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

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| In the matter of: | ) | |
| | ) | |
| REDACTED | ) | ISCR Case No. 15-04010 |
| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

For Government: Nicole A. Smith, Esq., Department

Counsel For Applicant: Leon J. Schachter, Esq.

06/08/2018

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## Decision

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MENDEZ, Francisco, Administrative Judge:

Applicant presented sufficient evidence to mitigate security concerns alleged under the personal conduct guideline. Clearance is granted.

## Statement of the Case

On October 29, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) alleging security concerns under the personal conduct guideline. Applicant answered the SOR and requested a hearing (Answer). By agreement of the parties, a hearing was scheduled for January 23, 2018.[1] Applicant testified at the hearing and the exhibits offered by the parties were admitted into the administrative record.[2] The transcript of the proceeding was received on January 31, 2018.[3]

[1] *See* Appellate Exhibit I (scheduling correspondence).

[2] Government Exhibits 1 – 5 and 7 – 9, Applicant's Exhibits A – C, and Attachments A – C were admitted. Applicant's objection to Exhibits 4, 7, and 8 were overruled as further discussed herein. Department Counsel withdrew Government Exhibit 6 for identification and it is not part of the record.

[3] After the hearing, I concluded that the evidence warranted a decision in Applicant's favor. I informed the parties that, unless an objection was raised, I intended to fairly, quickly, and efficiently resolve the case through summary disposition. ISCR Case No. 15-03176, n.2 (App. Bd. May 26, 2017) (benchmark for when summary disposition is warranted). Department Counsel objected. *See* Appellate Exhibit VII.

## Evidentiary Rulings

1. Motion to exclude evidence: DENIED.

Applicant moved to preclude the Government from presenting evidence regarding a 1998 arrest on suspicion of driving under the influence (DUI) and fairly large financial transactions in 2003 and 2007. These matters are alleged as security concerns in the SOR. Applicant cites to the legal defenses of collateral estoppel and laches in support of his motion.[4] Applicant's motion is denied. The Government cannot be precluded or estopped from assessing a person's security clearance suitability regarding relevant matters of which the person is placed on reasonable notice. Moreover, a past favorable adjudication does not bar security officials from reassessing a person's eligibility, especially when new matters surface raising a security concern. *See generally* ISCR Case No. 14-03986 at 3 (App. Bd. Apr. 19, 2017) ("Additionally, the Government cannot be precluded from protecting classified information under the doctrine of equitable estoppel and has the right to reconsider the security significance of past conduct in light of more recent conduct having negative security significance.")[5]

2. Objection to Exhibit 4: DENIED.

Applicant objected to Exhibit 4, the summaries of his 2000 and 2014 security clearance interviews. Applicant was sent a copy of the summaries as part of a DOHA interrogatory. He was provided the opportunity to review the summaries and confirm or contest their accuracy. Applicant responded that the summaries, *as written*, were inaccurate. However, *subject to his clarifying comments*, the summaries accurately reflected his statements during the two security clearance interviews.

DOHA proceedings are designed to allow the parties to present a full, fair, and accurate record of an applicant's security clearance eligibility. In order to achieve these goals, DoD Directive 5220.6 (Directive) ¶ E3.1.19, states that the federal rules of evidence "shall serve as a guide." Furthermore, the DOHA Appeal Board has stated that administrative judges should liberally apply the "technical rules of evidence," and err on the side of admitting all relevant and reliable evidence.[6]

The Directive, however, does contain one major exception to this evidentiary rule of inclusion. Specifically, pursuant to ¶ E3.1.20, a DoD personnel background report of investigation, including a summary of a person's security clearance interview, is generally

[4] *See* Appellate Exhibits II and III; Transcript (Tr.) at 7-11 (motions and arguments).

[5] *See also* ISCR Case No. 07-00311 at 2 (App. Bd. Jan. 17, 2008) ("a prior decision to grant an applicant access to classified information does not impair a Judge's subsequent adverse determination."), citing to and quoting from ISCR Case No. 03-23190 at 4 (App. Bd. Jul. 12, 2007) ("The government is not estopped from making an adverse clearance decision when there were prior favorable determinations.").

[6] ISCR Case No 03-21434 at 5 (App. Bd. Feb. 20, 2007) ("the DOHA process encourages Judges to err on the side of initially admitting evidence into the record, and then to consider . . . what, if any, weight to give to that evidence."); ISCR Case No. 14-06011 (App. Bd. Dec. 9, 2015) ("The weight that a Judge assigns to evidence is a matter within his or her discretion.").

inadmissible.[7] The danger posed by admitting an unauthenticated interview summary is obvious. Namely, an investigator due to inattention, forgetfulness, or for other reason may incorrectly summarize the interview or portions of the interview. Notwithstanding the proceeding, a summary of a security clearance interview is admissible in a DOHA proceeding if an applicant does not raise an objection to the summary or adopts it as an accurate recitation of what he or she said during the interview.[8]

Department Counsel did not call a witness and presented no other independent evidence beyond the interrogatory response to establish the reliability of Exhibit 4.[9] Thus, in light of Applicant's objection, the exhibit is inadmissible unless Applicant adopted the interview summaries in responding to the DOHA interrogatory. Applicant argues that he could not properly authenticate the summaries and his interrogatory response should be viewed as contesting the accuracy and reliability of the summaries. *But see* ISCR Case No. 11-13999 (App. Bd. Feb. 3, 2014) (judge erred in sustaining a similar objection and excluding an interview summary that an applicant had adopted pre-hearing in response to a DOHA interrogatory).

After reviewing Applicant's interrogatory response and considering the entire record evidence, including Applicant's education, background, and experience, I find that Applicant adopted the interview summaries contained in Exhibit 4. However, in assessing the weight to give the exhibit, I have considered Applicant's interrogatory responses qualifying his adoption of the summaries. *See* Tr. 18-29; Appellate Exhibit VII.

3. Objection to Exhibit 7: DENIED.

Applicant objected at hearing to the admission of Exhibit 7, a charging document and a military police report regarding the alleged 1998 DUI incident. The objection was overruled and the exhibit was admitted. Public court records and police reports are generally admissible in DOHA proceedings. See Tr. 30-32. *See generally* ISCR Case No. 15-02859 (App. Bd. June 23, 2017) ("Although [the police report] contains hearsay, this exhibit is admissible both as an official record under Directive ¶ E3.1.20 and as a public record under Federal Rule of Evidence 803(8).")

4. Objection to Exhibit 8: DENIED.

Applicant objected to the admission of Exhibit 8, a letter from his former defense counsel regarding the 1998 DUI incident. At hearing, I sustained Applicant's objection because the exhibit was a statement by a third-party witness and the exhibit's apparent

[7] *See also* Executive Order 10865, § 5 (prohibiting "investigative reports" without an authenticating witness).

[8] *See* ISCR Case No. 15-01807 at 3 (App. Bd. Apr. 19, 2017) ("In the absence of any objection to [an investigator's summary of a security clearance interview] or indication that it contained inaccurate information, the Judge did not err by admitting and considering that document."). *See also* ADP Case No. 15-07979 (App. Bd. May 30, 2017) (adoption of summary at hearing); ISCR Case No. 08-01075 at 4 (App. Bd. Jul. 26, 2011) (adoption of summary pre-hearing).

[9] Department Counsel was given time post-hearing to submit additional evidence, including to call the investigators who prepared the summaries, to establish the accuracy and reliability of Exhibit 4. Department Counsel did not provide additional evidence. *See* Tr. 82-87; Appellate Exhibit VI.

lack of relevance. *See* Tr. 32-33. After the hearing and having an opportunity to re-review the exhibit in light of the entire record, I *sua sponte* reversed my earlier ruling and admitted the exhibit. *See* Appellate Exhibit VII. *See also* ISCR Case No. 12-10335 at 2 (App. Bd. July 21, 2017) (judge erred in excluding letter from applicant's accountant, because hearsay is generally admissible in DOHA proceedings); ISCR Case No. 11-12461 at 3-5 (App. Bd. Mar. 14, 2013) (limiting scope of E.3.1.22's procedural bar).

## Findings of Fact

Applicant, 59, is married with three grown children. He primarily raised his children on his own after he and his first wife divorced. He served in the U.S. military from 1978 to 2002. Applicant deployed and placed his own personal safety at risk to save others on several occasions while in the military. During the later part of his military career, Applicant served in highly sensitive military positions. He was assigned to the Pentagon on September 11, 2001, and helped with the evacuation and rescue efforts. He retired from the military in 2002, and has continued working for the federal government in highly sensitive positions as a civilian employee and contractor.

Currently, Applicant is the chief executive officer of two companies that hold contracts with the federal government. One of these contracts is to conduct background investigations. Applicant is active in his community through his church. He has held a security clearance since at least 1992, and is well respected by several individuals, who themselves have had long and distinguished government careers, for his loyalty to the United States, trustworthiness, honesty, and dependability.[10]

### 1998 DUI

In 1998, Applicant was arrested by military police on suspicion of DUI and he was subsequently charged with violating Article 111, Uniform Code of Military Justice. The charge was dismissed after Applicant's former defense counsel raised serious concerns about the credibility of the investigation. Applicant's defense counsel also provided notice of his intent to call several key witnesses to show that Applicant was not intoxicated at the time of the arrest. Applicant was subsequently promoted and assigned to highly sensitive positions. The promotion and assignment boards were aware of the DUI arrest.

Applicant maintains to the present day that the arrest was unlawful. He has freely shared details of the arrest with his former supervisors, security clearance investigators, and others both while in the military and after retiring from the military. In 2009, Applicant voluntarily agreed to a DoD-administered polygraph interview and was questioned extensively regarding the DUI. His clearance was thereafter renewed.[11]

Applicant submitted security clearance applications in 1999, 2006, and 2014. On each of these applications, Applicant was asked about his criminal record. Applicant did not list the 1998 DUI. He was subsequently questioned about the 1998 DUI and his failure to list it on the applications during the ensuing background investigations. Applicant has

[10] Tr. 36-39, 64-65; Exhibits 1 – 4; Exhibits A, C, G.

[11] Tr. 48-59; Exhibits 4, 5, 7, 8; Exhibits A, C, E; Answer, Attachment A.

consistently maintained that he did not list the 1998 arrest and charge because he considers the entire matter invalid or unlawful. He was also advised by a security official some years ago that he did not need to list the DUI on his security clearance application because the charge was dismissed.

Additionally, despite repeatedly being questioned by investigators about the omission of this information, Applicant's security clearance was consistently renewed without incident until the SOR was issued. Based on these past favorable security clearance adjudications, Applicant came to believe that he was correct in not listing the 1998 arrest and charge on the applications. He now recognizes his mistake in not listing the 1998 matter and other biographical information on his past security clearance applications, and will correctly report the information on future applications.[12]

**2004 Job Loss**

In January 2004, Applicant was laid off by his former employer due to a reduction in force after the company merged with another firm. A month later, in response to a subpoena or court order, Applicant's former employer produced a certified business record in Applicant's divorce proceeding. This business record reflects that Applicant was involuntarily laid off due to a reduction in force.[13]

In approximately January 2005, the DoD received a letter from Applicant's former supervisor regarding the 2004 termination. The JPAS incident report notes that the former supervisor claimed Applicant "falsely completed his timesheet on 12-19-03 and attempted unauthorized access to a controlled area on 12-24-03."[14]

In March 2006, Applicant submitted a security clearance application. In response to questions about his employment record, Applicant indicated he had not been fired nor left a job under unfavorable circumstances in the past seven years.[15]

Applicant explained that he and his former supervisor had a falling out and the claims of employee misconduct were investigated by his former employer's HR department, which determined that they were meritless. The former supervisor was subsequently reprimanded by the employer. Applicant's 2004 job loss was not related to the former supervisor's false allegations of employee misconduct. Instead, it was due to a reduction in force.[16]

[12] Tr. 48-59, 70-78; Exhibits 1 – 5; Exhibits C, E.

[13] Tr. 48-59, 78-81; Exhibit B.

[14] Exhibit 9. Department Counsel was given time post-hearing to submit the actual letter and other evidence from Applicant's former employer regarding the alleged employee misconduct. Department Counsel did not provide any additional evidence. *See* Tr. 82-87; Appellate Exhibit VI.

[15] Exhibit 2.

[16] Tr. 59-64.

Applicant's security clearance record reflects that his former supervisor's allegations of employee misconduct were reviewed and investigated by the Government following the submission of the 2006 security clearance application. After the investigation and review were completed, the Government determined that Applicant remained eligible for access to classified information. Applicant also took a DoD-administered polygraph in July 2009, with the results indicating "favorable."[17]

**Large financial transactions**

In June 2007, Applicant received a $19,000 federal tax refund and deposited the funds in his bank account. He provided documentation from the IRS to corroborate his testimony regarding the source of the funds. During his 2008 security clearance interview, Applicant was asked about a large bank withdrawal ($22,000) in 2003 and the $19,000 deposit. He provided a sworn affidavit to the investigator attesting to the fact that the withdrawal was used to pay for expenses related to his divorce and the source of the $19,000 deposit was a tax refund. Applicant also stated under oath that he was willing to "submit to a polygraph examination to resolve any conflicts/discrepancies that may exist within my background investigation." Subsequently, Applicant underwent a polygraph interview and his security clearance was renewed.[18]

In 2014, Applicant went through another background investigation. He was again asked about the 2003 bank withdrawal and the $19,000 bank deposit in 2007. He told the investigator that he was happy to answer any questions, but asked whether the 2003 financial transaction was beyond the scope of the current background investigation. The investigator did not ask any further questions about the 2003 transaction. Applicant then went on to answer the investigator's questions about the source of the $19,000 deposit, initially stating that "it was probably from" a tax refund. Due to the passage of time, though, Applicant was uncertain and agreed with the investigator's suggestion that the money could have instead been related to a bonus he received from his former employer.[19]

After receiving the SOR and investigating the matter, Applicant is now certain that the source of the $19,000 deposit was a tax refund. In responding to DOHA interrogatories, Applicant stated under oath that he is "available anytime" to answer any questions about the 2003 financial transaction. Applicant's clearance was not revoked nor suspended for supposedly failing to cooperate with security processing.[20]

## Law, Policies, and Regulations

This case is decided under Executive Order (E.O.) 10865*, Safeguarding Classified Information within Industry* (February 20, 1960), as amended; the Directive; and the National Security Adjudicative Guidelines (AG), which became effective on June 8, 2017.

[17] Exhibit C at 1; Tr. 55-56.

[18] Tr. 42-47, 55-56; Exhibit C; Exhibit D at 5-6; Exhibit H.

[19] Tr. 40-47; Exhibit 4.

[20] Tr. 40-47; Exhibit 4; Exhibit C; Exhibit H.

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). Instead, persons are only eligible for access to classified information "upon a finding that it is clearly consistent with the national interest" to authorize such access. E.O. 10865 § 2.

When evaluating an applicant's eligibility for a security clearance, an administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations, the guidelines list potentially disqualifying and mitigating conditions. The guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies the guidelines in a commonsense manner, considering all available and reliable information, in arriving at a fair and impartial decision. AG ¶ 2.

Department Counsel must present evidence to establish controverted facts alleged in the SOR. Directive ¶ E3.1.14. Applicants are responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven . . . and has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15.

Administrative Judges must remain fair and impartial, and carefully balance the needs for the expedient resolution of a case with the demands of due process. Therefore, an administrative judge will ensure that an applicant: (a) receives fair notice of the issues, (b) has a reasonable opportunity to address those issues, and (c) is not subjected to unfair surprise. Directive, ¶ E3.1.10; ISCR Case No. 12-01266 at 3 (App. Bd. Apr. 4, 2014).

In evaluating the evidence, a judge applies a "substantial evidence" standard, which is something less than a preponderance of the evidence. Specifically, substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record." Directive, ¶ E3.1.32.1. *See also* ISCR Case No. 16-03712 at 3 (App. Bd. May 17, 2018).[21]

Any doubt raised by the evidence must be resolved in favor of the national security. AG ¶ 2(b). *See also* Security Executive Agent Directive 4 (SEAD 4), ¶ E.4. Additionally, the Supreme Court has held that responsible officials making "security clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531.

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. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain

[21] However, a judge's mere disbelief of an applicant's testimony or statements, without actual evidence of disqualifying conduct or admission by an applicant to the disqualifying conduct, is not enough to sustain an unfavorable finding. ISCR Case No. 15-05565 (App. Bd. Aug. 2, 2017); ISCR Case No. 02-24452 (App. Bd. Aug. 4, 2004). Furthermore, an unfavorable decision cannot be based on matters not alleged in an SOR. ISCR Case No. 14-05986 (App. Bd. May 26, 2017). Unless an applicant is provided notice an issue raises a security concern, unalleged matters can only be used for specific limited purposes, such as assessing mitigation and credibility. ISCR Case No. 16-02877 at 3 (App. Bd. Oct. 2, 2017).

degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

## Analysis

### Guideline E, Personal Conduct

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. Additionally, of special interest in assessing a person's eligibility, are circumstances where a person fails to cooperate or provide truthful and candid answers during a security clearance investigation or the adjudicative processes. Such conduct will normally result in an unfavorable eligibility determination. *See generally* AG ¶ 15.[22]

In assessing Applicant's case, I considered the disqualifying and mitigating conditions listed under Guideline E, including the following:

> AG ¶ 16(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 national security eligibility or trustworthiness, or award fiduciary responsibilities;
>
> AG ¶ 16(b): deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, . . . involved in making a recommendation relevant to a national security eligibility determination, or other official government representative;
>
> AG ¶ 16(c): credible adverse information in several adjudicative issue areas . . . which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information;
>
> AG ¶ 17(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;

[22] *See also* SEAD-4, Appendix A, ¶ 2(i) ("the adjudicative process is predicated upon individuals providing relevant information pertaining to their background and character for use in investigating and adjudicating their national security eligibility. Any incident of intentional material falsification . . . raises questions about an individual's judgment, reliability, and trustworthiness and may be predictive of their willingness or ability to protect the national security.")

AG ¶ 17(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; and

AG ¶ 17(f): the information was unsubstantiated or from a source of questionable reliability.

The gravamen of the security concern here is that Applicant allegedly has not been fully candid about his criminal history, finances, and employment record. Applicant met his heavy burden of proof and persuasion in refuting the serious SOR allegations. Although his failure to recognize the need to list the 1998 DUI on his security clearance applications is stupefying, he did not omit this information with an intent to deceive or mislead. Rather, Applicant sincerely believed that, despite the straightforward, clear questions on the applications, he was not required to list the DUI. His innocent state of mind was in part contributed to by the repeated renewals of his clearance after submitting applications that have now come under a cloud of suspicion. Applicant freely discussed the DUI during each of his background investigations over the past two decades and passed a polygraph examination in 2009 that, in part, focused on the DUI.

Additionally, Applicant provided independent, credible documentation to corroborate his testimony. Notably, he provided IRS documentation showing that the source of the large bank deposit in 2007 was a tax refund. In 2008, Applicant provided a sworn affidavit to investigators regarding the 2007 and 2003 financial transactions. No evidence suggesting that the information Applicant provided in the affidavit was false or misleading was raised. Applicant informed the Government two years ago that he is willing to answer any questions about the 2003 financial transaction and no evidence was provided that he refused to answer follow-up questions about this 15-year-old financial transaction.[23] Applicant also provided documentation to corroborate his testimony that the 2004 job loss was not related to the serious, yet unfounded claims of employee misconduct. Accordingly, as further discussed below, Applicant refuted each of the SOR allegations and showed that he cooperated with security processing and provided truthful responses to investigator's questions.

**SOR 1.a (failure to cooperate about 2003 bank withdrawal)**

The SOR alleges in ¶ 1.a that Applicant failed to cooperate with his recent security clearance investigation by refusing to answer the investigator's questions about the 2003 financial transaction. The only evidence on this point is the investigator's summary of the interview.[24] Applicant, in responding to the DOHA interrogatory, disputed the

[23] *See* Tr. 70 – 81 (no questions about the 2003 transaction were asked during cross-examination).

[24] Exhibit 4 at 11 ("On 11/19/2003, the subject took out $22,662 from his [ ] Bank account. The subject explained that his money was used to pay bills at the time. The subject refused to be more specific or provide any other pertinent details. It was his opinion that this transaction was out of scope and unnecessary to his current background investigation. For this reason, the subject would not answer any other questions regarding this currency transaction."). The investigator was not called as a witness and no information was provided regarding what question(s) Applicant purportedly refused to answer about the 2003 transaction. It is unclear whether the investigator reviewed the 2008 affidavit.

investigator's summary. He stated, "I believe I did answer questions about the 2003 transaction, and I am available anytime if any further clarification is required." [25]

Applicant acknowledged at hearing that he asked the investigator whether the 2003 transaction was relevant or material to the current investigation, but told the investigator he was willing to answer any questions she may have about the transaction. The investigator then decided not to pursue any further line of inquiry about the 2003 bank withdrawal.[26]

Applicant's willingness to discuss this financial transaction and other matters during the recent and past security clearance investigations is supported by the weight of the evidence. Notably, Applicant provided an affidavit during his 2008 investigation wherein he discussed numerous matters, including the 2003 bank withdrawal. He then reiterated his willingness to discuss the 2003 bank withdrawal in responding to a DOHA interrogatory in 2016. No evidence was provided that Applicant refused a follow-up interview or inquiry regarding the 2003 bank withdrawal after submitting his interrogatory response. Applicant responded to questions at hearing in a straightforward and credible manner, including questions regarding the 2003 and 2007 financial transactions. Accordingly, I find that Applicant presented sufficient evidence to show that he cooperated with the recent background investigation. SOR 1.a is decided in his favor.

**SOR 1.b (alleged misleading information about the 2007 bank deposit)**

The SOR alleges in ¶ 1.b that Applicant provided misleading and contradictory explanations regarding the source of the 2007 bank deposit. No evidence was provided that the monies deposited into Applicant's bank account was from an illegal or dubious source. Instead, the apparent contradiction in explanations was due to the passage of time, forgetfulness, and the power of suggestion.

Applicant provided documentation from the IRS showing that the source of the large bank deposit was a tax refund, which is consistent with his sworn 2008 affidavit. Of note, the affidavit was prepared close in time to when Applicant received the tax refund and deposited the funds into his bank account. Years later, Applicant was unable to accurately recall the source of this one bank deposit and, understandably not wishing to give inaccurate information to the investigator, indicated that to the best of his recollection it was likely from a tax refund. The investigator then suggested a plausible, yet incorrect explanation for the money. Afterwards, Applicant researched the issue and was able to locate the supporting documentation to show that his original statements to investigators about the source of the 2007 deposit was accurate. Applicant's explanation about the apparent contradiction in his interview statements about the 2007 deposit is reasonable, credible, and consistent with the record evidence.

Consequently, I find that Applicant presented sufficient evidence to show that he provided truthful and honest responses to the best of his knowledge and belief during the

[25] Exhibit 4 at 15.

[26] Tr. 40-41.

course of two separate security clearance interviews about the source of the 2007 bank deposit. SOR 1.d is decided in his favor.

**SOR 1.c (omission of 1998 DUI from security clearance application)**

The security clearance process relies on the honesty and candor of all applicants. It begins with the answers provided in the security clearance application and continues throughout the clearance process. However, the omission of material information standing alone is not enough to establish that an applicant committed a deliberate falsification. Instead, in assessing intent, a judge must examine all the relevant facts and circumstances surrounding the omission, including a person's age, level of education, work experience, and familiarity (or lack thereof) with the security clearance process. An omission is not deliberate if the person genuinely forgot the information, sincerely was unaware of the information, inadvertently overlooked or misunderstood the question, or earnestly thought the information did not need to be reported.[27]

Applicant should have reported the 1998 DUI on the security clearance applications he submitted in 1999, 2006, and 2014. However, Applicant's failure to list the DUI on the applications was not done with the intent to deceive or mislead. He sincerely believed until recently that he was not required to list the information about what he considers an unwarranted arrest. His misunderstanding about his reporting requirement was contributed to by the improper advice he received from a former security representative and the repeated renewal of his clearance after he submitted past incomplete applications without issue. Additionally, Applicant thought that because he had been upfront about the DUI from the outset, including with his former supervisors, he did not need to list it on the applications.[28] Although this view is incorrect, it reflects Applicant's lack of malicious intent in omitting the DUI from his applications.

Applicant's lack of malicious intent is also evidenced by the fact that he freely and routinely discussed the 1998 DUI with security investigators over the past two decades. He voluntarily agreed to a DoD-administered polygraph interview in 2009 to resolve any potential concerns, including about the 1998 DUI. His clearance was again renewed following the polygraph interview. Although these interviews should have placed Applicant on notice that he needed to list the DUI, they did not and he continued to repeat his mistake, including on his most recent application. After considering all the evidence, both favorable and unfavorable, and having an opportunity to observe Applicant's demeanor at hearing, I find that the omission of the DUI was not deliberate nor intended to mislead. SOR 1.c is decided in Applicant's favor.

**SOR 1.d (2004 job loss)**

The SOR alleges in ¶ 1.d that:

> Your employment with [Employer X] was terminated in approximately January 2004, after the client you were supporting in [Y country] in 2003

[27] *See generally* ISCR Case No. 02-12586 (App. Bd. Jan. 25, 2005).

[28] *See* Tr. 89 (Department Counsel concedes that the Government has been aware of the DUI since 1999).

> refused to allow you access to its facilities and systems and requested that you not return to [Y country]; followed by a security violation in which you demanded access to SCIF that you were not authorized to enter. You deliberately failed to disclose this termination in your Electronic Questionnaires for Investigations Processing (e-QIP), executed by you on March 28, 2006, in Section 22: Your Employment Record.

The only evidence in support of this allegation is Exhibit 9, a JPAS entry, which states:

> [Employer Z] sent letter explaining subject's employment termination. His supervisor advised us that [Applicant] falsely completed timesheet on 12-19-03 and attempted unauthorized access to a controlled area on 12-24-03.

This JPAS entry summarizing the letter from the Applicant's former supervisor is at odds with Exhibit B, a business record from the human resources administrator for Employer Z, which reflects that Applicant was involuntarily terminated due to a reduction in force. In weighing this conflicting evidence, I find Exhibit B more credible because it is consistent with the other evidence and the circumstances following the 2004 job loss.

Applicant credibly testified about the issues he encountered with his former supervisor about the time sheet and secure facility issues. The matter was reviewed by his employer at the time and Applicant was cleared of any wrongdoing. Although Applicant has a motive to fabricate, his testimony is also supported by other independent and credible evidence. Notably, Applicant submitted his 2006 security clearance application after the JPAS incident report. Applicant's security clearance adjudicative record, Exhibit C, reflects that the allegations of employee misconduct were fully reviewed during the background investigation that followed the submission of the 2006 application. And, again, Applicant was polygraphed in 2009. It is reasonable to expect the polygraph examiner would have asked Applicant questions about the serious allegations of employee misconduct reflected in Exhibit 9. Applicant's clearance was renewed following the investigation and the favorable polygraph results.

Additionally, the record reflects that when Applicant submitted his 2006 application he was only aware that his job loss was due to a reduction in force. Of note, Exhibit B was provided in response to a subpoena or court order filed during the pendency of Applicant's divorce proceedings. After considering and weighing the evidence, I find Applicant established that the job loss in 2004 was unrelated to the allegations of employee misconduct referenced in Exhibit 9. He did not leave that employment under adverse circumstances. Accordingly, his response to the employment question on his 2006 security clearance application was accurate and true. SOR ¶ 1.d is decided in Applicant's favor.

## Whole-Person Concept

In assessing Applicant's eligibility for continued access to classified information, I also considered the whole-person concept. *See* AG ¶ 2; SEAD-4, ¶ E.4 (non-exclusive list of factors a judge should consider). In doing so, I specifically took into account Applicant's service to the nation in and out of uniform over the past 40 years. Also, the reference letters from those who have known Applicant for decades attesting to his trustworthiness, reliability, and other favorable character traits. Applicant met his burden of proof and persuasion to continue his eligibility for access to classified information.

## 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 (Personal Conduct): | FOR APPLICANT |
| Subparagraphs 1.a – 1.d: | For Applicant |

## Conclusion

In light of the record evidence, it is clearly consistent with the interests of national security to grant Applicant initial or continued eligibility for access to classified information. Applicant's request for a security clearance is granted.

_____
Francisco Mendez
Administrative Judge