized as honorable. He retired after completing over 19 years on active duty and over four years of inactive service. (AE A; Tr. 39, 77.)

Since November 2016, Applicant and his spouse have had their own business. They jointly own a used-clothing store, for which they paid a $25,000 franchise fee. They obtained a $200,000 business loan, on which they have paid $50,000. (GE 1; Tr. 72, 77-79.) Applicant was named as contract instructor of the year for 2016 by the ANG. (AE E; Tr. 70.)

On April 12, 2018, Applicant completed and certified to the accuracy of a Questionnaire for National Security Positions (SF 86) to renew his security clearance eligibility. In response to police record inquiries, he listed his September 2016 convictions of the Article 121 and Article 133 charges, indicating with respect to Article 121 that he was convicted of larceny, and that he was sentenced to 15 days confinement, a $25,000 fine, and a reprimand. (GE 1.)

On June 5, 2018, Applicant was interviewed by an authorized investigator for the Office of Personnel Management (OPM). About his resignation from his employment with the commercial airline in March 2015, Applicant indicated that the ANG notified the airline about his conduct, "which painted [him] in a bad light." He explained that it was "common practice" for pilots to call in sick when they need leave, and that, on one occasion, he called in sick to his civilian employer and reported to an ANG drill weekend to work, although he now does not think that he told the investigator that he called in sick only once to perform his military duties. (Tr. 97.) He admitted knowing that it was against company policy. About his larceny conviction, Applicant stated that when he out-processed from state X's ANG, some of the paperwork must not have been submitted appropriately because state X's ANG did not stop paying him, which resulted in an overpayment to him of approximately $65,000. He denied that he intentionally withheld any money. He explained that he was entirely wrapped up in his work and his home remodel, and he did not pay attention to the amounts being deposited into his bank account. Applicant indicated that he began repaying the debt in July or August 2014, and it was satisfied in full in either December 2014 or January 2015. Applicant admitted that he had yet to satisfy his $25,000

fine because DFAS had not received any record of the fine and so could not charge him. He claimed he had money set aside to pay the fine as soon as DFAS bills him. (GE 7.)

Applicant completed a financial statement for the OPM investigator showing household income of approximately $15,800 each month: $15,000 in combined military retirement and employment income for him and $800 in income for his spouse from her job teaching cycling classes at a local gym. Applicant and his spouse were taking no income from their used clothing business. They had $450 per month in discretionary income after paying their routine expenses and budgeting $500 for car maintenance, entertainment, and emergencies. He admitted that he owed approximately $40,000 in credit card debt incurred because he received his military retirement pay only twice between December 2015 and January 2017. He used credit cards to make up for the shortfall in his income. (GE 7.)

On October 12, 2018, the DOD CAF issued the SOR to Applicant because of his personal misconduct for which he was adjudged guilty in September 2016. In response to the SOR, Applicant asserted that he did not notice the overpayments because of his complicated pay records caused by "constantly changing temporary (TDY) orders" from state Y's ANG. In addressing mitigation, he indicated that he accepts responsibility for his "mistake" in not realizing and alerting the ANG that he was being overpaid, and that he and his spouse now closely monitor their finances and his payments from the U.S. government. He admitted that there were occasions when he called in sick to his commercial airline employer and used accrued PTO when he was on duty with his ANG unit, but asserted that the practice was "somewhat common in the airline industry." While he expressed regret for his poor judgment and realizes that his conduct "was not fully truthful," he also stated that he "likely [has] been punished more severely than any other person who has ever called in sick in order to work two jobs (a court-marital)." (Answer.)

On May 1, 2019, another defense contractor took over the contract to train drone pilots at the ANG base. Applicant and his colleagues were hired by the company so their work has continued without interruption. Applicant's duties require him to maintain a Secret clearance. (Tr. 34-35.) As of May 2019, the fine assessed at the court-marital proceeding had not been paid. Applicant provided evidence of an email from DFAS dated August 30, 2017, in response to an online inquiry from Applicant of August 29, 2017. In that email, DFAS indicated that its office of garnishment operations had no record of any court orders in his file and no record of a court judgment from September 2016. (AE R.) Applicant testified that a few months after his sentencing, he contacted DFAS about the fine and submitted formal requests, but received emails saying there is nothing in the system. When about to retire, he again inquired and received the same response. In terms of his emails to DFAS, Applicant testified that he is "pretty positive" that he did not reference the court order number in his correspondence. His attorney told him to have the money available to pay the fine. He and his spouse currently plan to take a loan from a 401(k) account to pay the fine. (Tr. 59-61, 83-84.) Applicant has not attempted to send DFAS a copy of the report of the court-martial proceeding, which shows the fine assessed. It was not suggested to him by his counsel, and he did not think of it. (Tr. 82.)

Character References

Continuation of Applicant's security clearance eligibility is strongly endorsed by several current and former military officers, who have held or hold high levels of security clearance and are familiar with Applicant's military duty performance, his work as a contract drone instructor pilot, or both. Applicant has given them no reason to doubt his judgment, reliability, or trustworthiness with regard to his willingness or ability to abide by security regulations. (AEs F-K, N-Q.)

As a lieutenant in a fighter squadron from 1995 to 1997, Applicant was hardworking, and always the first to volunteer. A now retired lieutenant general, who commanded the squadron at the time, indicates that Applicant was highly respected, and when he made a mistake, "he would own it." He believes that despite the court-martial, Applicant "remains as trustworthy, dedicated, and loyal" as he was as a young lieutenant in the squadron. He trusts Applicant "implicitly" and has absolute faith in Applicant's ability to protect classified information. (AE K.)

Applicant had no security incidents as a fighter pilot, a technician in the ANG, and currently as a government contractor. (AEs F-K, O-Q.) A colonel, who served alongside Applicant when they were both drone pilots for state X's ANG, witnessed Applicant take his security responsibilities very seriously. (AE P.)

Applicant's direct supervisor from 2014 to July 2017, throughout Applicant's "daunting court-martial process," believes that "the offenses decided against [Applicant] were an isolated and unintentional mistake for which [Applicant] has accepted the responsibility and consequences of with grace and honor." This retired lieutenant colonel opined that Applicant "should not be subject to double jeopardy for those offenses with respect to his security clearance." He has read the SOR and considers the security concerns "tenuous and untimely," given Applicant held a security clearance for some two years after the court-martial conviction. (AE H.)

A former military commander and now peer drone instructor at the state Y ANG base also worked as a civilian pilot for the commercial airline from which Applicant resigned in March 2015. He respects the opinion of the general court-martial, but he "vehemently" disagrees that the events provide an appropriate characterization of Applicant. (AE I.)

A colonel in the ANG, who has known Applicant since they were students at the military academy, commanded Applicant during his trial and conviction in 2016. She has known Applicant to be dedicated to his duty and successful and stable in all aspects, and attests that Applicant "is not a liar." (AE J.)

Two current co-workers, both retired colonels, testified by telephone and provided affidavits for Applicant. One is a fellow drone instructor pilot and the other is the site manager for the contract drone instructors. The instructor pilot was the operations group commander when Applicant was hired, initially part time, in August 2013. Because

Applicant's performance was consistently strong, he entrusted Applicant with additional classified duties, and Applicant never had a single incident of making even a clerical mistake regarding the protection of classified information. This co-worker knew that there was a military investigation and adjudication, but he did not take part in the military's investigation of Applicant, and had no part in the military's recommendations. This co-worker was very impressed by Applicant's ability to handle a difficult situation with a positive attitude. The military trusted Applicant, ordering him back to active duty following the court-martial, and Applicant continued to perform "flawlessly." When confronted with the evidence of overpayments and that Applicant had viewed his LES showing the overpayments, the co-worker indicated that he still considers Applicant trustworthy. He has had no reason to doubt Applicant, who he submits "has acknowledged all his behaviors and taken positive steps to alleviate any and all factors that may have contributed to a perception of inappropriate demeanor." (AE F; Tr. 105-125.)

The site manager, who currently supervises Applicant, considers him to be "a dependable, trustworthy, and effective instructor at this site." Applicant made him aware of the charges then pending against him over a year before the court-martial proceeding. Before Applicant's "legal troubles," Applicant taught an academic class at the Secret level without any adverse incidents. Applicant is consistently considered among the top instructors by his students, other crew personnel inside the ground control station, and by their military customer. Regarding drone flights, Applicant follows "a myriad of rules and regulations that govern the operation of [the drone] with no deviation and constantly makes quick decisions and exercises sound judgment during flying operations." After Applicant's court-martial conviction, the site manager asked the military squadron commander, group commander, and wing commander whether Applicant could continue as an instructor pilot, supervising students who drop laser-guided bombs on occasion. Applicant's commanders had no reservations about continuing to trust Applicant to do the right thing. The site manager indicates that Applicant has been careful to remind others that he cannot be exposed to classified information while his clearance is suspended. The site manager expressed no reservations about Applicant holding a security clearance. He has "complete faith in him doing his job." Despite some extenuating circumstances, Applicant never sought to excuse his behavior. It was meaningful to the site manager that Applicant retained his rank and was not separated from the military after his court-martial conviction. The site manager has seen other instances of egregious mistakes in pay made by the military. The supervisor could not speak to whether Applicant should have been more aggressive in trying to fix the error. Applicant made him aware that he was given jail time and a fine, but he had no knowledge about whether Applicant had paid his fine. (AE G; Tr. 129-147.)

A friend of Applicant's for the past five or so years is employed as a clinical psychologist at a Veterans' Affairs healthcare facility. Applicant has impressed him as being focused and goal-oriented. Regarding the offenses, this psychologist stated that Applicant "may have been guilty of an isolated incident of poor decision-making in trying to balance competing demands." He does not believe Applicant had any malicious intent, and considers Applicant's offense to be minor. In his experience, Applicant is someone who takes pride in his professional and personal character. (AE M.)

Policies

The U.S. Supreme Court has recognized the substantial discretion the Executive Branch has in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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 required to be considered 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 overall adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(a), the entire process is a conscientious scrutiny 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The applicant 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 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. 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

The security concern about personal conduct is articulated in AG ¶ 15:

> 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. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:
>
> (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and
>
> (b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant was adjudged guilty at a September 2016 general court-martial proceeding of larceny of government funds in violation of Article 121 of the UCMJ and of conduct unbecoming an officer and a gentleman in violation of Article 133 of the UCMJ. The evidence shows that he retained some $67,301 (after DFAS audit) in military pay to which he was not entitled between August 2013 and February 2014. His conduct unbecoming an officer and a gentleman involved him wrongfully and dishonorably calling in sick on apparently three to five occasions to his then civilian employer, a commercial airline, when he was not ill so that he could perform military duties. His extremely poor judgment in two diverse aspects establishes the security concerns under AG ¶ 15, and support "a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations," as contemplated in disqualifying conditions AG ¶¶ 16(c) and 16(d), which state:

> (c) credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; 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 individual may not properly safeguard classified or sensitive 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 government protected information;

(2) any disruptive, violent, or other inappropriate behavior;

(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 court-martial larceny conviction could have been alleged under the criminal conduct guideline, and so AG ¶ 16(d) is not strictly applicable to his larceny of government funds on that basis. Even so, it was clearly untrustworthy, inappropriate behavior in violation of the UCMJ, and a recurrent misuse of Government resources. His lies to his civilian employer, in known violation of the commercial airline's sick leave policy, constituted a pattern of dishonesty and rule violations.

Applicant has the burden of establishing one or more of the mitigating conditions under AG ¶ 17:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a personal with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Mitigating conditions AG ¶¶ 17(a), 17(b), 17(f), and 17(g) have no applicability. Applicant reported his convictions on his SF 86, but it is difficult to find the good-faith, prompt disclosure required for mitigation under AG ¶ 17(a) when he made no effort to inform the government of the substantial overpayments to him when they were occurring or to correct his time records with his then civilian employer, who learned of his falsification of his time from the military and not from Applicant. In a written statement provided to the military during its investigation into the overpayments, Applicant admitted that, at one point, his spouse mentioned a large amount in their bank account. Applicant indicated that he thought it was from his first TDY payment. He can be expected to have reasonably taken steps to have made an inquiry into the source of the funds.

AG ¶ 17(c) applies in that the personal conduct at issue occurred between August 2013 and April 2014. Even so, the mitigating weight of the passage of time has to be weighed against the seriousness of the personal conduct and evidence that undermines his claim of reform. It is significant in extenuation that Applicant did not take any action to cause the overpayments, but he is culpable for not bringing the error to the attention of the government. The military officers who presided at his court-martial obviously did not believe his denials of any knowledge of the overpayments, for they found him culpable of an offense that requires an intention to wrongfully withhold or deprive. Additionally, his false claims of illness to his then civilian employer are no less serious because he had paid time off. He admitted that he could have requested the leave, but he acted out of expediency and self-interest in disregard of known company leave policies. The recurrent nature of his larceny and false claims of illness is an aggravating factor that makes it difficult to conclude that it happened under such circumstances that it is unlikely to recur.

With respect to reform under AG ¶ 17(d), Applicant testified, "I take 100 percent responsibility that the court-martial findings were accurate." However, he also continues to maintain that he did not realize the overpayments exceeding $10,000 each month for about six months until he was confronted by the military investigators. He cited several factors: multiple changes in his military orders; pay from the commercial airline that was never the

same; changes in his ANG pay because of times in transition and times in training; TDY expenses; and "quite a bit of money flowing through [his and his spouse's] checking account going to contractors and coming in from multiple sources." It is simply not credible for Applicant to claim that he failed to recognize the overpayment of some $67,301, received by him over a brief span of six months, especially where he was found to have accessed his LES payment records for each of the pay periods at issue. Of his several reasons for the purported oversight, his commercial pilot pay, TDY expense payments, and cash flow in and out of his checking account would not be on his LESs, so they could not reasonably be sources of overpayments. His ANG pay is reported on his LES, but Applicant would have known how many duty hours he worked, and he presented no documentation showing such variations in his orders and duty pay that could explain overpayments exceeding $11,000 a month for six months. Steps taken to monitor his personal finances do not mitigate the concerns for his trustworthiness. Moreover, he has yet to pay his $25,000 fine assessed for the court-martial. While DFAS may need a record of the fine to accept his payment, he has also not provided DFAS with the documentation of the trial record showing the fine. He testified that he did not think about providing that record, but he failed to show that he has been proactive in addressing that known obligation. He presented in evidence one email from August 2017. He testified that he wishes he could pay the debt, and that he set aside the funds to pay the debt. However, when pressed about the source of the funds, he expressed a plan to take the money from a 401(k) account. As for his Article 133 conduct, Applicant expressed regret for lying to his former employer, but it is somewhat troubling that he cites common practice among pilots and a culture that he slid into as factors to explain his lies.

AG ¶ 17(e) applies because of Applicant's disclosures of his court-marital conviction on his SF 86, to the OPM investigator, and to several of his colleagues and friends. It is unclear to what extent he has disclosed the details to the individuals who strongly endorse him for security clearance eligibility. The two witnesses who testified for Applicant were not fully aware of the extent of the overpayments that Applicant wrongfully accepted. At the same time, the concerns of vulnerability are not substantial. For the reasons addressed above, Applicant's judgment, reliability, and trustworthiness are of primary concern, and the security concerns in that regard are not sufficiently mitigated, despite the passage of time. Serious personal conduct security concerns persist because of his theft of government funds and his dishonest conduct as a civilian employee for the airline. For the reasons noted, adverse findings are returned with respect to SOR ¶¶ 1.a and 1.b.

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 his conduct and all relevant circumstances in light of the nine adjudicative process factors listed at AG ¶ 2(d), which are as follows:

> (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.

Some of the adjudicative process factors were addressed under Guideline E, but some warrant additional comment. Applicant's contributions to the military and now as a civilian contract drone instructor pilot are unassailable and weigh in his favor under the whole-person concept. He has a long history of handling classified information appropriately, and he has been careful to advise others that he cannot access classified information while his security clearance is suspended. His stellar reputation as a pilot and now pilot instructor, and as a person of high integrity and good character, are difficult to reconcile with the personal conduct that led to the court-martial. He has offered no plausible explanation to overcome the circumstantial evidence of the home remodel, and the thousands of dollars paid out to contractors, as factors in his acceptance of some $67,301 in overpayments without notifying the government. Military officers, who are presumed to have viewed the evidence objectively and without bias or a personal stake in the outcome, found Applicant culpable of serious misconduct under the UCMJ.

Security clearance decisions are not intended to punish applicants for specific past conduct. The security clearance assessment is a reasonable and careful evaluation of an applicant's circumstances and whether they cast doubt upon his judgment, self-control, and other characteristics essential to protecting national security information. In exceptional cases, an administrative judge may grant initial or continued eligibility for a security clearance, despite the presence of an issue(s) that can be partially but not completely mitigated. Appendix C of Security Executive Agent Directive (SEAD) 4 grants DOHA administrative judges the discretionary authority to grant initial or continued eligibility for a security clearance *despite the presence of an issue(s) that can be partially but not completely mitigated* with the provision of additional security measures. See also Memorandum, Director for Defense Intelligence (Intelligence and Security), dated January 12, 2018 ("Appendix C identifies authorized exceptions that are to be utilized when making adjudicative decisions to grant initial or continued eligibility for access to classified information or to hold a sensitive position . . . Effective immediately, authority to grant clearance eligibility with one of the exceptions enumerated in Appendix C is granted to any adjudicative, hearing, or appeal official or entity now authorized to grant clearance eligibility when they have jurisdiction to render the eligibility determination.") At the same time, when there is an issue of significant security concern, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990). The Government must be able to rely on those persons granted security clearance eligibility to fulfill their responsibilities consistent with laws, regulations, and policies, and without regard to their personal interests. For the reasons discussed, Applicant has raised enough doubt in that regard to where I am unable to conclude that it is clearly consistent with the national interest to continue his eligibility for a security clearance.

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:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for access to classified information is denied.

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Elizabeth M. Matchinski
Administrative Judge