



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



In the matter of:)
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Applicant for Security Clearance)

WHS-C No. 23-00013-R

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: Bradley P. Moss, Esq.

04/25/2023

Decision

MURPHY, Braden M., Administrative Judge:

The Government alleged personal conduct security concerns based upon Applicant’s alleged correspondence and financial interactions, in about 2014-2016, with foreign individuals being investigated by the U.S. government for their alleged involvement in child sex trafficking, and upon Applicant’s alleged failure to cooperate with government investigators interviewing him in 2019 about his purported involvement in that criminal conduct. Applicant denied wrongdoing in all respects. This puts the Government to its burden to establish by substantial evidence that Applicant is disqualified from eligibility for access to classified information. Based upon my review of the documentary and testimonial record evidence, I conclude that the record evidence submitted in this case is not sufficient for the Government to have established by substantial evidence that Applicant was involved in or engaged in the alleged criminal activities being investigated by the U.S. Government. The investigation did not lead to criminal charges against Applicant. He was interviewed in connection with that criminal investigation, an interview conducted by his employer, a U.S. government agency. He initially waived his right not to

testify (*Garrity* rights)¹ and spoke freely to the interviewing agents, but then later terminated his interview by indicating his intent to seek legal counsel. I conclude that the fact that he did so does not establish a failure to cooperate or that he concealed relevant and material information, since his denials are not rebutted by contrary evidence. Personal Conduct security concerns are not established. Moreover, Applicant provided extensive whole-person character evidence, both personally and professionally, regarding his reliability, trustworthiness, and good judgment. Applicant's request for renewed eligibility for access to classified information and a national security sensitive position is granted.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on April 30, 2014. On or about August 8, 2020, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued him a Letter of Intent (LOI) to Revoke Eligibility for Access to Classified Information, Assignment to Duties that have been designated National Security Sensitive, and Access to Sensitive Compartmented Information (SCI). The LOI included a Statement of Reasons (SOR) that detailed security concerns under the adjudicative guidelines for personal conduct (Guideline E) and financial considerations (Guideline F). The DOD CAF issued the SOR under Executive Order (Exec. Or.) 12968, *Access to Classified Information*, dated August 2, 1995; DOD Manual 5200.02, *Procedures for the DOD Personnel Security Program (PSP)*, effective on April 3, 2017 (DODM 5200.02); Intelligence Community Directive (ICD) Number 704, *Personnel Security Standards And Procedures Governing Eligibility For Access To Sensitive Compartmented Information And Other Controlled Access Program Information* (October 1, 2008) and Intelligence Community Policy Guidance (ICPG) 704.3 (Denial or Revocation of Access to Sensitive Compartmented Information, Other Controlled Access Program Information, and Appeals Processes (October 2, 2008); and Security Executive Agent Directive 4 (SEAD 4), *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective within the DOD on June 8, 2017.

Applicant answered the SOR on October 15, 2020, with a narrative statement and 15 enclosures (Ans. Encl. 1-15). (Answer) On or about November 14, 2022, DOD Consolidated Adjudication Services revoked his eligibility for access to classified information and Applicant appealed that denial under the provisions of DODM 5200.02.

On December 2, 2022, Under Secretary of Defense (Intelligence & Security) Ronald Moultrie issued a memorandum that provided that any individual whose clearance eligibility was revoked or denied between September 30, 2022, and the date of that memorandum, shall be afforded the opportunity to pursue the DOHA hearing and appeal process set forth in DOD Directive 5220.6. As a result of Under Secretary Moultrie's memo, Applicant was given the opportunity to receive the process set forth in DOD Directive

¹ Under *Garrity v. New Jersey*, 385 U.S. 493 (1967), the protection of the individual under the Fifth Amendment against coerced statements prohibits the use in subsequent criminal proceedings of statements obtained under threat of removal from a job. However, the Fifth Amendment does not prohibit the use of these statements in administrative or civil matters.

5220.6, and he elected that process in a memo dated January 31, 2023. (Tr. 7-9; Hearing Exhibit (HE) I)

The case was assigned to me on February 1, 2023. Applicant's counsel entered his appearance on February 4, 2023. That e-mail, and my February 6, 2023 response, is marked as HE II. In a February 13, 2023 e-mail, Applicant's counsel sought an order of summary disposition. On February 14, 2023, I responded and indicated that DOD Directive 5220.6 did not give me that authority. (HE III; Tr. 10-12) On February 28, 2023, DOHA issued a notice scheduling Applicant's in-person hearing for March 17, 2023.

The hearing convened as scheduled. Department Counsel submitted Government's Exhibits (GE) 1 through GE 3. I grouped GE 3 into four separate exhibits, GE 3a through 3d. GE 1, GE 2, and GE 3d were admitted without objection. (Tr. 25-27) GE 3a, 3b, and 3c were admitted over Applicant's objections. (Tr. 25-34) Applicant submitted five exhibits, marked as Applicant Exhibits (AE) A through E. They were admitted without objection. (Tr. 37-41) Applicant testified in person, and four character witnesses testified by phone. At the end of the hearing, I held the record open until April 4, 2023 to allow Applicant the opportunity to submit additional documentation. He timely submitted four documents, his DD-214, a letter from the VA about his disability status, and two character letters. Those documents are marked as AE F through AE I and admitted without objection. The record closed on April 6, 2023. DOHA received the hearing transcript (Tr.) on March 23, 2023.

Additional Procedural Rulings

At the start of the hearing, Department Counsel moved to withdraw the Guideline F allegations in the SOR. The motion was granted without objection. (Tr. 14-15) Those allegations will not be addressed further, except in relation to Guideline E or the whole-person concept, as necessary. (This also includes the 15 enclosures Applicant included with his SOR response, documents I reviewed but which I will only reference in the Facts as necessary).

When Department Counsel rested the Government's case, Applicant's counsel renewed his motion for dismissal on the grounds that the Government had not met its *prima facie* case for disqualification under Guideline E. The motion was denied. (Tr. 35-37)

One of Applicant's character witnesses, Mr. D, was his supervisor at another government agency (GA # 1). Mr. D. testified by phone (see discussion in the Facts section, below). Present with him on the phone during his testimony was a representative from the GA # 1 general counsel's office (GC), who participated in the hearing, without objection, with the limited purpose of advising the court if Mr. D was potentially about to offer testimony that was either classified or law enforcement sensitive. (Tr. 62-64) GC spoke up on one occasion to object to the speculative nature of a potential answer to one question. I requested that such an objection come from Department Counsel instead of GC, and the testimony continued. (Tr. 77-78)

During the hearing, upon reviewing the SOR, I called the parties' attention to the fact that the last paragraph under "Guideline E" in the SOR actually cites "Guideline D" for sexual behavior. It references several disqualifying conditions under "Guideline D" of DOD Directive 5220.6 and concludes, "Therefore, your sexual behavior is a security concern." (SOR, page 2, last paragraph of "Guideline E.") Department Counsel then confirmed that Guideline D had not been alleged in the SOR and was not part of the case. I therefore consider the reference to "Guideline D" in the SOR to be erroneous. (And if it wasn't, it should have been more clearly and properly alleged). (Tr. 128-130) I will therefore disregard that reference.

Findings of Fact

Based on my review of the pleadings and the record evidence, I make the following findings of fact:

The SOR

The Guideline E portion of the SOR chiefly relies on several reports of investigation (ROIs) from GA # 1. (GE 3). The SOR is written in narrative format, including one paragraph of factual allegations (Guideline E, ¶ 1) and one paragraph detailing GA # 1's conclusions about Applicant's lack of candor during the investigation and GA # 1's resulting concerns about his "trustworthiness, reliability, dependability, discretion and personal conduct." (Guideline E, ¶ 2) (The third paragraph under Guideline E erroneously cites and discusses Guideline D, as noted above).

Guideline E, ¶ 1 of the SOR contains the following allegations, either generally or specifically (with Applicant's answers, as stated in his SOR Response and his testimony, paraphrased in the parentheses, and further addressed below).

- 1) Applicant "failed to report foreign contacts and [failed to] cooperate with [GA # 1]." (Applicant denies this). (Answer)
- 2) During an investigation by a second government agency (GA # 2) into international child sex trafficking, "you were identified as possibly being involved in the sexual exploitation of minors." (Applicant denies any such involvement). (Answer, ¶ 1.c)
- 3) "You were identified as sending significant financial transactions via Western Union to an identified individual who is a known/suspected Money Runner in the Philippines who is now incarcerated, but routinely received money for payment as a result of live streaming sex shows involving young children." (Applicant denies any such involvement).
- 4) "You reportedly sent the Western Union transactions prior to being hired by [GA # 1]" while on active duty in the Marine Corps in Japan. (Applicant denies this.)
- 5) "Your e-mail address [E-mail 1] was used to access child sex performances." (Applicant denies that he ever did so).
- 6) Applicant was asked if he knew any (unidentified) foreign nationals to whom he (allegedly) sent money via PayPal or Western Union between 2014 and 2016

- on several occasions. (Applicant denied knowing these individuals and denied sending anyone any money via PayPal or Western Union during this timeframe).
- 7) "You [indicated] that you used various chatrooms to speak to people throughout the world, however you would not provide the names of the chatrooms you used." (Applicant denied using chatrooms, and referenced other social media sites) (SOR ¶ 1.i)
 - 8) "When confronted with information that was known that you sent the aforementioned individuals money via PayPal, you responded, "Ok." (Applicant denies that this constitutes an admission). (Answer, ¶ 1.g)
 - 9) "When asked to provide information regarding your financial transactions on PayPal/Western Union you refused to provide on [sic] why you sent the money . . ." (Applicant denies that he did this). (Answer, ¶ 1.h)
 - 10) ". . . and you terminated the interview by requesting to consult with an attorney." (Applicant admits this conduct but denies that it constitutes a failure to cooperate). (Answer, ¶¶ 1.h, 1.i)

Applicant's Answer:

In his Answer, Applicant denied failing to report foreign contacts and failing to comply with the investigation. (Answer, ¶ 1.b) He noted that the reference to the word "possibly" (in allegation #2, above) shows that "there is no definitive proof of the alleged accusations against him," with no supporting factual evidence against him." (Answer, ¶ 1.c)

Applicant acknowledged receiving *Garrity* rights and decided, against his attorney's advice, to waive those rights and agree to be interviewed. Once informed that GA # 1's agents could not access his work computer, he gave them the password so they could do so. (Answer, ¶¶ 1.d, 1.j) He said he had a PayPal account that he rarely used, and that his ex-girlfriend had sometimes used his PayPal account or credit card for online shopping on Asian websites. People came to his home and might have had access to his computer. He denied "that I sent money to individuals that I do not know and never had contact with. Although they allege that money was transferred from my account, they have not provided any evidence that I specifically sent the money, yet they continue to make these defamatory statements." (Answer, ¶ 1.d) Applicant asserted that he had been a victim of fraud on several occasions. (Answer, ¶ 1.e)

Applicant denied sending or receiving any illegal pornographic material. He provided the investigators with his e-mail address (E-mail address 1) and suggested his e-mail address had been hacked or compromised. (Answer, ¶ 1.f)

Applicant said, "at no time did I intend not to cooperate with the investigation, my only intention was to temporarily halt questioning until I was able to further consult with, and have an attorney present when questioning resumed at a later date. (Answer, ¶ 1.h)

Personal and professional background:

Applicant is 39 years old. He was married between 2003 and 2008 and has no children. He has over 100 college credits but has not earned a degree. (Tr. 173) He enlisted in the Marine Corps at age 18, in September 2001. He was first trained in aviation electronics and moved to the intelligence field in 2005-2006. He was honorably discharged from the Marine Corps in June 2015 as a staff sergeant (E-6) (GE 3c at ¶ 4, GE 1; Tr. 138-139, 174-177; AE F, AE G) Applicant documented that he is a disabled veteran, and 100% of his disabilities (joints and respiratory problems) are tied to his military service. (Tr. 168-169; AE G)

After the Marine Corps, Applicant held a contractor position with a third government agency. He also worked in security for a member of a high-level headquarters. Applicant began working at GA # 1 in August 2017 as a technical investigator. He held a top-secret security clearance with SCI access until it was revoked in November 2022. (GE 3a, ¶ 3; Tr. 135-136)

The Government's Documentary Evidence:

GA # 1's ROIs (GE 3a-3.d):

GE 3 is comprised of several reports of investigation (ROIs) from GA # 1 regarding Applicant, dated June 6, 2018; July 6, 2018; August 1, 2018; and February 13, 2019, respectively. (GE 3a-3d). The ROIs were offered into evidence by Department Counsel but without any underlying documentation of supporting substantive evidence. (Applicant's counsel objected to admission of some of these documents under the rule of completeness, Fed. R. Evid. 106. The objection was overruled. (Tr. 25-34).

GE 3a states that "this reactive investigation was initiated pursuant to suspected violations of 18 United States Code (USC) 2252 (Certain Activities Relating to Material Involving the Sexual Exploitation of Minors)." (GE 3a, ¶ 1) In December 2017, GA # 1 was contacted by the resident agent in charge (RAC) of a GA # 2 office. The RAC reported that during an ongoing international undercover investigation by GA # 2, Applicant was "identified as possibly being involved in the sexual exploitation of minors." Specifically, he "was identified as sending money through Western Union (WU) to an identified individual in the Philippines who routinely received money as a result of live streaming sex shows involving young children." Applicant purportedly sent the WU transactions while an active-duty Marine stationed in Japan, before he was employed by GA # 1. (GE 3a, ¶ 2)

GE 3b (ROI of July 6, 2018) details certain discussions between agents of GA # 1 and GA # 2 regarding the investigation. On or about June 27, 2018, a GA # 2 section chief (SC) advised that "[GA # 2] never should have passed the information concerning [Applicant] to [GA # 1] due to the lack of evidence of any wrongdoing." The only information GA # 2 had concerning Applicant was that "he made approximately two payments to an account in the Philippines that was identified as selling live sex shows of minors." SC further advised that there was no way to determine why Applicant "sent money to the

account, nor what, if anything, he purchased with the money.” All that could be confirmed was that Applicant transferred money two times to the account in the Philippines. SC could not provide any dates or other information about the transactions. (GE 3b, ¶ 2)

In July 2018, Applicant was scheduled to fly from the United States to Japan for a friend’s wedding. On or about July 10, 2018, the GA # 1 RA requested that GA 2’s RAC provide Applicant’s phone number for use as a point of contact regarding a search of Applicant by agents of GA # 1 upon his return to the U.S. There is a notation that GA # 2 should not have provided GA 1 with Applicant’s name due to the lack of evidence of wrongdoing. (GE 3b, ¶¶ 3, 4)

On or about July 12, 2018, GA # 2’s case agent for the undercover investigation spoke to GA # 1’s RA and expressed concern that GA # 1 wanted to terminate Applicant rather than prosecute him. GA # 1’s RA advised that Applicant was the subject of a criminal investigation. GA # 2’s case agent provided RA with evidence revealing 14 money transactions between September 2014 and June 2016 in which financial accounts associated with Applicant transferred money to individuals known or suspected to be involved in the online sexual exploitation of children and/or child sex trafficking. (GE 3b, ¶ 5) (That underlying evidence was not offered in this case and is not part of the record evidence here. Because it was not offered, Applicant’s efforts, through counsel, to obtain related underlying documentation from the AGA to use in defending the allegations here were unsuccessful). (AE D)

GE 3c (GA # 1’s ROI dated Aug 1, 2018) indicates that by June or July 2028, the two GAs had agreed to work together in a joint investigation “specifically targeting” Applicant. (GE 3c, ¶ 3)

GA # 1 reviewed Applicant’s military record, which referenced charges of misuse of a government credit card (UCMJ Article 92) and making false statements (UCMJ Article 107) leading to non-judicial punishment (NJP) (GE 3.c, ¶ 4) About this, Applicant testified that when he was in the Marine Corps, he was charged or cited for misusing a government credit card when he withdrew money on his government card on one occasion to pay a debt when he had lost his personal credit card and did not have access to a bank. He said it was reported to the DOD CAF but no action was taken against his clearance. He received non-judicial punishment (NJP) and was restricted to base for 30 days. Applicant asserted that one of the two charges were dismissed but was not certain which one. (Tr. 136-138, 178-181) Beyond the reference in GE 3c, there is no corroborating documentation in the record of these charges, or what resulted.

Review of Applicant’s GA # 1 “user share file” confirmed his home address, cell phone number, private e-mail address (E-mail address 1); and his July 2018 trip to Japan for a friend’s wedding, with details of the itinerary. (GE3c, ¶¶ 5-7)

Keywords were searched through the National Center for Missing and Exploited Children (NCMEC)’s cyber tipline database. All searches for negative information yielded no negative results. (GE 3.c, ¶ 9) the GA # 1 RA also obtained the IP addresses associated

with Applicant's GA # 1 user account and submitted preservation requests for his social media accounts. The investigation was ongoing. (GE 3.c, ¶¶ 10, 11)

GE 3d is the GA # 1 ROI of Applicant's February 2019 interview with AGA authorities. The GA # 1 RA advised Applicant of his "*Garrity* rights." [See discussion below] Applicant waived his rights and agreed to be interviewed. (GE 3d at ¶¶ 1, 2)

In his interview with GA # 1 agents, Applicant asked several questions about the fact that he had been searched in July 2018 (at the U.S. airport when he returned from the wedding in Japan). He expressed frustration with the fact that the investigation had led to his being sidelined at work and unable to do his job. He was informed that the GA # 1 had been contacted by GA # 2 regarding an ongoing investigation, which resulted in the initiation of an investigation by GA # 1 against him. He was also informed that GA # 1 had custody of his work device, that had been seized by GA # 2, but they had been unable to access the device, since it was passcode-protected. Applicant provided the appropriate passcode, which unlocked the device. (GE 3d at ¶ 3)

In discussing foreign contacts. Applicant disclosed his ex-girlfriend, who lives in Japan. (GE 3d at ¶ 4). He disclosed two personal e-mail addresses (E-mail 1 and E-Mail 2), both with the same large e-mail service. He said he had not used E-mail 2 since 2014. (Tr. 153) He denied use of another, third e-mail address, with another provider, one he said did not use. (GE 3d at ¶ 5) (Tr. 152-155)

The investigators asked Applicant if he knew any foreign national named C, A1, or A2. (The individuals are named in GE 3, but I have used initials here) Applicant denied knowing anyone by these names. They asked him if he had ever sent money to named individuals C, A1, or A2, via PayPal, individuals they had reason to believe Applicant had sent money to on multiple occasions during 2014 or 2015. Applicant denied doing so. (GE 3d at ¶¶ 6, 7) (Tr. 153-154)

Applicant confirmed in the interview with GA # 1 that he used PayPal as an online money transfer service. He indicated that he had used various "chatrooms" to speak to people around the world, but, according to GE 3d, would not provide the names of the "chatrooms" he used. (GE 3d at ¶ 8)

Applicant was then confronted by the investigators about sending these individuals money via PayPal, Applicant responded, "OK." When asked why he had sent them money, he refused to answer. (GE 3d at ¶ 8) The ROI then says, "As background, [C, A1, and A2] are known to be associated with the Online Sexual Exploitation of Children (OSEC)." GE 3d at ¶ 8) (This statement in the ROI, allegedly made by an unidentified U.S. government agent, is not supported by corroborating testimonial or documentary evidence in the record here).

Applicant further stated "That's not me," and related further, "I know exactly what your [sic] [Redacted] talking about." He acknowledged that GA # 1 was in possession of

PayPal transactions but would not explain why he sent the money. Applicant then ended the interview by requesting to consult with an attorney. (GE 3d at ¶ 9)

GA # 1's RA then reiterated to Applicant that he could recontact RA after consulting with an attorney. Applicant said he understood and said he wanted to help the situation. He said he knew what RA was "trying to do" and said he would recontact RA. Applicant said he no longer knew how to contact the individuals he was asked about. "At the conclusion of the interview, [Applicant] was turned over to his second-line supervisor." (GE 3d at ¶ 10) There is no further documentary record evidence regarding what, if anything, happened next, or if either Applicant or GA # 1 attempted to re-engage the interview.

GA # 1's Security Access Eligibility Report (GE 2):

GE 2 is a Security Access Eligibility Report (SAER) from GA # 1 to the DOD CAF regarding Applicant, sent under the DOD's Continuous Evaluation Program, which requires commands to promptly report security-significant information for individuals indoctrinated into SCI access. The basis for the report regarding Applicant was his alleged failure to report foreign contacts and to cooperate with the investigation. (GE 2)

Specifically, GE 2 noted that Applicant was identified in GA # 2's investigation regarding ongoing sexual exploitation of minors in the Philippines. He was "possibly involved" in activities including sending money to foreign nationals identified as providing internet access to sites that live-stream sex shows involving young children. When interviewed during the investigation by GA # 1, Applicant was asked to provide information regarding his financial transactions on PayPal and WU. Applicant refused to provide an explanation of why he sent the money and terminated the interview by requesting to consult with an attorney. (GE 2 at 4)

The Command's observations (made by unidentified personnel) were that Applicant:

has not been forthcoming regarding the financial transactions, information developed by [GA # 2], or during [GA # 1's] investigation. Absent full cooperation, [GA # 1] has a serious concern about his trustworthiness, reliability, dependability, discretion, and personal conduct. (GE 2 at 4)

The SAER memo noted that "formal prosecution is not being pursued at this time" but that Applicant "remains a prosecutorial person of interest in an ongoing investigation." GA # 1 has suspended the Inspector General's investigation. GA # 1 also suspended Applicant's access to classified information for cause and placed him on indefinite suspension. GA # 1 "cannot favorably recommend eligibility for access to classified information." (GE 2 at 4)

As noted above, the Government's case did not include any underlying substantive evidence from the investigations by either GA # 1 or GA # 2. No witnesses testified as part of the Government's case from either of these GAs or any other government agency.

Further, there is no indication in the Government's case that any action to remove him from employment was taken against Applicant as a result of the criminal investigation, beyond the suspension of his clearance (later revoked by the DOD CAF) and his related placement on administrative leave (which remains ongoing).

Applicant's testimony:

Between 2014 and 2016, Applicant was stationed for a period in Japan, and part of the time he was in the U.S (after June 2015). He testified that, during 2014 to 2016, he did not send money to any foreign national, via PayPal, WU, or otherwise, for the exploitation of children, nor did he access live or virtual child sex performances. He denied any sexual interest in anyone underage and he pronounced it "disgusting." (Tr. 145-146)

Applicant was once placed into police custody in Japan on suspicion of drunk driving, but no alcohol was found in his system and no charges were filed. (Tr. 146-147) Otherwise, Applicant has never been charged with a crime, beyond his military NJP issues. (Tr, 147, 162, 227)

Applicant remains employed at GA # 1 and has been on unpaid administrative leave since about March 2019. He was recently approved for secondary employment and has held a job since about September or October 2022 in an uncleared position outside of government contracting. He earns an annual salary of about \$115,000. (Tr. 131-133, 227-229)

Applicant said he learned of the investigation when he was stopped by government investigators while deplaning in the U.S. after returning from the wedding in Japan, in the summer of 2018. They asked for his passport, said it was a random check, and asked them to follow him. They then confiscated his electronics (work computer, personal computer and a personal cell phone) and asked for his computer passwords. He said he was told if he did not comply he could be fired, so he did so. (Tr. 139-141, 188) This was the same computer he had in 2014-2016. (Tr. 188) When his items were seized, he reported the matter to his direct supervisor, Mr. D. (Tr. 142) (See Mr. D's testimony, below)

Applicant's personal computer and phone were returned to him about two months later. (Tr. 142) He was never told what was found on them, and he asserted he was not told why his equipment was seized. He asserted he was not told of any investigation into him personally. (Tr. 144) He was allowed to return to work, with full access to government computers, until he was placed on administrative leave, about eight months later. (Tr. 143)

Applicant was interviewed by GA # 1 in 2019. He was brought to the interview by his program manager, because he had an injury at the time that affected his mobility. (Ans. Encl. 7). He was advised of his "Garrity rights." He was asked to waive those rights in writing, and said if he did not do so, he would be terminated. As a result, he signed the waiver. (Tr. 147-148) (The waiver is not in evidence here, nor the specific wording of the "Garrity warning" he received).

Applicant was interviewed once, by two agents from GA # 1. This was the first time he was aware of the specific nature of the investigation. (Tr. 184-186) The agents asked about the incident when his electronics were taken from him. He was informed that GA # 1 had been in possession of his government computer for some time, but they were not able to access it because it was password protected. Applicant gave them the password and they gained access to the computer. (Tr. 148)

Applicant said he was asked about foreign contacts from years before, foreign travel, and individuals he did not know. He was asked about some e-mails, some of which were his and some which were not. They asked again about the individuals he did not know. When he denied knowing those people, GA # 1's agents called him a liar. (Tr. 149)

Applicant said the GA # 1 agents accused him of sending money via PayPal and WU from his accounts. Applicant said, "Okay," by which he said he meant, "Okay, what's your point. I don't know these individuals. I didn't send this money." (Tr. 149) (See also SOR Response at ¶ 1.g, in which Applicant further explained his mindset: "OK, and?", or "so what," as in "OK. I understand what you are saying, and that still does not change the fact that I do not know these people.") Applicant asserted (to the agents) that he had "done nothing but comply." He had given them his personal and work computers and cell phones, phone contacts, e-mails, e-mail contacts, messages, WhatsApp and messages, and "all my social media" contacts and messages. (Tr. 149-150)

Feeling threatened with potential termination and being called a liar to his face, Applicant said he "felt like I needed somebody in the room to observe." His program manager was not allowed to be present. He did not believe he was under criminal investigation, but rather administrative questioning "to get to the bottom of something." (Tr. 151) He did not respond to the agent's questions about what social media websites he used because he was frustrated, felt threatened, had been called a liar, and wanted an observer present because "it was just a contentious situation." (Tr. 206) He said the investigators were yelling at him during the interview. (Tr. 211)

Applicant denied that he was informed of his *Garrity* rights because he was under criminal investigation. He said he waived his *Garrity* rights because he was told he would be asked questions about why his personal electronics and government computer were taken from him. At some point, he said, the agents informed him he was a suspect or person of interest. (Tr. 212-213)

When asked during his hearing why he did not provide an explanation to the agents about why he had sent money using a PayPal account, Applicant said, "I cannot provide information on something I did not do." (Tr. 218-219, 225) He denied saying in the interview that he no longer knew how to contact the individuals he was asked about. He said, "I emphatically denied knowing those individuals." (Tr. 219)

Applicant denied terminating the interview. He said (apparently repeatedly) that he wanted a "third party" present. "At no time did I say I would not comply." (Tr. 151) He said that at the end, he was told that the agents "would be in town for two more days, and that

I could have my lawyer get in touch with them.” (Tr. 151) He asserted that he called and messaged them not the next day but the day after that, and had his lawyer call them, with no response. (Tr. 151)

Applicant noted in his SOR response that he consulted with an attorney and was told not to agree to be interviewed. (Tr. 187; SOR Answer) He agreed to the interview because he was told he would be terminated if he refused. (Tr. 187-188)

Applicant testified that “the interview ended with the agents telling me that they have two more days in [city S] and to have my lawyer contact them.” He said “I had a lawyer at the time. I was having trouble contacting him the following day. . . . My lawyer attempted to contact them and from what they tell me, they were ignored.” He was unable to recall the name of his lawyer, or the names of the agents. He also said he texted the agents from his government cell phone. He said they responded and said they were going to return to Washington, D.C. GA # 1’s agents did not contact him again. (Tr. 225-227) He did not provide any documentation regarding his retention or use of a lawyer or any communication between himself and a lawyer, such as a retainer letter or other correspondence, either before or after his interview with GA # 1, to corroborate these assertions.

Applicant said he opened a PayPal account in 2015, not in 2014, as referenced in GE 3d. He said he used E-Mail 1 to do so, not E-mail 2. He has had only one PayPal account. (Tr. 154-155, 199-200; AE C) Applicant denied having a WU account between 2014 and 2016. (Tr. 155) Applicant provided documentation showing that he has been a member of WU since April 2018. (AE B) His personal information with both PayPal and WU includes E-mail account 1. (AE B, AE C)

Applicant said he had one bank account, with a military credit union, as well as a credit card with that institution. He no longer has access to the bank account statements or the credit card statements from that time, but for 2016. (Tr. 156-158, 202-203) He provided more recent credit card statements, from 2016. (AE E) He also banks with another institution that caters to the military community. (Tr. 202)

Applicant denied that he was ever presented with documentation from GA # 1 about his PayPal or WU financial transactions or related e-mail or phone contacts he allegedly used. (Tr. 155-156) He has never been contacted by the Justice Department or told that he was the subject or target of a criminal investigation. (Tr. 162)

Applicant was unable to cite to any fraudulent purchases or transactions that he was impacted by from 2014-2016. He acknowledged that references to such transactions in his Answer to the SOR were based on speculation. (Tr. 157-158, 161, 195-196) Applicant did not recall taking action to inquire if his e-mail or computers had been hacked. (Tr. 193-195) He did not share his passwords with others and did not recall anyone else using his e-mail or computer at home between 2014-2016. (Tr. 198-199)

In his testimony, Applicant said that the investigators used the word “chatrooms,” but he meant social “websites” (or social media forums) such as Facebook, Instagram, and WhatsApp. (Tr. 163) Applicant denied using social media to engage in criminal conduct. He still has access to those social media accounts. He denied any unreported foreign contacts from social media platforms. (Tr. 163, 192-193) Applicant defined “live-streaming” as “these vloggers that go around showing their life. I don’t do that. No.” None of his social media interactions involved that activity. (Tr. 208-209)

When he was in Japan, Applicant was dating someone. She was of legal age, about a year and a half older than he was. (Tr. 158-159) All of his roommates there were U.S. citizens and none were engaged in criminal conduct. Some of them occasionally would have had access to his personal computer, but he never observed anyone engaged in unusual or concerning computer conduct, or unauthorized financial transactions. (Tr. 163-164) After returning to the United States, Applicant occasionally allowed his then girlfriend to use his credit card, but only with “express permission.” He does not recall her ever making unauthorized purchases or engaging in any criminal behavior. (Tr. 165-166) He said she also used his PayPal account. (Tr. 200-201) She did not have access to his computer passwords. (Tr. 205)

Applicant testified that the clearance revocation process has had a significant financial impact on him. He fell behind on his accounts (as evidenced, perhaps, by the now-withdrawn Guideline F case) and wondered how he would get by. He sought permission from GA # 1 to pursue a second job and heard no response for two years. He is grateful to his friend, Mr. E (Character Witness 3, below) for giving him a place to live and for the help of his brother (Character Witness 4, below). (Tr. 166-168)

The SOR alleges, in part, that Applicant was identified as sending significant financial transactions via WU to an identified individual, a suspected money runner in the Philippines, now incarcerated, who routinely received money for payments for live-streaming sex shows involving young children. (SOR, ¶ 1). (The purportedly “identified individual” is not identified in the SOR). Applicant said, “I’ve never done those things and I’ve received no evidence whatsoever of me doing those things.” (Tr. 220-221). He denied making a financial transaction by WU or any other means to someone he knew to be involved in live-streaming sex shows involving young children, in the Philippines or anywhere else, prior to joining NCIS or at any other time. (Tr. 221-222)

Applicant denied that an e-mail address account of his (E-Mail 1) was used to access child sex performances. (Tr. 222-223) The SOR alleged that Applicant knew foreign nationals “by the name of whom you sent money to via PayPal on two separate occasions in 2016.” [sic – no name is referenced after the phrase “by the name of . . .”] “You denied knowing anyone by that name.” (SOR, ¶ 1) Applicant denied sending money to any foreign nationals via PayPal in 2016. (Tr. 223) He denied sending money to any (also unidentified) foreign nationals seven times by PayPal in 2014, as alleged. (Tr. 223-224) He denied sending money to a third (unidentified) foreign national four times via PayPal in 2014. (Tr. 224) Applicant denied declining to provide identifying information about chatrooms he used, because he did not use chatrooms. (Tr. 224-225) (The

statements in the SOR allege that Applicant sent money to these unidentified individuals. The SOR notes that Applicant repeatedly denied knowing them. The SOR does not detail any contrary evidence purporting to disprove Applicant's denials). (SOR ¶ 1)

Applicant testified on re-direct that investigators from GA # 2 had access to his cell phone, and his social media accounts were not password protected on his cell phone. No one from either GA # 1 or GA # 2 ever told him there was anything of concern in his social media accounts. (Tr. 229-230) He said he provided GA # 2's agents with passwords for his social media accounts and messages and provided names of the websites he accessed to GA# 1 investigators by providing his passwords. (Tr. 231-232)

Applicant said he might have accessed a "chatroom"-type of website for accessing a publicly available "tech blog" forum for a "computer or server question" but "not regularly." (Tr. 230) He has never accessed the "dark web" in his personal capacity. He was unable to recall the type of security he had on his e-mail accounts in 2014-2016. He currently uses "two-factor authentication" when it is available. (Tr. 230-231)

Character evidence:

Character witness 1, Mr. L, served in the Marine Corps from 1995-2017 before retiring as a gunnery sergeant (E-7). He then worked for the U.S. Government and is now employed with a government contractor in the intelligence field. He has held a high-level clearance for many years. Mr. L first met Applicant in 2007 when Applicant applied to join the counter-intelligence field in the Marine Corps. Mr. L was his direct enlisted supervisor in that unit for about two years (2009-2011). Mr. L regards Applicant as a "great team leader" and a "very dynamic thinker." Mr. L was not aware of any misconduct by Applicant. (Tr. 44-49, 55)

Mr. L did not serve with Applicant during 2014-2016. He has never had access to Applicant's personal computer. He has had training regarding keeping his personal computer information secure. (Tr. 55-56)

Mr. L and Applicant remain personal and family friends. They have intermittent contact about once a month by phone or text. Mr. L has observed no unusual interaction with foreign nationals and Applicant. He is aware of the SOR allegations. He said Applicant was "as shocked as I am about it" and understands that Applicant denies the allegations "emphatically." (Tr. 51, 52, 59) Mr. L is not aware of Applicant ever paying to access child sex performances and has no reason to believe he would do so. Applicant is a person of "high character" who has "always been great around my family, my children." (Tr. 52-53) He has not known Applicant to show interest in dating anyone underage. (Tr. 53)

Mr. L has no concerns about Applicant's judgment, clearance eligibility or working in a cleared capacity. He would like to hire Applicant if he is found eligible for a clearance, and he recommends him for a position of public trust with the government. (Tr. 53-54, 58, 59) (Mr. L also provided a reference letter that Applicant included with his SOR Response. (Answer Encl. 2))

Character witness 2, Mr. D, retired from the Marine Corps in 2012 as an E-7, after 20 years. He then worked for another government agency (AGA) as a contractor and has worked for GA # 1 since 2014. He has held a clearance for many years. Mr. D first met Applicant in the Marine Corps in about 2008, when Applicant was a student of his in a counter-intelligence course. He described Applicant as a “very good student.” (Tr. 65-68) He had no interaction with Applicant between 2014-2016. (Tr. 85)

In 2017, Mr. D hired Applicant to work for him in counterintelligence at GA # 1. Applicant was his “number one pick.” (Tr. 69) Mr. D was Applicant’s first-line supervisor and then his second-line supervisor after Applicant was placed on administrative leave in about October 2021. Mr. D always rated Applicant as one of the “top three” investigators in the office. (Tr. 71-72)

Beyond the issues in the SOR, Mr. D is not aware that Applicant had unusual or concerning interactions with foreign nationals. Applicant had access to government computers, all subject to routine monitoring. He was not aware of the discovery of illegal materials relating to Applicant. (Tr. 72-75) Mr. D said Applicant contacted him when GA # 2 confiscated his personal belongings at the airport. (Tr. 90-91)

Mr. D is aware of the issues in the SOR and provided a supporting letter as well as hearing testimony. That statement was cleared by GA # 1 authorities. (Tr. 75-80; Ans. Enc. 1) Mr. D spoke to Applicant about the allegations and related that Applicant told him his personal information was stolen on multiple occasions, that they were not his accounts. Applicant would not have made the payments, and that he did not have the accounts during the timeframe alleged. Applicant told Mr. D he was “explicitly denying making those transactions” and was denying having access to child sex performances. (Tr. 81)

Applicant was never cited for security violations or infractions, or any employee misconduct when working with Mr. D. Mr. D was not aware of any unusual or concerning interactions with foreign nationals, sexual misconduct, illicit or illegal conduct. (Tr. 81-82) Mr. D checked in with Applicant by e-mail about once a week once Applicant was placed on administrative leave. (Tr. 82, 91) Applicant is still on administrative leave from GA # 1. (Tr. 92)

Mr. D has observed no conduct and heard no statements by Applicant causing doubts raising concerns about Applicant’s judgment, trustworthiness, or willingness to comply with the law. (Tr. 83, 87) He has no reason to believe that Applicant engaged in the conduct alleged, or would engage in the sexual exploitation of minors. (Tr. 84) He has no objection to Applicant returning to work at GA # 1 if he is cleared, and he recommends him for a position of trust. (Tr. 84-85)

Character witness 3, Mr. E, is also a long-time cleared employee of a defense contractor. (Tr. 97, 108) He met Applicant in the Marine Corps, in about 2009 or 2010 through mutual friends. Mr. E is a personal friend of Applicant’s and has also been his landlord for about the last two years. Applicant lives in a small home on Mr. E’s property. Mr. E considers him part of the family. Applicant “hang[s] out together . . . constantly” with

Mr. E's , his wife, and children. Applicant attends family social events and picks the children up from events. (Tr. 94-102, 109-110)

Mr. E's two teenagers have never raised concerns about Applicant's conduct with them. Applicant has never been in a relationship with someone underage or expressed a desire for a relationship with someone underage. Mr. E has no concerns about Applicant's interactions with foreign nationals. Applicant has never shown interest in paying to access child pornography or child sex performances. (Tr. 102-105)

Mr. E has reviewed the SOR and discussed it with Applicant, and Applicant has denied the allegations. Mr. E regards them as "absolutely impossible." If he felt otherwise, he would not allow Applicant around his children and family. He has no concerns about Applicant working for the government in position of trust or in a cleared environment. Mr. E did not visit Applicant in Japan during 2014-2016. He has never had access to Applicant's personal computer. (Tr. 105-107)

Character witness 4 is Applicant's older brother, B. B is employed by a state university. He described Applicant's upbringing and family background. B is vaguely aware of Applicant's work in counterintelligence. B and Applicant are "very close" and talk often, several times a week. B has never had cause to question Applicant's judgment or to work in a cleared environment. (Tr. 112-119, 123-124)

B said Applicant has had two serious relationships. Applicant has never dated or been interested in someone underage. He has never known Applicant to view or access child sex performances or send money to those involved in the exploitation of children. B has reviewed the SOR and is aware of the allegations. He said Applicant was "surprised and shocked" by the allegations and that "he didn't do it." Applicant has never been charged with a crime. (Tr. 117-121, 126-127) Since Applicant's suspension from his job, he has been out of work and under some financial strain. He had to sell his home. They have always sent money to their mother when she needed help. (Tr. 122-125)

In considering the character evidence presented in his hearing, Applicant highlighted the fact that two witnesses want to hire him, and that he "should feel comfortable to come back and work at [GA # 1 if [he] should so choose." He has been fighting these allegations for five years to clear his name. (Tr. 170)

Three references provided character letters for the hearing. (AE A, AE H, AE I) Mr. R (his first name) is a DOD civilian who has held a security clearance for about 20 years. He has known Applicant since early 2009, through the Marine Corps and their training together. He has had professional and personal contact with Applicant. Mr. R has full confidence in Applicant's trustworthiness, loyalty, reliability, and his personal and professional conduct. Applicant is close to Mr. R's family and regards him as a family member. He strongly recommends that Applicant's access to classified information be restored. (AE A)

Ms. L is a DOD civil servant and wife of a Marine. She has known Applicant since 2010, when her husband and Applicant were stationed together in Japan. Applicant is considered part of the family. He has attended many of their family celebrations and has assisted her family members when they are in need. Applicant drove their teenage daughter to college several hours away. Ms. L trusts Applicant implicitly around her family. She has “absolutely no doubt” that the allegations are “entirely false.” She is aware of the SOR allegations and strongly endorses reinstatement of his clearance. (AE H)

Mr. B is a DOD civilian, with a clearance, who has known Applicant since they became friends in Japan. He considers Applicant part of the family and he trusts Applicant around his children. He provided a letter expressing similar sentiments as Ms. L, and strongly endorses reinstatement of Applicant’s clearance. (AE I)

Policies

As the U.S. Supreme Court held in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), it is well established that no one has a right to a security clearance. Security determinations should err, if they must, on the side of denials. 484 U.S. at 531. The objective of the security clearance process is the fair-minded, commonsense assessment of a person’s life to make an affirmative determination whether the person is eligible for a security clearance. The adjudicative process is an evaluation of the whole person. It recognizes that we should view persons by the totality of their acts, omissions, motivations, and a number of other variables. Each case must be adjudged on its own merits, taking into consideration all relevant evidence, both favorable and unfavorable, and applying sound judgment, common sense, and careful analysis.

The standard for security clearance decisions is whether granting or continuing eligibility for a clearance is clearly consistent with the interests of national security. In all adjudications, the protection of the national security is the paramount consideration. Therefore, any doubt concerning a person being considered for access to classified information must be resolved in favor of national security.

Burden of Proof

The Government reposes a high degree of trust and confidence in persons with access to classified information. 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. See *also* Exec. Or. 12968 (Aug. 2, 1995), § 3.1.

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. “Substantial evidence” is “more than a

scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. Department Counsel is responsible for presenting witnesses and other evidence to establish the facts alleged in the SOR that have been controverted. Directive, ¶ E3.1.14.

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). “Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security.” AG ¶ 2(b).

Analysis

Guideline E ¶ 1 of the SOR is broken down into 10 separate allegations. (See Items #1 through # 10, at the beginning of the Facts section, above). Before addressing application of Guideline E disqualifying or mitigating conditions to these allegations, it must be established whether there is record evidence to support them as a factual matter, let alone whether they establish disqualifying conduct, mitigated or otherwise. So I turn to that first.

SOR allegations #2 through #5 concern Applicant’s alleged contacts and financial interactions with unidentified foreign individuals allegedly involved in child sex trafficking and the sexual exploitation of minors. Applicant denies these allegations in all respects. This means the Government has the burden of proving those allegations by substantial evidence. The Government has not met its burden as to those allegations. I note, in particular, that SOR allegation # 5 (“Your e-mail address [E-mail 1] was used to access child sex performances.”) has no support in the record evidence in this case at all. Similarly, there is no record evidence, let alone substantial evidence, in this case, to support that Applicant engaged in any contact, conduct, or financial transactions with any foreign (or other) individuals (named or otherwise) involved in such conduct.

Some of those allegations (SOR allegations #2 through # 4) note that Applicant was identified in investigations by GA # 1 and/or GA # 2 as being involved in, or even “possibly” involved in transactions with foreign individuals involved in child sex trafficking. This may be true, but it is not established by substantial evidence in this case, without supporting corroborating evidence beyond GE 3, the GA # 1 ROIs. In particular, I note that Applicant was not only not charged with a crime, by the end of the ROIs, he was no longer

considered a suspect, only a person of interest. SOR allegations # 2, # 3 (further discussion below) and # 4 are not established by substantial evidence.

The remaining allegations chiefly concern Applicant's alleged failure to cooperate with the investigations. Among these are allegations that Applicant failed to report foreign contacts during the GA # 1 investigation (SOR allegation #1 (in part) and allegations # 3 and 6)

These allegations are not established. Applicant's ex-girlfriend in Japan was a foreign contact – but Applicant identified her. He denied knowing or interacting with the foreign individuals allegedly involved in child sex trafficking (not identified in the SOR at all, and who are identified in the GA # 1 ROIs as individuals I refer to here as C, A1, and A2). Applicant denied any knowledge of these individuals and there is no record evidence, let alone substantial evidence in the record here, to disprove his denials. SOR allegations # 1 (in part), # 3, and # 6 are not established by substantial evidence.

Similarly, SOR allegation # 8 is not established. Applicant was apparently asked about these individuals, but the allegation that it was “known that you sent the aforementioned individuals money via PayPal” is not established, nor did Applicant admit this by saying “OK.” SOR allegation # 8 is not established by substantial evidence in the record here.

SOR allegation # 9 states, “When asked to provide information regarding your financial transactions on PayPal/Western Union you refused to provide on [sic] why you sent the money...” This allegation is based on a faulty premise, since it was not established that Applicant DID send money, via PayPal, Western Union, or any other mechanism to foreign individuals, whether related to the investigations by GA # 1 or GA # 2 or otherwise. Applicant denied the allegation (as he did in the interview) and there is no record evidence to rebut his denial. SOR allegation # 9 is not established by substantial evidence.

SOR allegation # 7 concerns the reference to “chatrooms” in GE 3 and Applicant's alleged failure to disclose the names of chatrooms he used. GE 3 does reference chatrooms, but Applicant denied using any chatrooms (beyond chatrooms regarding computer technology), and said instead that he meant other social media outlets such as Facebook and WhatsApp. Facebook and WhatsApp are not mentioned in GE 3, but there is no other evidence to rebut Applicant's statement that he does not use chatrooms. Since there is no other evidence that he uses (or used) chatrooms, his alleged “failure” to provide the names of chatrooms (where he might have interacted with foreign individuals) is not established, either as a factual matter, or as a failure to cooperate. SOR allegation # 7 is not established by substantial evidence.

(To the extent that there are any SOR allegations regarding “failure to cooperate” during the investigations by GA # 1 or GA # 2 because Applicant “failed to provide his computer passwords,” this is not established – Applicant provided his passwords when asked, and they worked).

This leaves SOR allegation # 10, regarding the end of the interview, and the general “failure to cooperate” with GA # 1, set forth in the rest of SOR allegation # 1). As a factual matter, the record evidence establishes that Applicant terminated the interview with GA # 1 when he requested to seek legal counsel. SOR allegation # 10 is established. Whether this constituted “failure to cooperate” (SOR allegation # 1) is a legal question requiring examination of the Guideline E general security concern and the Guideline E disqualifying conditions (AG ¶¶ 15, 16).

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct:

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 proceedings. 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, himself an employee of GA # 1, was interviewed in February 2019 by GA # 1 agents. He initially waived his *Garrity* rights and agreed to participate. However, he ultimately terminated the interview, and indicated that he wished to consult legal counsel. The interview was not in connection with a personnel security determination, but rather was conducted pursuant to his suspected violations of 18 USC 2252 (Certain Activities Relating to Material Involving the Sexual Exploitation of Minors).” (GE 3a, ¶ 1)

Applicant’s interview was not in connection with a personnel security determination. Thus, whether or not Applicant’s request to consult legal counsel constituted “reasonable cause” to terminate the interview, and thereby led him to cease “to undergo or cooperate,” with the interview process, AG ¶ 15(a) does not apply.

In terminating the interview by invoking his right to counsel, Applicant engaged in a “refusal to provide full, frank, and truthful answers to lawful questions of investigators.

Similarly, however, since the investigators were involved in a criminal investigation, and not a personnel security determination, AG ¶ 15(b) also does not apply.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

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

(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 individual may not properly safeguard classified or sensitive information;

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

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant denied engaging with or sending money to foreign nationals purportedly involved in the sexual exploitation of children. His denials of that conduct are unrebutted by substantial evidence that he engaged in that conduct. If it were shown otherwise, AG ¶ 16(e) would unquestionably apply. But that showing is not met here, so AG ¶ 16(e) is not established.

As noted above, it is not established by substantial evidence here that Applicant engaged in "association with persons involved in criminal activity." He was investigated for violation of 18 USC 2252, but was not charged with any crime, though he remained a person of interest. AG ¶ 16(g) is not established.

The GA # 1 interviewers were investigators and security officials (with Applicant's own employer). Applicant terminated the interview and requested to consult legal counsel. He did not, however, deliberately provide false or misleading information, nor did he conceal or omit information, concerning relevant facts, to his employer, an

investigator, security official, or other official government representative. AG ¶ 16(b) does not apply.

Applicant terminated an interview relating to a criminal investigation by requesting to consult legal counsel. He did so after signing a waiver of his *Garrity* rights. However, this did not constitute a “violation of a written or recorded commitment made by the individual to the employer as a condition of employment.” AG ¶ 16(f) does not apply.

This leaves AG ¶ 16(c), if for no other reason than it is the “catch-all” disqualifying condition that should be examined when potentially disqualifying conduct doesn’t fit squarely anywhere else in the Guideline E disqualifying conditions.

According to GE3d, the GA # 1 agent reiterated to Applicant that he could recontact GA # 1 after consulting with an attorney. Applicant says he was told that GA # 1’s agents would be in town for two more days and that his attorney could contact them. Applicant asserted that he called and messaged them not the next day but the day after that, and had his lawyer call them, with no response. He was unable to recall the name of his lawyer, and produced no corroborating documentation, either that he had retained a lawyer, or that said lawyer had reached out to the GA # 1 agents to re-engage (or that Applicant had done so himself). However, there is also no evidence in the record that GA# 1’s agents affirmatively sought to re-establish contact with Applicant, without success.

What happened after Applicant terminated the interview to consult legal counsel, then, is not only unclear, it is almost non-existent. It is therefore rather difficult on the record before me to make an affirmative finding that Applicant’s actions constituted a failure to cooperate, and thus, a security concern (particularly concerning an interview relating to a criminal investigation that did not lead to criminal charges (or any evidence, documented or otherwise, even in this administrative forum, of criminal conduct. I recognize that Applicants typically have a duty to cooperate fully with the security process, even if they consult legal counsel. (See, e.g., mitigating condition AG ¶ 17(b)). But it is not clear that what Applicant did here, in exercising his constitutional right to consult legal counsel in a criminal investigation (particularly under likely threat of losing his job) constituted security-significant disqualifying conduct. I cannot find that AG ¶ 16(c), or any other disqualifying condition, applies.

Since I conclude that no Guideline E disqualifying conditions apply, I need not address application of any mitigating conditions.

Whole-Person Analysis

Under AG ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. An administrative judge must evaluate an applicant’s security eligibility by considering the totality of the applicant’s conduct and all the relevant circumstances. An 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis.

As noted at length above, I found that 9 of the 10 possible factual Guideline E allegations in the SOR are not established by the record. No criminal charges resulted, nor were any suggested by the record evidence in the administrative forum here. Applicant strenuously and consistently denied all allegations of criminal misconduct. His denials are also unrebutted by substantial contrary record evidence.

The 10th factual allegation, Applicant's termination of the NCIS interview, was established as a factual matter, but its circumstances, involving his request to consult legal counsel in a criminal case (particularly one that did not lead to criminal charges) did not establish a Guideline E security concern, particularly given consideration of all of the record evidence here, including Applicant's testimony and the rest of his case.

It does appear that GA # 1 "moved the goalposts" on the Applicant here, since, although criminal prosecution was not being pursued against him, and they seem to have taken no action to suspend or terminate his employment on the basis of the criminal investigation, they nonetheless suspended his clearance, and did so for cause, having concluded that he failed to fully cooperate.

In weighing the whole-person evidence, I credit and acknowledge the testimony of Applicant's character witnesses, all of whom attested to his integrity, work ethic, professionalism, judgment, trustworthiness, and reliability, both professionally and personally. In particular, I note that several witnesses (both in testimony and letters) specifically noted that they regard him as a member of the family and trust him to be around their children. I also credit Applicant's long and honorable service in the Marine Corps and as an GA # 1 employee. And I note that the allegations are not only unsubstantiated, they are also now quite dated, as they concern alleged (but unproven) criminal conduct from 2014-2016 (seven to nine years ago) and an interview from 2019. I also note that Applicant's most recent completed security clearance background investigation stems from a 2014 SCA, now nine years on.

For these reasons, I conclude that personal conduct security concerns are not established. Overall, the record evidence therefore leaves me with no questions or doubts

as to Applicant's eligibility for access to classified information, including, as appropriate, SCI, and assignment to national security sensitive duties.

Formal Findings

Guideline E: Personal Conduct: For Applicant

Allegations 1-10: For Applicant

Guideline F: Financial Considerations: Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to continue Applicant's national security eligibility for access to classified information. Eligibility for access to classified information, and a national security sensitive position is granted.

DOHA administrative judges currently do not have authority to grant eligibility for access to SCI. The continuation of Applicant's eligibility for access to classified information is authorized by the Moultrie memorandum, but the Moultrie memorandum did not confer authority to DOHA to grant SCI eligibility. With the grant of top-secret eligibility in this decision, it is now possible for an appropriate authority to grant Applicant SCI eligibility, based on the security clearance granted here, if they so chose.

Braden M. Murphy
Administrative Judge