



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



In the matter of:)
)
) ISCR Case No. 14-01900
)
Applicant for Security Clearance)

Appearances

For Government: Tara Karoian, Esq., Department Counsel
For Applicant: Alan V. Edmunds, Esq.

04/21/2016

Decision

DUFFY, James F., Administrative Judge:

Applicant mitigated the security concerns under Guidelines C (foreign preference), B (foreign influence), and E (personal conduct). Eligibility for access to classified information is granted.

Statement of the Case

On April 5, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines C and B. DOD CAF acted under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within DOD on September 1, 2006. On November 5, 2015, Department Counsel amended the SOR by adding a Guideline E (personal conduct) allegation.

Applicant answered the SOR on May 15, 2015, and the amendment to the SOR on November 18, 2015. He requested a hearing. The case was assigned to me on

November 10, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on November 18, 2015, scheduling the hearing for December 7, 2015. The hearing was convened as scheduled. At the hearing, Department Counsel offered exhibits (GE) 1 through 14. Applicant testified and offered exhibits (AE) A through D. The record was held open until December 14, 2015, for Applicant to submit additional information. Applicant timely submitted documents that were marked as AE E. All exhibits were admitted into the record without objection. DOHA received the hearing transcript (Tr.) on December 15, 2015.

Findings of Facts

Background Information

Applicant is a 32-year-old employee of a defense contractor. He has been working for his current employer since February 2012. He graduated from high school in 2002. He earned a bachelor's degree in 2010 and a master's degree in 2013. He has never been married and has no children. At the time of the hearing, he was engaged to be married to a U.S. citizen. He has held a security clearance since about 2008.¹

Under Guideline C, the SOR alleged that Applicant voluntarily served in the German Army in 2004 and 2005 (SOR ¶ 1.a). Under Guideline B, the SOR alleged that he has connections to Germany and to its citizens and residents that create a potential conflict of interest (SOR ¶ 2.a), that his grandmother is a citizen and resident of Germany (SOR ¶ 2.b), and that he maintains contact with a friend who is a citizen and resident of Germany as well as an officer in its military (SOR ¶ 2.c). The Guideline C allegation is also cross-alleged under Guideline B (SOR ¶ 2.d). Under Guideline E, the SOR alleged that he refused to provide full, frank, and truthful answers to investigators' questions (SOR ¶ 3.a). In his Answers to the SOR and its amendment, he admitted the Guideline C allegation, but denied the allegations under Guidelines B and E. His admission is incorporated as a finding of fact.²

Applicant was born in Germany. In 1984, he entered the United States when he was less than two years old. He grew up in the United States. His family spoke German in their home. He resided in Germany – first with his grandparents and then while serving in the German Army – from about 2003 to 2005. He returned to the United States in 2005. He became a U.S. citizen in March 2008. His mother was born in Germany. She is a U.S. citizen, but he indicated that he is estranged from her and does not know much about her, including her birthdate, middle name, or naturalization number. His father is a resident of the United States and a citizen of Germany, Venezuela, and the United States. His stepmother is deceased; she was a citizen and

¹ Tr. 14-18, 20-22; GE 1-3.

² Applicant's Answer to the SOR. SOR ¶ 1.b alleged that Applicant voted in a German election in approximately September 2005. In the Amendment to the SOR, SOR ¶ 1.b was withdrawn.

resident of the United States. His brother, three stepbrothers, and two stepsisters are citizens and residents of the United States.³

Applicant had multiple German passports over the years. He no longer has a German passport. His last German passport was surrendered to his facility security officer and later destroyed.⁴

SOR ¶¶ 1.a and 2.d - Applicant served in the German Army in 2004 and 2005

Applicant had a desire to serve in the military. He attempted to join the U.S. military, but learned he was disqualified due to a medical condition. He discovered that he was not disqualified from serving in the German military. In 2004, he enlisted in the German Army at age 19. He later became an officer candidate and maintained a junior enlisted rank. He was assigned to a unit that had a special operations mission. He never held a German security clearance.⁵

In his Answer to the SOR, Applicant stated that he learned his U.S. green-card status was in jeopardy by residing in Germany. His feelings toward the United States and desire to create a prosperous life led to his decision to leave the German military and return to the United States. At the hearing, he stated that he realized he made a mistake by joining the German military. He acknowledged that he had an identity crisis when he was young. He was a German citizen that grew up in the United States, spoke German at home, and identified with his German roots. His friends in the United States referred to him as “the German kid” along with other derogatory names.⁶

While serving in the German military, Applicant’s fellow soldiers considered him an American and treated him as an outsider. He found his German experience and its culture alien to him and felt like an outcast. Due to this experience, he learned that the United States was his home and the place where he wanted to live. He applied for a hardship discharge from the German Army, which was denied. His commanding officer hinted to him that he could obtain a discharge by failing the physical fitness test. He intentionally failed that test and was honorably discharged from the German Army with no reserve status or other service obligation. He returned to the United States within days of his discharge. He has resided in the United States since his discharge from the German military.⁷

³ Tr. 16, 23, 30, 38, 55-56; Applicant’s Answer to the SOR; GE 1-3.

⁴ Tr. 27, 35-36; GE 1-3.

⁵ Tr. 20-22, 38-41, 52-53, 56, 65; Applicant’s Answer to the SOR; GE 1. It is unknown whether Germany refers to certain military units as “special operations” units.

⁶ Tr. 22, 38-41, 52; Applicant’s Answer to the SOR; GE 1, 4, 8.

⁷ Tr. 27-30, 41-45, 52, 56-59; Applicant’s Answer to the SOR; GE 1, 8.

SOR ¶ 2.a - Applicant has connections to foreign persons, citizens, and residents of Germany and the German government that create a potential conflict of interest; and SOR ¶ 2.c - Applicant maintains contact with a friend who is a citizen and resident of Germany as well as an officer in its military. Applicant denied these allegations. In his Answer to the SOR, he stated that he had contact with two people who are residents of Germany. One served as a lieutenant in the German Army. He communicated with that individual about once a year via Facebook and their conversations were about birthdays, holidays, or other casual matters. He has not had contact with this individual in the past two years. He no longer has this individual's phone number, email address or home address and does not know how to get in contact with him. Applicant also had contact with the other individual every few months. He last contacted this other individual in March 2015. Their conversations are about family, birthdays, holidays, and miscellaneous matters. Applicant claimed he had no connection to the German government. He does not have any financial or property interests in Germany. He is no longer a citizen of Germany and has no foreign identification cards. He has no continuing connection to Germany military personnel and is not a member of any organization or political group in Germany.⁸

SOR ¶ 2.b - Applicant's grandmother is a citizen and resident of Germany. Applicant denied this allegation. In his Answer to the SOR, he stated that his grandmother was a citizen of Germany, but resided in England. He indicated that he only had contact with her on her birthdays. At the hearing, he stated that she passed away in 2015. At the time of the hearing, he had no relatives in Germany.⁹

SOR ¶ 3.a - Applicant failed to provide full, frank, and truthful answers to investigators' questions

Applicant denied this allegation. During multiple security interviews with investigators from another government agency (AGA) in 2011 and 2012, he declined to provide the identity of his commanding officer in the German Army. He suggested alternative ways of obtaining that information, but the AGA investigators declined to pursue those suggestions. Because of his refusal to provide that information, an AGA investigator terminated an interview early. One report of investigation indicated that Applicant "continues to display a strong loyalty to the German Government by demonstrating an unwillingness to provide information regarding his obligation to the German Army." However, the only specific unwillingness mentioned in the reports is that he failed to provide the name of his former commanding officer. He did provide information about his German military training, the location of that training, the name of his military unit, and the weapons and equipment he became qualified to operate. One report also stated "Reevaluation of this assessment is recommended should [Applicant] decide to cooperate with his security processing." Based upon his failure to cooperate

⁸ Tr. 22-24, 27, 30, 34-38, 45, 51; Applicant's Answer to the SOR; GE 4. Applicant testified that, under German law, he needed to apply to retain his German citizenship when he acquired his U.S. citizenship. He did not submit such an application. He stated that he is only a U.S. citizen.

⁹ Tr. 23, 45; Applicant's Answer to the SOR; GE 4.

during the interviews (cited as a Guideline E concern) and his military service with a foreign country (cited as a Guideline C concern), the AGA denied him access to sensitive compartmented information (SCI).¹⁰

Applicant testified that, as he was being discharged from the German Army, a staff sergeant told him the identity of the commanding officer was sensitive because of the nature of their mission. He understood this as being similar to the restriction that may exist in the U.S. in identifying members of the Special Forces. The reports of the interview indicate that he claimed he refused to provide the identity of the commanding officer as a matter of integrity and not from any sense of loyalty to Germany. He was trusted with sensitive information and honored that trust. He also stated that he would not breach that trust for his own personal gain, namely, to obtain SCI access at the AGA.¹¹

Applicant testified that he initially did not remember his commanding officer's name, but later remembered it and declined to provide it during the interviews. At some point, he learned that his former commanding officer was no longer in the German Army and concluded the name was no longer sensitive information. He later provided the AGA with the last name of his former commanding officer and stated he did not remember his first name. He appealed the denial of SCI access. His appeal was denied.¹²

Character Evidence

Applicant's overall performance rating was "met expectations" for 2012 and "exceeded expectations" for 2013. He provided reference letters that describe him as intelligent, trustworthy, honest, and loyal. One reference letter from a federal law enforcement agent noted that Applicant was subjected to extensive background security investigations and assisted several federal agencies on national security matters.¹³

Federal Republic of Germany

Germany is a constitutional democracy. It is a member of the North Atlantic Treaty Organization. On October 7, 2015, Secretary of State John Kerry stated: "To the United States, Germany is a trusted ally, a partner, and a friend." Germany has experienced human rights problems. Authorities continued to prolong incarceration of certain categories of offenders after they completed their sentences, asserting they remained a threat to society. The government limited the freedoms of speech, press, assembly, and association of neo-Nazi and other groups deemed extremist or threats to

¹⁰ Tr. 16, 24-25, 28-30, 45-51, 59-66; GE 4-14. Applicant testified that the only information he did not provide was the name of his former commanding officer.

¹¹ Tr. 28-30, 53-54, 59-66; GE 6-14.

¹² Tr. 28-30, 33-34, 48-51, 62-66; GE 11-14.

¹³ Tr. 17-20, 27, 30-33, 54-55; AE A-D.

the constitution. Contractors committed human rights abuses against asylum seekers and refugees in government-provided housing.¹⁴

Policies

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

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

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

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

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

Section 7 of EO 10865 provides that adverse decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the

¹⁴ AE E. Applicant submitted the request for me to take administrative notice of facts concerning Germany.

applicant concerned.” See also Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline C, Foreign Preference

AG ¶ 9 expresses the security concern for foreign preference:

When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

AG ¶ 10 describes conditions that could raise a security concern and may be disqualifying. One is potentially applicable in this case:

(a) exercise of any right, privilege or obligation of foreign citizenship after becoming a U.S. citizen or through the foreign citizenship of a family member. This includes but is not limited to: . . . (2) military service or a willingness to bear arms for a foreign country

When Applicant joined and served in the German Army, he was a German citizen. He did not become a U.S. citizen until after he completed his German military service. AG ¶ 10 does not apply in this case. I find in favor of Applicant under Guideline C.

Guideline B, Foreign Influence

AG ¶ 6 expresses the security concern regarding foreign influence:

Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

AG ¶ 7 sets forth two disqualifying conditions that potentially apply.

(a) contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a

foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;

(b) connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information;

AG ¶¶ 7(a), 7(d), and 7(e) require substantial evidence of a “heightened risk.” The “heightened risk” required to raise one of these disqualifying conditions is a relatively low standard. “Heightened risk” denotes a risk greater than the normal risk inherent in having a family member living in a foreign country or owning property in a foreign country. The totality of Applicant’s family ties to a foreign country as well as each individual family tie must be considered.

Guideline B is not limited to countries hostile to the United States. “The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States.”¹⁵

Furthermore, “even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security.”¹⁶ Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation’s government, its relationship with the U.S., and its human rights record are relevant in assessing the likelihood that an applicant’s family members are vulnerable to coercion from the government, terrorist organizations, or other groups.¹⁷

The evidence established that Applicant maintained contact with two German citizens after he completed his German military service and returned to the United States. One of those individuals was a lieutenant in the German Army. Additionally, Applicant initially refused to disclose the identity of his former commanding officer to U.S. investigators during security clearance interviews. AG ¶¶ 7(a) and 7(b) apply to SOR ¶¶ 2.a and 2.c.

Applicant’s grandmother was a German citizen. At the time of the hearing, she had passed away. I find in favor of Applicant on SOR ¶ 2.b.

The Guideline C allegation was cross-alleged under this guideline. However, Applicant’s service in the German Army while he was German citizen does not trigger

¹⁵ ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

¹⁶ ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002).

¹⁷ See *generally*, ISCR Case No. 02-26130 at 3 (App. Bd. Dec. 7, 2006) (reversing decision to grant clearance where administrative judge did not consider terrorist activity in area where family members resided).

any of the above disqualifying conditions. No evidence was produced to show his German military service makes him vulnerable to exploitation, pressure, or coercion by a foreign person, group, or country. I find in favor of Applicant on SOR ¶ 2.d.

AG ¶ 8 provides conditions that could mitigate foreign influence security concerns. Three are potentially applicable in this case.

(a) the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S.;

(b) there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest; and

(c) contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation.

Applicant did not have any contact with the lieutenant in the German Army for two years before the hearing. When they had contact, their communications were of a casual nature. He no longer has the lieutenant's phone number, email address, or mailing address. He does not know how to contact the lieutenant. Applicant also had contact with another German citizen every few months after returning to the United States. His last contact with this other individual was in March 2015. Their communications were of a casual nature. AG ¶ 8(c) applies to the two German friends who Applicant communicated with after his military service.

Applicant was a German citizen who grew up in the United States. Soon after completing his German military service in 2005, Applicant returned to the United States. Since then, he has resided in the United States. He became a U.S. citizen eight years ago. He is no longer a German citizen. He has no financial or property interests in Germany. He is engaged to marry a U.S. citizen. His immediate family members are citizens and residents of the United States. He has no continuing connection to Germany due to his military service. While he refused to disclose the identity of his former commanding officer during security interviews, he credibly testified that he did not disclose that information as a matter of integrity and not from any sense of loyalty to Germany. I find that Applicant can be expected to resolve any potential conflict of interest in favor of U.S. interests because of his deep and longstanding relationships and loyalties in the United States. AG ¶ 8(b) applies. AG ¶ 8(a) partially applies.

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 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 following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance 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, and cooperation with medical or psychological evaluation; 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. One potentially applies:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

Applicant refused to disclose the identity of his former German commanding officer during multiple security clearance interviews. AG ¶¶ 15(a) and 15(b) apply. No evidence was presented that Applicant provided false or misleading information to investigators. AG ¶ 16(b) does not apply.

Two mitigating conditions under AG ¶ 17 potentially apply:

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

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

As noted above, Applicant credibly testified that he refused to disclose the identity of his former commanding officer during the security interviews as a matter of

principle and not from any sense of loyalty to Germany. When he learned that his former commanding officer was no longer in the German military, he disclosed his last name. He indicated that, if the tables were turned, he would not disclose sensitive U.S. information. His refusal to provide information during security interviews happened under unique circumstances that are unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 17(c) applies. AG ¶ 17(a) partially applies.

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 relevant 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 considered the potentially disqualifying and mitigating conditions in light of all relevant facts and circumstances surrounding this case. I have incorporated my comments under Guidelines C, B, 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 provided reference letters that described him as trustworthy, honest, and loyal. He had an identity crisis when he was younger that is now resolved. He came to realize that the United States is his home, and he became a U.S. citizen. The evidence shows that he can be expected to resolve any potential conflicts of interest in favor of the United States.

Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. After considering all the evidence, I conclude Applicant mitigated the security concerns under the guidelines for foreign preference, foreign influence, and personal conduct.

Formal Findings

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

Paragraph 1, Guideline C:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Withdrawn
Paragraph 2, Guideline B:	FOR APPLICANT
Subparagraphs 2.a – 2.d:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

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

James F. Duffy
Administrative Judge