



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-01331

Appearances

For Government: David F. Hayes, Esquire, Department Counsel

For Applicant: *Pro se*

09/21/2017

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding personal conduct. Eligibility for a security clearance and access to classified information is denied.

Statement of the Case

On August 18, 2015, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application.¹ On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a set of interrogatories. Applicant responded to those interrogatories on May 16, 2017.² On June 7, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For*

¹ GE 1 (e-QIP, dated August 18, 2015).

² GE 2 (Applicant's Answers to Interrogatories, dated May 16, 2017).

Access to Classified Information (December 29, 2005) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006.³ The SOR alleged security concerns under Guideline E (Personal Conduct), and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on June 13, 2017. On June 27, 2017, he responded to the SOR and elected to have his case decided on the written record in lieu of a hearing. However, on July 12, 2017, pursuant to ¶ E3.1.7, Additional Procedural Guidance (Enclosure 3), of the Directive, Department Counsel requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on July 21, 2017. The case was assigned to me on August 1, 2017. A Notice of Hearing was issued on August 4, 2017. I convened the hearing as scheduled on August 22, 2017.

During the hearing, 2 Government exhibits (GE) 1 and GE 2, and 17 Applicant exhibits (AE) A through AE Q were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on August 30, 2017. The record closed on August 30, 2017.

Rulings on Procedure

Department Counsel requested that I take administrative notice of 50 U.S.C. § 3802, *War and National Defense, Military Selective Service: Registration*.⁴ Facts are

³ Effective June 8, 2017, by Directive 4 of the Security Executive Agent (SEAD 4), dated December 10, 2016, *National Security Adjudicative Guidelines* (AG) for all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position, were established to supersede all previously issued national security adjudicative criteria or guidelines. Accordingly, those guidelines previously implemented on September 1, 2006, under which this security clearance review case was initiated, no longer apply. In comparing the two versions, there is no substantial difference that might have a negative effect on Applicant in this case.

⁴ §3802. Registration

(a) Except as otherwise provided in this chapter it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 1101(a)(15) of title 8, for so long as he continues to maintain a lawful nonimmigrant status in the United States.

(b) Regulations prescribed pursuant to subsection (a) may require that persons presenting themselves for and submitting to registration under this section provide, as part of such registration, such identifying information (including date of birth, address, and social security account number) as such regulations may prescribe.

(June 24, 1948, ch. 625, title I, §3, 62 Stat. 605 ; June 19, 1951, ch. 144, title I, §1(c), 65 Stat. 76 ; Pub. L. 92-129, title I, §101(a)(2), Sept. 28, 1971, 85 Stat. 348 ; Pub. L. 97-86, title IX, §916(a), Dec. 1, 1981, 95 Stat. 1129 .)

proper for administrative notice when they are easily verifiable by an authorized source and relevant and material to the case. In this instance, the Government relied on the United States Code. After weighing the reliability of the source documentation and assessing the relevancy and materiality of the facts proposed by the Government, pursuant to Rule 201, *Federal Rules of Evidence*, I take administrative notice of 50 U.S.C. § 3802.

Findings of Fact

In his Answer to the SOR, Applicant denied, with comments, both of the factual allegations pertaining to personal conduct (¶¶ 1.a. and 1.b.) of the SOR. Applicant's comments are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 41-year-old employee of a defense contractor. He has been an alarm technician with his employer since September 2012. He had previously been an electronics technician with a casino from 2005 until 2010, when he was part of a mass layoff. He is a 1994 high school graduate. He has never served with the U.S. military. He was granted a top-secret security clearance with access to sensitive compartmented information (TS-SCI) in 2013. Applicant was married in 2003. He has a son, born in 1996, and a daughter, born in 2004.

Personal Conduct

On August 18, 2015, when Applicant completed his e-QIP, he responded to certain questions in Section 14 pertaining to his Selective Service Records. The first question was if he is a male born after December 31, 1959, and he responded "yes." The second question asked if he had registered with the Selective Service System (SSS), and he responded "no."⁵ He explained his reasons for not registering with the SSS as follows:⁶

Honestly, I had no idea I was supposed to, even before I graduated I can't remember this topic ever coming up. Over the years though I have talked to people about this and I was always told there was no need to. But I guess

On June 27, 1980, President Jimmy Carter, in addressing implementation of sections of the Military Selective Service Act, as amended (50 U.S.C. App. 451 et seq.) [now 50 U.S.C. 3801 et seq.], proclaimed as follows:

§1–101. Male citizens of the United States and other males residing in the United States, unless exempted by the Military Selective Service Act, as amended, who were born on or after January 1, 1960, and who have attained their eighteenth birthday, shall present themselves for registration in the manner and at the time and places as hereinafter provided. . . § 1–105. Persons born on or after January 1, 1963, shall present themselves for registration on the day they attain the 18th anniversary of their birth or on any day within the period of 60 days beginning 30 days before such date; however, in no event shall such persons present themselves for registration prior to January 5, 1981.

⁵ Failing to register or comply with the Military Selective Service Act is a felony punishable by a fine of up to \$250,000 or a prison term of up to five years, or a combination of both. See <https://www.sss.gov/registration/why-register/benefits-and-penalties>

⁶ GE 1, *supra* note 1, at 15.

everyone was wrong. So presently here are the steps that I am taking to resolve this issue. On August 29, 2012, I had gone to the Selective Service website and downloaded a Request for Status information letter and I filled it out. It was mailed to them on August 30, 2012. Since then, I have received a letter on September 14, 2012 that I had given to my manager to put with my file.

Applicant was interviewed by an investigator with the U.S. Office of Personnel Management (OPM) on August 11, 2016. When he was initially questioned by the investigator regarding his failure to register with the SSS, Applicant responded that he was not previously aware his registration was required when he turned 18 years old, essentially the same reasons as he had previously offered. However, upon a more rigorous confrontation, Applicant's story changed.⁷

[Applicant] admitted that he intentionally, and with the intent to deceive, falsified his security forms with regards to the information reported regarding his Selective Service registration. [Applicant] confirmed he was born after December 31, 1959. [Applicant] intentionally and willfully failed to register with the Selective Service when he turned 18 years old. [Applicant] admitted he was aware of the requirement to register with the Selective Service, and he originally learned about it during his high school years. At the time, [Applicant] had no intent of going into the military, and intentionally did not register or pursue registration because of that. [Applicant] originally indicated on his security forms that he never knew that he had to register because he felt it was less embarrassing to state he never knew, than to admit he intentionally did not register. [Applicant] also knew that his intentional failure to register could preclude [him] from certain benefits, which may have included his job. [Applicant] was afraid that if he listed he intentionally failed to register for Selective Service, he may not have gotten his current job No one else knows [Applicant] willfully failed to register with the Selective Service.

[Applicant] took additional actions to conceal his failure to register with the Selective Service. Upon [his] initially completing his employment paperwork with [his current employer], [Applicant] was asked about his registration for Selective Service by his [supervisor], Security Manager. [Applicant] lied about his prior knowledge of having to register. [Applicant], after knowing he had never registered, checked the Selective Service Registration website, which confirmed he had never registered. [Applicant] then submitted a Request for Status Information letter to the Selective Service, which was sent [in August] 2012. [Applicant] received a letter back from Selective Service, dated [September] 2012, which confirmed [Applicant] was required to register, but never did. [Applicant] was notified that he could no longer register because he was over 26 years of age. The letter went on to state there were federal penalties associated with the willful failure to

⁷ Personal Subject Interview, dated August 11, 2016, at 3-4, attached to GE 2, *supra* note 2.

register with the Selective Service; however, the letter also stated that if someone did not willfully fail to register, then by law they could not be disciplined or denied employment. [Applicant] felt his failure to register was a “hot Topic” with regards to his employment with [his employer]. So [Applicant] simply stated he was never aware. [Applicant] took no other actions to conceal his failure to register.

On May 10, 2017, in responding to the interrogatories, Applicant submitted yet another version of the facts:⁸

[I]n regards to my U.S. Selective Service record; I never tried to be deceitful in regards to this matter, nor was I attempting to conceal my failure to register. When I was going into my senior year of high school or approaching 18 years of age, I don't remember my school counselor or teachers explaining to myself or classmates that it was a requirement to register. At that time in my life, I had no intent of joining the military, therefore would never have inquired about this topic or have been made aware of it. . . . When I was interviewed by the investigator on this matter, yes, I was embarrassed because I had to admit (again) that I didn't know I had to register upon turning 18 years old. I don't feel this makes me an untrustworthy person. I am just an individual who lacked guidance when I was a minor and I am apologizing once again for this.

In his June 2017 Answer to the SOR, Applicant offered a combination version of the facts, especially as they related to the OPM interview:⁹

. . . I do feel as if there was some confusion on my part or his or both of ours. When asked the question of “Have you registered for the SSS?”, my answer was “no” that I had not registered and when I was asked the reason being, I replied “I didn't know that I was required to do so. I was simply unaware.” After discussing this with the investigator at length and answering more of his questions, I did say that in hindsight, I wish that I had. Meaning, I wish that I had known that this was something mandatory upon turning 18 years of age. I also discussed with the investigator during the interview how I remember seeing Army recruiters walking around my high school. I had no intent on joining a military branch so disregarded their visit. The staff/or teachers didn't advise students to register with the SSS.

. . . I feel as if my words were taken out of context which is why the report [of the Personal Subject Interview] seemed contradictory to my original report dating back to 2012. I don't recall telling the investigator that I purposefully concealed the fact that I deliberately didn't register with the SSS. I have never hidden this or had any reason to do so. I did not fear

⁸ Letter from Applicant, dated May 10, 2017, attached to GE 2, *supra* note 2.

⁹ Applicant's Answer to the SOR, dated June 27, 2017, at 1-2.

admittance would preclude me from obtaining employment. . . . The only thing I have is embarrassment for never knowing that I had an obligation to do this when I was younger. . . .

I never meant to misinform the investigator or seem dishonest during my interview. I do get nervous when I am talked to, or interrogated, about my failure to register with the SSS because I'm often made to feel like my reason or answer is inadequate; however my answer has always been the truth . . . I was uninformed and as a result I didn't register because I simply didn't know that I was required to do so.

During the hearing, Applicant's comments again covered a broad range related to his failure to register with the SSS. He stated: ". . . I personally believe that the. . . investigator didn't want to take my answer for no, I don't know. He didn't want that answer, so he kept pressing me, pressing me, pressing me." When it was noted by Department Counsel that Applicant's interview statement said that Applicant had admitted that he had intentionally, and with intent to deceive, falsified the security form with regard to the Selective Service registration, Applicant denied ever saying or admitting that. When discussing the military recruiters at his high school, Applicant denied what had been reported and stated that the information was again taken out of context. Applicant also denied ever acknowledging that his failure to register could preclude him from certain benefits. In Applicant's view, most of the comments and acknowledgments attributed to Applicant in the Personal Subject Interview, other than the admissions regarding not being aware of the registration requirement, were mere fabrications made by the investigator.¹⁰

In September 2012, the SSS wrote Applicant acknowledging that a search of the SSS files and an examination of the information Applicant furnished them revealed that Applicant was required to register with the Selective Service, but he had not done so. He was informed that he could not register after attaining the age of 26. No notices were sent to him by the SSS regarding the requirement to register. The SSS also referred to 50 App. U.S.C. 462(g) which states:¹¹

(g) A person may not be denied a right, privilege, or benefit under Federal law by reason of failure to present himself for and submit to registration under section 3 (of the Military Selective Service Act) if – (1) the requirement for the person to so register has terminated or become inapplicable to the person; and (2) the person shows by a preponderance of the evidence that the failure to register was not a knowing and willful failure to register.

The types of benefits referred to by SSS for which non-registrants are ineligible are: (1) federal student loans and grant programs; (2) federal job training under the

¹⁰ Tr. at 29-37.

¹¹ AE A (Letter, dated September 14, 2012).

Workforce Innovation and Opportunity Act; (3) federal jobs; (4) a security clearance as a contractor; and (5) U.S. citizenship for immigrants.¹²

While the focus of the SOR was on personal conduct issues of alleged falsifications and lack of candor in the e-QIP and during the OPM interview, the actual failure to register under the Military Selective Service Act was not specifically alleged in the SOR. I consider Applicant's failure to register to be unalleged conduct.¹³

Character References

Applicant's immediate supervisor and a number of colleagues have known and worked with Applicant over a variety of years, and they are all strongly supportive of him. Applicant's reputation is a plethora of positive characteristics: dedicated and loyal worker, outstanding ethical behavior, unwavering integrity and professionalism, honesty, trustworthiness, hard-working, positive attitude, willingness to contribute, exceptional moral character, extremely reliable, team player, good judgment, mature outlook, focused, responsible, dependable, intelligent decision making, self-motivated, and intelligent.¹⁴ Former coworkers from his days at the casino are equally impressed by him.¹⁵ Neighbors and friends offered supportive comments regarding his community activities. Applicant is a great role model who has picked up neighbor-children from school when parents were unable to do so, he assisted a neighbor install a faucet, ceiling fan, and pool pump, assisted neighbors with weekend lawn maintenance, and he has volunteered to assist incapacitated neighbors.¹⁶ One friend who has known Applicant for 19 years said that she had never witnessed Applicant "be purposefully deceptive, dishonest or unethical in any way, ever."¹⁷

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,

¹² See <https://www.sss.gov/home/men-26-and-older>

¹³ Unalleged conduct can be considered for certain purposes, as discussed by the DOHA Appeal Board in ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003). (Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole-person analysis under Directive § 6.3.). I will consider it as part of the whole-person analysis.

¹⁴ AE E (Character Reference, dated August 17, 2017); AE F (Character Reference, dated August 7, 2017); AE J (Character Reference, undated); AE K (Character Reference, dated August 15, 2017); AE L (Character Reference, dated August 2017); AE M (Character Reference, dated August 4, 2017); AE N (Character Reference, dated August 7, 2017); AE O (Character Reference, dated August 15, 2017); AE Q (Character Reference, dated August 8, 2017).

¹⁵ AE G (Character Reference, dated August 12, 2017); AE I (Character Reference, dated August 10, 2017).

¹⁶ AE B (Character Reference, undated); AE C (Character Reference, undated); AE D (Character Reference, undated).

¹⁷ AE P (Character Reference, dated August 18, 2017).

“no one has a ‘right’ to a security clearance.”¹⁸ 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.”¹⁹

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the guidelines in SEAD 4. In addition to brief introductory explanations for each guideline, the guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant’s eligibility for access to classified information.

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

In the decision-making process, facts must be established by “substantial evidence.”²⁰ 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.²¹

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

¹⁸ *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

¹⁹ Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

²⁰ “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).

²¹ See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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."²²

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."²³ Thus, nothing in this decision should be construed to suggest that I have based this decision 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 ¶ 16:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

²² *Egan*, 484 U.S. at 531.

²³ See Exec. Or. 10865 § 7.

¶ 16: The guideline notes some conditions that could raise security concerns under AG

(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 national security eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

As noted above, the focus of the SOR in this instance is not Applicant's failure to register with the SSS, but rather what were his reasons for not doing so. The inquiries sought to determine if Applicant's failure to register was a knowing and willful failure to register, or simple ignorance regarding registration requirements. Over the course of time, commencing with the e-QIP responses in August 2015, including the OPM interview comments in August 2016, the responses to interrogatories in May 2017, the June 2017 Answer to the SOR, and culminating with his comments during the August 2017 hearing, Applicant's sometimes inconsistent narratives merely exacerbated the issue. If Applicant was unaware of the registration requirement as he stated in the e-QIP, in which case he did not intentionally falsify the facts in his e-QIP response, but he did lie to the OPM investigator, or he told the OPM investigator the truth and he lied in the e-QIP.

Applicant strongly and repeatedly denied the comments that were attributed to him by the OPM investigator. He stated he was embarrassed because of his lack of knowledge regarding the registration requirements; his words were taken out of context by the OPM investigator; the OPM investigator did not want to accept Applicant's reasons, and kept pressing him; that he did not recall telling the OPM investigator that he purposefully concealed the fact that he deliberately did not register; and that the OPM investigator's rendition of what Applicant supposedly said were mere fabrications.

Applicant's numerous comments provide sufficient evidence to examine if his responses were deliberate falsifications, as alleged in the SOR, or merely a misunderstanding of the true facts on his part. Proof of an error in a response, standing alone, does not establish or prove an applicant's intent or state of mind when the response occurred. As an administrative judge, I must consider the record evidence as a whole to determine whether there is a direct or circumstantial evidence concerning Applicant's intent or state of mind at the time the alleged falsification occurred. I have considered the entire record, including Applicant's initial and subsequent comments.²⁴ Applicant's

²⁴ The Appeal Board has cogently 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

explanations for his submissions, in my view, were that he was finally being confronted with his actions from two decades earlier. On the one hand he would have me believe that he is mature enough to hold a security clearance, and on the other hand, he would have me believe that he is ignorant and naive regarding his SSS registration requirements. Those inconsistent explanations stretch credulity. The allegations that the OPM investigator fabricated the comments made by Applicant during the OPM interview, have merely added to my disbelief. Applicant acknowledged that when he was going into his senior year in high school, he recalled seeing Army recruiters walking around the high school, but because he had no intent on joining the military, he disregarded their visit and intentionally did not register with the SSS, although he was aware of the requirement to do so. AG ¶¶ 16(a) and 16(b) have been established.

The guideline also includes examples of conditions under AG ¶ 17 that could mitigate security concerns arising from personal conduct. They include:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) 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;
- (d) 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

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. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)). See also ISCR Case No. 08-05637 at 3 (App. Bd. Sept. 9, 2010) (noting an applicant's level of education and other experiences are part of entirety-of-the-record evaluation as to whether a failure to disclose past-due debts on a security clearance application was deliberate).

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activities was unwitting, has ceased, or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I have concluded that none of the mitigating conditions apply. Applicant's falsifications regarding the reasons for his failure to register with the SSS in his August 2015 e-QIP and his OPM interview comments in August 2016, by intentionally failing to disclose the true reasons for his failure to register with the SSS two decades earlier, is recent, serious, and not mitigated. A key component of the protection of classified information is reliance on security clearance holders to accurately report potential compromise of classified information. A person who has offered false statements regarding past actions cannot be relied upon to report potential compromise of classified information. Applicant's actions, or relative inaction, under the circumstances casts substantial doubt on his current reliability, trustworthiness, and good judgment.

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 SEAD 4, App. A, ¶ 2(d):

(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 SEAD 4, App. A, ¶ 2(c), the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Moreover, 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.²⁵

²⁵ 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).

There is some evidence mitigating Applicant's conduct. There is no evidence of misuse of information technology systems, or mishandling protected information. Applicant is well thought of by his superiors, coworkers, friends, and neighbors. By all reports he is an outstanding employee, husband, father, and friend.

The disqualifying evidence under the whole-person concept is more substantial. During the period in which Applicant was required by the Military Selective Service Act to register with the SSS (from the age of 18 until the age of 26), he failed to do so. The failure was associated with his determination that he had no intent on joining the U.S. military, and although Applicant offered some commentary to the contrary, it was a knowing and willful failure to register. Had that conduct simply ended there, there might not be further significant interest in this case. However, the conduct did not cease. Instead, when questioned in the e-QIP and by an OPM investigator, Applicant tarnished his previously outstanding reputation for honesty and truthfulness, and he lied as to the reasons for not having registered with the SSS. He then continued with the false scenarios by lying in his answers to the interrogatories, when responding in the Answer to the SOR, and again during the hearing. Not only did he lie, he also contended that the OPM investigator had falsified his comments pertaining to the reasons why the non-registration took place. The OPM investigator had no reason to make false statements; Applicant did.

Applicant argued that notwithstanding his failure to register with the SSS, because the period for registration has terminated, he cannot be denied a right, privilege, or benefit under federal law. He is only partially correct. The second portion of 50 App. U.S.C. 462(g) also requires that the non-registrant show, by a preponderance of the evidence, that the failure to register was not a knowing and willful failure to register. Because of Applicant's many variations of the facts, I concluded that he was merely covering up, in an attempt to avoid, the evidence of his knowing and willful failure to register. Under those circumstances, and in light of his differing scenarios, Applicant failed to prove by a preponderance of the evidence, his inaction to register was unknowing and unwillful.

Furthermore, as noted in the SSS website, non-registrants are ineligible for a security clearance as a contractor. Moreover, as previously stated, "no one has a 'right' to a security clearance." In falsification issues, it is frequently said that the cover-up is worse than the actual action. Applicant's vacillating stories and explanations are the most troubling features of this case. He was given several opportunities to state the truth, but he failed to take advantage of those opportunities. Applicant's actions, under the circumstances, continue to cast doubt on his current reliability, trustworthiness, and good judgment.

Overall, the evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has failed to mitigate the security concerns arising from his personal conduct. See SEAD 4, App. A, ¶¶ 2(d)(1) through 2(d)(9).

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: AGAINST APPLICANT

Subparagraphs 1.a. and 1.b.: Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

ROBERT ROBINSON GALES
Administrative Judge