



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 14-05973

Appearances

For Government: Andrew Henderson, Esq., Department Counsel
For Applicant: *Pro se*

01/13/2017

Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant mitigated personal conduct concerns and financial considerations. Eligibility for access to classified information is granted.

Statement of Case

On June 16, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) detailing reasons why DOD adjudicators could not make the affirmative determination of eligibility for a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied, or revoked. The action was taken under Executive Order 10865 (E.O. 10865), *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the Adjudicative Guidelines (AGs) implemented by DOD on September 1, 2006.

Applicant responded to the SOR on July 7, 2015, and requested a hearing. The case was assigned to me on January 14, 2016, and was scheduled for hearing on April 26, 2016. At hearing, the Government's case consisted of ten exhibits (GEs 1-10). Applicant relied on one witness (himself) and 13 exhibits (AEs A-H and J-N). The transcript (Tr.) was received on May 6, 2016.

Procedural Issues

Before the close of the hearing, Applicant requested the hearing be kept open to permit him the opportunity to supplement the record with an original Form 1099-C, Cancellation of Debt (Form 1099-C) filed with the Internal Revenue Service (IRS) by his mortgage company (creditor 2.a). For good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded two days to respond. Within the time permitted, Applicant provided a handwritten copy of the Form 1099-C (dated August 31, 2010) filed by his lender with the IRS in August 2010. Applicant's submission was admitted as AE O.

Because of questions about the authenticity of the Form 1099-C, I asked Applicant to provide a better copy of the Form 1099-C from his lender. Applicant provided a new handwritten copy of the Form 1099-C that was certified by his lender on June 27, 2016. Applicant's updated submission was admitted without objection as AE P.

Summary of Pleadings

Under Guideline E, Applicant allegedly (a) was the subject of an Office of Personnel Management/Federal Investigative Services (OPM/FIS) integrity assurance investigation where he was found to have falsified investigations and was subsequently terminated from his Company A employment on approximately March 9, 2012 due to the falsification allegations and (b) had his work audited in November 2012 by OPM/FIS integrity assurance as the result of discovered discrepancies in his completed work and the re-work of the assigned investigator and was subsequently terminated from Company B due to the discrepancies found by OPM/FIS.

Under Guideline F, Applicant allegedly accumulated a delinquent debt on an account that has been placed in collection in the amount of \$82,958. Allegedly, this debt remains delinquent.

In his response to the allegations contained in subparagraphs 1.a and 1.b of the SOR, Applicant denied each of the allegations. Specifically, he denied any false reporting while he was a member of his Company A investigation staff. While admitting his March 2012 termination from Company A, he denied his termination was due to falsification. He claimed his termination was due to his following a direct order of his team leader and Company A management personnel in 2011 regarding multiple background investigations of his work in the first part of fiscal year 2012 (November and December 2011).

Applicant claimed, too, that he was never interviewed by Company A management personnel or OPM investigators regarding the 2011 integrity assurance investigation. He claimed that he followed the training format either prescribed to him by a Company A

trainer, or pursuant to direct orders from Company A team leaders and management personnel, when preparing his reports of investigation (ROIs) over the course of his employment tenure spanning January 2007 and December 2011. And he claimed he never received any forms or discipline for violating investigative policies or procedures while employed by Company A.

Addressing the November 2012 audit by OPM/FIS/integrity assurance (IA) team of investigators, Applicant denied being terminated from his Company B employment in March 2013 due to falsification of his ROIs. He claimed he commenced working for Company B in May 2012, and shortly after his start-up, he was told by his trainer that OPM had requested a note audit of his Company B work based on unsupported information Company A had provided OPM. He claimed that he received additional training from Company B and was told that the audited notes he had prepared during his initial start-up with Company B contained inaccurate information.

Applicant claimed in his response that he was told by Company B's quality control manager (Ms. L) in October 2012 that their investigation findings contained "Zero" integrity concerns (only quality concerns) regarding his case work. He claimed he was contacted by both his human resources representative and his quality control manager in December 2011 and was told he was being laid off from Company B's OPM contract solely due to direct orders received from OPM.

Further, Applicant claimed he received a February 2013 letter from Company B to OPM's lead investigator (X) regarding case expanded rework of Applicant's notes and reports while employed by Company B. Applicant claimed that Company B's findings revealed no integrity concerns, only quality concerns that were correctable with additional training.

Applicant claimed he has since completed 40 hours of training with his current employer and will continue to receive training assignments on a monthly basis, which he never received during his employment tours with Company A and Company B. He also claimed this training has made him more knowledgeable of the background of the investigative process, including all policies and procedures required by his employer and their government customers.

Addressing the Government's financial concerns, Applicant denied the delinquent account covered in SOR ¶ 2.a is currently delinquent. He claimed the account was charged off by the SOR ¶ 2.a creditor in August 2010, which issued him a Form 1099-C with the IRS.

Applicant also claimed he received a credit report from the credit reporting agencies confirming the account on his delinquent home loan line of credit was due to a foreclosure of a previous residence in 2008. He claimed this foreclosure occurred more than seven years old ago, and beyond the reporting agency's reporting period, and it no longer appears on his credit report.

Findings of Fact

Applicant is a 52-year-old investigator for a defense contractor who seeks a security clearance. The allegations covered in the SOR were denied by Applicant and placed in issue. Findings follow.

Background

Applicant married his first spouse in December 1987 and divorced her in September 1997. (GEs 1-3) He remarried in September 1999 and separated from his second spouse in October 2009. (GEs 1-3) He has two adult daughters from his first marriage and no children from his second marriage. (GEs 1-3 and AE K)

Applicant attended college classes between July 1988 and November 1988 at a local community college and earned a certificate in June 2012. (GE 1) He claimed no military service or legal training. (GEs 1-3)

Applicant has worked for his current employer (Company C) since June 2013 as an investigator. (GEs 1-3) Between December 2012 and June 2013, he was unemployed. Previously (between May 2012 and December 2012), he provided investigation services for a federal government investigations firm (Company B) before he was laid off from an OPM contract in December 2012. (GEs 1; Tr. 47-49) for cited reasons of providing fabricated or misleading information to his previous employer, Company A (2007-2011). (GEs 1 and 5-6 and AEs B and H) Applicant was unemployed between March 2012 and May 2012 after being first suspended (December 2011) and then terminated (unjustly by Applicant's account) by Company A for unexplained reasons without being interviewed by his supervisor or company representative. (GE 1 and AE B; Tr. 36-40)

Before joining Company A in 2007, Applicant worked for a number of years in law enforcement between 1984 and 1997. (GE 1; Tr. 33-34) After he experienced on-the-job back injuries in 1996, he was forced to retire from law enforcement (Tr. 34-35). Following his retirement, he opened his own private investigation firm, which he managed for over six years before closing his firm due to business losses he attributed to an economic downturn. (Tr. 35-36)

Raised auditing issues concerning Applicant's investigation notes and reports

Between January 2007 and March 2012, Applicant was officially employed as an investigator for Company A (a national investigative service) He completed a small training period with Company A and related training from OPM before beginning his work for Company A as a field investigator. (Tr. 36-37)

Beginning in August 2011, Applicant's case load increased considerably, and to the point where he could not keep up with his assigned cases and complete them in a timely manner. (Tr. 37, 65-68) When he brought these concerns to the attention of his supervisor (team leader K), team leader K told him to RTUC (Record Tract Unable to Cover) his source contacts and move on in the interest of increasing his production. (Tr.

38, 65-68) Applicant followed his team leader's directions and initiated a practice of RTUCing source contacts in his cases.

In December 2011, Applicant was contacted by team leader K and told he was suspended from his investigative duties with Company A for a possible integrity violation. (Tr. 38) Team leader K asked Applicant to sign the termination letter without providing him a copy, and without first interviewing him or furnishing him reasons for his termination. Moreover, team leader K did not permit him to provide answers to any questions that arose during the rework investigations that followed management questions about the accuracy and integrity of the government background investigations conducted by Applicant. (GE 1; Tr. 36-40)

Applicant expressed his belief that team leader K initiated these termination actions to scapegoat Applicant to cover-up an ongoing OPM investigation of Company A's widespread reporting failures. (GE 2 and AE C) In a Justice Department news release in August 2015, the Government announced its settlement of allegations that Company A violated the False Claims Act (FCA) for conduct involving a contract for background investigations that Company A held with OPM. (AE C) Under the reported terms of the settlement, Company A agreed to forgo its right to collect payments the company claimed were owed by OPM (in excess of \$30 million) in exchange for release of liability under the False Claims Act (FCA). (AE C)

OPM investigation records of March 2013 confirmed that Applicant's Company A team leader (K) conducted an internal investigation to verify Applicant's source contact notes and found numerous discrepancies in his investigator notes covering his contacts and attempted contacts of his sources. (GE 5) In the team leader's sampling of Applicant's case notes in December 2011, he found 50 validated source notes and 27 inconsistencies among the 80 case notes he sampled. (GE 5; Tr. 68-69)

Among the team leader's noted concerns from his sampling of Applicant's case notes were appearances of copied, pasted notes, the apparent use of different pens in the completing of Applicant's case notes (raising concerns with K about Applicant's not completing his notes contemporaneously), discrepancies in the information transferred from Applicant's notes to his submitted ROIs, and noted discrepancies in Applicant's reported contacts and failed contact attempts that could not be verified from Applicant's reported source contacts and attempted contacts. (GE 5; Tr. 68-69) Team leader K wrote in his report that while some of the noted inconsistencies were performance-related, others raised questions of investigative integrity. (GE 5)

Team leader K's findings did not include any input from Applicant on his sampled notes and prepared ROIs. Most of team leader K's findings are potentially reconcilable with other alternatives consistent with good-faith practices that do not raise integrity, or even quality concerns. Examples include the following possibilities: the use of different pens resulting from his pens running out of ink; attempted source contacts that could not be reached because the sources either were not home or they could not recognize Applicant's phone number on their caller ID; memory lapses or mistaken understandings in Applicant's note taking without the benefit of recording devices or transcripts (like those

that are used in evidentiary hearings); and the possibility of rework investigators encountering sources with poor or altered recollections from their interviews with Applicant. If afforded an opportunity to explain the discrepancies detected by team leader K, Applicant might have been able to provide plausible explanations. Instead, Applicant's lap top computer with his stored information was seized by team leader K without Applicant's being afforded the opportunity to address team leader K's identified concerns.

After team leader K completed his reported sampling findings and forwarded them on to OPM for its review, OPM suspended Applicant in December 2011 from any further work on Company A's background investigation contract with OPM. (GE 5 and AE D; Tr. 36-40) Company A followed its suspension with permanently terminating Applicant's employment in March 2012. (Tr. 39-40) Applicant's employer thereafter notified OPM, which recorded Company A's findings with instructions to be informed should Applicant attempt access to an OPM background investigations contract with any other contractor in the future. (GE 5)

In May 2012, Applicant received an offer of employment from another government background investigation firm: Company B. Unbeknownst to Applicant at the time, Company B notified OPM in April 2012 of its intention to employ Applicant. (GE 5; Tr. 50-51) After reviewing its past ROIs by Applicant, OPM approved Applicant's Company A employment while advising Company A to conduct its own internal 100 per cent post-audit of Applicant's background investigation source work after the completion of his employer's training. The rework audit was to cover the first 30 days of Applicant's startup with Company B. Audit results, in turn, were to be provided to OPM by July 2012. (GE 5) Applicant noted that he did not receive any training from Company B before his employer initiated its first internal audit of his work. (Tr. 50-51)

Company B completed its note audit of Applicant's investigation reports in July 2012 and forwarded its findings to OPM. (GE 5-6). The investigator's rework findings of 45 cases completed by Applicant from June 2012 through July 2012 identified no clear integrity concerns, but several quality concerns, which (L) summarized in Company B's July 2012 report to OPM's lead investigator (X). Company B confirmed that it discussed its findings of the 45-case audit with Applicant and provided guidance as needed. (GEs 5 and 6, at 72)

Company B's discussions with Applicant in August 2012 over its June-July 2012 audit findings included suggestions for Applicant in conducting his interviews: adding information to his notes contemporaneously after completing the interview instead of adding information later from memory with a different type of pen. In their August 2012 discussions with Applicant Company B rework investigators also discussed with Applicant the improvements they found in the cases they audited in the June-July 2012 time period. (GEs 5 and 6, at 73-76) Still, the investigators found some integrity concerns in this follow-up sampling, as well as serious quality concerns. (GE 6, at 76)

OPM reopened its file in November 2012 and instructed Company B to conduct a five-case sampling of Applicant's case notes and reports covering his background investigations. In its five-case sampling, Company B found numerous integrity and quality

entries. (GE 5, at 20) Some of the entries reflected non-contemporaneous entries in the reports following interviews with the sources. Case reports reflected information in multiple instances (13 in all) that were found not to have been provided by the sources upon recheck. (GEs 5-6)

Company B submitted the results of its five-case sampling of Applicant's case notes to OPM in December 2012 for the agency's independent review. (GEs 5 and 6) In its report to OPM, Company B recited the guidance it provided Applicant and confirmed that Applicant was open to making adjustments and exhibited a good attitude. (GE 5) Company B proposed new field training and guidance for Applicant covering all areas of concern raised by its sampling, with emphasis placed on conducting more thorough reviews and record interviews, as well as "putting forth efforts needed to obtain required coverage." (GE 5, at 21) Company B proposed to correct the open cases to report correct testimonies and records.

In its December 6, 2012 response to Company B's findings and proposals, OPM expressed agreement with Company B's proposed revisions to the four open cases and reminded Company B to schedule any law checks if needed for the developed residences. However, OPM did not agree with Company B's training and verbal warning proposals. (GE 5)

Because of its noted numerous integrity and quality concerns arising from Company B's findings, OPM directed that Applicant be removed from work on Company B's contract with OPM, and notified Company B of its decision. (GE 5 and AE H; Tr. 51-52) OPM also instructed Company B to conduct a 30-day rework of 33 cases completed by Applicant between November 2012 and December 2012. (GEs 5-6 and AE H; Tr. 51-52)

Company B complied with OPM's request and laid off Applicant in December 2012 from any further work on the OPM contract. (GE 5 and AE F; Tr. 52-53) In her email notice to Applicant, L did not indicate to Applicant that he did anything wrong and attributed Company B's layoff to OPM's instructions. (AE H; Tr. 52-53)

In turn, Company B followed OPM's rework instructions and completed its rework of the 33 cases it was tasked to complete. (GEs 5-6 and AE F; Tr. 73-72)) In OPM's review of Company B's five-case sampling results in December 2012, OPM found numerous integrity and quality entries. Some of the entries reflected non-contemporaneous entries in the reports following interviews with the sources. Case reports reflected information in multiple instances (13 in all) that were found not to have been provided by the sources upon recheck. Again, though, Applicant was not furnished an opportunity by OPM to see the agency's findings and provide explanations potentially reconcilable with good-faith investigation practices.

Company B completed its rework of the 33 cases it was tasked to complete in February 2013. Its findings revealed no integrity concerns, but some serious quality concerns. (GEs 5-6 and AE F; Tr. 72-73) OPM's independent review of Company B's audited 33 cases produced contrary conclusions that cannot be reconciled with Company

B's findings. (GE 5) OPM's separate findings revealed integrity concerns, some "more egregious concerns found during rework," as well as quality concerns. (GE 5, at 21) OPM acknowledged Applicant's removal from the OPM contract on December 11, 2012. (GE 5, at 21-22)

Applicant disagreed with OPM's investigative findings of his work discrepancies. He continued in his hearing to insist he never falsified any notes or reports and that he only followed team leader K's instructions to RTUC in the event he was not able to complete his source interviews. (GEs 2-3 and AE F; Tr. 45-46, 65-68, 72-73) In her email response to Applicant's December 2012 inquiry, his Company B supervisor (L) concurred with Applicant's summation that his ordered layoff from Company B had nothing to do with his work, but "was OPM's call, and not our recommendation." (AE H)

In his OPM interview of May 18, 2014, Applicant assured the investigator that he never falsified any investigative report. (GE 2) More specifically, he denied falsifying any of his investigative reports and attributed any short cuts taken while employed by Company A to directions from his team leader K to limit his source contacts in specific cases to increase overall productivity. (GE 2; Tr. 54-55, 64-68)

In his May 2014 OPM interview, Applicant affirmed the advice given him by his team leader K to RTUC work that he could not get to due to case load backlogs and complete in a timely way. (GE 2; Tr. 64) Applicant's overall credibility is good, and the RTUC steps he acknowledged taking on the strength of team leader K's recommendations to meet production goals are fully supported by his testimony and written statements. (GEs 1-2)

Integrity standards enforced by Applicant's Company C employer

Applicant's current employer (a key provider of background investigations for DOD agencies) stresses integrity in its background investigations. In an April 2016 reminder to its independent contractors, Company C emphasized the importance of integrity and quality in background investigations. (AE M) It cited its strong criteria for ensuring integrity and quality in its investigations that include re-contacting up to 30 percent of each investigator's references sources each month. (AE M) Citing its excellent field reporting statistics, Company C encouraged its investigators to take their time "and remember integrity above all else." (AE M)

In January 2016, Company C announced its formation of an inaugural contract investigator advisory board and invited Applicant to become a member of the board. (AE L) In making its announcement and extending Applicant a membership invitation, Company C's president extolled the value of Applicant's work and requested his advice and insights as a member of the new board. (AE L) Applicant, in turn, credited Company C with providing outstanding training. (Tr. 53)

Applicant's finances

Applicant purchased a home in 2005 in another state for around \$443,000. (Tr. 61-62, 76) He mistakenly accepted an adjustable mortgage for three years that called for

monthly loan payments of \$2,400, that later adjusted upwards to \$3,600 a month. (GE 3; Tr. 56-57)

In 2006, Applicant took out a home equity line of credit of \$86,000 with creditor 2.a that was designed to fund the landscaping costs of Applicant's new home. (GE 3; Tr. 58-59, 74-75) Loan funds from the line of credit were also used to pay off a prior \$45,000 purchase money mortgage and other debts. (60, 76-77)

By August 2008, Applicant had become seriously delinquent in his servicing of his home equity line of credit with SOR creditor 2.a. Creditor 2.a charged off Applicant's home equity line of credit, secured by a second mortgage, in the amount of \$82,952. (GEs 9-10 and AE P) His home had lost one-half of its market value by September 2008, and the mortgage on the home was foreclosed in 2008. (Tr. 57, 77)

At a public auction sale in 2008, Applicant's home sold for less than \$300,000. (Tr. 78-79) Applicant's home no longer had any security value available to satisfy creditor's home equity loan after the first mortgagee's foreclosure brought insufficient sale proceeds to satisfy the even the first mortgage holder's security interest in the property. (AE P)

Neither before nor after Applicant's first mortgage was foreclosed by the first mortgagee did SOR creditor 2.a take any affirmative steps to independently foreclose its junior mortgage. Moreover, the home equity lender never made any collection demands on Applicant for the \$82,958 deficiency balance reported after the public sale of the property over the course of the ensuing two years. (GEs 3, 8-9 and AEs M-N, and O-P) When Applicant contacted the home equity lender to inquire about addressing the deficiency balance, the lender declined to accept any payments from him. (Tr. 79-80)

In August 2010, SOR creditor 2.a abandoned its collection efforts and issued a Form 1099-C cancellation of debt to Applicant in August 2010, confirming it had charged off the reported \$82,958 deficiency balance and was no longer interested in enforcing the deficiency. (GE 3 and AEs I and O-P; Tr. 81-82) SOR creditor 2.a, in turn confirmed to Applicant its filing a Form 1099-C with the IRS in January 2011. (AEs O-P)

SOR creditor 2.a considers its home equity loan claim unenforceable. As a sold out junior lienor following the first mortgagee's foreclosure sale in 2008, creditor 2.a no longer has any security interest in Applicant's line of credit that it could enforce judicially or non-judicially. (AEs N and P) The delinquent debt is no longer reported in Applicant's most recent April 2016 credit report. (AE N) All of his other accounts are in current status. (AE N)

Endorsements

Applicant is well-regarded by his Company C supervisors and former colleagues. (AE K) Company C's president characterized Applicant as "one of the most outstanding

investigators in the industry.” (AE K) He went on to describe Applicant as hard-working, conscientious, and dependable, and one who often volunteers to take difficult assignments that other investigators shy away from.

Company C’s president credited Applicant with completing his assignments “with the highest level of quality and integrity.” (AE K) Former supervisors and colleagues who worked with Applicant at Company A and Company B were equally laudatory about the dedication, integrity, honesty, and loyalty Applicant consistently displayed in his investigations. (AE K)

Friends who worked with Applicant in law enforcement considered Applicant a colleague who never compromised his integrity or beliefs when challenged. (AE K) They expressed their complete trust and confidence in Applicant as a friend and professional. And his ex-spouse expressed total confidence in Applicant as a hard-working, reliable, honest and dedicated professional who has served his community as a law enforcement officer and has been a good citizen. (AE K)

Applicant’s performance evaluation covering the period of July 2012 through September 2012 assigned Applicant an overall rating of 4 (exceeds requirements on some of the more difficult and/or complex parts of the job) on a scale of 1-5. (AE G) He received positive ratings on individual categories of productivity, telephone testimonies, timeliness, quality, adaptability, initiative and self-development, quality control, security, administrative responsibilities, communication, and the receipt of formal progressive counseling. (AE G) Applicant was credited, too, with continually volunteering for company-authorized travel opportunities, and being a “solid performer and team player.” (AE G)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering security clearance cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual’s reliability, trustworthiness, and ability to protect classified information.

These AGs include “[c]onditions that could raise a security concern and may be disqualifying” (disqualifying conditions), if any, and many of the “[c]onditions that could mitigate security concerns.” Each of these conditions must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

The following AG ¶ 2(a) factors are pertinent: (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.

Viewing the issues raised and evidence as a whole, the following individual guidelines are pertinent in this case:

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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. AG ¶ 15.

Financial Considerations

The Concern: Failure or inability to live within one's means, satisfy debts and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. . . AG ¶ 18.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding

that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States, v. Gaudin*, 515 U.S. 506, 509-511 (1995).

As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of E.O.10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Jurisdictional authority over the issues raised by the Government and Applicant are limited to fact and legal issues covering Applicant's eligibility to hold a security clearance. DOHA has no jurisdiction to address any of the employment-related claims that Applicant may have against his prior employers and OPM.

Personal conduct concerns over Applicant's background investigations

Security concerns are raised over Applicant's historical practices of RTUCing identified sources and failing to follow up on his sources in the background investigations he conducted in 2011 and 2012. Some of the identified discrepancies in the rework audits conducted by Companies A and B involved RTUCs. Other raised both investigative quality and integrity concerns. Applicant's acknowledged RTUC practices and insisted they were directed by his Company A team leader K (beginning in 2011) in the interest of increasing team production and revenue and involved quality concerns

only. The rework audits conducted by Company A and Company B investigators produced reported findings with noted discrepancies that the rework investigators found to raise both quality and integrity concerns.

Rework audits of Applicant's case notes and ROIs conducted by Company A agents in 2011 were forwarded to OPM for their independent evaluation and recommendations. Based on Company A's findings, Applicant was suspended (with OPM's concurrence) in December 2011 from any other work on Company A's contracts. OPM, in turn, issued instructions to be informed should Applicant seek employment with any others with background investigation contracts with OPM. Once these Company B rework audits were completed, they were provided to OPM (in July 2012). Company B's initial note audit identified no clear integrity concerns, but several quality concerns.

Still, Company A's rework audit findings were endorsed by OPM and incorporated in its employment directives to other investigation forms interested in hiring Applicant without any opportunities afforded Applicant to review the rework findings produced by Company A's rework investigators and passed along to OPM for approvals. The evidentiary record is clear that Applicant's car keys and laptop were seized by team leader K without any afforded opportunity to review and comment on rework findings. Like the petitioner in the landmark Supreme Court decision of *Greene v. McElroy* (360 U.S. 474 (1959)), who was denied investigatory reports and statements of his accusers, Applicant was deprived of procedural safeguards of confrontation and cross-examination by OPM before the agency took its unilateral actions of imposing *a priori* conditions on Company A, and any other contractor interested in hiring Applicant to perform background investigations on an OPM contract. OPM took these actions without affording Applicant an opportunity to review its findings of quality and integrity lapses and provide explanations of his actions in identified case notes and ROIs.

Without Congressional or Presidential authority, Chief Justice Warren writing for the majority in *Greene* found the administrative practices of the DOD-created personnel security appeal boards violated petitioner's procedural safeguards. See *Greene v. McElroy, supra*, at 497. Before *Greene*, security clearance programs and procedures were established by directives issued by the Secretary of Defense or the Secretaries of the respective services. (*Id.*, at 495) None of the governing programs and procedures were creatures of statute or Presidential executive orders. *Greene* articulated the principle that without Congressional delegation or exercise of Presidential authorization, the reasonableness of the service boards' actions in depriving a person of a security clearance depends on the presence of fact findings that incorporate evidence previously disclosed to the petitioner "so that he has an opportunity to show that it is untrue." (*Id.*, at 497-498) These principles pronounced in *Greene v. McElroy, supra*, underscored the importance of the right of confrontation and cross-examination and the belief that "no safeguard for testing the value of human statements is comparable to that furnished by cross-examination," citing 5 Wigmore on *Evidence*, § 1367 (3d ed. 1940). (*Id.*, at 498). These affirmed rights of confrontation and cross-examination reflect core principles

incorporated in E.O. 10865, which have continued to guide DOHA decision-making in security clearance cases for over a half-century. In *Geene, supra*, Justice Warren writing for the majority concluded that the administrative hearing afforded the applicant did not comport with the Court's traditional ideas of fair procedure and was not a procedure authorized by either the President or Congress. (*Id.*, at 508) Instead of deciding whether the President had inherent authority to create such an administrative program for addressing security clearance appeals, or what the limits on executive or legislative authority may be, the Court decided only that the DOD-created boards were not empowered to deprive the petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination, and remanded the case to the district court for proceedings that are not inconsistent with the Court's decision. (*Id.*, at 509)

Presented with the option of endorsing the administrative proceedings approved by the DOD security clearance appeal boards or providing safeguards that ensure appellant rights of confrontation and cross-examination of an appellant's accusers, President Eisenhower chose to extend the rights of confrontation and cross-examination to contractor employees of private sector employers seeking security clearances. The result was the Presidential adoption of E.O. 10865 in 1960. E.O. 10865 continues to be DOHA's guiding charter for the conducting of security clearance hearings for contractor applicants seeking security clearances.

In Applicant's case, neither Company A nor OPM afforded Applicant an opportunity to address Company A's rework audit findings. Based on their review of Applicant's notes and ROIs, they drew the worst possible inferences from Applicant's audited work product. Without access to the full case notes and ROIs stored in the laptop computer seized from Applicant by his team leader K in December 2011, Applicant was at a distinct disadvantage in responding to the factual findings (redacted in many places) developed by the rework investigators assigned to review Applicant's work. Other possible explanations for the apparent discrepancies were ruled out by the rework auditors without affording Applicant the chance to address their auditing concerns. The actions of these rework investigators reflect conclusions reached without regard to any possible alternative theories and conclusions that might be reasonably derived from Applicant's notes and reports regarding his stated attempts to reach sources and the information he obtained from the sources he reached.

To be sure, drawing inferences from circumstantial evidence about a background investigator's motives and intent is a very risky thing. As Sherlock Holmes responded to Dr. Watson, "It (the stick) may seem to point very straight to one thing, but if you shift your own point of view a little, you may find it pointing in an equally uncompromising manner to something entirely different." A. Conan Doyle, *The Boscombe Valley Mystery* (1891) Holmes' observations provide poignant reminders of the dangers of trying to rely too much on initial hypotheses without putting them to demanding tests. In Applicant's case, the alternatives to false reporting are numerous and required a good deal more

investigating and analysis before settling on findings of Applicant short-cutting and fabricating his reports.

In subsequent follow-up audits of Applicant's case notes produced during his brief employment with Company B, the audits identified a number quality concerns but few entries that raised integrity questions. Following OPM's directions, Company B submitted its five-case samplings to OPM in December 2012, along with recitations of the guidance and verbal warnings it provided Applicant (inclusive of new training and guidance for Applicant covering all of company B's sampling concerns.

OPM expressed some agreement with Company B's findings and proposals, but disagreed with Company B's training and verbal warning proposals. Noting the numerous integrity and quality concerns it drew from its own review of Company B's findings, OPM directed Applicant's removal from its background investigations contract with Company B over Company B's recommendations and instructed Company B to conduct a 30 day rework of 33 cases completed by Applicant in November-December 2012.

Company B followed through with OPM's rework instructions and completed its rework of the 33 cases it was directed to complete without any noted integrity concerns, only quality concerns in a few areas. In its review of Company B's submitted findings with respect to both the company's five-case rework and 33-case rework, OPM identified both integrity and quality concerns that it could not reconcile with Company B's findings. Both in its sampling of the five cases OPM opened in November 2012, and of the 33 additional cases it received from Company B in December 2012, OPM found numerous entries that raised integrity and quality concerns without alluding to any potential alternatives. Based on these independent findings, in December 2012 and February 2013, OPM declined to reconsider its directions to Company B to remove Applicant from its background investigations contract.

Applicant continues to deny ever falsifying any of his source notes and ROIs. He cites to his long record of service in law enforcement and the support he received from Company B, and from his Company C supervisors and past colleagues who have worked with him at Companies A and B and who found him to be completely honest and reliable in their working relationships. Moreover, the rework audits of the 33 Applicant cases completed by Company B at OPM's direction found no manifest discrepancies that raised integrity concerns, and no quality concerns that could not be corrected with better training and counseling. When the Company A and Company B findings are considered together, they reflect quality concerns correctable by training, but no discrepancies that cannot be reconciled with other alternatives that do not raise integrity concerns about Applicant's investigative reporting.

Historically, the Appeal Board has emphasized the importance of a strong rehabilitation program and a seasoned track record in mitigating serious personal

conduct concerns. See ISCR Case No. 95-0622 at 4-5 (App. Bd. April 18, 1997). Holding a security clearance requires a high degree of trust and confidence in the person entrusted with classified information. *Snepp v. United States*, 444 U.S. 507, 511 n.6 (1980) Institutionally, OPM maintains investigative files (including integrity files) in accordance with established agency procedures. Its record background investigation reports require consistent accuracy and thoroughness and do not permit shorting cutting corners to increase production and revenue for the contracting firm and its investigators. OPM's findings in Applicant's case, however, are based on incomplete data and the lack of any afforded opportunity extended to Applicant to review the reworked audits by his Company A and Company B employers and provide explanations of the gaps and discrepancies noted in the rework findings.

Based on the foregoing findings and conclusions, one disqualifying condition (DC) of Guideline E partially applies to Applicant's situation. DC ¶ 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: (2) a pattern of dishonesty or rule violations; and (4) evidence of significant misuse of Government or other employer's time or resources. . . ." applies to the developed facts herein.

Because the evidence is less than clear how much Applicant's background notes and ROIs were attributable to heavy work loads, poor advice from team leaders like K, inadequate training, or alternative explanations of the noted gaps and discrepancies that are consistent with good investigative practices, more direct evidence is needed from Applicant's team leaders and supervisors, with afforded opportunities to Applicant to cross-examine and challenge any produced documentation, to resolve the raised questions about Applicant's integrity associated with the rework audits of his case notes and ROIs.

Under the circumstances of the evidence produced in this record, the findings and conclusions reached by OPM and Applicant's employers (primarily Company A) cannot be accepted as reliable proof of any dishonesty on the part of Applicant in his conducting of background investigations at both Company A and Company B. Records produced by Companies A and B and OPM covering gaps and discrepancies in Applicant's investigations are not enough to create doubts about his exhibited integrity in his reporting to warrant Government concerns about his trustworthiness, reliability and judgment in handling his investigation assignments. Fully available to Applicant on the issue of raised integrity concerns is MC ¶ 17(f), "the information is unsubstantiated or from a source of questionable reliability."

Applicant's underlying conduct is fully mitigated, not only by his favorable resolving of trust concerns associated with the rework audits of his background investigations with his previous employers, but by the solid performance evaluations he has received from not only his current employer, Company C, but from his Company B employer as well. To his credit, Applicant has demonstrated a long track record of trusted, dedicated public service in law enforcement and in his investigative work with Company B (from the perspective of his employer), and with his new employer, Company C. He has impressed his supervisor of Company C, as well as well as colleagues and former colleagues who credit him with high levels of trust and judgment. The training and experience in investigations he has received from Company C in particular promises to serve him well in the future.

Whether Applicant provides background investigation reports to OPM and its client agencies is uncertain at this time. But the praised work he has provided DOD agencies through his current employer, Company C, has been well received according to his Company C supervisor and is encouraging. While the allegations raised against Applicant in the SOR are serious if proven, the trust issues raised are for the most part unsubstantiated and mitigated by the longstanding trust that Applicant's current and former colleagues have placed in him.

Safe predictions of Applicant's meeting security clearance eligibility requirements are warranted at this time. Considering all of the evidence presented, personal conduct concerns are unsubstantiated on issues that involve honesty and mitigated on raised questions about Applicant's work habits.

Financial concerns

Additional security concerns are raised over the major deficiency debt Applicant incurred with his home equity lender in 2008 following the foreclosure of the first mortgage on the property that left insufficient sale proceeds to cover both the first mortgage and second mortgage secured by a second mortgage. The SOR creditor 2.a debt was eventually charged off by the lender and a Form 1099 C issued to Applicant in 2010.

Security concerns are raised under the financial considerations guideline of the AGs where the individual applicant is so financially overextended as to indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, which can raise questions about the individual's reliability, trustworthiness, and ability to protect classified information, and place the person at risk of having to engage in illegal acts to generate funds. Applicant's accumulation of a sizable deficiency following the foreclosure of his first mortgage in 2008 warrants the application of two of the disqualifying conditions (DC) of the Guidelines ¶ DC 19(a), "inability or unwillingness to satisfy debts," and ¶19(c) "a history of not meeting financial obligations."

Applicant's SOR creditor 2.a deficiency debt is attributable partially to taking on too much debt and the falling real estate market in his region in 2008 that hampered his ability to sell his home and avoid foreclosure. Economic conditions in his community severely impaired his ability to sell his property, and ultimately prevented him from selling the property in 2008 to cover his two mortgages.

Because the sale proceeds from the public auction in 2008 brought only \$300,000 (well below the mortgage balance on Applicant's first mortgage), the first mortgagee encountered a considerable deficiency in excess of \$100,000. Under his state's anti-deficiency statute, the first mortgagee retained no deficiency rights. See CCP, § 580b. The only exception would be if the listed home equity line issued by Applicant's home equity lender could be legally characterized as purchase money. Post-purchase home-equity lines of credit for landscaping and paying off other debts are not covered by CCP, § 580b.

Although Applicant does not argue specifically for enforcement protection under his state's statute of limitations, his creditor 2.a's deficiency balance on its extended equity line of credit (relying more on his receipt of a Form 1099-C from his lender), Applicant is protected from any enforcement action by his SOR creditor 2.a by his state's four-year statute of limitations in the event his Form 1099-C should prove to be faulty for any reason. His state's relevant statute of limitations for written contracts and claims involving real estate is four years (CCP Rev. Stats. ¶ 337, *et seq.*) Holding only a non-collateralized loan balance on its equity line of credit extended Applicant, this sold-out junior mortgagee had no remaining security interest in the property by which to pursue a deficiency claim. Instead of pursuing an unsecured deficiency claim against Applicant, it opted to charge off its claim and issue a Form 1099-C to Applicant and the IRS. Presuming the IRS accepted the creditor 2.a's Form 1099-C submission, Applicant is freed of any risk of legal enforcement of the deficiency debt owned by SOR creditor 2.a.

If for any reason, the IRS did not approve of creditor 2.a's Form 1099-C submission on Applicant's behalf, creditor 2.a would still be barred from any enforcement against Applicant. Statutes of limitation, however, while considered important policy tools for discouraging plaintiffs from pursuing stale claims and promoting finality in litigation, have never been equated by the Appeal Board with good-faith efforts to repay overdue creditors. See, e.g., ISCR Case No. 02-30304 at 3 (App. Bd. April 2004)(quoting ISCR Case No. 99-9020 at 5-6 (App. Bd. June 2001)). What constitutes a "good-faith" effort to repay overdue creditors requires a showing that "a person acts in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation" See *id.* Summarized, an applicant must establish some kind of concrete plan for repaying the debt in issue besides relying on a legally permissible option like filing for Chapter 7 bankruptcy or taking advantage of a statute of limitations.

When addressing repayment efforts generally, the Appeal Board has not required an applicant to establish "that he has paid off each and every debt listed in the SOR."

See ISCR Case no. 07-06482 at 2-3 (App. Bd. May 21, 2008)(internal citations omitted). All that the Board has required is that the “applicant demonstrate he has a plan to resolve his financial problems and has taken significant actions to implement that plan.” See *id.* This Applicant attempted initially with SOR creditor 2.a, but was declined. Since that time his state’s statute of limitations has expired and Applicant has received a Form 1099-C from the creditor.

Based on his own evidentiary showing, extenuating circumstances contributed to Applicant’s inability to resolve his mortgage obligations during the period in 2008 when real estate prices in his community were depressed. A confluence of heavy mortgage debts on the property, a downturn in the economy that adversely impacted his business, and his inability to save his home through a short sale under depressed real estate conditions hampered his ability to carry the property or dispose of it in an orderly way.

An extenuating condition available to Applicant is ¶ MC 20(b) of the financial considerations guideline, “the conditions that resulted in the behavior were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce, or separation, and the individual acted responsibly.” While some judgment problems persist over Applicant’s taking on so much debt with his purchase of the home in 2006, and his later taking on more debt the same year with a home equity line of credit, his actions are considerably extenuated by unforeseen economic conditions and his inability to dispose of the property during the housing downturn that extended throughout 2008 and 2009.

In recognition of the modest constructive efforts Applicant made to resolve his mortgage debts in 2008 through a short sale of his residence, some mitigation credit is available to him. Age of the SOR creditor 2.a charge-off of its second mortgage on his property is covered by two of the mitigating conditions for financial considerations: ¶ MC 20(a), “the behavior happened so long ago, was so infrequent, or occurred under circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment,” and ¶ MC 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.” Neither mitigating condition is dispositive, but they do have some applicability to Applicant’s situation.

When addressing repayment efforts generally, the Appeal Board has not required an applicant to establish “that he has paid off each and every debt listed in the SOR.” See ISCR Case no. 07-06482 at 2-3 (App. Bd. May 21, 2008)(internal citations omitted). All that the Board has required is that the “applicant demonstrate he has a plan to resolve his financial problems and has taken significant actions to implement that plan.” See *id.*

Applicant’s proactive steps in addressing his SOR creditor 2.a debt following the foreclosure of his residence in 2008 encompassed oral exchanges with the lender and

lack any documented correspondence trail. However, the lender has never pursued collection of the deficiency debt and confirmed its lack of any interest in collection of the debt. While this debt is large in amount, it has been Applicant's only reported debt delinquency before or after he received a Form 1099-C. And the creditor 2.a debt has since been removed from Applicant's most recent credit report. Further, the Form 1099-C Applicant received from the creditor subjects him to federal and state tax exposure on the amount of the debt forgiven by the lender. Considering all of the facts and circumstances, this SOR creditor 2.a debt is mitigated by the passage of time, the creditor's issuance of a Form 1099-C, and the noted extenuating circumstances that accompanied his loss of his home to foreclosure in 2008.

From a whole-person standpoint, there is certainly no evidence presented that Applicant is currently living beyond his means in his present circumstances. He is well thought of by his supervisors and colleagues and provides highly valued investigation services to his current employer, Company C. In making a whole-person assessment, careful consideration was given to the respective burdens of proof established in *Egan (supra)*, the AGs, and the facts and circumstances of this case in the context of the whole person. Favorable conclusions warrant with respect to the allegations covered by subparagraph 2.a.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE E (PERSONAL CONDUCT):	FOR APPLICANT
Subparas. 1.a-1b:	For Applicant
GUIDELINE F (FINANCIAL CONSIDERATIONS):	FOR APPLICANT
Subpara. 2.a:	For Applicant

Conclusions

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

