

The Security Executive Agent, by Directive 4, *National Security Adjudicative Guidelines* (SEAD 4), dated December 10, 2016, superceded and replaced the September 2006 adjudicative guidelines (AGs). They apply to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. Procedures for administrative due process for contractor personnel continue to be governed by DOD Directive 5220.6, subject to the updated substantive changes in the AGs, effective June 8, 2017. Application of the AGs that were in effect for the issuance of the SOR would not affect my decision in this case.

Applicant responded to the SOR on October 30, 2016, and he requested a hearing. The case was assigned to me on June 5, 2017, and scheduled for hearing on August 3, 2017. The Government's case consisted of six exhibits (GEs 1-6). Applicant relied on one witness (himself) and six exhibits. (AEs A-F) The transcript was received on August 15, 2017.

Procedural Issues

Before the opening of the hearing, Department Counsel amended the SOR to add ¶ 2.c, which alleges as follows: On or about January 25, 2017, Applicant violated security policy by using another individual's common access card (CAC) to enter an unauthorized industrial area. Applicant did not oppose the amendment.

Prior to the close of the hearing, Applicant requested the record be kept open to permit him the opportunity to supplement the record with awards, commendations, and character references. For good cause shown, Applicant was granted seven days to supplement the record. Department Counsel was afforded seven days to respond. Within the time permitted, Applicant provided copies of Navy achievement and commendation medals, training certificates, designations and accommodations, and command endorsements. Applicant's submissions were admitted without objection as AEs G-I.

Before closing the record, I admitted without objection a final decision of the Naval Personnel Security Appeal Board (PSAB) granting Applicant a conditional clearance directing the DON CAF to reinstate Applicant's security clearance upon the condition that Applicant "have no further criminal conduct." (HE 1)

Summary of Pleadings

Under Guideline J, Applicant allegedly was arrested and charged with (a) larceny in November 2003; (b) fugitive from justice in December 2006; (c) felony arson 2d degree in December 2006; (d) insurance fraud in January 2007; (e) false report to police officer in August 2007; and (f) went to Captain's Mast for the charge of adultery in February 2014 and received a reduction in rank and required to forfeit half of his pay for two months.

Under Guideline E, Applicant allegedly (a) falsified his security clearance application (e-QIP) of May 2015 by deliberately failing to disclose a judgment entered against him in 2012 in the amount of \$11,410. Allegedly, the omission constituted a non-

disclosure of a material fact in his e-QIP. By virtue of the SOR amendment, adultery allegations against Applicant are covered by Guideline E as well under SOR ¶ 3.a.

Under Guideline F, Applicant allegedly incurred an adverse judgment in 2012 in the amount of \$11,410. Allegedly, this judgment remains unpaid and outstanding.

In his response to the SOR, Applicant admitted each of the SOR allegations with explanations. He claimed the larceny charges arose from trying to secure a lost computer with the intention of returning it to its rightful owner. He further claimed the charges were dropped in court following the owner's favorable testimony. He claimed he was on Navy deployment when the arson charges were filed against him in connection with burning his car and committing insurance fraud in December 2006.

Addressing the personal conduct allegations, Applicant acknowledged having an adulterous affair with a woman at work and claimed that after he informed his command of his inappropriate relationship, he told his wife, who, in turn, told the woman at work, who reported the affair to his command. Applicant claimed that he was punished by both his wife and his command.

In his response to the financial allegations covered by SOR ¶ 2.b, Applicant claimed he misunderstood the question, and because he had previously satisfied the 2012 judgment in 2014, he mistakenly assumed he did not need to answer the question affirmatively. And in responding to SOR ¶ 3.a, Applicant claimed the 2012 judgment in issue had been satisfied in 2014.

Findings of Fact

Applicant is a 32-year-old civilian training specialist for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated and adopted as relevant and material findings. Additional findings follow.

Background

Applicant was raised by his single parent mother in a low-income neighborhood and has no siblings. (GEs 1-2) He married his high-school girlfriend in August 2004 and divorced in 2010. (GEs 1-2; Tr. 53-54) He has two children from this marriage (ages 12 and nine). He remarried in 2010 and has no children from this marriage. (Tr. 53-54) Applicant earned a high school diploma in May 2002 and reported no additional post-high school credits. (GEs 1-2; Tr. 52) With no money to attend college, he enlisted in the Navy in June 2003 and served 11 years of active duty. (GEs 1-2; Tr. 52) He received an honorable discharge on May 28, 2015. (GEs 1-2; Tr. 33-34, 74)

Since May 2015, Applicant has been employed by his current employer. He had no additional civilian employment to report. He applied for his current position on May 27, 2015, just a day before his Navy discharge. (GEs 1-2; Tr. 74)

Applicant's arrest history

Applicant has a considerable history of criminal arrests and convictions, dating to 2003. In November 2003, as a 17-year old minor, Applicant was arrested and charged with a grand theft felony offense stemming from his finding a laptop computer and backpack that the owner had left behind. (GEs 2-3 and 6 and AE A) Instead of leaving the items where he found them, he took them with him with the stated intention of returning them to the owner.

When Applicant tried to return the items to the owner, the owner accused him of stealing them. Charged with grand theft (a felony) on the strength of a filed police report by the owner, the assistant state's attorney declined to prosecute Applicant on these charges and abandoned them. (GE 3 and AE A)

Applicant was arrested again in December 2006, this time for arson (felony second degree). Prior to his arrest, Applicant and his pregnant wife were stationed in a neighboring state and lived in a two-bedroom townhouse. After taking in 15 family members displaced by Hurricane Katrina (inclusive of his mother, aunt, uncle, and eight of his friends), he did not have enough money as a petty officer third class to care for his expanded family without serious financial strains. (GEs 2 and 6; Tr. 35-36) To raise money for his family, he burned his own car with the intent of committing insurance fraud.

In early 2006, Applicant filed reports with the police and his insurance company that his car had been stolen. (GEs 2 and 6; Tr. 56-57) His reports were false, for, in fact, he had intentionally burned his car to raise money for his family. Following his interview by an insurance investigator processing his claim, he withdrew his claim. (GEs 2 and 6) While misdemeanor charges were made against Applicant for filing a false police report, disposition of the charges is unclear. (GE 3)

Before deploying, Applicant informed his Navy command of the arson incident and received a very unfavorable evaluation. (Tr. 57) While commending Applicant for his honesty, his command imposed restrictions on promotions and special assignments. (Tr. 35-36)

In December 2006, Applicant was arrested on felony charges of arson (2d degree). Because he was deployed at the time of his arrest and did not appear in court to answer the charges, he was also charged with being a fugitive from justice in December 2006, in addition to the arson charges. (GEs 2-3) In January 2007, Applicant appeared on these felony arson charges and was placed on supervised probation for three years. (GEs 2-3; and AE B) Accepting Applicant's claims that he was deployed when the arson charges were issued, the sentencing court dismissed the fugitive from justice charges. (GEs 2-3) His supervised probation order issued by this court expired in 2009 and was not renewed. (GE 3)

In January 2007, the assistant state's attorney in another court filing brought an insurance fraud charge against Applicant, greater than \$100,000, but less than \$200,000

(a felony in the second degree). (GE 3) Appearing in court in March 2007 to answer charges of insurance fraud in this other judicial district, Applicant pled guilty to insurance fraud and was sentenced to five years of community service with deferred adjudication. (GEs 1-3)

Upon fulfilling the court's probation conditions (inclusive of making \$8,000 in restitution to the insurance company and lender), the entered deferred adjudication of the insurance fraud charges were dismissed in March 2012. (AEs C-D) While not fully developed in the record, the false police report charges conceivably could have been merged with the more serious insurance fraud charges.

In February 2014 (while on active duty), Applicant engaged in an adulterous affair with another enlistee and was charged with adultery, a criminal offense covered by the Uniform Code of Military Justice (UCMJ). Concerned about his violating his marital vows, he told his wife of the affair. (GE 2) His wife, in turn, called the woman involved in her husband's affair, who reported the affair to her command.

At a convened Captain's Mast, Applicant received a reduction in rank from E-7 to E-5 and forfeited one-half of his pay for two months. (GEs 1-4) Applicant has since expressed deep remorse for his marital betrayal and is in the process of reconciling with his wife.

In January 2017, Applicant used a CAC belonging to another to gain entrance to an unauthorized building. (GE 4) Applicant does not dispute these reported actions. At the time, Applicant did not have authority or approval to be inside the industrial area. While no compromise of sensitive information occurred, Applicant, who was properly briefed on CAC use policy, deliberately violated DoD security policy and misused the CAC to enter an unauthorized industrial area.

Finances

Sometime in the early 2000s (exact date unknown), Applicant purchased a vehicle (not the vehicle he burned in 2006) and financed his purchase with a loan from SOR creditor ¶ 3.a. (GE 5) In the aftermath of Hurricane Katrina and the ensuing displacement of friends and family members, Applicant's finances tightened considerably in 2005. (GE 2; Tr. 39)

When Applicant could no longer make his car payments, the lender defaulted him and repossessed the vehicle. (GE 2; Tr. 39, 58-59, and 64-65) Applicant's lender, in turn, sued him for the deficiency owed on the car loan. (GEs 2-4) SOR creditor ¶ 3.a, in turn, obtained an adverse judgment against Applicant in 2012. Applicant has since satisfied this judgment in one lump sum payment in February 2014 and secured a release of the same. (GE 2 and AE F)

Applicant's other accounts are reportedly maintained in current status. (GE 5) His July 2017 credit report revealed no deficiencies among his other reported accounts.

E-QIP omissions

Asked to complete an e-QIP in May 2015, Applicant failed to disclose the adverse judgment entered against him in 2012. (GE 1; Tr. 47) Applicant attributed his omission to a misunderstanding of the question based on his previous satisfaction of the judgment in issue. He relied on the mistaken advice given him by his attorney who assured him the satisfied judgment would no longer appear on his credit report. (Tr. 47) Applicant's explanations are accepted.

Character references, awards, and certificates

Applicant is well-regarded by fellow co-workers and Navy colleagues who served with Applicant and are familiar with his work performance and leadership skills. They believe that Applicant has learned from his past mistakes and credit his high work ethic and professionalism. (AE E) They consider him to be of good character and add their support to his clearance appeal.

Over the course of his 11 years of active duty military service, Applicant earned numerous achievement awards and certificates of training and recognition. (AE G) His awards include multiple achievement medals, certificates recognizing him for his training completion and expeditionary combat skills, warfare designations, sailor of the quarter recognitions, and other Navy accommodations. (AE G)

Policies

The SEAD 4, App. A lists 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 guidelines include conditions that could raise a security concern and may be disqualifying (disqualifying conditions), if any, and many of the conditions that could mitigate security concerns.

These guidelines 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 App. A, 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 App. A, AG ¶ 2(d) 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 App A, AG ¶ 2(d) 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:

Criminal Conduct

The concern. Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

Personal Conduct

The Concern. 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 adjudicating processes 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 or sensitive information. Financial distress can also be caused or exacerbated by, and thus can be a possible indicator of, other issues of personnel security concern such as excessive gambling, mental health conditions, substance misuse, or alcohol abuse or dependence. An individual who is financially overextended is at greater risk of having to engage in illegal acts or otherwise questionable 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 Exec. Or. 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

Security concerns over Applicant's judgment, reliability, and trustworthiness are raised under Guidelines J and E as the result of his lengthy arrest history covering the period between 2003 and 2014. Separate personal conduct concerns arise over his omission of his 2012 judgment in the e-QIP he completed in May 2015 and his misuse of a CAC he obtained from another person to enter an unauthorized building in January 2017. Financial concerns are raised as well over the 2012 judgment entered against Applicant that allegedly had not been satisfied.

Criminal and personal conduct concerns related to Applicant's arrest history

Applicant's considerable pattern of criminal arrests and convictions span a period of over eight years and cover his arson and insurance fraud convictions of 2007 (both felonies) and adultery offense of 2014 for which he received non-judicial punishment at a convened Captain's Mast. His offenses warrant the application of one disqualifying condition (DC) under the criminal conduct guideline: DC ¶ 31 (b), “evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of

criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted,” fully applies to Applicant’s situation.

While there is some overlap here, Applicant’s pattern of criminal offenses are also covered by the personal conduct guideline. 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 individual may not properly safeguard classified or sensitive information. This includes, but is not limited to, consideration of . . . (3) a pattern of dishonesty or rule violations.” Applicant’s overlapping criminal offenses reflect not only violations of his state’s criminal statutes, and the UCMJ, but some pattern of rule violations as well.

Because of the lengthy history of Applicant’s criminal offenses: one that stretches between 2006 and 2014 with a brief elapsed time since he committed his most recent adultery offense in 2014, none of the mitigating conditions potentially available to him apply. His collective offenses were neither minor nor aged when considered in context with each other and preclude safe predictions at this time that Applicant will not engage in criminal behavior in the future.

Granted a conditional clearance by the Navy PSAB in 2009, Applicant was placed on notice that any future criminal conduct would subject him to risk of revocation of his clearance. His adultery offense of 2014 constituted a serious violation of the UCMJ and represented a clear breach of the conditions imposed on him by the Navy PSAB. His breach of these conditions placed him at risk to clearance revocation in any future review of his clearance eligibility. At this point, more time is needed to absolve Applicant of risks of recurrent criminal behavior.

Personal conduct concerns re: Applicant’s e-QIP omissions and CAC misuse

Addressing his e-QIP omission of his 2012 judgment (SOR ¶ 3.a), Applicant acknowledged his omission but attributed the omission to mistaken advice from his attorney that the judgment would no longer appear in his credit reports once the judgment was satisfied. Applicant’s explanations are both plausible and credible and are accepted. Considering all of the circumstances surrounding his omission, allegations of deliberate omission of the judgment are unsubstantiated.

By contrast, Applicant’s alleged misuse of another’s CAC in 2017 is both admitted and fully substantiated as a deliberate and material violation of DoD security policy. His deliberate misuse of another’s CAC to enter an unauthorized building

represents a serious and recent breach of DoD security policy and is covered by DC ¶ 16 (d) of the personal conduct guidelines

While Applicant is remorseful for his judgment lapse in misusing another's CAC to gain entrance to a building that at the time he had no CAC of his own to rightfully enter the building, his actions represented a serious breach of DoD security policy and is still recent in its occurrence. When considered in conjunction with his lengthy criminal history, more time is needed to mitigate the CAC misuse incident before he can be absolved of risks of future recurrence. Based on a consideration of the compiled evidentiary record, it is still too soon to absolve him of all recurrence risks related to his misuse of another's CAC to enter an unauthorized building.

Financial concerns

Security judgment concerns are raised over Applicant's incurring of a judgment in 2012, which allegedly he had not been satisfied. Applicant's incurring of an adverse judgment warrant the application of two of the disqualifying conditions (DC) of the Guidelines: DC ¶¶ 19(a), "inability to satisfy debts" and 19(c), "a history of not meeting financial obligations." Applicant has since satisfied the judgment and obtained its full release from the creditor. MC ¶ 20 (d), "the individual initiated and is adhering to a good-faith effort to repay overdue creditors or otherwise resolve debts," fully applies to Applicant's situation. Applicant's credit reports corroborate his claims that he is paying his other accounts in a timely way. Financial concerns are mitigated.

Whole Person Assessment

In making a whole-person assessment, consideration is accorded Applicant's early childhood years growing up in a low-income neighborhood with a single mother and the progress he demonstrated as a Navy enlistee over a 11-year military career. His numerous Navy awards and certifications attest to his dedication to becoming a successful sailor. He is credited with enjoying strong command support and impresses as generally sincere and remorseful about his past lapses in judgment.

Still, Applicant brings to these proceedings a lengthy history of serious criminal offenses and breaches of rules and regulations that have only recently abated. Doubts about his good judgment under pressure continue to be raised and create risks of recurrent criminal behavior and rules violations that have not been fully mitigated. Applicant's actions to date reflect a lack of trustworthiness, reliability, and ability to protect classified information. See AG ¶ 18.

Taking into account all of the documented facts and circumstances surrounding Applicant's record of serious criminal offenses and violations of rules and regulations over an extended period of time, there is insufficient probative evidence of restored

trustworthiness, reliability, and judgment on Applicant's part to mitigate criminal and personal conduct concerns. Reasonable doubts about Applicant's trustworthiness, reliability, and judgment remain. Applicant is credited with mitigating security concerns over his e-QIP omissions and entered 2012 creditor ¶ 3.a judgment.

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:

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| GUIDELINE E (CRIMINAL CONDUCT): | AGAINST APPLICANT |
| Subparagraphs 1.a-1.f: | Against Applicant |
| GUIDELINE E (PERSONAL CONDUCT): | AGAINST APPLICANT |
| Subparagraphs 2.a and 2.c: | Against Applicant |
| Subparagraph 2.b: | For applicant |
| GUIDELINE F (FINANCIAL CONSIDERATIONS): | FOR APPLICANT |
| Subparagraph 3.a: | For Applicant |

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's eligibility to hold a security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

