DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
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	)	
Applicant for Security Clearance	)	

Appearances

For Government: Stephanie Hess, Esq., Department Counsel
For Applicant: *Pro se*

May 11, 2011

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for a security clearance to work in the defense industry. The evidence shows a federal agency denied Applicant eligibility for access to sensitive compartmented information (SCI) in 2004 based on a combination of several grounds as follows: drug involvement, personal conduct, foreign influence and preference, and criminal conduct. Under consideration here are some of the underlying factual bases for that denial decision. During 2002–2004, while going through pre-employment processing with the other federal agency, he made odd and troubling, if not inexplicable, statements that call into question his current judgment, trustworthiness, and reliability. He did not provide a satisfactory explanation sufficient to rebut, explain, extenuate, or mitigate the statements. The other alleged matters, including the foreign influence and preference matters, are resolved in his favor. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,[1] on November 3, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guidelines known as Guideline E for personal conduct and Guideline C for foreign preference.

Applicant timely answered the SOR and requested a hearing. Department Counsel then amended the SOR in December 2010, by adding an allegation under Guideline B for foreign influence. This allegation, at SOR ¶ 3.a, like the Guideline C allegation, simply cross-referenced certain matters alleged under Guideline E. Applicant timely answered the amended SOR.

The case was assigned to me January 26, 2011. The hearing took place February 23, 2011. The transcript (Tr.) was received March 3, 2011.

Without objections, the record was kept open until March 3, 2011, to allow Department Counsel to present a request to take administrative or official notice of certain facts about the country of Israel. Those materials were timely received, made part of the record as Exhibit 12, and I have taken notice of the facts set forth in the written request. Applicant was given an opportunity to respond to the request, but no such response was received.

Findings of Fact

Applicant's admissions to the SOR allegations, as set forth below, are accepted as findings of fact. The following findings of fact are supported by substantial evidence.

Applicant is a 52-year-old employee of a federal contractor. He has been married and divorced twice. He married for the third time in 2004. He has no children of his own, but his current wife has two adult children from a previous marriage; both children are gainfully employed in the United States. He is seeking a security clearance for his job as a training specialist or instructor, which he has held since July 2008. His wife, who became a U.S. citizen in 2008, is similarly employed at the same location, except that she recently began employment as a federal employee for a military department. Applicant reports that she was granted a security clearance.

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[1] This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

Applicant's employment history includes military service in the U.S. Army. He served during 1986–1990, during which time he was trained as a counterintelligence agent. Thereafter, from about 1991 to 1998, he earned both a master's degree and a Ph.D. from a university's department of Near Eastern studies. He is proficient in Arabic, and he has studied Hebrew as well.

Applicant worked as an assistant professor for a language school from 1999 to 2008. He worked chiefly as an Arabic language instructor, although he worked in other areas of the school as well. He was employed continuously at the school except for a five-month period in 2005, when his contract was not renewed. He resumed employment with the school when another department offered him a contract.

The SOR allegations arise from information Applicant provided during his unsuccessful attempts to obtain employment, both as an employee and then a contractor, with a federal agency during 2002–2004. During this time, he went through an application and screening process, which included a polygraph examination on two occasions. Concerning the SOR allegations under Guideline E, the evidence establishes the following:

1. During a January 2002 interview with the federal agency, Applicant expressed concerns about whether he would be able to work for an administration or mission that was contrary to his moral values. During the same interview, he stated that he was unsure if he could ever work for a Commander in Chief (i.e., the U.S. President) who did not share his political and personal views. With explanation, Applicant admits making this statement.

2. During a June 2004 interview (not January 2002 as alleged) with the same federal agency, Applicant stated that he had an affinity for Israel, and that if asked to translate information that could result in adverse action against Israelis, he may be tempted to omit or alter information to aid the Israeli people.[2] With explanation, Applicant admits making this statement.

3. During the same June 2004 interview, he reported that from January 2002 to April 2002, while working at the language school, he often worked six hours daily, but claimed eight hours daily. With explanation, Applicant admits this conduct.

4. Applicant married his current wife in 2004, when she was a foreign citizen, in violation of the federal agency's policy against association with foreign nationals. With explanation, Applicant admits unknowingly or unintentionally violating this policy.

In his hearing testimony, Applicant admitted making the statements noted above in subparagraphs 1 and 2.[3] He claimed he did "not recognize the person who uttered

[2] This statement serves as the sole basis for Guideline B and C matters.

[3] Tr. 45–47.

the statements;"[4] he claimed to have no rational explanation for the statements; he claimed to be appalled at the thought of making the statements; he claimed to have no recollection of actually uttering the words; and he claimed that:

> So embarrassed am I now and so traumatized am I emotionally, mentally, at the thought of the things that I said in that abnormal state of mind, which is the only way that I can think to describe it, that I have simply blotted it from my memory. So when I said, I don't recall, I wasn't - - I didn't mean to imply that there was any question that I had said it. [I] did say it if the Government says I did it.[5]

In addition, Applicant attributed his statements to the fear and panic he experienced during the polygraph examinations, especially so the first examination in 2002.[6] He claimed that, looking back, the situation was laughable, and he described himself as "idiotically naive."[7]

Also in his hearing testimony, Applicant denied any foreign preference, foreign influence, or allegiance to any country over the United States. He explained that by marrying his wife in 2004, he unknowingly or unintentionally violated a policy he had agreed to follow as an applicant for employment with the federal agency.

Applicant did not present any documentary evidence. Likewise, he did not present the testimony of any witnesses other than his spouse and his own.

Law and Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. The Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.[8] As noted by the Supreme Court in *Department of Navy v. Egan*, "the clearly consistent

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[4] Tr. 46.

[5] Tr. 47.

[6] Tr. 72.

[7] Tr. 73.

[8] *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

standard indicates that security clearance determinations should err, if they must, on the side of denials."[9] Under *Egan,* Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[10] An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[11]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[12] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[13] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[14] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[15] In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.[16] The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[17]

The AG set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of the relevant facts and circumstances, the pertinent criteria and adjudication factors, and the whole-person concept.

The Government must be able to have a high degree of trust and confidence in those persons to whom it grants access to classified information. The decision to deny a

[9] 484 U.S. at 531.

[10] Directive, ¶ 3.2.

[11] Directive, ¶ 3.2.

[12] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[13] Directive, Enclosure 3, ¶ E3.1.14.

[14] Directive, Enclosure 3, ¶ E3.1.15.

[15] Directive, Enclosure 3, ¶ E3.1.15.

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

[17] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

person a security clearance is not a determination of an applicant's loyalty.[18] Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

1. Foreign Preference and Foreign Influence

The foreign preference and foreign influence matters are discussed together because they are based on the same factual matters; namely, Applicant's statement in 2004, when he expressed an affinity for Israel. I have considered his statement, the passage of time since he made the statement, his strong denial of any foreign preference, foreign influence, or allegiance for any country other than the United States, the nature of the foreign country as set forth in the administrative notice request, and analyzed his statement under the concerns and conditions for Guidelines B and C.[19] Although his statement still presents personal conduct concerns, which are discussed below, it no longer poses undue foreign preference and foreign influence concerns. Accordingly, Guidelines B and C are decided for Applicant.

2. Personal Conduct

Under Guideline E for personal conduct,[20] the suitability of an applicant may be questioned or put into doubt due to false statements and credible adverse information that may not be enough to support action under any other guideline. The overall concern under Guideline E is:

> Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations [that may] 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.[21]

The first issue here is the security significance of two of the four matters alleged under Guideline E. First, I attach no security significance to Applicant's working fewer hours than required during January–April 2002. Although his conduct was wrong and he knew it was wrong, it does not rise to the level of disqualifying conduct that makes him unsuitable for a security clearance. His conduct is dated, relatively minor, and not

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[18] Executive Order 10865, § 7.

[19] AG ¶¶ 6–8, and AG ¶¶ 9–11 (setting forth the security concerns and the disqualifying and mitigating conditions).

[20] AG ¶¶ 15, 16, and 17 (setting forth the security concern and the disqualifying and mitigating conditions).

[21] AG ¶ 15.

uncommon in the workplace. Second, I attach no security significance to Applicant's violation of the federal agency's policy about associating with foreign nationals. He provided a credible explanation that his violation of the policy was unknowing or unintentional or both.

The second issue here, and the apparent gravamen of the SOR, is the security significance of the other two matters alleged under Guideline E. During 2002–2004, while going through pre-employment processing with the other federal agency, Applicant made odd and troubling, if not inexplicable, statements that call into question his current judgment, trustworthiness, and reliability. His statements (concerning the Commander in Chief and affinity for Israel) raise serious doubts about his ability or willingness to place the national security interests of the United States above his own self-interests. Applicant is both an experienced and well-educated man, and he knew or should have known the gravity of his statements. And under Guideline E, his odd and troubling statements raise the following disqualifying conditions:

> ¶ 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
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> ¶ 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.

There are several mitigating conditions to consider under Guideline E.[22] I have given due consideration to them and I conclude that none apply in Applicant's favor. Granted, he made the statements several years ago, and he made the statements under circumstances that are stressful to many people. But given the gravity of his statements, they cannot be dismissed by the passage of time. The same goes for his current disavowal of the statements. We have all said things we would like to take back, but his claims, as described in the findings of fact, are simply dubious and cannot be relied upon. This is especially so concerning his claim of no memory of making the 2002 statements. Applicant did not provide a satisfactory explanation sufficient to rebut, explain, extenuate, or mitigate the statements.

[22] AG ¶ 17.

To conclude, under Guideline E for personal conduct, the evidence as a whole justifies current doubts about Applicant's judgment, trustworthiness, and reliability. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I relied in part on the opportunity to listen to Applicant's testimony and observe his demeanor during the hearing. In addition, I gave due consideration to the whole-person concept[23] and Applicant's favorable evidence. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline E:	Against Applicant
Subparagraph 1.a(1):	Against Applicant
Subparagraph 1.a(2):	Against Applicant
Subparagraph 1.a(3):	For Applicant
Subparagraph 1.a(4):	For Applicant
Paragraph 2, Guideline C:	For Applicant
Subparagraph 2.a:	For Applicant
Paragraph 3, Guideline B:	For Applicant
Subparagraph 3.a:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge

[23] AG ¶ 2(a)(1)–(9).