



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 09-06218

Appearances

For Government: Melvin A. Howry, Esquire, Department Counsel
For Applicant: Stephanie N. Mendez, Esquire

May 13, 2011

Decision

GALES, Robert Robinson, Administrative Judge:

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

Statement of the Case

On March 24, 2009, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).¹ On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on January 19, 2010.² On another unspecified date, DOHA issued him another set of interrogatories. He responded to the interrogatories on January 19, 2010.³ On another unspecified date, DOHA issued him a third set of interrogatories. He

¹ Government Exhibit 1 (SF 86), dated March 24, 2009.

² Government Exhibit 5 (Applicant's Answers to Interrogatories, dated January 19, 2010).

³ Government Exhibit 6 (Applicant's Answers to Interrogatories, dated January 19, 2010).

responded to the interrogatories on March 22, 2010.⁴ On July 7, 2010, DOHA issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline E (Personal Conduct), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on July 26, 2010. In a sworn statement, dated August 6, 2010, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on September 20, 2010, and the case was assigned to me on October 4, 2010. A Notice of Hearing was issued on November 15, 2010, and I convened the hearing, as scheduled, on December 1, 2010.

During the hearing, eight Government exhibits (GE I, and GE 1-7) and nine Applicant exhibits (AE A-I) were admitted into evidence without objection. Applicant and two other witnesses testified. The hearing transcript (Tr.) was received on December 9, 2010. The record was kept open until December 15, 2010, to enable Applicant to supplement the record. Applicant took advantage of that opportunity and he submitted eight additional exhibits, which were admitted into evidence (AE J-Q) without objection.

Findings of Fact

In his Answer to the SOR, Applicant partially admitted some of the factual allegations pertaining to personal conduct (¶¶ 1.a. through 1.c., 1.e., and a portion of 1.f.) of the SOR. Those admissions are incorporated herein as findings of fact. He denied the remaining factual allegations or portions thereof (¶¶ 1.d., a portion of 1.f., and 2.a.).

Applicant is a 56-year-old employee of a defense contractor, currently serving as a principal account manager in business development.⁵ He is a June 1980 graduate of a technical institute with a bachelor's degree in an unspecified discipline.⁶ Applicant entered active duty with the U.S. Navy in April 1980, and served until he was transferred

⁴ Government Exhibit 7 (Applicant's Answers to Interrogatories, dated March 22, 2010).

⁵ Government Exhibit 1 (SF 86), *supra* note 1, at 13; Applicant Exhibit Q (Performance review, dated December 16, 2009).

⁶ Government Exhibit 1, at 11.

to the retired list, effective July 1, 2001.⁷ Applicant married his first wife in September 1978, and divorced her in December 1994.⁸ He married his current wife in December 1994.⁹ Applicant has two children, a son, born in October 1996, and a daughter, born in November 1998.¹⁰

Personal Conduct - Security Clearance

In March 1995, Applicant was granted a Top Secret security clearance.¹¹ At some unspecified point thereafter, he was granted access to sensitive compartmented information (SCI). Applicant's security clearance was suspended on April 7, 2000,¹² and his access to SCI was suspended in May 2000 for violations of Articles 121 (Larceny) and 133 (Conduct Unbecoming an Officer), Uniform Code of Military Justice (UCMJ).¹³ On January 12, 2001, the command recommended Applicant's security clearance be permanently removed.¹⁴ On May 29, 2001, the DON CAF issued Applicant an LOI to revoke his security clearance and eligibility for access to SCI.¹⁵ The LOI contained a provision which stated: "If you choose not to respond or fail to provide a timely response, our preliminary decision will IMMEDIATELY become final, based upon review of the available information."¹⁶ Applicant contends he was on several months of terminal leave when the LOI was issued, and he never received it and was not aware of it.¹⁷ There is a note on the acknowledgement of receipt of the LOI, made by the special security officer (SSO) that Applicant had retired, and furnished Applicant's address and

⁷ Government Exhibit 6 (Certificate of Release or Discharge from Active Duty (DD Form 214), dated June 30, 2001), attached to Applicant's Answers to Interrogatories.

⁸ Government Exhibit 1, *supra* note 1, at 23-24.

⁹ *Id.* at 22-23.

¹⁰ *Id.* at 27-28.

¹¹ Government Exhibit 4 (Joint Clearance and Access Verification System (JCAVS) Person Summary, dated February 17, 2009), at 1.

¹² Government Exhibit 2 (Security Access Eligibility Report (SAER), dated January 12, 2001, at 1, attached to Department of the Navy Central Adjudication Facility (DON CAF) Letter of Intent to Revoke Security Clearance and Eligibility for Access to SCI (LOI), dated May 29, 2001).

¹³ Government Exhibit 2 (Message from Commander Third Fleet, dated May 10, 2000, cited in LOI). Applicant contends that sometime after March 28, 2000, he was informed that he would retain his secret clearance, and he was removed from his office space where he had access to SCI and moved to an area where secret was the highest level available. He was advised his application for retention of SCI was not going to be processed. See Government Exhibit 6 (Applicant's Answers to the Interrogatories), *supra* note 3, at 1; Government Exhibit 2 (SAER), *supra* note 12, at 3; Tr. at 41.

¹⁴ Government Exhibit 2 (SAER), *supra* note 12, at 4.

¹⁵ Government Exhibit 2 (LOI), *supra* note 12.

¹⁶ *Id.* at 2.

¹⁷ Tr. at 80.

telephone number.¹⁸ There is no evidence that the LOI was ever redirected to Applicant or that Applicant ever received the LOI. Applicant was subsequently granted a top secret security clearance in August 2005.¹⁹

Personal Conduct - Military Performance

During his military career, Applicant served as a carrier-based F-14 strike-fighter pilot, F-14 flight instructor, and air show performer. He flew 49 combat missions in support of Operation Desert Storm. Applicant was awarded the Defense Meritorious Service Medal, Meritorious Service Medal, Air Medal (with three devices), Navy Commendation Medal (with two devices), Navy Achievement Medal (with three devices), Joint Unit Commendation, Meritorious Unit Commendation, Navy Battle "E" (with three devices), National Defense Service Medal, Southwest Asia Service Medal (with three devices), Sea Service Deployment Ribbon (with five devices), Armed Forces Expeditionary Medal, Kuwait Liberation Medal (Saudi Arabia), and Kuwait Liberation Medal (Kuwait).

In March 2000, Applicant shoplifted items from a base exchange. Applicant attributed his actions to pain medication-induced absentmindedness where he simply casually walked out of the exchange, past the check-out stand, without paying for his merchandise.²⁰ He was apprehended by a member or members of the security forces squadron after a review of a video surveillance tape.²¹ On May 16, 2000, Applicant appeared before an Admiral's Mast and he was awarded non-judicial punishment (NJP) under Article 15, UCMJ. The offenses identified were two violations, each, of Articles 121 (Larceny) and 133 (Conduct Unbecoming an Officer).²² Applicant was given a punitive letter of reprimand, and ordered to forfeit one-half of his pay per month for two months, with one-half of the amount suspended for six months.²³ Applicant contends the Admiral was "old school" and "outraged that [Applicant] would try to 'hide behind this medical defense' and not take responsibility for the behavior."²⁴ The decision was appealed, unsuccessfully.²⁵

¹⁸ Government Exhibit 2 (LOI), *supra* note 12, at encl. 2.

¹⁹ Government Exhibit 4 (JCAVS), *supra* note 11, at 2.

²⁰ Applicant Exhibit C (Statement, undated), at 2; Government Exhibit 6 (Applicant's Answers to the Interrogatories), *supra* note 3, at 2; Tr. at 42. *See also* Applicant Exhibit K (Doctor's statement, dated June 29, 2000), at 1, wherein the military physician opined that Applicant's actions were "most likely medication related." It should be noted that, effective July 1, 2001, the Department of Veterans Affairs (VA) granted Applicant a combined disability rating of 60 percent. *See* Government Exhibit 6 (VA Disability decision, undated), attached to Applicant's Answers to the Interrogatories.

²¹ Government Exhibit 2 (SAER), *supra* note 12, at 1. There is no copy of the NJP paperwork in the case file.

²² Applicant's Answer to the SOR, dated August 6, 2010).

²³ Government Exhibit 2 (LOI), *supra* note 12, at encl. 2; *Id.*

²⁴ Applicant Exhibit C, *supra* note 20, at 2.

²⁵ Government Exhibit 7 (Applicant's Answers to the Interrogatories), *supra* note 4, at 2; Applicant Exhibit C, *supra* note 20, at 2; Tr. at 47.

Because all officers are required to have favorable security clearance eligibility, and Applicant was no longer eligible, he was administratively processed for retirement based on failure to maintain professional standards, and he was placed on the retired list, effective July 1, 2001, with unacceptable conduct as the stated reason for separation, and ineligible for reenlistment.²⁶ He was a commander at the time of his retirement.²⁷

The command chief of staff noted that Applicant “displayed questionable traits for truthfulness in connection with the offenses for which he received NJP. His explanations of events surrounding the offenses defied credulity and cast into doubt his integrity in certain situations.”²⁸ Former naval aviator colleagues of Applicant are effusive in their praise for him. One flight training classmate, a person who has known and flown with Applicant since 1980, characterized Applicant using terms including ethical, leader, humble, team player, trustworthy, loyal, and committed.²⁹ Another long-time friend, for whom Applicant was the flight instructor in 1986, noted that he has trusted Applicant with his life, and believes Applicant is trustworthy, loyal, and ethical.³⁰

Personal Conduct – Civilian Performance

In January 2001, while he was still on terminal leave from the military, Applicant commenced working in business development for a government contractor.³¹ He remained with the company until he resigned in March 2008, in lieu of termination for inflating expense reports.³² Applicant described his resignation as follows.³³

Left job by mutual agreement following allegations of misconduct. There were allegations of a violation of a corporate policy. While there was a

²⁶ Government Exhibit 6 (DD Form 214), *supra* note 7. The reentry code “RE-2” appearing in block 27, DD Form 214, means “ineligible for reenlistment.” Applicant claimed he was unaware that he was ineligible to reenter. See Applicant’s Answer to the SOR, *supra* note 22.

²⁷ *Id.*

²⁸ Government Exhibit 2 (SAER), *supra* note 12, at 3.

²⁹ Applicant Exhibit G (Character reference, dated November 9, 2010).

³⁰ Applicant Exhibit E (Character reference, dated November 15, 2010).

³¹ Government Exhibit 1, *supra* note 1, at 15; Tr. at 48.

³² Government Exhibit 4 (Contractor Adverse Information Report file – Report of Adverse Information, dated March 21, 2008). The March 2008 date is identified as the actual date of resignation in lieu of termination, and February 12, 2009 is identified as the date the report was submitted to the security office. The February 2009 date appears as the date of the incident in Government Exhibit 4 (JCAVS), *supra* note 11. However, the Confidential Separation Agreement and Release of Claims states that Applicant’s employment will end effective March 21, 2008. See Applicant Exhibit J (Confidential Separation Agreement and Release of Claims, dated March 20, 2008), at 1. Further confusing the issue is a letter from DOHA to the contractor erroneously indicating the Adverse Information Report was dated March 21, 2009. See Government Exhibit 4 (Letter from DOHA, dated November 19, 2009).

³³ Government Exhibit 1, *supra* note 1, at 17; Applicant Exhibit C, *supra* note 20, at 3-4. See *also*, Tr. at 49-57.

significant amount of blame to go around and heavy tension related to office politics, in the end, I was the one ultimately responsible. Rather than spend the time fighting the allegations only to return to the same office politics and tension, I elected to retire.

In the Report of Adverse Information, the government contractor's facility security officer stated "[Applicant] was terminated from employment with the Corporation, but it looks as though it was allowed to go through as a 'resignation.' Very simply, [Applicant] was terminated due to inflating expense reports."³⁴

The government contractor conducted an investigation into Applicant's 2007 travel expenses (\$26,017) and 2008 travel and related expenses (\$13,867).³⁵ An internal review disclosed the following:³⁶

Corporate Ethics, Human Resources (HR), and Corporate Business Development (CBD) worked with Corporate Legal, Corporate Security, and Corporate Finance in the disposition of [Applicant's] case. . . . (please note that we are legally bound by our agreement with [Applicant] to not disclose the nature of or facts surrounding [Applicant's] departure . . . to any other than the United States Government). . . .

One former colleague, who has known Applicant for over 20 years, both as a naval aviator and as a vice president of the same government contractor, characterized Applicant's supervisors in 2008 as "manipulative, devious, controlling and worried more about their own power position than the good of the customers and the corporation. . . . It became obvious they were on a vendetta."³⁷ He also believes Applicant is trustworthy and exhibits the highest standards of ethical conduct and moral character.³⁸ Another former colleague attributes Applicant's difficulties with their former government contractor to a difference of opinion between Applicant and an off-site superior and alienation between two offices of the same company.³⁹ Applicant's former administrative assistant is highly supportive of him. She concurs in the assessment of others that Applicant was caught in an environment where Applicant's superior was a small-minded, poor supervisor with a personal agenda and large ego.⁴⁰ Because of the

³⁴ Government Exhibit 4 (Contractor Adverse Information Report file – Report of Adverse Information), *supra* note 32.

³⁵ Government Exhibit 4 (Contractor Adverse Information Report file – Internal e-mail, dated February 17, 2009).

³⁶ *Id.* There is no direct evidence to indicate what the specific findings of the investigation were, and the only documentation offered pertaining to the allegations are the conclusions appearing in the adverse information paperwork based upon general allegations.

³⁷ Applicant Exhibit A (Character reference, dated November 8, 2010), at 2.

³⁸ *Id.*

³⁹ Applicant Exhibit E, *supra* note 30, at 2.

⁴⁰ Applicant Exhibit D (Character reference, dated November 18, 2010), at 4.

office politics, frustration over the fighting, and stress from Applicant's superior, she chose to relocate to an office in another state, out of his jurisdiction.⁴¹ She described Applicant as a "documenter" who kept records of everything,⁴² and contends that she and Applicant went over the office budget and each expense report, and "without any reservation . . . every expense report . . . was accurate and placed in the proper category." Nevertheless, Applicant's superior frequently contested every line item and "massaged the numbers."⁴³ She described Applicant as "an honorable, humble and ethical man."⁴⁴ She added that Applicant is trustworthy, ethical, honest and sincere.⁴⁵ Applicant's former direct manager at his current employer is also highly supportive of Applicant's continued access to classified information.⁴⁶

On July 12, 2000, Applicant was interviewed by an investigator from an unspecified organization. An incomplete extract of the unsworn and unsigned document which appears to be a report of investigation (ROI) states the following regarding the 140 minute interview: "[Applicant] denied any involvement with Law Enforcement or any Criminal Activities since Jun 82" ⁴⁷ Because ten years had passed since the identified date, Applicant was unable to indicate if the extract accurately reflected the information he purportedly told the investigator.⁴⁸

On March 24, 2009, when Applicant completed his SF 86, he responded "no" to one question pertaining to his investigations and clearance record. The question asked:⁴⁹

To your knowledge, have you EVER had a clearance or access authorization denied, suspended, or revoked; or been debarred from government employment? If "Yes," give the action(s), date(s) of action(s), agency(ies), and circumstances. Note: An administrative downgrade or termination of a security clearance is not a revocation.

The SOR alleges Applicant deliberately failed to disclose that his access to SCI was suspended in about April 2000. Applicant denies he intended to deliberately falsify or omit the true facts, and contends he was advised by his security officer to generally only

⁴¹ *Id.* at 2; Tr. at 120.

⁴² Tr. at 117.

⁴³ Applicant Exhibit D, *supra* note 40, at 1, 3.

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 4.

⁴⁶ Applicant Exhibit I (Character reference, dated November 22, 2010).

⁴⁷ Government Exhibit 7, *supra* note 4, at 3.

⁴⁸ *Id.* at 5, 7.

⁴⁹ Government Exhibit 1, *supra* note 1, § 25.b., at 40.

go back seven years when answering the questions in the SF 86.⁵⁰ Applicant acknowledged that the security officer did not specifically refer to this particular question when discussing how far back Applicant was to go in answering the question.⁵¹ In his Answer to the SOR, Applicant stated:⁵²

I failed to properly qualify the answer regarding security clearance processing from 2000 to 2001. [My only awareness was that the SCI portion of my clearance was not being renewed (i.e. I was told the update process was being discontinued and that all other clearances I held would remain in effect).] What I read in [the SOR] goes into a level of detail I am not aware of nor would I know how to properly quantify a response. I did not knowingly falsify the response.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no one has a ‘right’ to a security clearance.”⁵³ 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. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.”⁵⁴

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

⁵⁰ Tr. at 90.

⁵¹ *Id.* at 93.

⁵² Applicant’s Answer to the SOR, *supra* note 22.

⁵³ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

⁵⁴ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

In the decision-making process, facts must be established by “substantial evidence.”⁵⁵ The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.⁵⁶

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”⁵⁷

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”⁵⁸ Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Analysis

Guideline E, Personal Conduct

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

⁵⁵ “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

⁵⁶ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

⁵⁷ *Egan*, 484 U.S. at 531

⁵⁸ See Exec. Or. 10865 § 7.

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a), a “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities,” is potentially disqualifying. In addition, under 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,” may raise security concerns. Similarly, under AG ¶ 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person’s personal, professional, or community standing . . . ,” may raise security concerns. Applicant’s omissions, concealments, and falsifications of critical information pertaining to his criminal conduct while on active duty, his NJP, and the loss of his security clearance and access to SCI, provides sufficient evidence to examine if his omissions were deliberate falsifications or were the result of simple oversight or negligence on his part.⁵⁹

As to AG ¶ 16(a), the sole focus of that potentially disqualifying condition is the incident regarding the response to the question on the SF 86 pertaining to the denial, suspension, or revocation of a security clearance or access authorization (SOR ¶ 2.a.). As noted above, Applicant’s security clearance was suspended on April 7, 2000, and his access to SCI was suspended in May 2000. Those are facts known to the command and those involved in processing security clearance eligibility, as set forth in documents, but there is no evidence to show that Applicant was given written or oral notice of the actions, or that he was ever made aware of them. There is no evidence that Applicant was ever debriefed when he lost his security clearance or SCI. To the contrary, Applicant contends that sometime after March 28, 2000, he was informed that he would

⁵⁹ The Appeal Board has explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10390 at 8 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

retain his secret clearance, and he was removed from his office space where he had access to SCI, pending the investigation, and moved to an area where secret was the highest level available. His application for SCI retention was not being processed. Moreover, Applicant denied intending to deliberately omit, conceal, or falsify the true facts. While Applicant's answer to the question may be incorrect, there is no evidence to support a conclusion that it was a deliberate falsification on his part. AG ¶ 16(a) has not been established.

As to AG ¶ 16(b), the sole focus of that potentially disqualifying condition is the incident regarding the responses to the question(s) purportedly asked by the investigator in July 2000, pertaining to possible involvement with law enforcement or any criminal activities since 1982 (SOR ¶ 1.c.). As noted above, Applicant was apprehended by a member or members of the security forces squadron after a review of a military exchange video surveillance tape. In May 2000, Applicant appeared before an Admiral's Mast and he was awarded NJP under Article 15, UCMJ. The offenses identified were two violations, each, of Articles 121 (Larceny) and 133 (Conduct Unbecoming an Officer). This incident would not have been reportable in the SF 86 because there is no evidence that Applicant was ever "charged" with any felony offense under the UCMJ. The evidence as to what Applicant may or may not have said during the purported interview calls for speculation because of the nature of the "evidence." An incomplete extract of an unsworn and unsigned document which appears to be part of a ROI states that Applicant "denied any involvement with Law Enforcement or any Criminal Activities since Jun 82" Because ten years had passed since the identified date, Applicant was unable to indicate if the extract accurately reflected the information he is alleged to have given at that time.

Furthermore, there is substantial concern that the document submitted by the Government should be barred by § E3.1.20., of the Directive, which states: "An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence. . . ." In this instance, the document was not recognized by the Applicant; the document did not appear to be a complete document; the document was not signed by either the drafter of the document or by Applicant; and the document was not received with an authenticating witness. Likewise, it is unclear if the words appearing on the document are those of Applicant, or a general conclusion of the drafter. In addition, it appears that the requisite preliminary circumstances, as set forth in § E3.1.22., of the Directive have not been met.⁶⁰ Under these circumstances,

⁶⁰ A written or oral statement adverse to the applicant on a controverted issue may be received and considered by the Administrative Judge without affording an opportunity to cross-examine the person making the statement orally, or in writing when justified by the circumstances, only in either of the following circumstances:

E3.1.22.1. If the head of the Department or Agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his or her identity would be substantially harmful to the national interest; or

E3.1.22.2. If the GC, DOD, has determined the statement concerned appears to be relevant, material, and reliable; failure to receive and consider the statement would be substantially harmful to the national security; and the person who furnished the information cannot appear to testify due to the following:

although the document was admitted into evidence, I cannot give substantial weight to its contents. AG ¶ 16(b) has not been established.

Applicant's actions while in the military exchange and his subsequent NJP, the loss of his security clearance and access to SCI, his forced retirement from active duty with the associated ineligibility to reenter the service, and his resignation from his former employer, are activities which, if known, may affect Applicant's personal, professional, or community standing, and raise security concerns. AG ¶ 16(e) has been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from personal conduct. 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) may apply. Also, AG ¶ 17(d) may apply 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." Similarly, if "the information was unsubstantiated or from a source of questionable reliability," AG ¶ 17(g) may apply.

Appellant's pain medication-induced absentmindedness and actions while in the military exchange occurred in March 2000, over a decade ago. Applicant did something for which he has shown remorse. While the extenuating circumstances were rejected by the Admiral during the NJP, they have been supported by his physician, a Navy doctor. His medical condition was subsequently recognized and controlled more effectively. While the offense was not really minor in nature, the command chose to handle it administratively as an NJP, not as a military court-martial. There is substantial evidence of Applicant's outstanding reputation and previous gallant service to our Nation. In light of the length of the period since his action, there is little doubt as to Applicant's current reliability, trustworthiness, or good judgment. Moreover, with his controlled medication, such behavior is unlikely to recur.

There is substantial controversy related to the incident pertaining to Applicant's resignation from his former employer. On one side there is a Report of Adverse Information wherein the government contractor's facility security officer stated "[Applicant] was terminated from employment with the Corporation, but it looks as though it was allowed to go through as a 'resignation.' Very simply, [Applicant] was terminated due to inflating expense reports." That statement appears to be a simplified conclusion which is not supported by the record. The government contractor conducted an investigation into Applicant's 2007 travel expenses and 2008 travel and related expenses, but there is no explanation as to what the investigation may have found and there are no expressed conclusions. Instead, there is a general comment that several

E3.1.22.2.1. Death, severe illness, or similar cause, in which case the identity of the person and the information to be considered shall be made available to the applicant; or

E3.1.22.2.2. Some other cause determined by the Secretary of Defense, or when appropriate by the Department or Agency head, to be good and sufficient.

divisions coordinated in the disposition of Applicant's case, and the government contractor noted that it was legally bound by an agreement with Applicant to not disclose the nature of or facts surrounding Applicant's departure to any entity other than the U.S. Government. In this regard, Applicant raised a significant point. If the government contractor was required to report the information, why did it delay doing so until February 2009, nearly 11 months after the resignation? The answer has not been furnished.

On the other side there is the undisputed allegation by Applicant, supported by several former coworkers in a position to know the situation, that Applicant was caught in an environment of office politics with a new off-site superior who was described as "manipulative, devious, controlling and worried more about their own power position than the good of the customers and the corporation. . . . It became obvious they were on a vendetta." Several character references, including those who knew Applicant before, during, and after the alleged incident, concur in an assessment that Applicant is trustworthy and exhibits the highest standards of ethical conduct and moral character. AG ¶¶ 17(c), 17(d), and 17(g) all apply.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

There is substantial evidence against mitigating Applicant's conduct. Applicant shoplifted, was apprehended, and disciplined under NJP. As a result, he lost his security clearance and access to SCI, was forced to retire from active duty, and he subsequently resigned from his former employer, amid allegations of inflating expense reports.

The mitigating evidence under the whole-person concept is also substantial. Until his March 2000 pain medication-induced absentmindedness and actions while in the military exchange, Applicant had an outstanding reputation and previous gallant service to our Nation. The command chose to handle Applicant's conduct administratively as an

NJP, not as a military court-martial. While the extenuating circumstances for his actions were rejected during the NJP, they have been supported by his physician, a Navy doctor. Applicant's medical condition was subsequently recognized and controlled more effectively. Witnesses all concur that Applicant was and is trustworthy, ethical, honest and sincere, and has good judgment.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.⁶¹ Applicant's 2000 incident in the military exchange, and the subsequent negative actions which occurred as a direct result of his actions, all occurred over a decade ago, and have not recurred. He displayed remorse and reasonable explanations for his action, and his subsequent actions and activities are sufficient to mitigate continuing security concerns. See AG ¶¶ 2(a)(1) through 2(a)(9).

Overall, the record evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has mitigated the personal conduct security concerns.

Formal Findings

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

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

⁶¹ See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

Conclusion

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

ROBERT ROBINSON GALES
Administrative Judge