DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
---	)	ISCR Case No. 14-04235
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

04/25/2016

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding financial considerations, handling protected information, and personal conduct. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On January 9, 2014, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application.[1] On September 17, 2014, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective

[1] GE 1 (e-QIP, dated January 9, 2014).

September 1, 2006. The SOR alleged security concerns under Guideline F (Financial Considerations), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

It is unclear when Applicant received the SOR, as there is no receipt in the case file. In a sworn statement, dated October 7, 2014, Applicant responded to the SOR allegations, but he failed to indicate if he was requesting a hearing before an administrative judge or a decision based on the administrative record without a hearing before an administrative judge. On July 1, 2015, the Defense Office of Hearings and Appeals (DOHA) issued an Amendment to the SOR. The Amended SOR alleged security concerns under Guidelines K (Handling Protected Information) and E (Personal Conduct). Once again, it is unclear when Applicant received the Amended SOR, as the receipt in the case file is undated. Applicant responded to the Amended SOR on July 10, 2015, and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on September 9, 2015. The case was assigned to me on September 18, 2015. A Notice of Hearing was issued on September 28, 2015, and I convened the hearing as scheduled on October 29, 2015.

During the hearing, six Government exhibits (GE 1 through GE 6) and one Applicant exhibit (AE A) were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on November 12, 2015. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. He submitted additional documents which were marked as AE B through AE Q and admitted into evidence without objection**.** The record closed on November 23, 2015.

Findings of Fact

In his Answers to the SOR and Amended SOR, Applicant admitted one of the factual allegations pertaining to handling protected information (¶ 2.a.), and one of the factual allegations pertaining to personal conduct (¶ 3.b.). He denied the remaining allegations with explanations. Applicant's answers and explanations are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 57-year-old employee of a defense contractor. He has been with the company since July 1987, and currently serves as a communications security (COMSEC) custodian and manager.[2] A 1977 high school graduate, Applicant received an associate of arts degree in basic electronics in 1983, and he completed three years of university courses but did not earn another degree.[3] While in high school, Applicant entered the delayed enlistment program of the U.S. Army, and upon his high school

[2] GE 1, *supra* note 1, at 12.

[3] GE 1, *supra* note 1, at 10.

graduation, he enlisted in the U.S. Army. In 1980, he transferred to the U.S. Army Reserve, and he has remained in the active reserves and currently is in the grade of master sergeant (E-8).[4] He was granted secret or top secret security clearances since October 1987, and in May 1998 he also was granted access to sensitive compartmented information (SCI). He currently holds a top secret security clearance.[5] Applicant was married in July 1987, and divorced in July 2011.[6] He and his wife have three daughters (born in 1981, 1982, and 1987) and two sons (born in 1985 and 1989).[7]

Military Service, Awards, and Decorations

During his military service, Applicant was deployed overseas on two occasions. He was a participant in Operation Desert Storm in 1991 and he was in Iraq from December 2006 until January 2008.[8] He was awarded the Bronze Star Medal, the Combat Action Badge, the Joint Service Commendation Medal, the Meritorious Service Medal (3 awards), the Army Commendation Medal (3 awards), the Joint Service Achievement Medal, the Joint Meritorious Unit Award, the Army Superior Unit Award, the Army Good Conduct Medal (8 awards), the National Defense Service Medal (bronze service star), the Global War on Terrorism Service Medal, the Armed Forces Service Medal, the NCO Professional Development Ribbon (4 awards), the Presidential Unit Citation Award, the Army Service Ribbon, the Overseas Service Ribbon (2 awards), the Overseas Training Ribbon, the South West Asia Service Medal, the Armed Forces Reserve Medal (with M device (2 awards) and 10-year bronze hourglass), the Humanitarian Service Medal, the Rifle Qualification Badge, the Pistol Qualification Badge, the Grenade Qualification Badge, the Kuwait Liberation Medal (Saudi Arabia), and the Kuwait Liberation Medal (Kuwait).[9] Applicant was assigned for treatment purposes to the Wounded Warrior Transition Unit from September 2011 until March 2012.[10]

[4] GE 1, *supra* note 1, at 10-11; GE 2 (Personal Subject Interview, dated February 25, 2014), at 4; AE B (Biographical Summary, dated April 1, 2015), at 1.

[5] GE 1, *supra* note 1, at 41-43; GE 2, *supra* note 4, at 8-9, 15; Tr. at 6.

[6] GE 1, *supra* note 1, at 24-25, 49; GE 2, *supra* note 4, at 14-16. Applicant was unaware that the divorce had been finalized, for he and his wife had reconciled in May 2010, and he told his attorney to terminate the proceedings. The attorney apparently failed to do so, and neither Applicant nor his wife was ever notified that the divorce was final. They continue to cohabitate as husband and wife. *See* GE 2, *supra* note 4, at 14-16.

[7] GE 1, *supra* note 1, at 27-29.

[8] Tr. at 35; AE D (Personnel Qualification Record, dated October 15, 2011).

[9] AE C (Certificate of Release or Discharge from Active Duty, dated April 10, 2012); AE F (Official Photo, dated June 6, 2011); AE B, *supra* note 4, at 2.

[10] Tr. at 37.

Financial Considerations[11]

There was nothing unusual about Applicant's finances until about 2013. In 2001, Applicant and his wife obtained a home mortgage in the amount of $71,006, and during the ensuing years they routinely made their timely monthly mortgage payments. In 2013, their mortgage loan account was sold to another mortgage lender. The transition from one creditor to another did not go smoothly, and, in fact, was devastating to Applicant's financial record. Applicant referred to the transition as an "accounting nightmare." For some unexplained reason, the normal mortgage account from the original lender was altered to an escrow account by the new creditor. Applicant's routine monthly mortgage payments to the new creditor were misapplied by it, and funds were diverted as property taxes and homeowners insurance, items which he generally paid separately. The actions of the new creditor diminished the amounts credited as mortgage payments. In August 2008, the remaining balance was $46,929. Applicant's February 2014 credit report reflects the account was past due $3,926 with a remaining balance of $20,425 (SOR ¶ 1.a.). The new creditor finally acknowledged the problem and isolated its errors to correct the situation. Applicant's June 2015 credit report reflects a remaining balance of $9,476 with zero past due. As of October 30, 2015, the new creditor reported that the remaining loan balance was $6,583.59. There is no past-due balance. Applicant has made larger than required payments each month in an effort to accelerate his payoff because the new creditor is so inconsistent. The errors and the status of the account have been corrected and the alleged issues have been resolved.[12]

In approximately 2003 or 2004, Applicant co-signed for two student loans for his son, an individual who has the same name as Applicant. For the first five years, while his son was actively enrolled in college, the student loans were in forbearance or deferred status. In 2009 or 2010, when his son completed college, he was supposed to commence his payments. One loan, in the amount of $13,420, was with DirectLoans/U.S. Department of Education, and the other loan, in the amount of $18,200, was with Central Credit Services/Sallie Mae. Applicant's son was residing in the family residence and working for minimum wage. Nevertheless, Applicant expected his son to make the required loan payments. At some point, Applicant received a telephone call regarding the smaller of the two loans, and he was informed that the loan had become delinquent due to non-payment. In order to resolve that status, Applicant agreed to make the payments himself. He made monthly payments of $120 for about one year. At the end of the year, Applicant informed his son that he was again going to be responsible for making the payments.[13]

[11] General source information pertaining to the financial accounts discussed below can be found in the following exhibits: GE 3 (Combined Experian, TransUnion, and Equifax Credit Report, dated September 12, 2008); GE 4 (Combined Experian, TransUnion, and Equifax Credit Report, dated February 11, 2014); GE 5 (Equifax Credit Report, dated June 30, 2015); GE 1, *supra* note 1, at 44-48; GE 2, *supra* note 4. More recent information can be found in the exhibits furnished and individually identified.

[12] AE A (Proof of Electronic Payment, various dates); AE Q (Detail Transaction History, dated October 29, 2015); AE P (Mortgage Payoff Statement, dated October 30, 2015); Applicant's Answer to the SOR, dated October 7, 2014), at 1; GE 2, *supra* note 4, at 11-12; Tr. at 40-44.

[13] GE 2, *supra* note 4, at 9-10; Applicant's Answer to the SOR, *supra* note 12, at 1-2; Tr. at 44-45.

In September 2013, Applicant's son returned to school, and the student loans should have gone into either forbearance or deferred status. In November 2013, Applicant's son set up a monthly repayment plan under which he agreed to make monthly payments of $75 for each of the two loans. Applicant hoped to make his son responsible for his own student loans, but he acknowledged that if his son cannot accept that responsibility, Applicant will assist him and take over the payments. In January 2014, Applicant was advised that the balance of the loans owed was approximately $18,200. All of Applicant's son's student loans, including the two for which Applicant was a co-signer, were subsequently consolidated and Applicant was advised that the loans total $52,000. He was also advised that if he paid $20,000, his name would be removed from his son's student loans, and those loans would be transitioned to Applicant's son's sole ownership for repayment responsibility. A new repayment plan was put into effect, and, at least as early as October 2014, or before, Applicant's son was making monthly payments of $250.[14]

A review of Applicant's credit reports reflects inconsistent information pertaining to the various student loans. Applicant's September 2008 credit report lists four separate student loans: one was opened in September 2003 associated with the U.S. Department of Education, reflecting a high credit of $11,279 and a deferred balance of $10,454; the remaining three were associated with Sallie Mae, with one opened in September 2004, reflecting a high credit of $12,000 and a deferred balance of either $15,580 according to two credit reporting agencies, or $15,652 according to another credit reporting agency; one opened in August 2005 with a high credit of $5,000 and a deferred balance of either $6,689 according to two credit reporting agencies or $6,736 according to another credit reporting agency; and one opened in September 2005 with a high credit of $12,500 and a deferred balance of either $17,577 or $17,414, depending on the credit reporting agency.[15] Since Applicant co-signed for the first two loans, with two different agencies, at appears that he co-signed for one loan for $11,279 and another loan for $12,000.

Applicant's June 2015 credit report reflects a churning of student loan accounts by various lending agencies and servicing agencies. The previously referenced September 2003 student loan with the U.S. Department of Education is listed four times, with three different high credit numbers which differ from the information listed in the 2008 credit report. There are four different account numbers, only one of which matches the one from 2008. One listing shows a past-due balance of $11,451, another shows a remaining balance of $7,353, and two other listings reflect a zero balance. The account was either assigned or sold, depending on which listing is being examined. The previously referenced September 2004 student loan with Sallie Mae, now Navient, is listed once, with an entirely different account number. The account has a remaining balance of $19,051, of which $5,467 is past due, although $17,077 was previously

[14] GE 2, *supra* note 4, at 10; Applicant's Answer to the SOR, *supra* note 12, at 1-2; Tr. at 46-48.

[15] Account numbers reflected for each of the loans described above are also inconsistent. For example, one account has either ten digits or six digits listed, depending on the credit reporting agency; another has either 23, 18, or 16 of the same digits; another account has either 23, 18, or 16 digits; and another account has either 23 or 16 digits. *See* GE 3, *supra* note 11, at 9-12.

charged off. The previously referenced August 2005 student loan also with Navient is listed once, with an entirely different account number from the earlier listing, but which is identical to the one now listed for the 2004 loan. The account has a remaining balance of $9,436, of which $3,106 is past due, although $7,848 was previously charged off. The previously referenced September 2005 student loan also with Navient is listed once, with an entirely different account number from the earlier listing, but which is identical to the one now listed for the 2004 loan. The account has a remaining balance of $28,421, of which $10,734 is past due, although $21,790 was previously charged off.[16]

Applicant believes all the student loans have been incorrectly associated with his personal finances, and not properly segregated as to himself or to his son. He is seeking the assistance of a credit repair firm to resolve the student loan issues. On October 30, 2015, Applicant received a monthly bill from FedLoan Servicing, purportedly handling the student loan account(s). The account number listed differs from all of the other student loan accounts that are reflected in the various credit reports. The bill indicates an original balance of $8,895.93 (which differs from the high credit for all of the other reported student loans) and a current balance of $9,422.97. The last payment received is shown as April 1, 2014, and there is a past-due amount of $500.76. The total due in November 2015 was $542.49.[17]

The SOR alleged that there are three delinquent accounts that were charged off by Sallie Mae (SOR ¶¶ 1.b. through 1.d.) as well as three delinquent accounts that were placed for collection by the U.S. Department of Education (SOR ¶¶ 1.e. through 1.g.). One of those accounts was charged off. No account numbers appear in the SOR. With the exception of only one allegation (SOR ¶ 1.f.), the alleged delinquent balances and amounts charged off do not comport with any of the accounts listed in the credit reports or other documentary evidence presented. The amount alleged in SOR ¶ 1.e. ($9,400) is not the amount placed for collection, but rather the high credit of the account. The evidence presented is inconsistent and frequently garbled. While Applicant has taken steps to resolve the student loan issues, it appears that the matter has not yet been resolved.[18]

On November 16, 2015, Applicant completed a Personal Financial Statement which reflected a net monthly income of $6,602; normal monthly expenses of $5,565; and other financial obligations (credit cards and loans) of $1,190. His net monthly

[16] GE 5, *supra* note 11, at 2-6.

[17] AE O, dated October 30, 2015).

[18] Because there are no consistent, market-wide federal standards for student loan servicing and servicers generally have discretion to determine policies related to many aspects of servicing operations; and because student loan borrowers encounter servicing problems or practices that discourage utilization of alternative repayment plans, including income-driven repayment plans, in September 2015, the Consumer Financial Protection Bureau (CFPB), the U.S. Department of Education, and the U.S. Department of the Treasury issued a *Joint Statement of Principles on Student Loan Servicing.* That same month, the CFPB issued a lengthy analysis entitled *Student Loan Servicing*. That analysis discussed many aspects of the problems involved in student loan borrowing and servicing facing borrowers.

remainder was approximately $1,847, available for discretionary savings or spending.[19] He has no other delinquent accounts.

Handling Protected Information

As the COMSEC custodian and manager, Applicant works in a secured "closed area" containing several containers of classified or proprietary materials. About one dozen employee personnel also have access to the area. On June 10, 2013, at about 9:22 a.m., Applicant opened a particular COMSEC container and signed the open/closed sign-off sheet. The section was manned by COMSEC personnel until 4:15 p.m. At the end of the day, Applicant closed the container but failed to spin the dial which locks it. He then became involved in other activities and failed to properly secure the container. At about 4:30 p.m., that same day, while conducting security rounds of classified containers, a security officer discovered that the container in the COMSEC office was not properly secured. The following day, an investigation was conducted by the facility security officer (FSO): the container was unattended for approximately 15 minutes; there was a 100 percent inventory of the container and it was determined that all COMSEC material was accounted for; all persons involved were cleared to the level of the involved material; and the location where the material was stored is a restricted access area. Based on all of the above, "[t]he possibility of compromise cannot be ruled out, but is highly unlikely." Applicant was re-briefed on safeguarding and end-of-day check procedures. The employer reported the "improperly secured Keying material" incident and requested that it be considered a final report (SOR ¶ 2.a.). Although the report does not mention any written warning being given to Applicant, he acknowledged receiving a written counseling.[20] There is no copy of the written counseling in evidence. Based on the evidence, I conclude that the incident constituted a "security infraction" rather than a "security violation."[21]

Applicant accepted responsibility for the security infraction and admitted the allegation. He noted that he had previously spent ten years in a proprietary closed area and had never incurred any security infractions. He returned to the employer after a lengthy absence, and about three weeks before the incident, he was assigned to his new position as COMSEC custodian, something that he was not used to doing, while learning the responsibilities, policies, and procedures of the position.[22] The Joint Personnel Adjudication System (JPAS) Incident History indicates that Applicant received proper training on how to secure a safe and closed area prior to June 10, 2013. However, there is no documentary evidence to reflect his completion of such

[19] AE G (Personal Financial Statement, dated November 16, 2015).

[20] GE 7 (COMSEC Insecurity Report, dated June 10, 2013); GE 6 (Incident History, dated March 17, 2015); GE 2, *supra* note 4, at 16-17; Applicant's Answer to the Amended SOR, dated July 10, 2015; Tr. at 48-52, 57-58, 73.

[21] "A security violation is any incident that involves the loss, compromise, or suspected compromise of classified information." DOD 5220.22-M-Sup 1, *National Industrial Security Program (NISPOM) Operating Manual Supplement*, § C1.3.2.1.1. "A security infraction is any other incident that is not in the best interest of security that does not involve the loss, compromise, or suspected compromise of classified information." DOD 5220.22-M-Sup 1, *NISPOM Operating Manual Supplement,* § C1.3.2.1.2.

[22] Applicant's Answer to the Amended SOR, *supra* note 20; Tr. at 51-52; GE 2, *supra* note 4, at 16-17.

training, the timeframe of such training, or any signed acknowledgment by him of such training.

A second incident occurred ten days later. On June 20, 2013, at about 1 p.m., Applicant opened a COMSEC storage closed area/room and signed the intrusion alarm log sheet.[23] At 1:45 p.m., he departed the closed area/room; notified the security control center; believed he had properly spun the lock; set the intrusion alarm; and signed the open/closed sign-off sheet. At about 4:55 p.m., that same day, while conducting security rounds of closed areas, a security officer discovered that the lock was not properly secured. The following day, an investigation was conducted by the FSO: the intrusion alarm was properly set; the closed area was not entered between 1:45 p.m. and 4:55 p.m.; there was a 100 percent inventory of the closed area and it was determined that all COMSEC material was accounted for; all persons involved were cleared to the level of the involved material; the intrusion alarm was properly activated; and the location where the material was stored is a restricted access area. Based on all of the above, "[t]he possibility of compromise cannot be ruled out, but is highly unlikely." Applicant was re-briefed on Closed Area procedures and he was to be issued a written warning.[24] The written letter of counseling was supposedly to cover both security infractions, but Applicant said the incident may have been written up, but the counseling was done orally.[25] There is a copy of a formal written warning in evidence, but Applicant refused to sign it because he denied responsibility for the second incident.[26] It is unclear if Applicant received a copy of the document. The document states on its face that it is intended for the use of Human Resources to document the result of an investigation. It is a confidential form that should not be placed in an employee's personnel file.[27] The employer reported the "improperly secured closed area" incident and requested that it be considered a final report (SOR ¶ 2.b.). Based on the evidence, I conclude that the incident constituted a "security infraction" rather than a "security violation."

Applicant had engaged all of the supplemental protection security measures of the closed area but purportedly failed to activate the primary lock. He was adamant that he had also spun the lock, and he denied the allegation. The written letter of counseling was to remain in his personnel file for a one-year period, and if after that year there

[23] There is a multi-step procedure to gain access to the storage area/room: the security desk must be notified; the dial must be spun from the locked position; a security code must be entered; and the badge must be scanned. *See* GE 2, *supra* note 4, at 17. It should be noted that the Incident History incorrectly identified the date of the incident as June 24, 2013, when, in fact, the incident occurred on June 20, 2013, but was reported on June 24, 2013. *See* GE 6, *supra* note 20; Tr. at 72-73.

[24] GE 7 (COMSEC Insecurity Report, dated June 24, 2013); GE 6, *supra* note 20; GE 2, *supra* note 4, at 17; Applicant's Answer to the Amended SOR, *supra* note 20; Tr. at 52-60.

[25] GE 2, *supra* note 4, at 17; *But see* Tr. at 60, 74-76 where Applicant denied receiving a written warning about the second incident.

[26] AE N (Disciplinary Action Process Investigation Summary Form, dated June 26, 2013).

[27] AE N, *supra* note 26, at 1.

were no other security violations or infractions, it would be removed.[28] There is no evidence of any additional security violations or infractions.

Personal Conduct

On January 9, 2014, when Applicant completed his e-QIP, he responded to a question pertaining to his employment activities. The question in § 13A asked, for his current employment, "in the last seven (7) years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?" Applicant answered the question with "no." He certified that the response was "true, complete, and correct" to the best of his knowledge and belief. The SOR alleged that Applicant's response was a deliberate falsification of a material fact, supposedly because he had received written warnings for his security infractions (SOR ¶ 3.a.).

As noted above, the first incident report does not mention any "written warning" being given to Applicant. Neither does the JPAS Incident History. No such document was offered as evidence of a written warning. He acknowledged receiving a "written counseling." After the second incident, Applicant was re-briefed on Closed Area procedures and was to be issued a written warning. The JPAS Incident History does not mention that a written warning or a written letter of counseling was issued to Applicant. The written warning was supposedly to cover both security infractions, but Applicant contended it was merely an oral counseling. No such document was offered as evidence of a written warning. His boss told him not to worry about the incidents.

When he was completing his e-QIP, Applicant did not think the incidents were applicable to the question that was being asked until he was informed by the investigator from the U.S. Office of Personnel Management (OPM) that they were violations that should have been reported. Applicant claimed he did not know that. He did not realize that the incidents were serious enough to warrant that they be reported. In fact, he was unaware that the incidents had triggered incident reports. He specifically denied intentionally omitting the two security infractions. When Applicant returned to his employer from active duty, he was selected to replace a retiring COMSEC custodian. Although the JPAS Incident History indicates that Applicant received proper training on how to secure a safe and closed area prior to June 10, 2013, Applicant denied he was ever briefed or guided through the routines and responsibilities of the position by his predecessor. They merely checked the safes and the COMSEC office. Applicant simply focused on learning the duties of his position and processing all the over 25,000 COMSEC materials in his inventory. Applicant's performance and development summary for 2012 noted that with the impending retirement of a veteran COMSEC custodian, Applicant was "training-by-doing."[29]

On February 25, 2014, when Applicant was interviewed by the OPM investigator, the issue of security was raised without any confrontation taking place. Applicant did not

[28] GE 2, *supra* note 4, at 17.

[29] AE H (Performance & Development Summary, dated February 26, 2013).

hesitate in setting forth the two security infractions. He denied receiving written warnings, but did acknowledge receiving a written letter of counseling. No disciplinary actions were taken against him for the security infractions. The SOR alleged that Applicant's responses were deliberate falsifications of material facts, supposedly because he had denied receiving written warnings for his security infractions and otherwise deliberately failed to report them (SOR ¶ 3.b.). Although Applicant admitted the SOR allegation, such admission was not an admission of his deliberate falsification, but rather an acknowledgment, based upon the guidance furnished by the OPM investigator, that Applicant's responses were incorrect.

Work Performance and Character References

Applicant's immediate supervisor, the COMSEC Team Lead, has known Applicant for approximately 14 years, initially as a coworker. He characterized Applicant as honest, loyal, trustworthy, and highly respected. He noted in Applicant's annual performance report for 2013 that Applicant had become accountable for the production and accountability of over 25,000 COMSEC controlled items, and that it was a big role considering Applicant's "limited experience working with COMSEC." He acknowledged that Applicant had two security infractions over his 20-plus years with the company, but he would still not hesitate to recommend Applicant for a position that required protection of material or information vital to national security.[30] A member of the COMSEC team who is supervised by Applicant said that he has observed Applicant always go the extra mile to ensure the COMSEC material entrusted to the COMSEC office is never out of proper storage controls and always handled by appropriately cleared and currently briefed facility personnel.[31] Two long-time friends and neighbors, one a retired New York City Police Officer, and the other a former U.S. Marine, find him to be a man of integrity who is helpful, honest, faithful, courageous, trustworthy, knowledgeable, responsible, and approachable. Applicant is a good parent who has also coached little league baseball.[32] Applicant's military senior rater wrote that Applicant "sets and maintains the highest standards of honor and trustworthiness."[33]

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."[34] As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access

[30] AE K (Character Reference, dated November 3, 2015); AE H, *supra* note 29, at 3.

[31] AE L (Character Reference, dated November 3, 2015).

[32] AE J (Character Reference, dated November 5, 2015); AE I (Character Reference, dated November 10, 2015).

[33] AE E (NCO Evaluation Report, dated July 26, 2010).

[34] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."[35]

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."[36] The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.[37]

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information.

[35] Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

[36] "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "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).

[37] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Furthermore, "security clearance determinations should err, if they must, on the side of denials."[38]

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."[39] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

> Failure or inability to live within one's means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. . . .

The guideline notes several conditions that could raise security concerns. Under AG ¶ 19(a), an "inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly, under AG ¶ 19(c), "a history of not meeting financial obligations" may raise security concerns. A home mortgage loan was reported as delinquent and several student loans were placed for collection or charged off. AG ¶¶ 19(a) and 19(c) apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Under AG ¶ 20(a), the disqualifying condition may be mitigated where "the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment." Also, under AG ¶ 20(b), financial security concerns may be mitigated where "the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances." Evidence

[38] *Egan*, 484 U.S. at 531.

[39] *See* Exec. Or. 10865 § 7.

that "the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control" is potentially mitigating under AG ¶ 20(c). Similarly, AG ¶ 20(d) applies where the evidence shows "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts."[40] Under AG ¶ 20(e) it is potentially mitigating if "the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue."

AG ¶¶ 20(a), 20(b), 20(c), 20(d), and 20(e) apply. Applicant's financial problems were not caused by frivolous or irresponsible spending, and he did not spend beyond his means. Instead, as noted above, Applicant attributed his home mortgage problems to the transition of his account from the original lender to a new creditor. For some unexplained reason, the normal mortgage account from the original lender was altered to an escrow account by the new creditor. Applicant's routine monthly mortgage payments to the new creditor were misapplied by it, and funds were diverted as property taxes and homeowners insurance, items which he generally paid separately. The actions of the new creditor diminished the amounts credited as mortgage payments. Those actions were beyond Applicant's control. The new creditor finally acknowledged the problem and isolated its errors to correct the situation. As of October 30, 2015, the new creditor reported that the remaining loan balance was $6,583.59. There is no past-due balance. Applicant has made larger than required payments each month in an effort to accelerate his payoff because the new creditor is so inconsistent. The circumstances under which this situation occurred, and Applicant's accelerated payments, minimize the likelihood that such a situation will recur.

The problem with the student loan accounts can be attributed to several factors: Applicant and his son share the same name; Applicant co-signed for two student loans; Applicant's son obtained additional student loans; the loans went into default at a time when they should have been in forbearance or deferred; Applicant was trying to get his son to accept some financial responsibility for the loans; the student loans were incorrectly combined to reflect that they were all Applicant's; the student loans were churned by the various lending agencies and servicing agencies, making it appear that there were more loans than there actually were; and the information in the credit reports is garbled and inconsistent. Applicant made loan payments for the two co-signed loans

[40] The Appeal Board has previously explained what constitutes a "good-faith" effort to repay overdue creditors or otherwise resolve debts:

> In order to qualify for application of [the "good-faith" mitigating condition], an applicant must present evidence showing either a good-faith effort to repay overdue creditors or some other good-faith action aimed at resolving the applicant's debts. The Directive does not define the term 'good-faith.' However, the Board has indicated that the concept of good-faith 'requires a showing that a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation.' Accordingly, an applicant must do more than merely show that he or she relied on a legally available option (such as bankruptcy [or statute of limitations]) in order to claim the benefit of [the "good-faith" mitigating condition].

ISCR Case No. 02-30304 at 3 (App. Bd. Apr. 20, 2004) (internal citation and footnote omitted, quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 4, 2001)).

and has attempted to resolve the erroneously reported status of those loans with the various lenders and servicing agencies. While it appears that Applicant is making substantial progress, and most of the student loans should be in forbearance or deferred status, it does not appear that everything regarding the identification of the co-signed student loans has yet been sorted out and resolved.

With the possible exception of the student loan accounts – an issue that appears to still be unresolved – Applicant has no delinquent accounts. Furthermore, as Department Counsel conceded, "Applicant doesn't have a history of not paying his bills."[41] He has a monthly surplus of approximately $1,847 available for discretionary savings or spending. There are clear indications that Applicant's alleged financial problems are under control. Applicant's actions under the circumstances confronting him, do not cast doubt on his current reliability, trustworthiness, or good judgment.[42]

Guideline K, Handling Protected Information

The security concern relating to the guideline for Handling Protected Information is set out in AG ¶ 33:

> Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual's trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 34(g) "any failure to comply with rules for the protection of classified or other sensitive information*"* is potentially disqualifying. In addition, "negligence or lax security habits that persist despite counseling by management" may raise security concerns under AG ¶ 34(h). Applicant's employer determined that his actions on June 10, 2013 (improperly securing Keying material) and June 20, 2013 (improperly secured closed area), violated various security policies, and procedures. Those two incidents constituted "security infractions," and none of them constituted "security violations" under the NISPOM Supplement. Nevertheless, AG ¶¶ 34(g) and 34(h) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from handling protected information. Under AG ¶ 35(a), the disqualifying condition may be mitigated where "so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.*"* Also, AG ¶ 35(b) may apply if "the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities." Applicant has had

[41] Tr. at 100.

[42] *See* ISCR Case No. 09-08533 at 3-4 (App. Bd. Oct. 6, 2010).

two security infractions in ten days in the nearly 29-year period during which he has held a security clearance. Both of the security infractions involved his failure to activate or engage all of the supplemental protection security measures available in the security system.

After conducting security investigations for each of the cited incidents, the FSO concluded that there was no compromise or attempted compromise of classified material because most of the supplemental protection security measures were engaged or activated and functional, and there were no signs of attempted entry or missing items. The FSO seemingly concluded that neither of the incidents resulted from deliberate disregard, gross negligence, or a pattern of negligence under the NISPOM, for he requested that each of the incident reports be considered final reports.

Both security incidents – security infractions – occurred when Applicant either failed to fully spin the dial on a COMSEC container lock within a secured room, or purportedly failed to spin the dial on the locking mechanism of a COMSEC storage room. In both instances, he did engage the various supplemental protection security measures associated with the container and the room. He accepted responsibility for the initial infraction, but was adamant in his denial of the second infraction. Applicant noted that he had returned to his employer after a lengthy absence while on active duty, and about three weeks before the first incident, he was assigned to his new position as COMSEC custodian. He was not used to the position and was still learning the responsibilities, policies, and procedures of the position. As noted above, Applicant was "training-by-doing."

Both incidents occurred in June 2013, approximately two and one-third years before the date of the hearing. Applicant was counseled and re-briefed as to his responsibilities regarding safeguarding and end-of-day check procedures as well as on Closed Area procedures, and with the exception of counseling, a warning, and the internal Disciplinary Action Process Investigation Summary Form (which was not to be placed in Applicant's personnel file), he has not received any subsequent written warnings for practices dangerous to security or violations of the NISPOM.

Furthermore, Applicant expressed his contrition for the first incident and made tangible efforts to avoid repeating the lapses involved by increasing his level of vigilance. Applicant has acknowledged that he was careless, at least related to the first incident, and has taken a variety of steps to insure that his inadvertent failures do not recur. There are two incidents involving a failure to complete all of the associated safeguarding procedures with the COMSEC container and the COMSEC storage room. Under those circumstances, it might be argued that they constitute a pattern of behavior that might warrant adverse adjudicative action. However, Applicant's other characteristics under my whole-person analysis reflect a positive attitude towards compliance with rules and regulations and security consciousness. Applicant is a careful, conscientious individual who simply, and unintentionally, failed to lock a container or secure a room. He attributed part of his failure to his newness on the job and because he was still going through the learning process after returning from his military assignment. Applicant has demonstrated a positive attitude to the discharge of

his security responsibilities and embraced security consciousness. Considering the totality of the evidence, I find that AG ¶¶ 35(a) and 35(b) apply to mitigate the security concerns.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified 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 guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), it is potentially disqualifying if there is

> a deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.

Also, "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative" is potentially disqualifying under AG ¶ 16(b).

On January 9, 2014, when Applicant completed his e-QIP, he responded to a question pertaining to his employment activities. The question in § 13A asked, for his current employment, "in the last seven (7) years have you received a written warning, been officially reprimanded, suspended, or disciplined for misconduct in the workplace, such as a violation of security policy?" Applicant answered the question with "no." He certified that the response was "true, complete, and correct" to the best of his knowledge and belief. The SOR alleged that Applicant's response was a deliberate falsification of a material fact, supposedly because he had received written warnings for his security infractions.

Applicant's response provides sufficient evidence to examine if his submission was a deliberate falsification, as alleged in the SOR, or merely the result of oversight or misunderstanding of the true facts on his part. I have considered the somewhat limited period Applicant had held the position of COMSEC custodian, as well as the available information pertaining to Applicant's background, reputation, professional civilian career, and his military service, in analyzing his actions. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the falsification or omission occurred. As administrative judge, I must consider the record evidence as a

whole to determine whether there is direct or circumstantial evidence concerning Appellant's intent or state of mind at the time the falsification or omission occurred.[43]

As noted above, the first incident report does not mention any "written warning" being given to Applicant. Neither does the JPAS Incident History. No such document was offered as evidence of a written warning. He acknowledged receiving a "written counseling." After the second incident, Applicant was re-briefed on Closed Area procedures and was to be issued a written warning. The JPAS Incident History does not mention that a written warning or a written letter of counseling was issued to Applicant. The written warning was supposedly to cover both security infractions, but Applicant contended it was merely an oral counseling. No such document was offered as evidence of a written warning. His boss told him not to worry about the incidents.

When Applicant was completing his e-QIP, he did not think the incidents were applicable to the question that was being asked until he was informed by the OPM investigator that they were violations that should have been reported. Applicant claimed he did not know that. He said he did not realize that the incidents were serious enough to warrant that they be reported. In fact, he was unaware that the incidents had triggered incident reports. He specifically denied intentionally omitting the two security infractions. Applicant's explanations for his omissions and failure to report that he had received some sort of communication (whether it was a written warning, written counseling, oral warning, or oral counseling) pertaining to the two security infractions appear to be genuine and not fabricated. He was not reprimanded, suspended, or disciplined for misconduct in the workplace, which appears to be the focus of the e-QIP question. Because he was unaware of the significance of his two infractions, and the fact that his boss had told him not to worry about them, Applicant would have little, if any, motivation for the omission, concealment, or falsification. Furthermore, given Applicant's reputation for honesty and integrity, as well as his military history, an intentional lie or falsification by Applicant would be considered aberrant behavior. AG ¶ 16(a) has not been established.

On February 25, 2014, when Applicant was interviewed by the OPM investigator, the issue of security was raised without any confrontation taking place. Applicant did not hesitate in setting forth the two security infractions. He denied receiving written warnings, but did acknowledge receiving a written letter of counseling. No disciplinary actions were taken against him for the security infractions. The SOR alleged that Applicant's responses were deliberate falsifications of material facts, supposedly because he had denied receiving written warnings for his security infractions and otherwise deliberately failed to report them. Although Applicant admitted the SOR

[43] The Appeal Board has explained the process for analyzing falsification cases, stating:

> (a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred.

ISCR Case No. 03-10390 at 8 (App. Bd. Apr. 12, 2005) (citing ISCR Case No. 02-23133 (App. Bd. Jun. 9, 2004)).

allegation, such admission was not an admission of his deliberate falsification, but rather an acknowledgment, based upon the guidance furnished by the OPM investigator, that Applicant's responses were incorrect. AG ¶ 16(b) has not been established.

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.

There is some evidence against mitigating Applicant's conduct. Applicant failed to fully comply with his responsibilities as COMSEC custodian on two separate occasions and he had two security infractions in June 2013. He denied ever having received anything that would apply to the question. A home mortgage loan was reported as delinquent and several student loans were placed for collection or charged off.

The mitigating evidence under the whole-person concept is more substantial than the disqualifying evidence. Applicant is a decorated combat veteran. Applicant's immediate supervisor, as well as other co-workers and friends, have characterized Applicant as a man of integrity who is helpful, honest, faithful, courageous, trustworthy, knowledgeable, responsible, approachable, loyal, and highly respected. In 2013, Applicant had become accountable for the production and accountability of over 25,000 COMSEC controlled items. It was a big role considering Applicant's "limited experience working with COMSEC." A member of the COMSEC team has observed Applicant always go the extra mile to ensure the COMSEC material entrusted to the COMSEC office is never out of proper storage controls and always handled by appropriately cleared and currently briefed facility personnel. Applicant is a good parent who has also coached little league baseball. Applicant's military senior rater wrote that Applicant "sets and maintains the highest standards of honor and trustworthiness."

Applicant's financial problems arose when his home mortgage loan was transferred from his original lender to another creditor. Applicant's routine monthly

mortgage payments to the new creditor were misapplied by it, and funds were diverted as property taxes and home owners insurance, items which he generally paid separately. The new creditor eventually acknowledged its errors and corrected them. The account's status is back to being current. The other financial issue arose when Applicant co-signed for two student loans for his son. The loans went into default at a time when they should have been in forbearance or deferred, incorrectly combined with his son's other student loans to reflect that they were all Applicant's. They were churned by the various lending agencies and servicing agencies, making it appear that there were more loans than there actually were. Applicant made loan payments for the two co-signed loans and has attempted to resolve the erroneously reported status of those loans with the various lenders and servicing agencies. He has no other delinquent debts. Applicant's actions under the circumstances do not cast doubt on his current reliability, trustworthiness, or good judgment.

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his financial considerations, handling protected information, and personal conduct. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

Formal Findings

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

Paragraph 1, Guideline F:	For APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Paragraph 2, Guideline K:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	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.

ROBERT ROBINSON GALES
Administrative Judge