DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
	)	ISCR Case No. 20-01577
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Brian Farrell, Esq., Department Counsel
For Applicant: Jeffrey D. Billett, Esq.

02/23/2022

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Decision

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HARVEY, Mark, Administrative Judge:

In January 2016, Applicant was convicted at a special court-martial empowered to adjudge a bad-conduct discharge (BCD-SPCM) of three crimes involving illegal possession and importation of an automatic rifle, ammunition, and explosives from Afghanistan to the United States, and he was sentenced to 12 months of confinement and reduction from staff sergeant to specialist. He was charged with committing larceny of U.S. military munitions in Afghanistan; however, that charge was dismissed. He wrongfully appropriated basic allowance for housing (BAH) at the with dependent rate; however, he did not receive disciplinary action for this offense. Guideline J (criminal conduct) security concerns are not mitigated; however, Guideline E (personal conduct) security concerns are refuted. Eligibility for access to classified information is denied.

Statement of the Case

On March 15, 2018, Applicant completed and signed a Questionnaire for National Security Positions or security clearance application (SCA). (Government Exhibit (GE) 1) On November 20, 2020, the Department of Defense (DOD) Counterintelligence and Security Agency 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 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), effective June 8, 2017. (Hearing Exhibit (HE) 2)

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 Applicant 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 Guidelines J and E. (HE 2) On April 7, 2021, Applicant responded to the SOR and requested a hearing. (HE 3) On August 25, 2021, Department Counsel was ready to proceed.

On September 17, 2021, the case was assigned to me. On November 12, 2021, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for December 16, 2021. (HE 1) The hearing was held as scheduled.

As part of his SOR response, Applicant provided nine exhibits. (Applicant Exhibit (AE) A-AE I) At hearing, Applicant offered his SOR response, including the nine SOR exhibits; Applicant added a document to AE A, and an additional exhibit, AE J. (Transcript (Tr.) 7-9, 18-20, 22-23; GE 1-9; AE A-I) Department Counsel offered nine exhibits; however, Applicant objected to GE 7, a JPAS incident report, and GE 8, a DISS/CATS incident report, because they are cumulative. (Tr. 20) GE 7 and GE 8 were admitted; however, Applicant's comments are accepted for the weight the exhibits are accorded. (Tr. 21) Moreover, other documents admitted are better evidence than GE 7 and GE 8, such as Applicant's charge sheet and result of trial documentation. Applicant objected to GE 9, an Office of Personnel Management personal subject interview, because it was offered without a sponsoring witness. (Tr. 20) Applicant's objection to GE 9 was sustained. (Tr. 21) There were no additional objections; and all proffered exhibits, except for GE 9, were admitted into evidence. (Tr. 7-9, 18-21; GE 1-8; SOR response; AE A-AE J) GE 9 is attached to the record for appellate purposes. On December 30, 2021, DOHA received a transcript of the hearing.

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

Findings of Fact

In Applicant's SOR response, he admitted in part and denied in part the SOR allegations. (HE 3) He also provided extenuating and mitigating information. (*Id*.) His admissions are accepted as findings of fact.

Applicant is a 38-year-old lead weapons instructor, who has worked for a defense contractor since May 2020. (Tr. 26-27; GE 1; AE A) He is applying to be a special operations technician for which he will need a security clearance. (Tr. 69) If employed in this position, his work will be similar to his Army duties when he was in Army Special Forces (SF). (Tr. 70) He received praise for his contributions to his Defense employer. (HE 3 at 4; AE A) He has not had any employment problems after leaving confinement in October 2016. (Tr. 70)

In 2006, Applicant received a bachelor's degree in political science and an additional bachelor's degree in law and justice. (Tr. 25; HE 3 at 2) As part of his college experience, he volunteered in legal aid and was an advocate for people who were the victims of domestic violence. (Tr. 25-26; HE 3) He assisted in the preparation and publication of a legal study while in college. (Tr. 26; HE 3) He is currently deployed overseas working for a Defense contractor at a base. (Tr. 24, 27)

Applicant served on active duty in the Army from April 2007 to October 2016, and he received an honorable discharge. (Tr. 28, 44; AE E) He volunteered for, and was selected to attend, SF training. (Tr. 29-30; HE 3 at 2) He successfully completed SF training in January 2009 and was awarded the Green Beret. (Tr. 30; HE 3 at 2; AE D) He is Ranger, High Altitude Low Opening (HALO) parachute, and diver qualified. (Tr. 30-31; HE 3 at 2; AE D) He completed several additional specialty training courses. (Tr. 31; AE D)

Applicant was deployed to Pakistan for five months in 2011 and to Afghanistan for 10 months from 2013 to 2014. (Tr. 32-33; HE 3 at 3; AE D) He served his country in combat and went on exceptionally dangerous capture or kill missions. (Tr. 32-33; AE C) He had friends who were killed or injured in combat. (Tr. 33) He was a multi-purpose K9 handler, which included searching for improvised explosive devices (IED), other enemy munitions, and enemy weapons. (Tr. 34) More information about his military background is included in the Character Evidence section, *infra*.

Applicant's Department of Veterans Affairs (VA) disability rating is 90 percent, which includes disability for damage to various joints, traumatic brain injury (TBI), and 50 percent for post-traumatic stress disorder (PTSD). (Tr. 57-59, 142) He had service-related injuries to his hand and foot. (HE 3 at 3) He is seeking an increase in his disability rating to 100 percent. (Tr. 142)

Criminal Conduct and Personal Conduct

Alleged Theft, Importation, and Possession of Army and Foreign Munitions

The allegations in SOR ¶¶ 1.a and 1.b are cross-alleged in SOR ¶ 2.a. SOR ¶ 1.a alleges that Applicant was charged with the following criminal offenses: disobedience of a lawful general order, in violation of Article 92, Uniform Code of Military Justice (UCMJ); failure to provide notice and turn over abandoned property, in violation of Article 103, UCMJ; possession of unregistered firearms and explosives, in violation of Article 134, UCMJ; and larceny, in violation of Article 121, UCMJ. In January 2016, he was sentenced at a BCD-SPCM to be confined for 12 months and to reduction to specialist (E-4).

The conduct that formed the basis for the charges began during Applicant's most recent tour in Afghanistan in 2014. For about three months while Applicant was deployed to Afghanistan, he gathered munitions. (Tr. 139-140) Munitions are defined as military equipment, which includes firearms, ammunitions, and explosives. He did not describe how he obtained the munitions and whether he falsified any inventory, disposition, or turn-in documents. During this deployment, he said he told an SF colonel about having

munitions and wanting to bring the ordnance back to the United States to use for training of K9 teams. (Tr. 41, 95-97) He said he wanted munitions that were similar to enemy munitions encountered in Afghanistan for more realistic training. (HE 3 at 6, 11) The SF colonel told him it would involve too much paperwork, hassle, or effort to obtain approval. (Tr. 41-43, 97) The SF colonel did not specifically say no to Applicant's suggestion about importation of explosives from Afghanistan into the United States. (Tr. 98) Applicant did not provide the name or contact information for the SF colonel. Applicant denied that he received a direct order not to bring the ordnance to the United States. (Tr. 43) He decided to "improvise" to accomplish this self-identified training mission. (Tr. 42) He rationalized that he could not accept no for an answer when he might be able to save lives by taking the actions that he took. (Tr. 42) No one ever gave him permission to bring munitions from Afghanistan to the United States. (Tr. 83) The only enemy munitions identified were two PG-7VM, which are fired from a rocket propelled grenade (RPG)-7 launcher, and an AK-47. *See* The Specification of Charge II, and the Specification of Charge IV, *infra*. However, it is likely that the enemy in Afghanistan uses stolen U.S. munitions and PG-7VMs for IEDs and other nefarious purposes.

Applicant put the munitions he gathered in Afghanistan in an ISU-60 Army container along with K9 and other tactical equipment. (Tr. 88, 140) The ISU-60 was transported from Applicant's tactical location, to Bagram Air Base, and eventually to an Army canine facility in an installation in the United States. (Tr. 140-141) He did not indicate he warned the shipping entities (aircraft or ship), the Army, or customs that he had stored explosives or munitions in the container.

Applicant gathered more than 2,000 rounds of 5.56 millimeter ammunition in Afghanistan to bring to the United States. (Tr. 89) He brought the ammunition to the United States in ammunition cans in the ISU-60. (Tr. 89, 140-141) He said that there was too much "red tape and bureaucracy" in getting ammunition on the military installation, and he believed he could improve the survivability of his team by avoiding the bureaucracy in training involved in getting ammunition authorizations. (Tr. 91-92) He said that in 2014 he was focused on saving lives through realistic training. (Tr. 91-94) He did not provide any statements from anyone that 5.56 millimeter ammunition was unavailable for SF training at the installation where he was assigned.

Ammunition is accountable in the United States at U.S. Army ranges. (Tr. 116) Soldiers are not permitted to retain unused ammunition when leaving the range. (Tr. 116) Overseas unused ammunition is supposed to be transferred to the replacement unit when a unit rotates back to the United States. (Tr. 116) There was no information presented that the unit that replaced Applicant's unit suffered any mission decrement due to the missing munitions that Applicant took and exported to the United States from Afghanistan.

In November 2014, Applicant returned to the United States from Afghanistan, and he brought some live ordnance or munitions from overseas into the United States. (Tr. 37-38, 83) He wanted to train dogs with actual munitions because he believed that devices used for training in the United States had a different odor. (Tr. 38) He suggested use of ordnance from Afghanistan in K9 training would reduce or eliminate in-country acclimation of the dogs. (Tr. 38) He brought explosives and ammunition to the United

States to enhance a canine team's survivability. (Tr. 38) However, some of the items he brought were souvenirs that he took to remind him of an operation or mission. (Tr. 38) He said he had U.S. and enemy ordnance at his house to use for training because dogs need to recognize the difference between friendly and enemy munitions. (Tr. 39) He said he planned to take the ordnance to his base for training. (Tr. 40) He denied that the ordnance was for his own personal use or gain. (Tr. 41) Whatever he did not use for training, he intended to "organize a big cache and then blow it in place" on the military installation. (Tr. 95) He never said he intended to return the U.S. Army military property he imported from Afghanistan into the United States to Army official supply channels.

Applicant transported the munitions that he obtained in Afghanistan from the military installation to his off-post residence in his privately-owned vehicle. (Tr. 84-85) He never moved the munitions from his off-post residence. (Tr. 85) He never used the munitions for training. (Tr. 85) The munitions were stored in unlocked boxes in his off-post residence; however, they were in a room with a locked door. (Tr. 86) There is no evidence that he attempted to sell the munitions to others.

In late November 2014 while Applicant was on leave away from his home, there was a break-in of his off-post residence. (Tr. 139; HE 3 at 6) The burglar left a door partially open, and a neighbor called the police. (Tr. 139) The law enforcement officials who entered his off-post residence informed the Army of the ordnance in Applicant's residence. Some of Applicant's personal firearms were stolen in the burglary; however, he said none of the munitions that he brought from Afghanistan were stolen. (Tr. 138-139)

In July 2015, the following four charges and four specifications were referred to a BCD-SPCM. On October 16, 2015, Applicant and his counsel submitted a pretrial agreement in which they offered to plead guilty to the Specifications of Charges I, II, and IV, and Charges I, II, and IV, in return for referral to a BCD-SPCM, to accept the amendments to other charges and specifications, and to dismiss the larceny of military property charge. (GE 4 at 17-19) The offer to plead guilty included a promise to complete a stipulation of the facts supporting the guilty plea. The parties did not provide a stipulation of fact for inclusion in the security clearance record. (Tr. 142) The convening authority accepted the offer to plead guilty.

In the Specification of Charge I, and Charge I, Applicant pleaded guilty to wrongfully possessing and exporting one AN-M14 incendiary hand grenade; two M18A1 Claymore Antipersonnel Mines; four blocks of C4 Demolition Charges; 17 M81 Igniter Time Blasting Fuses; five M67 fragmentary hand grenades; eight rounds of 40 millimeter low velocity High Explosive Dual Purpose (HEDP); detonation cord; three thermobaric grenades; six blasting caps; M15 Modernized Demolition Initiators (MDI); M11 Modernized Demolition Initiators; one Dual In-Line initiator blasting cap; and C3 demolition charge datasheet. In addition to these items of U.S. military ordnance, he was also charged with items of non-U.S. military property, including an AK-47 assault rifle and one British fragmentation grenade. (GE 4 at 9-10, 12, 17). The maximum possible confinement for a violation of Article 92, UCMJ includes years of confinement. *See* MCM, 2012 ed., ¶ 16e(1)). Applicant agreed that the items in the Specification of Charge I above

were in his off-post residence and most were U.S. Army property. (Tr. 87-88) He did not have authority from any military authority to have this property in his residence. (Tr. 88) While he was deployed to Afghanistan, Applicant was entrusted with his SF team's property. (Tr. 135; HE 3 at 3)

Applicant pleaded guilty to the Specification of Charge II, and Charge II, failure to report and turn over captured or abandoned property, to wit: an AK-47 assault rifle, two PG-7VM, one RPG launcher, of a value greater than $500, in violation of Article 103, UCMJ (maximum sentence includes five years of confinement, *see* MCM, 2012 ed., ¶ 27e(1)(b));

The Specification of Charge III and Charge III were referred to trial; however, they were dismissed pursuant to a pretrial agreement. They allege larceny of military property of a value of more than $500, in violation of Article 121, UCMJ (maximum sentence includes 10 years of confinement, *see* MCM, 2012 ed., ¶ 46e(1)(c)). Applicant was charged with stealing the following items of U.S. Army military property from Bagram Base in Afghanistan on or about October 2014: 2,088 rounds of 5.56 millimeter ammunition; 491 rounds of 7.62 millimeter long range ammunition; 263 rounds of 9 millimeter ammunition; one AN-M14 incendiary hand grenade; two M18A1 Claymore Antipersonnel Mines; four blocks of C4 Demolition Charges; 23 M81 Igniter Time Blasting Fuses; five M67 fragmentary hand grenades; eight rounds of 40 millimeter low velocity High Explosive Dual Purpose (HEDP); 18 demolition blocks of ¼ lb. Trinitrotoluene charges; detonation cord; three thermobaric grenades; six blasting caps; M15 Modernized Demolition Initiators (MDI); M11 Modernized Demolition Initiators; one M142 Multipurpose Firing Device; one Dual In-Line initiator blasting cap; and C3 demolition charge datasheet. (GE 4 at 9, 14) He said he was not guilty of the larceny offense. (Tr. 43).

Applicant pleaded guilty to the Specification of Charge IV and Charge IV, wrongful possession of unlawful firearms, to wit: an AK-47 assault rifle, two PG-7VMs, and one rocket propelled grenade launcher, in violation of Article 134, UCMJ and 26 U.S.C. § 5861(d) (Section 5861(d) states, "it shall be unlawful for any person--(d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record"). (GE 4 at 9-10; HE 3 at 7)

Applicant providently pleaded guilty in accordance with his pretrial agreement; the larceny charge was dismissed; a military judge sentenced him to 12 months of confinement; and with good behavior, he served almost 10 months of confinement. (Tr. 45; HE 3 at 7) Applicant's father died while he was in confinement. (Tr. 44) Applicant said he took responsibility for and pleaded guilty to the offenses he committed. (Tr. 77) Applicant believed his offenses were not felonies. (Tr. 144-145)

Applicant disclosed the criminal offenses on his March 15, 2018 SCA. He admitted that he made the wrong choices in his manner of handling munitions, and he said he had no excuses or justifications for his actions. (Tr. 92-93) He promised to be detail oriented and strictly follow protocols and rules in the future. (Tr. 64, 92) He would not place the

mission at such a high priority that he would circumvent rules and laws in the future. (Tr. 65) He promised that he would not have any transgressions in the future. (Tr. 67)

Applicant inherited or purchased several rifles and guns. (Tr. 99) He denied that he was a collector of firearms or ammunition. (Tr. 100, 132) For example, he purchased a Walter P38 Nazi relic, a World War II Luger pistol, and a Valmet fold stock 5.56, which is an AK-style rifle. (Tr. 100-101) He currently owns seven to ten firearms. (Tr. 136) In 2017, he spent about $12,000 to purchase two firearms. (Tr. 136) He is currently storing the firearms he purchased. (Tr. 136) He purchased these items as investments. (Tr. 101) None of the firearms he currently owns fires a 5.56 milliliter round; however, in November 2014, he owned an AR-15, which fires a 5.56 milliliter round. (Tr. 137) The AR-15 was stolen in the burglary of his residence in November 2014. (Tr. 137)

Alleged Theft of Basic Allowance for Housing (BAH) and Family Separation Allowance

SOR ¶ 1.b alleges that in January 2015, Applicant was referred for disciplinary action for violation of Article 121, UCMJ, for receiving Basic Allowance for Housing (BAH) at the with dependent rate for failing to update his records to indicate he was divorced in 2012. There was probable cause to believe he fraudulently submitted a document for family separation allowance (FSA) for his deployment in 2014. He did not receive any disciplinary action because of his pending court-martial as indicated in SOR ¶ 1.a.

Applicant was married from 2007 to January 2012. (Tr. 35, 103) He believed his wife was upset with him because he dedicated his life to being a successful Soldier. (Tr. 36) His wife wanted to be his top priority, and he advised her that he was giving his career and the Army top priority. (Tr. 36) Applicant believed his decision to give such a high priority to Army SF caused or contributed to the end of his marriage. (Tr. 35-36)

Applicant said he provided his divorce decree to the Defense Finance and Accounting Service (DFAS), and he completed the documentation to change his BAH after his divorce from with dependent to single; however, DFAS continued to pay him BAH at the married or with dependent rate. (Tr. 46, 130; HE 3 at 9) He contacted DFAS three or four times in the next two months after his divorce, and he asked DFAS to stop paying him at the with dependents rate. (Tr. 46, 102) He was focused on being a good Soldier and completion of his SF missions, and he concluded DFAS would eventually correct their mistake. (Tr. 47, 131) The local DFAS office was notorious for being understaffed and inefficient. (Tr. 47) There is no evidence that he asked his chain of command or the Inspector General for assistance in getting DFAS to correct his BAH payments. He was not confronted with the overpayment until he returned from Afghanistan in November 2014. (Tr. 132) He did not provide copies of any correspondence sent to DFAS to correct the BAH overpayment.

Applicant received a BAH overpayment of about $15,000. (Tr. 127) He paid the overpaid funds back to DFAS in the beginning of 2015. (Tr. 48, 104, 126-127)

In late 2014, the Army Criminal Investigation Command and other law enforcement presented to Applicant a DD Form 1561, which was allegedly signed by Applicant on April 18, 2014, to apply for family separation allowance (FSA), which is an allowance paid when a Soldier is separated from their spouse and/or children while deployed. (HE 3 at 10; AE J) The DD Form 1561 indicates his deployment began on April 4, 2014, and he was "not divorced or legally separated from [his] spouse." (AE J) On May 12, 2014, a logistics branch lieutenant colonel, commanding, signed the DD Form 1561 (not an SF commander). (AE J) Applicant said he was re-deployed to Afghanistan in April 2014. (Tr. 48) He denied that he filled out or signed the DD Form 1561, and he noted his first name was not spelled correctly on the DD Form 1561. (Tr. 50-51, 128; HE 3 at 10) He was never charged with submitting a fraudulent DD Form 1561 or BAH fraud. (Tr. 52) He denied that he had ever stolen from his country. (Tr. 66)

An SF colonel and a former SF soldier described multiple problems with the same DFAS office that was supposed to process Applicant's BAH and FSA. (Tr. 109, 113-114, 121-122) The DFAS office may have had difficulties because of the SF operational tempo and various special pays for SF soldiers. (Tr. 109-111)

Applicant has good credit. (Tr. 53-55) A friend offered him employment at three to four times his Army pay, and he decided to stay on active duty because he wanted to deploy with his SF team. (Tr. 55-57, 122-123)

Character Evidence

An SF colonel, who is currently a battalion commander, attended the SF qualifications course with Applicant in 2008, and they subsequently served together in the same detachment. (Tr. 107, 113) He was aware of Applicant's court-martial; however, he still believed that at his core, Applicant had good character. (Tr. 112) A friend described Applicant as a patriot who wanted to continue to contribute to the Department of Defense. (Tr. 124) Numerous written character statements laud his contributions to mission accomplishment while serving as an SF Soldier and Defense contractor. (AE A; AE B) The general sense of Applicant's character statements is that he is patriotic, dedicated, reliable, diligent, brave, loyal, friendly, and professional. (AE A; AE B) Applicant is engaged in several charity endeavors. (HE 3 at 5)

In 2014, Applicant and his team were involved in a firefight in Afghanistan. Applicant repeatedly moved through enemy fire, and in the engagement, he entered a building and killed three enemy combatants. His actions saved the lives of two Afghan Soldiers who were medically evacuated and other team members through his suppressive fire upon enemy positions. He provided a "Narrative to Accompany the Award" and "Citation to Accompany the Award" for a Bronze Star with V device. (AE C) However, he did not provide the orders for the award or the recommendations for the award, which are usually detailed on a DD Form 638.

Applicant initially said he was awarded two Bronze Stars, and an Army Commendation Medal (ARCOM) with V device. (Tr. 34-35; AE D) Then he said, "I had a Bronze Star with valor. That was talked about being upgraded to a Silver Star. I had

another ARCOM with valor that same trip." (Tr. 35) He reiterated that he had an "Army Commendation Medal and the Bronze Star with Valor." (Tr. 35)

Applicant's DD Form 214 shows that he received the following Army awards and badges: two Bronze Star Medals (BSM); one Army Commendation Medal (ARCOM) with V Device; two Army Good Conduct Medals (AGCM); one National Defense Service Medal (NDSM); one Global War on Terrorism Service Medal (GWTSM); two Noncommissioned Officer Professional Development Ribbons (NCOPDR); one Army Service Ribbon (ASR); one NATO Medal; Combat Infantryman Badge (CIB); SF Tab; Ranger Tab; Military Freefall Parachutist Badge; Parachutist Badge; Special Operations Diver Badge; and Expert Marksmanship Badge with Carbine. (AE D) He successfully completed numerous training courses. (*Id*.) The narrative and citation Applicant submitted do not establish with certainty that he was awarded a Bronze Star with V device. His DD Form 214 listing of medals, awards, and badges is given greater weight than the narrative and citation he submitted and his claims that he received a Bronze Star with V device. *See* AE D.

Applicant believes he has changed since November 2014, and is now a better person. (Tr. 143) The "darkness and death" of his combat experiences temporarily clouded his judgment. (Tr. 143) He loves the United States, and he promised to serve honorably in the future. (Tr. 143) With a security clearance, he can increase his contributions to the national defense. (Tr. 143)

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 Directive presumes there is a nexus or rational connection between proven conduct under any of the Guidelines and an applicant's security eligibility. Direct or objective evidence of nexus is not required." ISCR Case No. 18-02581 at 4 (App. Bd. Jan. 14, 2020) (citing ISCR Case No. 15-08385 at 4 (App. Bd. May 23, 2018)).

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 [or her] 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

Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations."

AG ¶ 31 describes two conditions that could raise a security concern and may be disqualifying in this case, "(a) a single serious crime or multiple lesser offenses," and "(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted."

AG ¶¶ 31(a) and 31(c) apply to the following criminal offenses: (1) The Specification of Charge I and Charge I, failure to obey a lawful general order concerning possession of and exportation of munitions; (2) The Specification of Charge II and Charge II, failure to report and turn over captured or abandoned property, a firearm and explosives, in violation of Article 103, UCMJ; (3) The Specification of Charge III and

Charge III, larceny of military property of a value of more than $500, in violation of Article 121, UCMJ; (4) The Specification of Charge IV and Charge IV, wrongful possession of unlawful firearms, to wit: an AK-47 assault rifle, two PG-7VMs, one RPG launcher, in violation of Article 134, UCMJ and 26 U.S.C. § 5861(d); and (5) wrongful appropriation of BAH at the with dependents rate totaling about $15,000.

Applicant admitted (1), (2), and (4) at his hearing or court-martial or both. As to (3), he admitted that most of Army munitions that he gathered in Afghanistan were Army military property. He arranged for the transportation of the munitions to Bagram Air Force Base, then to his installation in the United States, and then to his residence. He said he was going to use the Army property for training; however, this use was not authorized by the Army. Eventually, he planned to destroy the munitions; however, he did not indicate this destruction would be authorized by the Army or through official Army channels. His intention not to return the Army munitions he took without authority to official Army possession or control constitutes an intention to permanently deprive the Army of the property, and the crime of larceny is established.

As to (5), Applicant knowingly retained and accumulated DFAS funds from the date of his divorce in January 2012 to DFAS's discovery of the overpayment. He knew he was not entitled to the extra BAH payments after his divorce, and after a couple of months of trying to correct the problem at DFAS, he did not take any further actions to return the government's funds. As an SF noncommissioned officer with two bachelor's degrees, he is presumed to know that if DFAS failed to correct the overpayment after a few months, his next steps should have been to contact the chain of command, Inspector General, or Legal Assistance for help. He did not take reasonable and timely steps to return the DFAS overpayment, and wrongful appropriation of DFAS funds is established.

The SOR allegations that Applicant committed larceny of BAH at the with dependents rate and FSA, and that he submitted a fraudulent DD Form 1561 to DFAS are refuted. Applicant knew that eventually DFAS would correct his pay records and obtain repayment of any overpayment, and therefore, he did not commit larceny from DFAS, as he did not have the intent to permanently deprive the government of funds. Moreover, Applicant credibly established that he is not a financially greedy person. As to the generation of the false DD Form 1561, most likely the DD Form 1561 was generated as a shortcut on his behalf without his knowledge or consent by a well-meaning Army person in the erroneous belief that he was entitled to the allowance.

AG ¶ 32 provides four conditions that could potentially mitigate security concerns:

> (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
>
> (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.

The 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 ¶¶ 32(a) and 32(d) apply. The offenses were committed during 2013 and 2014, and are not recent. He served his confinement and repaid the DFAS funds. He has learned from his mistakes, and is unlikely to repeat these particular offenses. Applicant is not financially greedy or avaricious. He is well educated, diligent, and successful in his employment. He has constructive community involvement.

The evidence against full mitigation is more persuasive. Applicant committed four serious criminal offenses (the wrongful appropriation of DFAS funds is not a serious offense in comparison to the munitions-related offenses). He had an opportunity to terminate his criminal activity over the three months he was gathering munitions in Afghanistan with the intention of importing them into the United States. There is no persuasive evidence that he intended to return the munitions into the official Army supply system. His actions put the personnel who transported the explosives from Afghanistan to the United States and the civilian population in his neighborhood at risk of death or serious injury. The person or persons who burglarized his home could have stolen the explosives and sold them to criminals. They could have used the explosives for their own nefarious purposes. While the chance of detonation of the munitions resulting in the death or injury is low, if they were accidently or deliberately detonated by untrained personnel, the result could be devastating.

Applicant is an intelligent person with an extensive background in munitions. He was well-aware of the destructive power of various munitions. His handling of the munitions in the charges constitutes serious misconduct.

In addition to the offenses under the UCMJ, Applicant's conduct involving firearms and munitions violated 18 U.S.C. §§ 922(a)(3) (illegal importation of firearms), 922(a)(4) (illegal importation of destructive device), 922(e) (failure to give written notice to shipper of presence of explosives), 922(i) (knowing transport or shipment of stolen firearm or ammunition), and possibly several other subsections in Title 18.

The SOR does not allege any violations of 18 U.S.C. § 922 or discuss the risks of death or injury entailed with uncontrolled shipment or possession of munitions. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006), the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

> (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive Section 6.3.

Id. (citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). *See also* ISCR Case No. 12-09719 at 3 (App. Bd. Apr. 6, 2016) (citing ISCR Case No. 14-00151 at 3, n. 1 (App. Bd. Sept. 12, 2014); ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006)). The non-SOR allegations will not be considered except for the five purposes listed above.

After careful consideration of the Appeal Board's jurisprudence on criminal offenses, and all the facts and circumstances, I have continuing doubts about the risks that Applicant will make poor decisions and show poor judgment in connection with security and classified information. While there is no evidence of criminal conduct after November or December 2014, it is too soon to conclude poor decisions or compromise of classified information is unlikely to recur. Not enough time has elapsed without serious premeditated misconduct to eliminate doubt about Applicant's current reliability, trustworthiness, and good judgment. Criminal conduct concerns are not fully mitigated.

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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The LOR alleges three disqualifying conditions in AG ¶ 16 that are relevant in this case. AG ¶¶ 16(c), 16(d)(3), and 16(e)(1) read:

> (c) credible adverse information in several adjudicative issue 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 person may not properly safeguard protected information;
>
> (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: . . . (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, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . . .

AG ¶¶ 16(c) and 16(d)(3) do not apply. As indicated in the previous section, Guideline J is the most appropriate guideline for Applicant's conduct. The Guideline J discussion indicates sufficient evidence for an adverse determination. AG ¶ 16(e) does not apply because his court-martial is publicly available. He disclosed his offenses on his SCA and discussed them at his hearing. Personal conduct security concerns are refuted.

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(a):

> (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 have incorporated my comments under

Guidelines J and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a 38-year-old lead weapons instructor, who has worked for a defense contractor since May 2020. He has not had any employment problems after leaving confinement in October 2016. In 2006, Applicant received two bachelor's degrees. He served on active duty in the Army from April 2007 to October 2016, and he received an honorable discharge. He completed SF training in January 2009 and was awarded the Green Beret. He is Ranger, HALO parachute, and diver qualified. He completed several additional specialty training courses.

Applicant was deployed to Pakistan for five months in 2011 and to Afghanistan for 10 months from 2013 to 2014. He served his country in combat and went on exceptionally dangerous capture or kill missions. He had friends killed or injured in combat. He was a multi-purpose K9 handler, which included searching for IEDs, enemy munitions, and enemy weapons. His VA disability rating is 90 percent, which includes disability for damage to various joints, TBI, and 50 percent for PTSD. He had service-related injuries to his hand and foot.

Numerous written character statements laud his contributions to mission accomplishment while serving as an SF Soldier and Defense contractor. The general sense of Applicant's character statements is that he is patriotic, dedicated, reliable, diligent, brave, loyal, friendly, and professional. Applicant is engaged in several charity endeavors.

In 2014, Applicant and his team were involved in a firefight in Afghanistan. Applicant repeated moved through enemy fire, and in the engagement, he entered a building and killed three enemy combatants. His actions saved the lives of two friendly Soldiers who were medically evacuated and other team members through his suppressive fire upon enemy positions. He was nominated for a Bronze Star with V device.

Applicant believes he has changed since November 2014, and he is now a better person. The "darkness and death" of his combat experiences temporarily clouded his judgment. He loves the United States, and he promised to serve honorably in the future. With a security clearance, he can increase his contributions to the national defense.

Applicant's DD Form 214 shows that he received the following Army awards and badges: two BSMs; one ARCOM with V Device; two AGCMs; one NDSM; one GWTSM; two NCOPDRs; one ASR; one NATO Medal; CIB; SF Tab; Ranger Tab; Military Freefall Parachutist Badge; Parachutist Badge; Special Operations Diver Badge; and Expert Marksmanship Badge with Carbine. He successfully completed numerous training courses.

Applicant's years of support to Army, including the dangers that service entailed, weigh towards mitigating security concerns. He has provided critical assistance to U.S.

Armed Forces. He has shown his patriotism, loyalty, and fidelity to the United States during his years of Army and support to a DOD contractor.

In ISCR Case No. 17-00629 at 4 (App. Bd. May 24, 2018), the Appeal Board cogently explained the relevance of service in a combat or hostile fire zone on behalf of the United States:

> Such evidence demonstrates that Applicant has repeatedly been willing to assume a high level of risk on behalf of the U.S. and shows his [or her] ties and sense of obligation to the U.S. could be sufficiently strong enough to support a favorable application of mitigating condition 8(b). *See* ISCR Case No. 05-03846 at 6 (App. Bd. Nov 14, 2006). . . . *See also* ISCR Case No. 04-12363 at 2 (App. Bd. Jul. 14, 2006); ISCR Case No. 07-00034 at 2-3 (App. Bd. Feb. 5, 2008); and ISCR Case No. 10-02803 at 6 (App. Bd. Mar. 19, 2012).

Applicant has a documented history of demonstrating courage and bravery under hostile fire. All these circumstances increase the probability that Applicant will recognize, resist, and report any attempts by a foreign power, terrorist group, or insurgent group to coerce or exploit him. *See* ISCR Case No. 07-00034 at 2 (App. Bd. Feb. 5, 2008). I have no doubt that Applicant would not succumb to any pressure or coercion to compromise classified information, and he would report any such attempts.

Applicant has possessed firearms after his court-martial conviction. 18 U.S.C. 922(g)(1) states, "It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." Federal circuit courts have found convictions by court-martial to be convictions in "any court." *United States v. Shaffer*, 807 F.3d 943, 947 (8th Cir. 2015) (citing *United States v. MacDonald*, 992 F.2d 967, 969-70 (9th Cir. 1993)). *See Holcombe v. United States*, 2021 U.S. Dist. LEXIS 2409 (W.D. Tex. 2021) (discussing Air Force and DOD processes for entering qualifying court-martial convictions into federal databases to prevent purchase of firearms). The term "punishable" refers to the maximum punishment and not the level of court. *See United States v. Essig*, 10 F.3d 968 (3d Cir. 1993) (holding maximum possible punishment of five years of confinement in misdemeanor-level of court constituted predicate conviction under the federal statute regarding the purchase of firearms, 18 U.S.C. § 922, even though defendant sentenced to probation for two years).

Army Regulation 27-10, Military Justice (Nov. 20, 2020), does not address qualifying court-martial convictions limiting possession of firearms under 18 U.S.C. § 922. The Navy post-trial processing guidelines require annotation on records for general courts-martial, but not for SPCM convictions for offenses carrying a maximum punishment exceeding one year evidently because the jurisdictional maximum for a SPCM is one year of confinement. *See* JAG/CNLSC INST 5814.1D, Encl. 5, Post-Trial Gun Control Act of 1968 Reporting Requirements (Sept. 6, 2019). For security clearance purposes, no adverse inference is drawn from Applicant's post-trial possession of firearms because his level of trial was a BCD-SPCM, which has a jurisdictional maximum limited to one year of confinement.

The factors weighing against continuation of his security clearance are more substantial than the mitigating circumstances. Applicant committed five criminal offenses. His scheme to gather munitions, including an AK-47, grenades, mines, RPGs, and explosives and to import them into the United States was knowing and premeditated. He risked injury or death to shippers and civilians. Fortunately, the munitions were recovered before they were used, lost, stolen, or exploded. His theft of U.S. military property valued at over $500 is a serious crime, which carries a maximum confinement of 10 years if his case were tried at a general court-martial, and larceny is a crimen falsi offense. His story about intending to use the explosives to train military dogs in the identification of enemy explosives is undercut by the absence of information about how he would use the mostly U.S. ordnance to conduct this training without being exposed to detection and apprehension by military authorities.

Other SF personnel attending his training might ask where and how he obtained the non-inert explosives or ammunition. If he told them that he stole the ammunition from the Army in Afghanistan, then anyone who possessed the stolen ammunition would be in jeopardy of prosecution for violation of 18 U.S.C. 922(j) for possession of stolen ammunition. Any military personnel who knowingly received the Army property stolen from the Army in Afghanistan without reporting the receipt would risk punishment for receiving stolen property, in violation of Article 134, UCMJ. His story about his plan to use the stolen military property for training is not plausible. Credibility is essential for a security clearance holder. The DOD must be able to rely on the security clearance holder to report his own security violation or the security violation of a colleague, even when disclosure might damage someone's career. I have lingering doubts that Applicant would report a security violation if he deemed the violation was done in good faith to complete the mission.

It is well settled that once a concern arises regarding an applicant's security clearance eligibility, there is a strong presumption against the grant or renewal of a security clearance. *See Dorfmont*, 913 F. 2d at 1401. Unmitigated security concerns lead me to conclude that grant of a security clearance to Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without criminal conduct and other conduct raising a serious concern, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

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 refuted; however, criminal conduct security concerns are not mitigated at this time.

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 J:	AGAINST APPLICANT
Subparagraphs 1.a and 1.b:	Against Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

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MARK HARVEY
Administrative Judge