DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[redacted]	)	ISCR Case No. 08-07644
SSN: [redacted]	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Richard Stevens, Esq., Department Counsel

For Applicant: F. Whitten Peters, Esq.,Thomas J. Roberts, Esq.,
Anthony K. Haynes, Esq., Embry Kidd, Esq.

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct) and K (Handling Protected Information). On consideration of the entire record, I conclude that Applicant has refuted the allegations under Guideline K and mitigated the security concerns under Guideline E. Eligibility for access to classified information is granted.

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Statement of the Case

Applicant submitted a security clearance application on April 24, 2007. On January 24, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline E. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense (DOD) on September 1, 2006.

Applicant received the SOR on January 18, 2010; answered it on January 29, 2010; and requested a hearing before an administrative judge. Department Counsel was ready to proceed on February 3, 2010, and the case was assigned to me on February 19, 2010.

Department Counsel amended the SOR on April 6, 2010, adding one allegation under Guideline K that cross-alleged the conduct alleged in SOR ¶¶ 1.b, 1.d, 1.e, 1.f, 1.h, 1.k, and 1.l under Guideline E. Applicant responded to the amended SOR on April 14, 2010, and he denied the Guideline K allegations.

Applicant's counsel requested that the hearing not be scheduled until late April 2010 due to the complexity of the case and number of senior-level witnesses. DOHA issued a notice of hearing on March 15, 2010, scheduling the hearing for May 4, 2010.

On April 26, 2010, I convened a prehearing conference at the request of both sides. There was no court reporter present. The purpose of the hearing was to mark and exchange documents; discuss scheduling; receive written objections and motions; and discuss administrative and logistical matters related to the hearing of this case. My Prehearing Conference Guidance was marked as Hearing Exhibit (HX) I and attached to the record. There was no discussion of the merits of any of the motions and no rulings. Department Counsel requested additional time to respond to the Applicant's motions, and we agreed that Department Counsel would be given until close of business on Monday, May 17, 2010, to file any responses.

I convened the hearing as scheduled on May 4, 2010. Subsequent hearing sessions were convened on May 5, 25, 26, and 27, and June 30, 2010. Department Counsel presented the testimony of three witnesses and submitted Government Exhibits (GX) 1 through 47. Applicant testified, presented the testimony of 14 witnesses and submitted Applicant's Exhibits (AX) 1 through 169. Objections to exhibits and my rulings are discussed below. Two additional witnesses testified at my direction.

At Applicant's request, I kept the record open to enable him to submit additional documentary evidence. He timely submitted AX 170 through 174. AX 171 and 173 were admitted without objection. AX 172 and 174 were admitted over Department Counsel's

objection. I granted the requests of parties for an opportunity to submit written closing statements, and they were timely submitted. They are attached to the record as HX LXVI and LXVII. Oral closing statements were scheduled for June 16, 2010, but postponed until June 30, 2010, at Applicant's request. Both sides presented oral closing statements on June 30, 2010. I granted the requests of both parties to submit written reply briefs after the hearing adjourned. Applicant submitted a reply brief on July 2, 2010, and it is marked as HX LXVIII. DOHA received the transcript on July 30, 2010.[1]

Procedural Rulings

Motion to Clarify SOR

Applicant moved to compel clarification of the SOR, complaining that Department Counsel has "refused to provide any link between any paragraph of the SOR and any particular document." (HX IV.) I denied the motion to provide the specific links requested by Applicant, but ordered Department Counsel to provide greater specificity for the dates alleged in SOR ¶¶ 1.a, 1.b, 1.d, 1.e, and 1.h. Applicant later renewed his earlier motion, specifically contending that Department Counsel had refused to clarify the purpose for which GX 40 and 41 were being offered. I again denied the motion. (HX XLVII.)

Directive ¶ E3.1.3 requires that the SOR be "as detailed and comprehensive as national security permits." The requirement of specificity pertains to the allegations, not to the evidence proving the allegations. *See* ISCR Case No. 02-05665 (App. Bd. May 7, 2003.) There is no requirement that Department Counsel disclose the specific links he or she intends to show between each item of evidence and each allegation. Thus, I ordered Department Counsel to be more specific about the dates of the alleged conduct, but I declined to require that he outline the evidence he intended to present in support of each allegation.

Motion to Compel Production of Complete and Unredacted Documents

Applicant moved to compel Department Counsel to produce complete and unredacted copies of GX 13, 14, 24, 27-31, and 39-41. All the documents had been obtained from another government agency and redacted to remove protected information. Applicant had obtained more complete copies of some documents by requesting them under the Privacy Act.

[1] The transcript consists of a separate numbered volume for each hearing day. Each volume is identified by the month and day followed by the specific page reference. Thus, the reference to the last page of the transcript for the hearing day on May 4, 2020 is Tr. 5/4 at 416. There are two versions of the transcript for the final hearing day, June 30, 2010. The first version was received on July 27, 2010. The second version (Tr. 6/30), revised after review by Applicant's counsel, was received on July 30, 2010. The second version was used for this decision.

Discovery by an applicant is limited to non-privileged documents and materials subject to control by DOHA. Directive ¶ E3.1.11. Department Counsel and Applicant are required to serve one another with a copy of any document to be submitted at the hearing. Directive ¶ E3.1.13. There is no requirement that Department Counsel provide Applicant with documents that he or she does not intend to offer in evidence. Furthermore, Applicant is only entitled to see what Department Counsel intends to submit; he is not entitled to compel Department Counsel to search for evidence that Applicant wishes to submit. Accordingly, I denied Applicant's motion. (HX XLII.)

Motion for Expedited Consideration of Security Issues

Applicant alleged that SOR ¶¶ 1.e, 1.j, 1.k, and 2.a appeared to be based on classified information, and asked that the admissibility of the underlying evidence be decided in advance of the evidence being offered. I denied the motion, because Applicant did not convince me that the issues could not be resolved in due course at the time the evidence was offered. (HX XLXI.)

Motion to Strike Certain Paragraphs of the SOR

After Department Counsel presented his case-in-chief, Applicant moved to strike SOR ¶¶ 1.e, 1.i, 1.j, 1.k, and 2.a on the ground that Department Counsel failed to present a prima facie case. Applicant moved to strike SOR ¶ 1.d, 1.e, 1.f, 1.g, 2.d, 1.e, and 2.f by removing the term "sensitive information" from each allegation, on the ground that Department Counsel had failed to present evidence defining "sensitive information." I denied the motion because there is no authority in the Directive to "strike" an allegation. The authorized remedies are to amend an allegation to conform to the evidence, or to resolve the allegation in an applicant's favor if it is not supported by substantial evidence. Neither side moved to amend the SOR.

Failure to Sequester Witness

Applicant presented the testimony of an expert witness regarding evidence adduced through polygraph examination. Over Department Counsel's objection, I permitted the expert witness to be present in the hearing room while a polygraph examiner testified about his interview of Applicant. (Tr. 5/25 at 45-46.) Fed. R. Evid. 615 recognizes an exception to the sequestration rule for an expert whose opinion is to be based upon the testimony of another witness. *See United States v. Seschillie*, 310 F.3d 1208 (9th Cir. 2002), *cert. denied,* 538 U.S. 953 (2003); *Mayo v. Tri-Bell Indus., Inc.,* 787 F.2d 1007, 1013 (5th Cir. 1986).

Administrative Notice

Department Counsel requested that I take administrative notice of the statutes pertaining to protection of agency functions, classification of documents, designation of documents as "For Official Use Only" (FOUO), Executive Orders and statutes prescribing standards of ethical conduct, and the Freedom of Information Act. (HX III as

amended by HX IX, HX XXIV, and LVII). Applicant objected on the ground that the versions presented for administrative notice were not relevant because they were not in effect at the time of the conduct alleged in the SOR. (HX XVI, XXV, and XLIV.) I granted Department Counsel's request as amended, subject to evaluating the relevance of the material.

Department Counsel also requested that I take administrative notice of two Appeal Board decisions (HX LXI) and documents pertaining to the nomination and confirmation of a U.S. [redacted] (HX LXIV). Applicant did not object, and I took administrative notice as requested.

Applicant requested that I take administrative notice of Department of Defense regulations pertaining to designation of documents as FOUO. (HX XLIV.) Department Counsel did not object, and I took administrative notice as requested. (HX LVII.)

In support of an objection to AX 172, Department Counsel requested that I take administrative notice of a DOD Inspector General Report pertaining to the substandard duty performance of the declarant. (Tr. 6/30 at 6-10). There was no objection, and I took administrative notice as requested. The report is attached to the record as HX LXV.

Except for HX LXV, the adjudicative facts administratively noticed are set out below in my Findings of Fact. I have considered the conclusions in HX LXV in determining the weight to be given to AX 172. The legal references administratively noticed are discussed below in the "Analysis" section of this decision.

Evidentiary Rulings

Before and during the hearing, both sides made numerous evidentiary objections. Two tables summarizing these objections, my rulings, and the record citations are attached to this decision as appendices. Many of Applicant's objections were mooted by testimony of the declarant, withdrawal of SOR allegations, or my favorable findings of fact. The table of evidentiary issues for government exhibits is attached as Appendix A; the table for Applicant's exhibits is attached as Appendix B.

The objections by both sides were based on relevance, the hearsay rule, lack of authentication, denial of the right to cross-examine the declarant, and the rule of completeness. I denied the objections based on relevance and hearsay, following the Appeal Board's general preference for administrative judges to admit evidence and then consider the evidentiary concerns in determining its weight. *See* ISCR Case No. 04-12449 (App. Bd. May 14, 2009). It is well-settled that hearsay evidence is admissible in security clearance hearings. *See Hoska v. U.S. Department of the Army,* 677 F. 2d 131, 138-39 (D.C. Cir. 1982); ISCR Case No. 03-06770 (App. Bd. Sep. 9, 2004). In several instances, the objections based on denial of the right to cross-examine the declarant were mooted when the declarant testified. Where the declarant was not identified or did not testify, I admitted the documents as official agency records, but considered the opposing party's inability to cross-examine the declarant in deciding the

weight to be given to the documents. *See* ISCR Case No. 06-06496 (App. Bd. Jun. 25, 2009).

Applicant made numerous objections based on Fed. R. Evid. 106, the "rule of completeness." The rule is intended to ensure that evidentiary material is not taken out of context. Although some exhibits were heavily redacted, the redactions did not affect my ability to determine the context in which statements were made.

In most cases, the "completeness" objection was actually an objection based on inability to identify or cross-examine the declarant under Directive ¶ E3.1.22. In this regard, the Appeal Board has held that Directive ¶ E3.1.22 does not require exclusion of statements that are admissible as official records under Directive ¶ E3.1.20. *See* ISCR Case No. 06-06496, *supra.*

To the extent that Applicant attempted to use Fed. R. Evid. 106 as a discovery rule, arguing that Department Counsel should obtain the redacted portions of documents and provide them to Applicant, I denied the objections, because Rule 106 does not require the proponent of the document to supply the missing parts to the opposing party. It merely entitles the opposing party to admission of the missing parts. Applicant was not entitled to invoke Rule 106 to insist that Department Counsel present the redacted portions of a document. However, he was entitled to present whatever evidence he had concerning redacted portions of the document as part of his case. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988).

Findings of Fact

In his answer to the SOR, Applicant denied all the allegations, but he admitted some facts alleged in his hearing testimony. His admissions at the hearing are described below and included my findings of fact. The facts administratively noticed are set out below.

Applicant is a 65-year-old consultant employed by a defense contractor. He held a security clearance from June 1974 until 1986, and from 1989 to 1993. He applied for eligibility for access to Special Compartmented Information (SCI), but his application was denied by another agency in January 1993 (GX 20.) He did not appeal, because he no longer needed a clearance. (Tr. 5/27 at 6-8.) He received a DOD clearance in January 1997 (GX 1 at 9.) He applied for a clearance from another agency, and it was denied in November 2000 (GX 23.) He applied again for a clearance and SCI access as a DOD employee in 2002. His application was denied in March 2003, based on reciprocal recognition of the earlier denial by the other agency. Based on the denial of SCI eligibility, his collateral clearances were revoked in 2004. (GX 42 at 21; Tr. 5/27 at 11-14.)

Applicant holds a doctorate from a prestigious university and is widely regarded as a . He has published numerous books and scholarly articles on . Two of his books were admitted

as evidence in this case (AX 160 and 161). He speaks several foreign languages fluently. [redacted]

Applicant began working for a defense contractor in 1973. His employer performed classified research for various agencies of the Government. Employees were required to complete the requirements for a doctoral degree as soon as possible, and they were expected to establish academic credentials by becoming widely published. Shortly after being employed, Applicant met the national security lawyer who later represented him in his efforts to keep his SCI clearance. (Tr. 5/26 at 113-14.) Applicant's employer had an extensive collection of classified research materials, an extensive manual of industrial security practices, and its own security department. His employer required prepublication review of everything to be published, in addition to any prepublication review required by the contract sponsor. As part of the employer's "publish or perish" policy, it would publish articles and send them to selected groups of national security experts, journalists, and other generalists and specialists. The articles were based on open source material but often addressed politically sensitive issues. Some of Applicant's work involved interviewing foreign military officials, making speeches, testifying before Congress, writing editorials for major newspapers, and talking to newspaper reporters. (Tr. 5/26 at 118-147; AX 1 through 9; AX 11.)

Applicant was allowed to work at home on unclassified projects involving open source material, and he accumulated an extensive library of books and periodicals, as well as an extensive computer database. (Tr. 5/26 at 147-49.) If Applicant created a document at home that later incorporated classified materials, he would take the document to his office, load it onto a classified computer, and then add the classified material. (Tr. 5/26 at 150-51.)

Applicant served as a [redacted] from 1978 to 1984 and from 1986 to 1991. He worked intermittently as a special government employee for a few days in May 1981 and from January 1998 to June 1999. He was a federal employee from September 1984 to April 1986, from August 1992 to February 1993, and from July 2001 to March 2003. (AX 159; GX 42 at 18.) He began working for a defense contractor in 2007 and submitted his current application for a clearance in connection with that employment. (GX 1.) If he receives a clearance, he will work on a DOD contract, supervised by a senior official in the DOD, who has worked in DOD for 36 years and has known Applicant since 1973. This official knows that Applicant is outspoken and controversial, but he considers him "a person of great integrity who has displayed a fastidious attention to protecting classified information." (AX 138 at 2.)

During his last stint of federal employment in 2001-2003, Applicant became concerned about a possible conflict of interest arising from his multiple and overlapping roles as a special government employee, a private citizen engaged in research and writing, and a defense contractor. During an interview with DOHA officials in September 2009, he stated that he consulted with an attorney in the government ethics office and was advised that there was no conflict of interest. (GX 42 at 19.)

Applicant is a controversial person. He was described by a former fellow as a "pathological liar." (GX 40 at 31.) A former supervisor in the DOD described him as extraordinarily intelligent, intense, and dedicated, but commented that his aggressive personality often irritated others and provoked complaints that he overstepped his authority. (GX 40 at 15.) When Applicant was in eight supported his but cautioned that he lacked humility. (GX 34.)

On the other hand, Applicant had a reputation among some for meticulously safeguarding classified documents. A former , now a career government employee with a top secret clearance, testified that she worked for Applicant for more than four years. She regarded Applicant as her mentor on security awareness and the importance of discretion in a political environment. She described him as extremely meticulous in protecting classified information. (AX 63 at 3-5.)

One of Applicant's former fellow , who worked for seven years as an intelligence analyst and 14 years as a , testified that Applicant is a brilliant expert in . He described Applicant as very conscientious and a person of high integrity. He described the work of a as "walking on eggshells every day," because of the need to draw the line between classified and unclassified information and to balance security requirements with political strategy. In this witness's view, everything in is politically sensitive. (Tr. 5/25 at 147, 150, 154-56, 208.) He testified Applicant was admired by fellow for his "ability to balance the responsibility of talking to the press and yet maintaining the boundary between what's classified and what's unclassified." (Tr. 5/25 at 158.)

Applicant is a worrier, second-guessing himself after making a comment and wondering if he divulged classified information. He testified that when there was a "huge front page story" based on a classified leak, he wondered if there could have been the "slightest scintilla" of a connection between something he said to a reporter and the newspaper story. (Tr. 5/27 at 103). A former who has known him for about 20 years testified he has "an excruciating conscience," and that he "may sometimes exaggerate his influence." (Tr. 5/26 at 76.) He is intimidated by polygraph examiners because of the power they have to rephrase possible admissions or to submit a report indicating deception. (Tr. 5/26 at 311-12, 352-53.)

Applicant's former lawyer has considerable expertise and experience in national security law and security clearance investigations, has served as a security consultant to DOD agencies, and provided security advice to Applicant's DOD supervisor in the . He is aware of the allegations in the SOR as well as other security investigations, has advised Applicant on ways to protect classified and sensitive information and to protect himself from false accusations. He describes Applicant as "an extraordinarily self-disciplined person." (Tr. 5/5 at 150.)

In 2003, Applicant's potential future supervisor asked a special assistant with considerable military and civilian experience in security administration and practices, handling of classified material, use of polygraphs in counter-intelligence, and the political process, to review GX 24, the report of investigation supporting the decision to deny Applicant eligibility for SCI access. The report of investigation, which is heavily redacted, addressed numerous allegations, including those now alleged in SOR ¶¶ 1.b, 1.c, 1.d, 1.f, 1.k, and 1.l. The special assistant reviewed only the redacted version, because he could not obtain the unredacted, classified version of the report of investigation. (Tr. 5/5 at 190.) The special assistant concluded that the report of investigation was seriously flawed in numerous respects. He concluded that the adjudicator was biased, did not understand key facts, omitted facts favorable to Applicant, and did not use an evidence-based process for his conclusions. (AX 108.) He showed his draft report to Applicant's current sponsor, who told him to send the report to a senior official in DOD. (Tr. 5/5 at 170.)

The special assistant worked with Applicant for about 15 months until Applicant lost his clearance, and worked with him on unclassified matters from 2002 to the date of his testimony. He found that Applicant was very meticulous in handling classified materials and regards him as a person of high integrity. (Tr. 5/5 at 164-65.) He also testified that Applicant "can be abrasive at times, viewed as arrogant by a lot of people and probably rightfully so," but he had no concerns about his judgment on security issues. (Tr. 5/5 at 195.) He admitted that, having worked with Applicant for some time, he was not a "completely independent and neutral" reviewer of GX 24. (Tr. 5/5 at 201.)

Several witnesses, including a senior member of the intelligence community for 28 years, testified that denial of Applicant's SCI eligibility was motivated by disagreement with his views and was the result of trumped-up charges. (Tr. 5/25 at 213-231; AX 107.) Another former senior official in the intelligence community, who served in four senior positions by ████████████ and who has known Applicant for about 48 years, testified that he supported Applicant's effort to reinstate his security clearance in 2005, but the effort was terminated when Applicant no longer needed a clearance. The witness testified he believed the decision to revoke Applicant's clearance was the result of policy disputes rather than legitimate security concerns. He was aware the Applicant had taken positions suggesting that policy experts had been deceived by false information, and those experts were embarrassed when the information was shown to be false. Based on his personal and professional interaction with Applicant, he considers him a "sound and honest man." He disagrees with the characterization of Applicant as undisciplined and unwilling to follow rules and regulations. When asked if he recommended that Applicant be given a security clearance, he responded, "Absolutely." (Tr. 5-25 at 287-307; AX 116.)

Applicant has consulted with a psychiatrist for many years, beginning in August ████, when he sought help for depression, manifested by irritability, depressed mood, insensitivity to others, anxiety, and sleep disturbance. In February ████, the psychiatrist concluded that his depression had been successfully treated with psychotherapy and medication. (AX 167 at Exhibit A.) In May ████, his psychiatrist supported his

application for a clearance, noting that he saw Applicant three times a week and that Applicant had improved his overall behavior through insight gained in psychotherapy. (AX 167 at Exhibit B.) In May 2010, the psychiatrist submitted an affidavit addressing the issues in the SOR. The affidavit noted Applicant's tendency to procrastinate, his tendency to be too self-critical, and his failure to be more assertive during interviews by security investigators and polygraph examiners. (AX 167 at 1-5.)[2]

In the last ten years, Applicant has worked to reduce the stressors in his life. He married a woman he has known for 20 years, cut back on his foreign travel, cut back on interaction with foreign officials, and reduced his media contact. (Tr. 5/27 at 68.) He has been chastened by his long fight to obtain, retain, and regain his security clearances. He believes he has become more cautious and less flamboyant and provocative than he was 10 years ago. (Tr. 5/27 at 68-70.) He testified he is wary of dealing with the press, having been "too badly burned in the past." (Tr. 5/27 at 35-36, 47-48.)

Numerous present and former senior officials within the DOD testified, submitted statements, or both in support of granting Applicant a clearance. They describe him as a person of high integrity, good judgment, reliability, discretion, and conscientious protection of classified information. (AX 168, 170-173, and 175.)

Applicant denied all the allegations in the SOR. Department Counsel withdrew SOR ¶¶ 1.a and 1.j. (Tr. 5/25 at 323; Tr. 5/27 at 12.) The remaining allegations concern ten separate incidents. For seven incidents, the same conduct is alleged under Guideline E and Guideline K. My findings of fact are set out below under each Guideline E allegation and its Guideline K counterpart for cross-alleged conduct.[3]

<u>SOR ¶¶ 1.b and 2.a:</u> In [redacted], Applicant was given a draft [redacted] policy document by a stranger, had reason to believe it contained classified information, and gave a copy of it to a newspaper reporter.

In [redacted], when Applicant was then employed by a defense contractor, he was given a document by a young man whom he did not know at a cocktail party. The man appeared to be a consultant for a defense contractor. The man told Applicant that he believed the document was consistent with Applicant's views on future relations with a foreign country of strategic importance to the United States, and that he had incorporated many of his Applicant's ideas into the paper. Applicant was well known for his views advocating increased military contacts with the country. The man told Applicant he hoped the document would be part of the [redacted] review of U.S. policy. At the hearing, Applicant described the document as an "advocacy piece." The document had no classification markings. (Tr. 5/26 at 159, 163-65.)

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[2] The psychiatrist's affidavit refers to Exhibit C, a 1978 letter recommending approval of Applicant's application for a clearance. Exhibit C is not included in AX 167, but it is included in the record as AX 12.

[3] The SOR allegations are compressed and summarized in this decision. They are intended to be topic headings rather than a full recitation of each allegation.

██████ issued a classified ██████ Memorandum ██████ ███. It is now declassified. It directed a review of future U.S. relations with the foreign country, It identified topics to be studied, defined the problem to be analyzed, set a deadline for completion of the study, and assigned responsibility for conducting it. (AX 126.)

In early ████, Applicant told a newspaper reporter that there were people in the Congress who were keeping alive the issue of future relations with the foreign country. (Tr. 5/26 at 167-69.) The reporter was a well-known journalist that Applicant's employer had encouraged him to use to gain favorable publicity. About two weeks later, on ██████, the newspaper announced the issuance of the ███. The newspaper article recites that the newspaper obtained a copy of the classified ███ on the date of the article. The article contains a broad discussion of U.S. foreign policy, discusses the differing views within the administration, and suggests a policy decision that was contrary to Applicant's views. (AX 125.) Applicant denied giving any classified information document to the reporter. (Tr. 5/26 at 168-69.)

In October ███, Applicant submitted a sworn statement to a polygraph examiner, in which he talked about his contacts with the newspaper reporter in ███. He told the investigator that the reporter "wrote two articles for which I provided information that drew upon my classified knowledge of U.S. government debates on policy." He told the investigator that he concluded that, after undergoing polygraph examinations and receiving clearances in 1978 and 1983, the information he provided to the reporter was unclassified, but that he has "always had strong doubts about the classification." GX 6 at 1. At the time Applicant submitted his statement to the polygraph examiner, the █████ document had not been declassified and Applicant had not seen it. (Tr. 5/26 at 171.) The cocktail-party document is not in the record, and the only evidence regarding it is Applicant's statement to the examiner.

Applicant testified that he disclosed the incident to the polygraph examiner as an example of a challenging situation where he had "drawn the line" between classified and unclassified information in his dealings with reporters. He also testified that he had been advised to tell a polygraph examiner about anything that worried him, in order avoid having the examiner conclude that deception was indicated. (Tr. 5/26 at 167-68.)

Applicant was interviewed again in October 1999, in connection with his application for access to Special Compartmented Information (SCI). A one-paragraph summary of the interview recites that Applicant gave the cocktail-party document to the reporter and "rationalized passing [the document] to the media by telling himself that the paper had no classification on it."

The interview summary of the October 1999 interview also recites that Applicant "further stated that in hindsight he should have checked and described it as a judgment call." GX 24 at 17. At the hearing, Applicant denied making the statement. He surmised that this statement may have been in response to a "throwaway question" from the examiner, such as, "Wouldn't it have been better if you had checked?" (Tr. 5/27 at 102.)

The evidence establishes that Applicant had an ongoing relationship with a well-known newspaper reporter that was not only permitted but encouraged by his employer. Applicant received a document advocating a change in U.S. policy at a party, and told the reporter about it. Two weeks later, the newspaper announced the policy review, citing classified information it received on the day the newspaper was published, and suggesting a policy change that was contrary to Applicant's views. There is no evidence that Applicant gave classified or sensitive information to the reporter. However, Applicant's failure to verify that the document contained no classified information raises a concern about his judgment.

<u>SOR ¶ 1.c:</u> In [REDACTED], Applicant was fired [REDACTED] for his comments to the media concerning U.S. policy [REDACTED]

Applicant was hired in [REDACTED]. When Applicant accepted the position, he was still working on a project for the DOD. [REDACTED]. (Tr. 5/4 at 332, 364.) However, some of the topics to be discussed on the trip were of interest to both [REDACTED]. (Tr. 5/26 at 189-90.) As part of his planning for the trip, Applicant requested support [REDACTED]. He also included suggested topics with U.S. foreign policy implications during meetings with officials. Although Applicant made this trip as a contractor employed by [REDACTED], the tasking message identifies him as the [REDACTED] (AX 149.) He testified he did not remember if he informed [REDACTED], his immediate supervisor, of his schedule of DOD activities. (Tr. 5/27 at 109.) However, a [REDACTED] gave [REDACTED] a copy of Applicant's request for support and the follow-up correspondence. (AX 15.)

[REDACTED] (GX 33.) Due to translation problems, his comments were portrayed as more extreme than what he actually said. (AX 27 at 5; Tr. 5/27 at 193-94, 201.) Applicant also made comments that were translated to suggest that [REDACTED] might not be "in touch" with current developments [REDACTED]. The [REDACTED] sent a letter to the [REDACTED], complaining that Applicant had not visited him or any of the [REDACTED], had made comments inconsistent with [REDACTED] efforts, and had suggested that he was out of touch [REDACTED]. (GX 32.)

Applicant was recalled from overseas, and his supervisor on [REDACTED] "gave [him] six weeks to find new employment." His supervisor believed that, as [REDACTED], he should have kept a "low profile" and stayed behind the

scenes. (GX 40 at 27-28.) An investigation by a [redacted] for another [redacted] concluded that Applicant's termination was premature and motivated by [redacted] pressure rather than the substance of the issues. (AX 16; AX 27; Tr. 5/4 at 334.)

The evidence establishes that Applicant made the overseas trip under difficult circumstances, traveling with [redacted] on a [redacted] tour but working independently of the committee on [redacted] project. He made some protocol mistakes and was the victim of a poor translation that made his comments about [redacted] and suggestions of a change in U.S. policy sound more inappropriate than they were. Nevertheless, his unguarded comments about sensitive U.S. policy issues and an [redacted] lack of [redacted] awareness raise questions about his judgment.

<u>SOR ¶¶ 1.d and 2.a:</u> In [redacted], Applicant provided sensitive but unclassified information to a newspaper reporter to discredit and embarrass a political adversary, and failed to inform his supervisor that he had leaked the information.

In December [redacted], while working [redacted], Applicant was detailed to serve on [redacted]. Team members were detailed to various [redacted] to represent [redacted] and his advisors during the [redacted]. (Tr. 5/25 at 190.) Applicant continued to report to his supervisor [redacted] and was paid as [redacted]. [redacted], and his duties included responding to press inquiries. (Tr. 5/25 at 160-61.) [redacted]. (Tr. 5/26 at 240.)

While serving on [redacted], Applicant received an electronic communication that was marked "Secret" but had no internal security markings. The practice in the [redacted] department in which the communication was generated was to mark the overall classification of the materials, but to not mark the classification of each paragraph. (Tr. 5/5 at 186-87.) The communication included unclassified notes about a meeting with [redacted]. The notes indicated to Applicant that [redacted] had misrepresented the policy position of [redacted] on a specific issue. Newspaper reports quoted [redacted] as representing that he and [redacted] agreed on the issues discussed. (AX 141.) After being asked for comments by a newspaper reporter, Applicant consulted with other team members and his [redacted] supervisor about whether he should talk to the press about the misrepresentation of the [redacted] views and, if so, what he should say. After clearing his remarks with his [redacted] supervisor, he told the newspaper reporter that [redacted] views were not those of [redacted]. (Tr. 5/25 at 167.)

The file pertaining to the denial of Applicant's SCI access includes a summary of an interview with a polygraph examiner in October 1999. The summary recites that Applicant admitted to the examiner that he gave the information to the newspaper intentionally to embarrass [redacted], to please [redacted] who shared his views, and to influence [redacted] outcomes. (GX 24 at 17.)

Applicant testified that the polygraph examiner's summary of their interview was not accurate in three respects. First, Applicant responded to an inquiry from a reporter, who recited the facts from newspaper articles, not from internal government communications. The thrust of the reporter's call was to ask if believed was representing when he made his statements. Second, Applicant did not admit that his motive was to embarrass the . His intent was the draw a line between views and what the had said during the . Third, Applicant did not act to please . He acted to carry out the instructions of to distance message from the message. (Tr. 5/26 at 229-230.) Applicant did not see the polygraph examiner's summarization of his interview until he appealed the denial of his application for SCI access. (Tr. 5/26 at 238.)

In an interview with Department Counsel in September 2009, Applicant stated that he heard "gossip" about a leak investigation, but he did not volunteer any information because he was not responsible for the leak. He stated that the information in the newspaper story was much broader than he had disclosed to the reporter and more than he knew about the incident. (GX 42 at 44.)

The evidence establishes that Applicant, while a member of , spoke to a newspaper reporter to contradict representation that he and agreed on a specific issue. Applicant cleared his contact and the substance of his remarks with supervisor. There is no evidence that Applicant disclosed classified information. The information was politically sensitive, but not "sensitive" in the national-security sense.

Furthermore, the interview summary pertaining to Applicant's motives does not purport to quote Applicant. The identity of the interviewer was withheld, and the interviewer was not available for cross-examination. Under these circumstances, I find Applicant's statement of motives for contradicting more plausible and credible than the anonymous interview's summary. I conclude that Applicant has rebutted SOR ¶ 1.d and the part of SOR ¶ 2.a cross-alleging ¶ 1.d.

SOR ¶¶ 1.e and 2.a: In while working as and participating in visit overseas, Applicant provided sensitive information to a newspaper reporter concerning the personal activities of a during the trip for the purpose of embarrassing .

In November Applicant was serving as . The assigned him to participate in a two-week to several countries. The delegation included alleged in the SOR, another more junior support staffs for both several , and Applicant. The senior on the trip was a rival of , and there was friction throughout the trip because Applicant was regarded as "watchdog."

Applicant and several other members of the delegation were excluded from meetings because there were too few seats. Applicant was frustrated by the exclusion because it made it impossible for him to report to about the delegation's activities. In a sworn statement in February 1989, Applicant commented that he thought there was too much shopping and frivolous activity on the trip. Applicant testified that he had heard the rumors about excessive shopping and avoidance of customs duties, but he had no personal knowledge. When the delegation returned, they were confronted by a newspaper reporter about jewelry purchases and an allegation that had not paid the required customs duty. Someone, not positively identified in the record, contacted and accused Applicant of leaking the accusation to the press. Applicant was suspected of leaking the embarrassing information because of his abrasive personality and his frustration at being excluded from meetings during the trip. He believed he was the frequent target of unsubstantiated allegations because of his lack of tact and offensive behavior. (GX 8 at 10.) The told a security investigator that Applicant's actions often were a source of extreme irritation and embarrassment to him. (GX 41 at 18.)

The asked Applicant if he was the source of the information, and he told Applicant to try to kill the story because it would likely cause Applicant contacted the reporter, told him how successful the trip had been with respect to counter-narcotics , and reminded the reporter of a previous lawsuit against him for malicious reporting of derogatory information about a prominent businessman. The story was never published. (Tr. 5/26 at 248-50.)

The delegation secretary, now an employee of an intelligence agency with a clearance, submitted a sworn statement to a security investigator in February 1989. She stated that the newspaper reporter began researching the story shortly after the trip. He contacted several members of the delegation and obtained copies of official communications during the trip. She was present when Applicant told the reporter that "he was making something out of nothing." (GX 35 at 9-10; AX 63 at 9-10.)

According to Applicant, the reporter told him that the senior staff discussed the shopping issue with him. The reporter appeared to have read the trip communications during the trip. (GX 8 at 9; GX 42 at 53-65.) During a DOHA interview in September 2009, Applicant pointed out that there were "five or more" persons who could have leaked the information, such as personnel, who owed no loyalty to , or the customs officials. (GX 42 at 63.) When was interviewed in February 1989 by a security investigator, she remembered Applicant being a member of the delegation, but she had no recollection of his duties and could provide no "insight or information" about him. (AX 62.)

I conclude Applicant has rebutted this allegation. The evidence shows that the reporter talked to several members of the delegation and obtained copies of its communications. The conclusion that Applicant leaked the information is based on speculation and conjecture.

<u>SOR ¶¶ 1.f and 2.a:</u> In , Applicant was dismissed from a senior government position for providing classified information concerning U.S. to foreign countries to a newspaper reporter.

<u>SOR ¶ 1.g:</u> In , Applicant intentionally withheld information concerning the extent of the sensitive information he had provided to the newspaper reporter.

Applicant was dismissed from his position in the DOD in , but the basis for his dismissal was a report from a polygraph examiner that Applicant had admitted compromising . Applicant's supervisor later learned that the report was false, and that someone else was source of the information about . (Tr.5/5 at 31; AX 53; AX 137 at ¶ 7.) His supervisor believes that the false report was in retribution for exposing factual errors in the agency's analysis of a sensitive issue. (AX 53; AX 137 at ¶ 15.)

When Applicant's supervisor learned that he had fired Applicant based on a falsified report from a polygraph examiner, he contacted members of the and senior officials in the DOD and told them that he had made a mistake by firing Applicant. He supported reinstatement of Applicant's clearance when Applicant was considered for positions on the staff and within the DOD that required a clearance. (Tr. 5/5 at 30-38; AX 53; AX 69.) DOD determined that Applicant's security clearance had been revoked "somewhat precipitously," and his clearance was reinstated in November 1989. (AX 162.).

In Applicant's supervisor was advised by a security consultant to prohibit subordinates with access to highly sensitive programs from speaking with the press. (AX 139 at 4.) The security consultant testified that former tend to have high confidence that they can deal with the press effectively, but that press contacts by subordinates working with "truly sensitive national security information" was a "poor juxtaposition." (Tr. 5/5 at 143.) Applicant's supervisor initially heeded the advice. The security consultant testified that Applicant complained about the prohibition on media contacts, but Applicant could not remember having any direct conversations with the consultant about the prohibition (Tr. 5/4 at 147; Tr. 5/27 at 122-23.) Around , Applicant's supervisor authorized him to be the office's spokesman with the press. (AX 137 at 14.) Applicant believed that his supervisor had instructed him to meet with the press regularly, and he did so about once a week. (Tr. 5/26 at 247.) Applicant also believed he had a mandate to find out what stories the reporters were working on so that senior DOD officials could "stop bad stories or shape ones that were coming out." (Tr. 5/27 at 128, 135.)

Applicant began having regular contacts with a newspaper reporter in and He had dinner with this reporter in , to discuss a biographical article the reporter was writing about a senior intelligence official. Applicant believed he had "a broad mandate – based on common sense – to use unclassified information to convey a favorable impression of defense policy to the press and to the Congress." (GX 10 at 7.) He testified these two dinner meetings were the only times in

his career that he discussed official business with the press over dinner. (Tr. 5/27 at 142.) His supervisor recognized that he may have "overused" Applicant as a press spokesman, and he talked to Applicant about "toning it down a bit." (AX 137 at ¶ 13.) A former colleague and close personal friend of Applicant told investigators that Applicant maintained a regular association with a number of newspaper reporters. (GX 40 at 54.) At the hearing, Applicant testified he did not remember a "moratorium" on press contacts, but he did remember his supervisor asking him to "tone it down a bit." He interpreted his supervisor's guidance to mean that he should spend less time with the media. (Tr. 5/27 at 118.)

In [redacted], Applicant talked to a newspaper reporter concerning U.S. [redacted] He had worked for two years to overcome internal government opposition to [redacted]. His efforts came to fruition in [redacted] when the [redacted] approved [redacted].

On the morning of Saturday, [redacted] the reporter called Applicant at his home and they discussed whether the reporter would attribute a quotation in the biographical article to Applicant by name. Applicant was surprised when the reporter told him that the biographical article would be accompanied by a story on the [redacted]. The reporter read him the text of the story, did not ask him anything about the decision to make the [redacted], and did not ask him to confirm any details about the story. However, Applicant decided to try to talk him out of publishing the article by denigrating the quality of the [redacted] being [redacted] falsely telling him that the [redacted] had already been [redacted] and suggesting that the number of [redacted] were fewer than what the article reported. The issue was politically sensitive because of the likelihood that some members of Congress would attempt to block the [redacted] if the [redacted] decision was disclosed prematurely. (GX 10 at 5; GX 12 at 2; Tr. 5/26 at 260-62.) The article was published on [redacted]. (GX 25-GX 28.)

Applicant called his supervisor at home immediately after his conversation with the reporter about the [redacted] and notified him of the conversation and the newspaper story about to be published. His supervisor cautioned him about lying to the press because he would lose credibility, and thanked him for trying to kill the story. (Tr. 5/26 at 262-63.)

One of Applicant's fellow [redacted] [redacted] testified that [redacted] referred to in the newspaper article was one of several programs where the policy debate was overt and debated publicly, but the details regarding execution of the policy were covert and classified. There were disagreements within the executive branch and significant opposition in Congress. (Tr. 5/4 at 273-81.) The witness was well acquainted with the two reporters responsible for the newspaper article. Based on his conversations with the reporters as well as other [redacted] the witness concluded that the source of the information in the newspaper article came from [redacted] or [redacted] and not from Applicant. (Tr. 5/4 at 285-292.)

Another former who worked for Applicant testified that, after the newspaper article appeared, she learned that the reporters had sources of information about the within the receiving country. (Tr. 5/4 at 302; AX 38.) She also testified that she listened to a telephone conversation with a fellow and the reporter who wrote the article, in which the asked the reporter if Applicant was the source and the reporter emphatically replied that he was not. (Tr. 5/4 at 304; AX 39.) She listened to the conversation at Applicant's request and with the consent of the In February , she submitted a sworn statement to the two agents investigating the leak of information to the reporter, providing the same information about the conversation between the and the reporter as she did at the hearing. (AX 63 at 15.)

A third who worked with Applicant testified that during a conversation with one of the newspaper reporter's rivals, he learned that Applicant was not the source of the story. According to this , the sources were several and another . (AX 40; Tr. 5/25 at 173-75.) The consensus among Applicant's fellow was that Applicant had no motive to leak the story because it threatened to undo all his work toward presidential approval of the . (Tr. 5/25 at 192.)

Applicant was interviewed by polygraph examiners on March 5, March 31, and May 5, , about his conversations with the reporter. During these, interviews, Applicant used a highlighter to mark the portions of the newspaper article that he had discussed with the reporter. (Tr. 5/4 at 206; GX 25; GX 26; GX 29.[4]) None of the highlighted portions were classified. Applicant was not the original source of most of the information in the article, but he acknowledged that he was the source of several collateral elements of the story. He eventually acknowledged that his conversation with the reporter may have had the effect of confirming the story. (GX 12 at 4; AX 123 at 17; Tr. 5/4 at 289; Tr. 5/5 at 125.) At the end of the March 5 interview, the examiner suggested that Applicant had not been totally truthful, and Applicant responded: "I'm beyond the point, where I can accurately and precisely say or know for sure how much of my conversations with [the reporter] are in that article. I did my best in trying to prevent the story from disclosing any classified information." The examiner put quotation marks around Applicant's response to indicate that they were his exact words. (AX 130 at 8; Tr. 5/4 at 241.)

At the end of the second interview on March 31, the polygraph examiner reported that Applicant admitted he had not been completely candid during the March 5 interview and that he had "hedged" on the amount of the information he had provided to the reporter. (GX 29 at 1.) The examiner testified that he put the word "hedged" in quotations in his report to indicate that it was the word used by Applicant. (Tr. 5/4 at 214.)

It is difficult to discern from the record what information Applicant withheld. The examiner's report is heavily redacted and the examiner's report is the only record of the

[4] The copies of the newspaper article are the best available, but nearly illegible. Applicant prepared and submitted AX 132, a reconstructed copy of the article and highlighted portions.

questions and answers during the pretest interview or the examination. The examiner's report reflects that one of the questions was whether Applicant provided or confirmed more of the information in that article than he had previously revealed to the examiner. (GX 29 at 1, 3.) The examiner reported that Applicant denied that he had "revealed" any of the information in the newspaper story, but believed he "may have" confirmed some items in the story, again using quotation marks to indicate the exact words used by Applicant. (Tr. 5/4 at 239; GX 131 at 1.) According to the attorney representing Applicant at the time, Applicant was concerned about the meaning of "confirm" and he found it difficult to speculate about the impact of his comments on the newspaper article. (GX 123 at 15.)

According to Applicant, the examiner asked him "if it was even faintly possible that the unclassified information and the misinformation [he] had disclosed to [the reporter] in sum could have somehow made [the reporter] more certain of his story." Applicant responded that if he were forced to speculate, it was "barely possible" that he might have confirmed what the reporter already knew. The examiner then asked Applicant if he had said this to the investigators in April ████. Applicant answered "No," and the examiner said, "You should have told them." (GX 9 at 4.) Applicant's failure to disclose the possibility that he had effectively confirmed the reporter's story is apparently the basis for the allegation that he intentionally withheld information from investigators in April ████

Applicant underwent a third polygraph by another examiner on May 5, ████ The examiner's report recites that during the pretest interview Applicant "acknowledged that he had not been candid" during previous interviews. According to the examiner's report, Applicant "deliberately withheld information from the investigators in an attempt to minimize his responsibility for information that appeared in that article," and that, in March ████ he "continued to withhold information . . . in an attempt to reduce his culpability." (GX 30.) The examiner's report does not identify whether he is referring to the March 5 interview, March 31 interview, or both. There is no evidence that Applicant withheld any information during the May 5 interview. A memorandum from Applicant's lawyer during these three polygraph examinations indicates that the alleged lack of candor referred to in the third examiner's report is the same difficulty with the term "confirm," discussed above regarding the first two polygraph examinations. (AX 123 at 15-16.)

Applicant's supervisor at the time the newspaper article appeared reviewed the portions of the article highlighted or annotated by Applicant, and concluded that none of the information was classified or sensitive. His supervisor also testified that the information could not have been designated as "For Official Use Only" (FOUO), because that category of information did not exist in ████. (Tr. 5/26 at 13-14.)[5] Notwithstanding the concerns of the polygraph examiners, Applicant was granted a clearance in 1989. (Tr. 5/26 at 293.)

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[5] While the FOUO designation may not have been used in the witness's agency in ████, the designation was used in the U.S. Army as early as the 1960s. *See* Guideline E Analysis at p. 30, *infra*.

The evidence establishes that Applicant did not provide classified or sensitive information to the reporter. It also establishes that Applicant's dismissal was not based on a leak of classified information about [redacted]. Thus, I conclude that Applicant has rebutted SOR ¶ 1.f, as cross-alleged in SOR ¶ 2.a.

The evidence also establishes that Applicant did not intentionally withhold information about the extent of information he provided to the reporter. Applicant was reluctant to acknowledge that he had the effect of confirming the reporter's story. His reluctance to speculate on the impact his conversation had on the reporter's confidence in the story falls short of intentionally withholding information. I conclude he has rebutted SOR ¶¶ 1.f and 1.g.

<u>SOR ¶¶ 1.h and 2.a</u>: In [redacted] Applicant disclosed classified information to foreign officials about a [redacted] war game conducted in [redacted].

In [redacted] Applicant was involved as a consultant in a four-day [redacted] war game pitting U.S. forces against foreign military forces. The game scenario was unclassified but protected as FOUO. (AX 78; Tr. 5/27 at 86.) The intelligence briefings were classified. (Tr. 5/27 at 92.) Although the game was terminated before there was a clear result, it was widely reported in the press that U.S. forces did not fare well. (AX 79; AX 80.) At least one nationally-distributed newspaper described it as a classified war game. (AX 79 at 5.) At a reception at the embassy of the country whose military forces were involved in the war game, Applicant joked with a senior intelligence official about the press reports of the war game. The foreign official apparently thought Applicant played a key role in the games, and Applicant did not disabuse him of that notion. Applicant told the foreign official that if he ever was involved in a war game again and was the head of the foreign team, he could make the foreign country win or lose. The foreign official laughed and responded that he should try to lose because his country loves peace. (GX 5 at 1; Tr. 5/26 300-03.)

Applicant was interviewed by a polygraph examiner on October 29, 1996. The polygraph examiner testified that Applicant disagreed with the first draft of his sworn statement, typed by the examiner after the first interview, because it was inaccurate. (Tr. 5/25 at 68.) The polygraph examiner testified that Applicant and his lawyer had an "angry conversation" about whether Applicant had admitted that the information was classified. The lawyer believed Applicant had admitted that it was classified and Applicant denied admitting that the information was classified. (Tr. 5/25 at 95, 98-99.) At the end of the interview, Applicant executed a sworn statement, but he refused to admit he had divulged classified information. (GX 6; Tr. 5/25 at 106.)

According to the lawyer, Applicant and he discussed that the occurrence of the war game was unclassified and the scenario was unclassified, but the same information "might be potentially classifiable if mingled with war game outcome analysis." The lawyer testified that Applicant repeated that analysis in his oral statement to the examiner. (Tr. 5/5 at 111-12; AX 139 at 9-10.)

Because Applicant refused to admit in writing that he had divulged classified information, the examiner submitted a separate memorandum with his report, stating:

> Subject provided the following information which he did not provide in a sworn statement:
>
> Subject advised that in ████ he was an observer of a ██████ – [foreign country] war game. Later at a reception at the [foreign] embassy in ████, Subject commented to [foreign] officials as to the results of the war game. Subject agreed that at least in part the war game was classified SECRET. He also admitted that his remarks to the [foreign] officials were classified.

(GX 7.)

The polygraph examiner's "technical report," which sets out the chronology of his actions to interview Applicant and conduct polygraph examinations, reflects that on November 15, 1996, Applicant and the examiner met at Applicant's request. At this meeting, Applicant told the examiner that he did not want his lawyer present at the next interview session because the lawyer "yelled" at him at the October 29 session. (AX 164 at 2.)

Applicant was interviewed again by the same examiner on February 12, 1997, and submitted a sworn statement. The statement was typewritten, but with Applicant's handwritten corrections and initials in several places. Applicant stated that he had been interviewed by a reporter about the ████ war game, and that he had been afraid ever since the interview that what he had told the reporter about the war game might have been classified. (GX 5 at 1.) He also stated that because his research contracts require access to foreign military officers, he "took a risk (of a security violation)" at a reception at the foreign embassy in ████ by joking with the foreign military official about the press reports concerning the war game. Applicant stated, "The game was partially classified Secret, so I have worried whether this joke was a security violation." (GX 5 at 1.)

On March 6, 1997, Applicant's lawyer wrote a letter to the polygraph examiner, stated that he was present during the entire interview, and told the examiner that his independent recollection was that Applicant did not admit divulging classified information about the war game. (AX 83.) The examiner testified he did not recall receiving the letter. (Tr. 5/25 at 124-25.)

Applicant presented the testimony of a highly-qualified expert polygraph examiner who has conducted more than 5,000 polygraph examinations and written extensively on the subject of polygraph examinations. The book authorized by the witness was admitted in evidence (AX 166.) The book makes several observations relevant to this case:

> <u>At page 8:</u> Spending too much time on actually interrogating a subject about a question during the pretest can sensitize a subject to a question and cause him to react to the question.
>
> <u>At page 9:</u> Interrogations in the polygraph context come about when an examiner believes that a subject is lying and elicitation fails to get an admission. . . . If no admission is obtained, a call has to be made and often this call is deception indicated.
>
> <u>At page 168:</u> [T]here was a perception growing among the examiners that unless they obtained an admission from a subject, they had not done their job.

The expert witness concludes his book with the revelation that he was denied a clearance at the end of a 31-year career. The denial was based on a polygraph examiner's conclusion that he was concealing information about his book and that the result of his polygraph examination was "unresolved reactions to all issues," a euphemism for "deception indicated." AX 166 at 263.

The expert witness pointed out numerous flaws in the polygraph examination of Applicant. With respect to Applicant's purported admissions, the witness testified that his practice and his agency's practice was to tape-record the polygraph interview, preserve the tapes forever, write down what the examinee says, and have the examinee verify the accuracy of the written statement. The failure of the examiner in this case to record the interview, preserve the recording, make a detailed record of exactly what was said during the interview, and review any admissions with the examinee were serious flaws. (Tr. 5/25 at 250-53) The witness also testified that in the polygraph community there is a high premium on obtaining admissions. He testified that just as a baseball player gains approval from home runs, a polygraph examiner's stock in trade is getting admissions. (Tr. 5/25 at 258.) Finally, he testified that Applicant "did everything wrong" during his examinations by talking too much and arguing with the examiner. (Tr. 5/25 at 277.)

The head of the agency that sponsored the war game testified that no part of the war game was classified and that the results of the war game were not encouraging for the U.S. He also reviewed the evidence of Applicant's joke and testified there was nothing classified or FOUO in Applicant's joking conversation with the foreign official. (Tr. 5/5 at 75-78.)

Unlike much of the evidence in this case, the evidence regarding this SOR allegation is Applicant's own sworn statement, corrected and initialed by him. The evidence establishes that Applicant did not provide classified or sensitive information to the newspaper reporter. It also establishes that he did not divulge any classified or sensitive information in his joke at the foreign embassy. It reinforces the evidence that Applicant is a worrier about security violations. However, it also establishes that

Applicant was willing to risk a security violation to foster his relationship with the foreign intelligence official. His willingness to risk a security violation raises security concerns.

<u>SOR ¶ 1.i</u>: In October 1996, Applicant deliberately withheld information concerning his possible disclosure of classified information to foreign officials.

In his sworn statement of February 1997 (discussed above under SOR ¶¶ 1.h and 2.a), Applicant disclosed that he had intentionally withheld information from the polygraph examiner before his polygraph examination in October 1996, "because of the operational sensitivity, because they did not appear to me to be germane to a [redacted] background investigation." Applicant disclosed that he had been in contact with a foreign person with access to classified information in his native country, but who did not appear to be an intelligence officer and never showed any interest in obtaining classified information from him. Applicant also disclosed that he strongly suspected, based on eyewitness information, that a U.S. government unclassified contract was being manipulated by two U.S. citizens and a foreign think tank to provide current classified U.S. government information to an intelligence organization in that foreign country. (GX 5 at 2.)

Applicant's decision to withhold this information was based on his understanding of advice from his lawyer. His lawyer at the time was concerned that questioning about counterintelligence concerns could risk harm to Applicant when he traveled abroad and could put at risk classified projects within the DOD. The lawyer testified that he advised Applicant not to needlessly disclose foreign contacts that had been fully authorized, because it could jeopardize U.S. Government national security policy and his personal safety abroad. The agency conducting the interviews did not have jurisdiction over counterintelligence matters, and Applicant's counsel did not think it appropriate for that agency to inquire about some of Applicant's foreign contacts that had been authorized by the U.S. Government. (Tr. 5/5 at 121-24; AX 139 at 13-14.) Applicant's lawyer was experienced in national security law and was the same security consultant who had advised Applicant's supervisor about controlling contacts with the press, discussed above under SOR ¶¶ 1.f and 2.a.

The evidence establishes that Applicant withheld information from a polygraph examiner on the advice of an experienced national security lawyer. The security implications of his conduct are discussed below in the "Analysis" section of this decision.

<u>SOR ¶¶ 1.k and 2.a:</u> In 1975, Applicant failed to properly safeguard a classified document in his personal residence and failed to appropriately safeguard it until surrendering it to security personnel.

In 1975, while employed by a defense contractor, Applicant wrote a seven-page unclassified report based on open-source materials. At the suggestion of a government official, he took his report to his classified work place, added some references to classified materials to back up his opinions, and placed classified markings on the

document. The classified document was then transmitted to a government agency. Applicant's employer did not retain a copy of the classified version. (GX 42 at 158-66.)

In October 1999, in response to a broad, open-ended question whether he had ever mishandled classified information, Applicant told a polygraph examiner that he found his unclassified draft of the document in 1984 or 1986, while cleaning out some personal files at home. (GX 42 at 169.) According to the polygraph examiner's summary of the interview, Applicant did not return the document to the government agency, "due to his own procrastination." (GX 24 at 18.)

A few days before the October 1999 interview, Applicant took his draft to his government office within the DOD, confirmed that his draft was unclassified, and then presented the title page (containing no classification markings) to the polygraph examiner. (GX 42 at 170.) The summary of the polygraph examiner's interview referred to the document as "the aforementioned draft paper now classified secret." (GX 24 at 18.)

In a DOHA interview in September 2009, he stated that he did not present the entire seven-page document to the polygraph examiner because he did not think the examiner wanted it, and the examiner seemed to accept the fact that the document was not classified. (GX 42 at 172.) Applicant admitted he was naïve to think that the polygraph examiner would "get it right." (GX 42 at 175.) Applicant later asserted that the examiner made no effort to obtain the document and have it reviewed. (GX 22 at 8.) Neither the classified nor the unclassified documents were submitted in evidence. Applicant believes the classified version was destroyed. (GX 22 at 8; GX 42 at 175, 178; Tr. 5/26 at 321-28.)

Two senior DOD officials submitted affidavits stating that they would have been notified immediately and conducted an investigation if Applicant had turned in a classified report that he had been storing at home. They both stated that they received no such reports. (AX 138 at 3; AX 170 at 1.)

The evidence supporting this allegation came entirely from Applicant. His testimony is exculpatory, and there is no evidence contradicting it. What is puzzling is why Applicant cited this incident in response to a question whether he had ever mishandled classified information, and then described it in totally exculpatory terms. The polygraph examiner filled in the evidentiary gaps with conjecture. Applicant's response is consistent with his reputation among some former colleagues for having an "excruciating conscience." I conclude that this allegation is not supported by substantial evidence.

SOR ¶¶ 1.l and 2.a: In October or November [redacted] Applicant provided sensitive or classified information to an uncleared [redacted] legislative assistant.

In the spring of [redacted] Applicant visited an overseas U.S. military command as a special government employee of the DOD, during which he was briefed on the U.S.

ability to defend its allies in the region. In May ████, a recently retired senior officer from that command was ████████ to be ████████████ to one of the countries in the region. In October ████, a ███████████, who had known Applicant personally and professionally for about 15 years, asked Applicant about █████████. She also asked a number of her fellow ██████ what they knew about ██████████. (Tr. 5/26 at 42.) Applicant had completed his tour of duty as a special government employee at the end of June ████ and he was working as a contractor for DOD. (AX 159.) Applicant expressed the view that ██████████ was "too soft" on certain policy issues, and he advised the █████ to "use the media in order to fish for answers." He told her there might be some disagreements within the military about ███████████ views, and that she should investigate that possibility. (Tr. 5/26 at 75.) Applicant also gave the █████ a copy of the book he had published regarding the country involved, but he did not give her any other written materials. (Tr. 5/26 at 45; AX 160.) Both Applicant and the █████ testified that the documents and the information given by Applicant were unclassified. (Tr. 5/26 at 48, 341-48; GX 42 at 194.)

The testimony of the █████ and Applicant is consistent with the summary of a polygraph interview of Applicant regarding the incident. The summary recites that Applicant admitted providing "lead information" to the █████ (GX 24 at 35.) In other words, he admitted during the polygraph interview that he told the █████ where to look for the information she needed.

The █████ drafted an editorial for her ██████, which appeared in a local newspaper. The █████ testified she did not remember Applicant playing a significant role in writing the editorial, because she considered herself a good writer. She testified she might have shared the editorial with Applicant after she drafted it, because she thought she had done a good job writing it. (Tr. 5/26 at 79-80.)

The ███████ staff requested a number of documents from DOD, but the █████ with whom Applicant talked did not play a major role in compiling the request for documents. (Tr. 5/26 at 67-68.) The ████████████████████████████████ pending release and consideration of the documents requested from DOD. (GX 36.) Six days later, ██. (HX LXIV.)

Applicant's supervisor in DOD asked him if he was involved in any way in the editorial, and Applicant responded, "Guilty as charged." In the September 2009 DOHA interview, Applicant explained that by "guilty as charged" he meant that his opinion was reflected in the editorial and that he had talked to the █████ about the nomination. (GX 42 at 142-43; Tr. 5/26 at 353.) Applicant's supervisor has no recollection of confronting Applicant about a leak investigation and no recollection of Applicant saying he was "guilty as charged." His supervisor also opined that he saw nothing wrong with Applicant discussing U.S. foreign policy with a ███████████ or providing information from his public writings as a private citizen. (Tr. 5/5 at 79; AX 138 at 4.)

Applicant testified that there was no connection between the military briefing and the DOD documents requested by the ██████ because the briefing did not involve the

issues addressed by the requested documents. However, the military commander expressing concern about a possible leak knew that Applicant had been involved in the issues addressed in the requested documents for more than 10 years. (Tr. 5/27 at 79-81.)

There is no evidence that Applicant divulged the content of the briefings he received from the overseas command. There is no evidence that Applicant used the content of those briefings to suggest questions or source material to the . Although the was politically sensitive, there is no evidence that Applicant disclosed any information that was national-security sensitive. Department Counsel argued that Applicant breached his duty as a special government employee by undermining the for , but Applicant had completed his tour of duty as a special government employee when the conversation occurred. Applicant's supervisor, a senior political appointee, was not concerned about the conversation. I conclude that Applicant has rebutted this allegation.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

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

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the

applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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 security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

In my findings of fact set out above, I found that Applicant rebutted several allegations that were resolved against him in previous adjudications. Federal agencies are required to give reciprocal recognition to each other's security clearance adjudications. *See* National Industrial Security Program Operating Manual (NISPOM), DOD 5220.22-M, February 28, 2006, ¶ 2-204; Department of Defense (DOD) Regulation 5200.2-R, *Personnel Security Program*, dated Jan. 1987, as amended (Regulation), ¶¶ C4.1.1, C4.1.2, and C4.1.4. However, there is no requirement that each finding of fact by another agency be accepted at face value by every other agency. Reciprocity is a rule of government economy, designed to avoid duplicative investigations and adjudications, but it is not a rule of estoppel. *See* ISCR Case No. 06-10859 at 4 (App. Bd. Sep. 2, 2010), *citing* ISCR Case No. 07-00260 at 2-3 (App. Bd. Jan. 24, 2008).

I noted that Applicant received his last security clearance in January 1997, after all the events alleged in the SOR, except for SOR ¶¶ 1.k and 1.l. It is well-established that granting a clearance does not estop the Government from making a subsequent adverse decision. *See* ISCR Case No. 08-05344 at 3 (App. Bd. Feb. 3, 2010) and cases cited therein.

I also noted that several adverse adjudications based on events alleged in the SOR occurred before the Supreme Court decision in *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988), on which our current due-process requirements are founded. Finally, I noted that the adverse SCI adjudications did not afford Applicant the due-

process protections that are the currently provided in the Directive and Intelligence Community Directive No 704 and Intelligence Community Policy Guidance No. 704.1, 704.2, and 704.3. As a result, his ability to test the evidence against him was more limited than it was in his hearing before me.

Guideline E, Personal Conduct

In my findings of fact, I resolved SOR ¶¶ 1.d, 1.e, 1.f, 1.g, 1.k, and 1.l, and the corresponding Guideline K allegations in Applicant's favor, because he presented sufficient evidence to rebut those allegations. Directive ¶ E3.1.15. I concluded that sufficient evidence was presented in support of SOR ¶¶ 1.b, 1.c, 1.h, and 1.i to raise security concerns under Guideline E.

The concern under this guideline 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 relevant disqualifying condition raised by SOR ¶ 1.i, alleging that Applicant deliberately withheld relevant and material information during an interview by a security investigator, is AG ¶ 16(b) ("deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative"). When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission. *See* ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)

Applicant admitted withholding information from the investigator, based on advice from his lawyer. His admission is sufficient evidence to raise this disqualifying condition, shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on false or misleading answers may be mitigated under AG ¶ 17(b) if:

> [T]he refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made

aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

This mitigating condition is established. Applicant withheld information during his interview in October 1996 on advice of counsel, but he provided complete information during a follow-up interview in February 1997.

The relevant disqualifying conditions pertaining to Applicant's withholding of information alleged in SOR ¶ 1.i, as well as the manifestations of poor judgment in SOR ¶¶ 1.b, 1.c, and 1.h, are as follows:

> AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and
>
> AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations.

The SOR alleged that that Applicant disclosed classified information, but the evidence did not support that allegation. The Government argued that some of the information disclosed by Applicant was FOUO, but several senior-level witnesses testified that the FOUO designation did not exist at the time of the conduct alleged. Nevertheless, these witnesses testified that the information disclosed by Applicant was not "sensitive." The FOUO designation is mentioned in the 1982, 1986, and 1989 versions of DOD 5200.1-R, but it is not defined. The definition of FOUO first appeared in DOD 5200.1-R in 1997, after most of the conduct alleged in the SOR.[6]

Finally, the Government argued that Applicant's conduct violated the standards of ethics for Government officers and employees. At the Government's request, I took

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[6] Army Regulations used the FOUO designation and defined the limits on disclosure of FOUO information as early as the 1960s. *See Silverthorne v. Laird, 460 F.2d 1175* (1972) (discussing the requirement in Army Regulation 340-16 to prohibit public disclosure of a FOUO document executed in 1971); *United States v. Franchia*, 13 U.S.C.M.A 315, 32 C.M.R 315 (1962) (discussing directive of the Secretary of the Army to treat a document created before 1962 as FOUO). The record does not reflect whether the FOUO designation was used in all the military departments before 1982.

administrative notice of Executive Order (E.O.) 11222, May 8, 1965; E.O. 12674, April 1, 1989 (revoking E.O 11222); 5 Code of Federal Regulations (CFR) §§ 2635.101, 2635.102, and 2635.703; and 5 U.S.C. § 552(b).

E.O. 11222 was in effect when the conduct alleged in SOR ¶¶ 1.b-1.g occurred. Three provisions applied to all government employees and are potentially relevant to this case:

> Sec. 202. An employee shall not engage in any outside employment, including teaching, lecturing, or writing, which might result in a conflict, or an apparent conflict, between the private interests of the employee and his official duties and responsibilities, although such teaching, lecturing, and writing by employees are generally to be encouraged so long as the laws, the provisions of this order, and the Civil Service Commission and agency regulations covering conflict of interest and outside employment are observed.
>
> Sec. 203. Employees may not (a) have direct or indirect financial interests that conflict substantially, or appear to conflict substantially, with their responsibilities and duties as Federal employees, or (b) engage in, directly or indirectly, financial transactions as a result of, or primarily relying upon, information obtained through their employment.
>
> Section 205. An employee shall not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, official information not made available to the general public.

Special government employees were subject to different rules, of which the following are potentially relevant to this case:

> Sec. 302. A consultant, advisor or other special Government employee must refrain from any use of his public office which is motivated by, or gives the appearance of being motivated by, the desire for private gain for himself or other persons, including particularly those with whom he has family, business, or financial ties.
>
> Sec. 303. A consultant, advisor, or other special Government employee shall not use any inside information obtained as a result of his government service for private personal gain, either by direct action on his part or by counsel, recommendations, or suggestions to others, including particularly those with whom he has family, business, or financial ties.
>
> Sec. 304. An advisor, consultant, or other special Government employee shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

The conduct alleged in SOR ¶¶ 1.h and 1.I occurred after the issuance of E.O 12674, which repealed E.O. 11222. The ethical principles for Government employees announced in E.O. 12674 were implemented by 5 CFR § 2635.101. The implementing regulations provide the same rules for full-time permanent government employees and special government employees. As defined in 5 CFR § 2635.102(h), "employee" includes a special government employee. The following principles are potentially relevant to this case:

> § 2635.101(b)(2): Employees shall not hold financial interests that conflict with conscientious performance of duty;
>
> § 2636.101(b)(3): Employees shall not engage in financial transactions using nonpublic Government information or allowing the improper use of such information to further any private interest;
>
> § 2636.101(b)(7): Employees shall not use public office for private gain;
>
> § 2636.101(b)(14): Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part; and
>
> § 2635.703(b): An employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure.

5 U.S.C. § 552(b) defines "nonpublic information" as:

> [I]nformation that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public. It includes information that he knows or reasonably should know: (1) is routinely exempt from disclosure under 5 U.S.C. 522 or otherwise protected from disclosure by statute, Executive order or regulation; (2) is designated as confidential by an agency; and (3) has not actually been disseminated to the general public and is not authorized to be made available to the public on request.

Applicant did not disclose any classified information to unauthorized recipients. However, the Government argued that Applicant disclosed "sensitive" information. "Sensitive" information is not further defined in Guidelines E or K. However, Appendix 3 of DOD 5200.1-R, January 1997, discusses "controlled unclassified information" and defines it as including FOUO information, "sensitive but unclassified" information (formerly "limited official use"), Drug Enforcement Administration (DEA) sensitive information, and "sensitive information," as defined in the Computer Security Act of 1987. I conclude that the term "sensitive information encompasses all the categories of

"controlled unclassified information" defined in DOD 5200.1-R. It also includes "nonpublic information" as defined in 5 U.S.C. § 552(b) and referred to in 5 CFR §§ 2636.101(b)(3) and 2635.703(b).[7]

The Government was unable to produce substantial evidence that any information disclosed by Applicant was "controlled unclassified information" "sensitive information," or "nonpublic information." When Applicant discussed the pending [redacted], he was a consultant, not an employee of the executive branch, and he was not subject to the ethical standards for government employees. However, there is no evidence that he disclosed any protected information or acted to advance his private interests or those of another when he discussed the [redacted] with the [redacted].

Except for the joke with a foreign intelligence official about the results of the war game, the Government also was unable to produce substantial evidence that Applicant acted for private gain. He admitted that the joke about the war game was motivated in part by his interest in fostering foreign connections for his personal scholarship and consulting business. However, the content of the joke was unclassified, widely reported in the newspapers, and does not qualify as "nonpublic information." In all other instances alleged in the SOR where "nonpublic information" was disclosed, it was done to further a legitimate political or governmental interest, and not for private gain or to further the private interests of Applicant or anyone else.

However, Applicant's careless security practices, demonstrated by the facts alleged in SOR ¶¶ 1.b and 1.h, and his lack of good judgment, demonstrated by the facts alleged in SOR ¶ 1.c, are established by his admissions. Based on those admissions, I conclude that AG ¶¶ 16(c) and (d) are established.

Security concerns based on personal conduct may be mitigated if "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." AG ¶ 17(c). No classified or sensitive information was disclosed. Applicant's dereliction was in failing to ensure that the information was not classified before he divulged it. He knew he was walking a fine line, and he risked an inadvertent security violation. Negligent conduct that risks serious harm to national security is not "minor." In this context, I conclude that the first prong of this mitigating condition ("so minor") is not established.

The second prong of this mitigating condition ("so much time has passed") focuses on whether the conduct was recent. There are no "bright line" rules for determining when conduct is "recent." The determination must be based on a careful evaluation of the totality of the evidence. *See* ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without

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[7] It is possible that Guideline K was also intended to protect other information such as a contractor's proprietary information or information that would be privileged under Fed. R. Evid. 501, but those kinds of information are not at issue in this case.

any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id*.

The conduct alleged in SOR ¶¶ 1.b and 1.c occurred when Applicant was 32-33 years old, while he was employed by a defense contractor that strongly encouraged media exposure and high publicity, and before his employment by the DOD. The conduct with the foreign intelligence official, alleged in SOR ¶ 1.h, occurred in , years ago. Applicant was granted a clearance in January 1997, after the incident, and served in various responsible positions until March 2003. I conclude that the second prong of AG ¶ 17(c) is established.

The third prong of AG ¶ 17(c) ("the behavior is so infrequent") is not established because there were multiple instances of careless security practices. The fourth prong (unique circumstances) is not established because the events occurred in the ordinary course of Applicant's employment.

Based on all the evidence, however, the final prong of AG ¶ 17(c) ("does not cast doubt") is established. The record is replete with testimonials from high-level officials to his current integrity, reliability, and trustworthiness. These officials worked with Applicant after the incident. Accordingly, I conclude that the mitigating condition in AG ¶ 17(c) is established.

Security concerns raised by personal conduct also may be mitigated if "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur." AG ¶ 17(d). After his embarrassing dismissal from a high-level position in Applicant sought psychiatric counseling, beginning in . His psychiatrist believes that his depression, irritability, and insensitivity to others have been successfully treated with psychotherapy and medication. During the last ten years, he has taken several steps to reduce the stressors in his life. At the hearing, he demonstrated a positive attitude about protecting classified and sensitive information. His experiences with polygraph examinations and multiple denials of applications for clearances have chastened him, made him more cautious about handling classified information, and made him wary of contacts with the media. I conclude that the mitigating condition in AG ¶ 17(d) is established.

Finally, security concerns raised by personal conduct may be mitigated if "(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). For the reasons set out in the above discussion of AG ¶ 17(d), I conclude that this mitigating condition also is established.

Guideline K, Handling Protected Information

The conduct alleged in SOR ¶¶ 1.b and 1.h was cross-alleged under this guideline. The security concern 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."

Applicant challenged the application of Guideline K to his case, arguing that the amendment of the guideline to encompass "sensitive" information violated the *Ex Post Facto* Clause of Article I, Section 10, Clause 1 of the U.S. Constitution. I have rejected his Constitutional challenge, because the overwhelming weight of legal authority holds that the *Ex Post Facto* Clause does not apply to civil or regulatory law, including industrial security clearance hearings. *See* ISCR Case No. 03-09412, 2004 WL 2896760 (App. Bd. Oct. 26, 2004) and cases cited therein.

Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information. Once it is established that an applicant has committed a security violation, he or she has a very heavy burden of demonstrating that he or she should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an administrative judge must give any claims of reform and rehabilitation strict scrutiny. In many security clearance cases, applicants are denied a clearance for having an indicator of a risk that they might commit a security violation (e.g., alcohol abuse, delinquent debts, or drug use). Security violation cases reveal more than simply an indicator of risk. ISCR Case No. 03-26888 (App. Bd. Oct. 5, 2006).The frequency and duration of the security violations are also aggravating factors. ISCR Case No. 97-0435 at 5 (App. Bd. July 14, 1998).

However, there were no security violations in this case. For the reasons set out in the above discussion of Guideline E, I conclude that Applicant rebutted the allegations that he disclosed classified or sensitive information to unauthorized persons. His poor judgment in risking a security violation is covered by Guideline E, as discussed above. I conclude that no disqualifying conditions under Guideline K are raised by the evidence.

Whole-Person Concept

Under the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines E and K in my whole-person analysis. Some of the factors in AG ¶ 2(a) have already been addressed, but some warrant additional comment.

Applicant is well-educated, mature, intelligent, and articulate. During the hearing, he displayed some of the intensity for which he is well known, but he was candid, and sincere. His testimony was plausible and credible. He displayed the loquacity observed by his polygraph expert. At times he was didactic and pedantic. He tended to carefully parse each question, dividing it into individual words and phrases before answering. After observing his demeanor, reviewing his testimony, and considering his personality, his experience in contentious political assignments, and the situations in which he was serving several masters, I found it unsurprising that he was often blamed for leaks, misunderstood, or accused of disloyalty. I was impressed by the ringing endorsements he has received from highly respected senior officers, past and present.

I have also considered that the earliest allegations against Applicant are more than 30 years old and the most recent are 15 years old. Applicant is no longer the brash, hard-charging [redacted], nor is he the 50-year-old self-promoting consultant who reveled in his ability to move in foreign intelligence circles with ease. He is now a 65-year-old scholar, mellowed and clearly chastened by his experiences with the security clearance process.

I have considered the allegations individually and as a whole to determine whether the record as a whole leaves me with doubts about Applicant's trustworthiness, reliability, and good judgment. After weighing the disqualifying and mitigating conditions under Guideline E, evaluating Applicant's conduct under Guideline K, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has mitigated the security concerns based on his personal conduct and rebutted the allegations based on his handling of protected information. I am satisfied that Applicant's personal conduct was mitigated under Guideline E as well as the whole-person concept. *See* ISCR Case No. 09-05655 at 2. (App. Bd. Aug. 24, 2010). Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

I make the following formal findings regarding the allegations in the SOR:

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 1.a	For Applicant (withdrawn)
Subparagraphs 1.b-1.i:	For Applicant
Subparagraph 1.j:	For Applicant (withdrawn)
Subparagraphs 1.k-1.l:	For Applicant
Paragraph 2, Guideline K:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge

Appendix A
Evidentiary Issues (Government Exhibits)

GX	Description	Objection	Ruling	Record
7	Memo for Record	Completeness Authentication Cross-exam	Admitted; mooted by Testimony	HX-XIV; Tr. 5/25 at 48 et seq.
13	Applicant's Memo for Record	Authentication Completeness	Admitted	HX-XIV; HX-XLI
14	CIA Memo for Record	Authentication Relevance Completeness	Admitted	HX-XIV; HX-XLI
15	Applicant's Letter	Relevance	Admitted	HX-XIV; HX-XLI
16	Letter	Relevance	Admitted	HX-XIV HX-XLI
17	Letter	Relevance	Admitted	HX-XIV; HX-XLI
18	Letter	Relevance	Admitted	HX-XIV; HX XLI
19	Applicant's letter	Relevance	Admitted	HX-XIV; HX-XLI
20	Agency letter	Hearsay Cross-exam	Admitted; authenticated as official record by witness	HX-XIV; HX-XLI; Tr. 5/27 at 148-52
23	Letter to Applicant	Authentication Relevance Cross-exam	Admitted	HX-XIV; HX-XLI
24	Agency letter	Authentication Hearsay Completeness Cross-exam	Admitted	HX-XIV; HX-XLI
26	Newspaper article	Illegible Cross-exam	Admitted	HX-XIV; HX-XLI
27	Newspaper article	Completeness	Admitted	HX-XIV; HX-XLI
28	Newspaper article	Completeness	Admitted	HX-XIV; HX-XLI
29	Polygraph exam results	Authentication Completeness	Admitted; authenticated by author	HX-XIV; HX-XLI; Tr. 5/4 at 209
30	Agency memo	Authentication Completeness Cross-exam	Admitted	HX-XIV; HX-XLI

Appendix A (continued)

Evidentiary Issues (Government Exhibits)

GX	Description	Objection	Ruling	Record
31	Agency Memo	Authentication Completeness Cross-exam	Admitted	HX-XIV;HX-XLI
38	Affidavit	Cross-exam	Mooted by withdrawal of SOR ¶ 1.a	HX-XIV
39	ROI Extract	Authentication Completeness Cross-Exam	Mooted by withdrawal of SOR ¶ 1.a	HX-XIV
40	ROI Extract	Authentication Completeness Cross-Exam	Admitted; authenticated by investigators	HX-XIV;HX-XLI; Tr. 5/4 at 131
41	ROI Extract	Authentication Completeness Cross-exam	Admitted; authenticated by investigators	HX-XIV;HX-XLI; Tr. 5/4 at 185
44	Newspaper article	Relevance Reliability	Admitted	HX-XIV;HX-XLI
45	Newspaper article	Relevance Reliability	Admitted	HX-XIV;HX-XLI
46	Academic article	Relevance Reliability	Admitted	HX-XIV;HX-XLI

Appendix B
Evidentiary Issues (Applicant's Exhibits)

AX	Description	Objection	Ruling	Record
13	Electronic Message	Relevance	Exhibit withdrawn	HX-XXXVI; HX-XLI; Tr. 5/26 at 3
14	Research Proposal	Authenticity	Admitted	HX-XXXVI; HX-XLI
15	Memorandum	Hearsay; Authenticity	Deferred; withdrawn	HX-XXXVI; HX-XLI; Tr. 5/26 at 3.
17	Newspaper article	Hearsay	Admitted	HX-XXXVI;HX-XLI
18	Newspaper article	Hearsay	Admitted	HX-XXXVI; HX-XLI
42	Memorandum to senator	Hearsay; Authenticity; non-expert opinion	Exhibit withdrawn	HX-XXXVI; HX-XLI; Tr. Tr. 5/26 at 4.
47	Letter from senator	Authenticity	Exhibit withdrawn	HX-XXXVI; HX-XLI; Tr. 5/26 at 4
62	Agency ROI	Authenticity; violates E3.1.20	Admitted on reconsideration	HX-XXXVI; HX-LVI; Tr. 5/25 at 6.
83	Polygraph results	Violates Directive	Admitted for limited purpose	HX-XXXVI; HX-XLI; Tr. 5/26 at 5-6
108	Agency memorandum	Hearsay; authenticity; non-expert opinion	Admitted	HX-XXXVI; HX-XLI
None	Motion in limine	Relevance	Motion denied w/o prejudice	HX-XXVII; Tr. 5/25 at 4-5.
AX 140-160	Motion in limine	Untimely	Denied	HX-XLVII; Tr. 5/25 at 5.
AX 140	Affidavit	Hearsay	Mooted by withdrawal of SOR ¶ 1.a	Tr. 5/25 at 25-26
162	ROI	Authentication	Admitted	Tr. 5/25 at 34
163	ROI	Authentication	Admitted	Tr. 5/25 at 35
167	Affidavit	Hearsay	Admitted	Tr. 5/25 at 34
168	Affidavit	Hearsay	Admitted	Tr. 5/25 at 35
167	Affidavit	Hearsay	Objection withdrawn	Tr. 5/25 at 327
168	Affidavit	Hearsay	Objection withdrawn	Tr. 5/26 at 106
172	Affidavit	Hearsay	Admitted	Tr. 6/30 at 10
174	Affidavit	Hearsay	Cross-exam waived	Tr. 6/30 at 11