DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
---	)	ISCR Case No. 16-03413
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Allison Marie, Esquire, Department Counsel
For Applicant: *Pro se*

04/24/2018

Decision

GALES, Robert Robinson, Administrative Judge:

Applicant mitigated the security concerns regarding personal conduct and criminal conduct. Eligibility for a security clearance and access to classified information is granted.

Statement of the Case

On August 24, 2010, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (1st e-QIP) version of a Security Clearance Application. On October 5, 2015, he submitted another Security Clearance Application (2nd e-QIP). On December 19, 2016, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a Statement of Reasons (SOR) to him, under Executive Order (Exec. Or.) 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 Access to Classified Information* (December 29, 2005) applicable to all adjudications and

other determinations made under the Directive, effective September 1, 2006.[1] The SOR alleged security concerns under Guideline E (Personal Conduct), Guideline J (Criminal Conduct), and Guideline C (Foreign Preference),[2] 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 January 1, 2017. On January 5, 2017, he responded to the SOR and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on March 20, 2017. The case was assigned to me on May 1, 2017. A Notice of Hearing was issued on May 3, 2017. I convened the hearing as scheduled on June 20, 2017.

During the hearing, Government exhibits (GE) 1 through GE 5, and Applicant exhibits (AE) A through AE S were admitted into evidence without objection. Applicant testified. The transcript (Tr.) was received on June 28, 2017. I kept the record open to enable Applicant to supplement it. He took advantage of that opportunity and timely submitted additional documents, which were marked and admitted as AE T through AE W, without objection. The record closed on June 27, 2017.

Findings of Fact

In his Answer to the SOR, Applicant partially admitted, with comments, several of the factual allegations pertaining to personal conduct (¶¶ 1.b. through 1.g., and 1.i.), but denied the remaining portions of those allegations as well as other allegations; and the factual allegations pertaining to criminal conduct (¶ 2.a.) in the SOR. Applicant's admissions and 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 61-year-old employee of a defense contractor. He has been with his current employer since June 2017, serving in a flexible position inspecting and repairing airplanes and boats, and fabricating parts. He had been a field service representative (FSR) or engineer with other employers until mid-2015, when he was let go because the security clearance review process was not concluded fast enough to retain him. He has also owned a company since 1989, working on European automobiles. Foreign-born and

[1] 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 an effect on Applicant in this case.

[2] Upon a motion by Department Counsel during the hearing to withdraw the foreign preference allegations under Guideline C, and there being no objection, the motion was granted and the allegations were withdrawn. No further references to the Guideline C allegations appear below. *See* Tr. at 15-16.

a 1987 naturalized U.S. citizen, Applicant earned his foreign version of a high school diploma in 1972, and a master's degree in automotive engineering and technology in 1976. He has also received an associate's degree in 1999. Before he came to the United States in 1979, Applicant was required to complete one year of compulsory Austrian military service, but he contended that because of a medical condition, he was drafted and discharged four decades ago. In 1981 he enlisted in the Air National Guard and he remained in an active capacity until he was honorably discharged as an airman (E-2) in September 1982.[3] Applicant was granted a secret security clearance in 1981, and maintained it until 1991, and again in 2012, and in 2014, he was granted eligibility for a moderate risk public trust (MRPT) position in 2014.[4] Applicant was married in 1980 and divorced in 1987. He remarried in 1990 and divorced in 1996. He again remarried in 1998. He had three sons, born in 1982 (died in 2017), 1984, and 1986.

Applicant has spent a substantial amount of time working overseas in a civilian capacity in support of U.S. military objectives in Iraq and Afghanistan. He was assigned to Iraq from April 2005 until April 2006, from April 2006 until November 2007, and from November 2007 until November 2010. He was assigned to Afghanistan from July 2012 until February 2013, and from April 2013 until July 2013.

Personal Conduct and Criminal Conduct[5]

The SOR alleged eight incidents of criminality by Applicant over a period of two decades, commencing in 1990 and continuing until 2010. In addition to those incidents, the SOR alleged two incidents of personal conduct in 2015 associated with Applicant's alleged falsifications on his 2nd e-QIP. The alleged incidents of criminality are as follows:

(SOR ¶ 1.b.): Applicant was arrested in about January 1990 and charged with hull identification number removal, a felony.[6] Applicant contends that the boat in question

[3] AE J (Report of Separation and Record of Service); AE J (Honorable Discharge Certificate).

[4] Tr. at 9-10.

[5] General source information pertaining to the alleged incidents of criminality discussed below can be found in the following exhibits: GE 4 (U.S. Office of Personnel Management (OPM) Report of Investigation (ROI) - Personal Subject Interview, dated March 16, 2012); GE 3 (U.S. Department of State (DOS) ROI – Subject Interview, undated, but after December 11, 2013); GE 2 (OPM ROI – Personal Subject Interview, dated February 8, 2016; Applicant's Response to the SOR, dated January 5, 2017).

[6] GE 3, *supra* note 5, at 10-11; GE 4, *supra* note 5, at 6; GE 2, *supra* note 5, at 9-10. The state law associated with hull identification removal states:

> (2) No person shall operate, use, or store on the waters of this state a vessel the construction of which was completed before November 1, 1972, for which the department has issued a certificate of title or which is required by law to be registered, unless the vessel displays a hull identification number. The hull identification number shall be clearly imprinted in the transom or on the hull by stamping, impressing, or marking with pressure. In lieu of imprinting, the hull identification number may be displayed on a plate in a permanent manner. A vessel for which the manufacturer has provided no hull identification number or a homemade vessel shall be assigned a hull identification number by the department which shall be affixed to the vessel pursuant to this section.

was his, and it was at his own workshop location when it was damaged while he was backing up a truck, and he accidently backed into the back and side of the boat, tearing off the transom which had the hull identification number attached to it. Shortly thereafter, two police officers visited his shop to question him about a stolen vehicle, and while they were questioning him, they noticed his boat. They accused him of altering the hull identification number and arrested him. Applicant initially said he did not recall ever going to court and the incident was dropped.[7] He subsequently said that he went to court and explained that all charges were dropped, without fines or probation, and the boat was returned to him.[8] The 2016 OPM investigator reported that adjudication was withheld for two years, and there was ten days probation.[9]

(SOR ¶ 1.c.): Applicant was arrested in about January 1990 and charged with perjury in an official proceeding, a felony.[10] Applicant contends that his brother used one of his vehicles while on vacation in this country and he received a ticket. Although his brother had a driver's license, and he purportedly signed the traffic citation, it was Applicant's brother and not Applicant who was the driver who signed the citation. Applicant denied that he was ever involved in the incident.[11] The 2016 OPM ROI stated the perjury "disposition: 2 years 10 days," and a fraud "disposition: 2 years of probation."[12]

(SOR ¶ 1.d.): Applicant was arrested in June 1996 and charged with aggravated assault – weapon, a felony.[13] Applicant offered two scenarios. He initially said he was not aware of the incident and denied ever having been charged with anything like that.[14] He subsequently said that he did not recall the incident.[15] However, in his Response to the SOR, Applicant remembered the incident. He said he was attacked at a traffic light by a man with a machete in an incident of road rage. Applicant used his son's baseball bat to

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> (3)(a) No person, firm, association, or corporation shall destroy, remove, alter, cover, or deface the hull identification number or hull serial number, or plate bearing such number, of any vessel, except to make necessary repairs which require the removal of the hull identification number and immediately upon completion of such repairs shall reaffix the hull identification number in accordance with subsection (2).

Title XXIV, §328.07, *Hull identification number required*

[7] GE 4, *supra* note 5, at 6.

[8] GE 3, *supra* note 5, at 11; Tr. at 44-45.

[9] GE 2, *supra* note 5, at 9. The OPM ROI did not provide a source or basis for this statement.

[10] GE 2, *supra* note 5, at 9-10.

[11] Applicant's Response to the SOR, *supra* note 5, at 2; Tr. at 55-56.

[12] GE 2, *supra* note 5, at 10. The OPM ROI did not provide a source or basis for this statement.

[13] GE 4, *supra* note 5, at 8; GE 2, *supra* note 5, at 9-10.

[14] GE 4, *supra* note 5, at 8.

[15] GE 2, *supra* note 5, at 10.

defend himself against the machete-wielding aggressor. He also named a witness to the incident. He contends the charges were dismissed.[16] The 2016 OPM ROI indicated that the charge of aggravated assault may have been combined with resisting or obstruction an officer without violence. While one section of the ROI said "no disposition," another section said court costs $105, and a third section said disposition "unknown."[17]

(SOR ¶¶ 1.e. and 1.f.): Applicant was arrested in November 1998 and charged with retail theft, a felony; kidnap of a minor, a felony; custodial interference; and out of state fugitive.[18] When Applicant was divorced, his ex-wife was granted sole physical custody of their youngest child, and he was granted sole physical custody of the two older children, with each parent having reasonable visitation rights.[19] Several years later, Applicant's ex-wife asked him if the two older boys could come back to her to reside for "a little while." He verbally agreed without formally altering the custody status. At about the same time, the youngest child, then around 16 years of age, came to visit Applicant during a school break. That child asked Applicant if he could remain with his father rather than returning to his mother. When Applicant informed his ex-wife of the situation, she was infuriated. He did not hear from her again, but unbeknownst to him, his ex-wife had contacted the authorities and reported that Applicant had kidnapped their son. A warrant was issued for Applicant's arrest.[20]

Applicant and his youngest son were shopping together, and as they left the store, a security guard stopped them and inquired about items that the son had taken. Applicant's son had shoplifted two watches, worth about $12 each. In a moment of panic and instinct, and concerned about his son's future of potentially staining his record at such a young age, Applicant took responsibility for the theft. Applicant and the security guard then got into an altercation and the police arrived to break them up. The police ran a criminal check on Applicant, and it resulted in the report that a warrant was outstanding for kidnapping a minor.[21] Applicant offered two scenarios. He initially said he was released that same day after posting bail, and that the charges were dropped before the scheduled court date because Applicant did have custody of the child.[22] He subsequently indicated that he spent 14 days in jail, but was released after his story and the legal custody status were verified. He appeared in court and presented his explanation to the judge, and all charges were dropped. There were no fees, penalties, or probation.[23] The 2016 OPM ROI

[16] Applicant's Response to the SOR, *supra* note 5, at 2; Tr. at 56-57.

[17] GE 2, *supra* note 5, at 9-10. The OPM ROI did not provide a source or basis for this statement.

[18] GE 4, *supra* note 5, at 8; GE 2, *supra* note 5, at 10; GE 3, *supra* note 5, at 11.

[19] AE V (Stipulation and Amendment to Final Order, dated August 12, 1988).

[20] GE 3, *supra* note 5, at 11; GE 4, *supra* note 5, at 8; Applicant's Response to the SOR, *supra* note 5, at 2; Tr. at 64-66.

[21] GE 3, *supra* note 5, at 11.

[22] GE 4, *supra* note 5, at 8.

[23] GE 3, *supra* note 5, at 11; Tr. at 61.

indicated that the charges of kidnap of a minor and custodial interference were turned over to another agency, and there was no disposition for the kidnap charge. The charge of retail theft was not mentioned.[24]

(SOR ¶ 1.g.): Applicant was arrested in October 2003 and charged with driving on a suspended or revoked license; simple assault on officer, firefighter, emergency medical care provider, traffic accident investigation officer, traffic infraction enforcement officer, inspector, analyst, operator, law enforcement explorer, parking enforcement specialist, public transit employee or agent, or security officer engaged in the lawful performance of his or her duties, a misdemeanor; and resisting officer/obstructing justice without violence, a misdemeanor.[25] Applicant explained that he was driving with his two older sons to a church function when he was stopped by the police for having an expired tag. Applicant explained to the officer that he had already paid for the tag but that it had not yet been received. When the officer ran Applicant's name through his computer, he learned that Applicant's license had been suspended. When the officer told him of the suspension, Applicant asked how that was possible, the officer refused to respond. Instead, the officer poked him in the chest and Applicant poked him back, telling the officer not to touch him. The officer grabbed him by the arm and pushed him to the ground. When other officers arrived at the scene, Applicant's two sons jumped out of the car to stop the officers from hurting their father. All three were arrested and charged.[26] Applicant appeared in court, explained what had happened, and presented evidence of the registration. All charges were dismissed.[27] The 2016 OPM ROI confirmed that the charges were dismissed.[28]

(SOR ¶ 1.h.): The SOR alleged that Applicant was charged with failure to appear in about August 2004. With regard to this allegation, the information appearing in Applicant's 2012 OPM ROI appears to be inconsistently garbled. It refers to an arrest on August 30, 2004 for failure to appear, to which Applicant initially denied ever being charged, and he denied having any knowledge of the incident to which it referred.[29] The ROI also referred to an arrest in August 2005 for theft, as reported by Applicant in his 1st e-QIP.[30] Applicant explained that in approximately 2002, he rented a storage container, placed it on his property, and used it for his business. Sometime in 2003, the container owner called to tell him that he needed the container back, and Applicant told him to come and get it. The owner never came to get it, and Applicant simply forgot about it. In August 2005, upon returning home from Iraq, Applicant was arrested because the container had

[24] GE 2, *supra* note 5, at 10. The OPM ROI did not provide a source or basis for this statement.

[25] GE 3, *supra* note 5, at 11-12; GE 4, *supra* note 5, at 8; GE 2, *supra* note 5, at 10.

[26] GE 3, *supra* note 5, at 11-12; GE 4, *supra* note 5, at 8; Tr. at 68-69.

[27] GE 3, *supra* note 5, at 11-12; GE 4, *supra* note 5, at 8; GE 2, *supra* note 5, at 10.

[28] GE 2, *supra* note 5, at 10. The OPM ROI did not provide a source or basis for this statement.

[29] GE 4, *supra* note 5, at 8.

[30] GE 4, *supra* note 5, at 5; AE N (1st e-QIP, dated August 24, 2010), at 48.

been reported as stolen. He posted bail that same day. Applicant never had to go to court, and the charge was dismissed.[31]

(SOR ¶ 1.i.): Applicant was apprehended by military police in March 2010 and charged with larceny of less than $100 from the military exchange in Iraq.[32] An investigation determined that Applicant had been observed selecting one compact disc (CD) and placing it in another CD case, and that he went through all final points of sale, and as he exited the facility, he was stopped and detained. Although there were several statements reportedly attached to the original Police Report, including one from a supposed eyewitness and another in which Applicant supposedly admitted the offense, no such attachments were submitted to me.[33] Applicant contended that he purchased a backpack for over $150, and as he was departing, he was accused of theft and detained. A $15 CD was found in the backpack, but Applicant denied he put it there. When he was told that there was a video of him, he demanded to see it, but that request was denied. No charges were ever brought against him.[34]

Additional Personal Conduct

In addition to those incidents of joint criminal conduct and personal conduct described above, the SOR alleged two incidents of personal conduct in 2015 associated with Applicant's alleged falsifications on his 2nd e-QIP. The alleged incidents of personal conduct are as follows:

(SOR ¶ 1.a.): On October 5, 2015, when Applicant completed his 2nd e-QIP, he responded to a question pertaining to foreign military service found in Section 15. That question asked if he had ever served, as a civilian or military member in a foreign country's military, intelligence, diplomatic, security forces, militia, other defense force, or government agency. Applicant answered "no."[35] He certified that his response to that question was "true, complete, and correct" to the best of his knowledge and belief. Before Applicant came to the United States in 1979, he was drafted into the Austrian Army over four decades ago and was medically discharged without serving.[36] He contends he was accurate when he said he did not serve in the Austrian Army, and the earlier interpretation of what he said about foreign military service was misinterpreted.

[31] GE 4, *supra* note 5, at 6. The 2012 OPM ROI does not cite to any information source, or source documents such as a FBI information record, police report, or court record, regarding the failure to appear charge or the theft charge, and there is no indication if the two charges are related.

[32] GE 5 (Military Police Report, dated March 7, 2010).

[33] GE 5, *supra* note 32, at 5.

[34] GE 4, *supra* note 5, at 2; Applicant's Response to the SOR, *supra* note 5, at 3; Tr. at 75-76.

[35] GE 1 (2nd e-QIP, dated October 5, 2015), at 29.

[36] Applicant's Response to the SOR, *supra* note 5, at 2; Tr. at 85.

(SOR ¶ 1.j.): On October 5, 2015, when Applicant completed his 2nd e-QIP, he also responded to a question pertaining to a question in Section 13A – Employment Activities. That question of particular interest was his reason for leaving his employment activity in December 2014. Applicant answered that he left because "end of contract."[37] He certified that his response to that question was "true, complete, and correct" to the best of his knowledge and belief, but the response to that question may have been, in fact, false, for a number of reasons. The SOR alleged that Applicant deliberately failed to disclose that he was discharged for unsatisfactory performance.

Initially, there is a confusing statement attributed to Applicant in the 2012 OPM ROI in which he purportedly stated that following the March 2010 incident at the military exchange in Iraq, although his employer never wrote him up for the incident, Applicant "resigned to make the situation go away."[38] During the hearing, he repeated that scenario.[39] Something in the timeline of events does not ring true for the incident occurred in March 2010, and Applicant did not leave his employer until December 2014.

According to the Employee Guide issued by Applicant's employer in October 2013, performance reviews are completed by the employee's first line supervisor during the ninth month of employment in Afghanistan.[40] On June 15, 2014, Applicant was given a formal counseling for unsatisfactory job performance and unproductive use of time. His manager/supervisor noted that Applicant had been trained for 30 days in Afghanistan; he had been counseled numerous times on his shortcomings; and during his 90 days in country, he did not possess the skills to work without direct supervision. Upon Applicant's return from his R & R break, his supervisor said he would begin a 30-day Performance Improvement Opportunity Worksheet (PIOW) to better evaluate Applicant's strengths and weaknesses.[41] Applicant's PIOW commenced on July 26, 2014, and during the period from that date until October 12, 2014, he was tasked with a multitude of assignments. He mastered some tasks, had a good working knowledge of other tasks, and he was experiencing difficulties because of a lack of confidence or lacking attention to detail on two tasks.[42] Applicant successfully completed the PIOW, and his Program Quality Control Director acknowledged that it generally took an employee about six months to become proficient on one particular program, and Applicant was at the six-month point into his contract at that time.[43]

[37] GE 1, *supra* note 35, at 19-20.

[38] GE 4, *supra* note 5, at 2.

[39] Tr. at 76-77.

[40] AE R (Employee Guide, dated October 1, 2013).

[41] AE O (Memorandum for Record, dated June 15, 2014).

[42] AE Q (PIOW, dated October 12, 2014).

[43] AE W (E-mail, dated June 27, 2017).

Applicant contends he was hired to be a quality control inspector in February 2014 while in the United States, and because he was considered a rehire from a previous contract with the employer, he was held back, and it took almost two weeks before he could get on a computer to complete all mandatory training classes. The employer expected Applicant to be "turn-key" before his arrival in Afghanistan, but Applicant only received minimal guidance before his departure from the United States, and he had still not completed his job-qualification packet. He eventually completed it with one hundred percent accuracy.[44]

Another issue was raised regarding Applicant's employment in Afghanistan. Applicant was entitled to three meals per day, but because of his schedule, he could only eat once a day. On occasion he would take milk powder for three days using his meal card to do so. One management individual objected to Applicant's practice, and he threatened Applicant that he would be written up if he did so again. As a result, Applicant sent an e-mail to both his program quality control director (PQCD) and the Human Resources (HR) Manager complaining about the meal issues.[45] That same day, the HR Manager said she would look into the matter.[46] Applicant's PQCD believes that Applicant's e-mail and his harsh comment about the in-country management team snowballed in an employee termination. His mediation efforts ultimately failed.[47]

Applicant denied that he was fired for unsatisfactory performance. He successfully completed his PIOW, and he eventually went on approved leave. He subsequently received a notification from his employer that he had been terminated – an action which he considered unjust.[48] He steadfastly contends that he resigned two weeks before his contract ended, and before he ever received notice of termination.[49]

Work Performance and Character References

The PQCD observed Applicant's work ethics and character while he in-processed and completed his state-side training. Applicant appeared to be a good employee by following the work schedule and completing the necessary training. He attests to the fact that Applicant successfully completed the PIOW, and he noted that Applicant's problem had to do with one particular program which normally takes an employee about six months in which to become proficient. Applicant was at that point. After Applicant contacted him about the food issue, he checked with that manager who told him there was an in-country policy on food items, but when asked, that manager was unable to produce a copy of the

[44] AE P (Applicant's Response to Memorandum for Record, dated June 15, 2014).

[45] AE S (E-mail, dated September 29, 2014).

[46] AE S, *supra* note 45.

[47] AE W, *supra* note 43.

[48] Applicant's Response to the SOR, *supra* note 5, at 3.

[49] Tr. at 79-80, 83.

policy. He believes this incident set the stage for continued hostilities between the parties.[50]

The senior brigade maintenance technician, a Chief Warrant Officer 4, observed Applicant's performance for one year while in Iraq. While serving as an International Military and Government (IMG) Mine Resistant Ambush Protected (MRAP) vehicle FSR during Operation Iraqi Freedom, Applicant quickly established himself as an asset for Soldiers working to maintain the newly field MRAPs. He spent countless hours training mechanics and developing their ability to repair the vehicles, and he went above his normal scope of work by fabricating repair parts needed to repair battle damaged MRAP and return them to the fight. Applicant's efforts had a direct result in the decrease of Soldiers injured on the streets of Baghdad. He has seldom seen an FSR that can match Applicant's knowledge. Applicant has demonstrated the mental and physical toughness to meet any challenge in a combat environment.[51]

The executive officer of the Task Force Military Police for the forward operating base in Iraq, a major, noted that Applicant's performance as the IMG MRAP FSR has been simply outstanding. Applicant's overall mechanical expertise and analytical prowess have been vital in maintaining their MRAPs operational readiness. Applicant routinely spent long hours working side by side with the mechanics repairing damaged or dead-lined MRAPs, ensuring that the Military Police going out in sector will have a fully operational MRAP. He considers Applicant a consummate professional who accepts nothing less than excellence from himself and those around him. His potential is unlimited and he will thrive when challenged.[52]

The commander of forward support company operating in Iraq, a captain serving on his third deployment, was very high on Applicant because of his technical expertise, his proactive professional development and networking, and his ability to motivate. Applicant's efforts directly influenced an operational readiness rate of over 96 percent. His accuracy in trouble shooting and diagnostic analysis saved the battalion millions of dollars which resulted in maximum time employed against the enemy, and contributing to the survivability of Soldiers in combat. Applicant taught classes to Combat Repair Teams and used his superior networking abilities and contacts to retrieve any part needed.[53]

For his outstanding service and dedication in support of Operation Iraqi Freedom during the periods December 2004 until January 2005, and again during 2008 until 2009, Applicant was presented with a Certificate of Appreciation and several challenge coins.[54]

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[50] AE W, *supra* note 43.

[51] AE E (Character Reference, dated October 31, 2008).

[52] AE D (Character Reference, dated October 29, 2008).

[53] AE F (Character Reference, dated February 2, 2009).

[54] AE B (Certificate of Appreciation, dated February 6, 2005); AE H (Photographs of various challenge coins dated October 3, 2013).

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, "no one has a 'right' to a security clearance."[55] 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."[56]

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."[57] 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.[58]

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

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

[57] "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).

[58] *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

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 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."[59]

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."[60] Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, 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

Upon consideration of all the facts in evidence, including those in the DOD CAF case file, those submitted by Applicant, his testimony, as well as an assessment of Applicant's demeanor and credibility, and after application of all appropriate legal precepts and factors, I conclude the following with respect to the allegations set forth in the SOR:

Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30: 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.

The guideline notes two conditions under AG ¶ 31 that could raise security concerns:

> (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

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

[60] *See* Exec. Or. 10865 § 7.

(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.

With one exception related to an alleged incident in March 2010, there are allegations in a variety of ROIs that Applicant was, on a number of occasions, between January 1990 and March 2010, arrested and charged, or charged without being arrested with a variety of crimes. Applicant disputed the underlying bases of most of the incidents, and steadfastly denied one particular incident. It is troubling that the information pertaining to the alleged crimes were offered only through the ROIs without citing any information source, or source documents such as a FBI information record, police report, or court record. Furthermore, some of the information appears to have been relying on written or oral statements made by others adverse to Applicant relating to controverted issues, and Applicant has had no opportunity to have those statements, much less cross-examine those persons.[61] Nevertheless, while the information of criminality is of poor quality,[62] it has generally been "admitted" by Applicant, raising that information to the level of substantial evidence. Accordingly, based on the actions described above, AG ¶¶ 31(a) and 31(b) have been established.

The guideline also includes examples of conditions under AG ¶ 32 that could mitigate security concerns arising from criminal conduct. They include:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

AG ¶¶ 32(a) and 32(c) apply, and AG ¶ 32(d) partially applies. As noted above, on a number of occasions between January 1990 and March 2010, Applicant was arrested and charged, or charged without being arrested with a variety of crimes. Reviewing the circumstances associated with the hull identification removal; the perjury; the aggressive

[61] Directive, Encl. 1, § 4(a): "An applicant shall be afforded an opportunity to cross-examine persons who have made oral or written statements adverse to an applicant relating to a controverted issue except that such statement may be received and considered without affording such opportunity in the circumstances described in either of the following paragraphs:" - (neither of which apply).

[62] *See* Directive, Encl. 1, §§ 5 (a) and (b), with respect to using investigative reports.

assault during the road rage incident; the kidnapping; the assault of an officer; and the retail theft by his son, for which there were either dismissals or no clear evidence of convictions, leads to a conclusion that Applicant's explanations are true. With regard to the alleged failure to appear charge, one which Applicant denied, the offense is not substantiated. The alleged 2010 larceny was supported by a Military Police Report, but the supporting statements were missing. There was no evidence that Applicant was disciplined, leading one to question the validity of the charge.

Because the ROIs did not report more than sketchy minimal information regarding those incidents, and some of the information was internally inconsistent or substantially incomplete, Applicant became the major source of the information regarding those incidents. With few exceptions, his explanations have gone unrebutted. For most of the alleged incidents, it appears that the charges were dismissed. However, even assuming that Applicant may have been found guilty of the alleged charges, so much time has elapsed since that alleged criminal behavior happened – at least eight years since the last alleged incident – and they happened under such unusual circumstances, and there have been no more recent similar behavior of conduct, it appears that it is unlikely to recur. Applicant has had, with the exception of one questionable issue with an employer, a good employment record, and placed himself in harm's way, performing essential services for the U.S. military missions in Iraq and Afghanistan.

A person should not be held forever accountable for misconduct from the past, and in this instance the most recent alleged criminal conduct is eight years ago. There are no concerns about future criminal conduct. Applicant's past history of criminal conduct, under the circumstances, no longer casts doubt on his reliability, trustworthiness, or good judgment.

Guideline E, Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> 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.

The guideline also includes examples of conditions that could raise security concerns under 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 employment qualifications, award benefits or status, determine national security eligibility or trustworthiness, or award fiduciary responsibilities; and
>
> (c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information.

My discussion related to Applicant's criminal conduct is adopted herein. At the time Applicant completed his e-QIP in October 2015, he denied any foreign military service. He was drafted into the Austrian Army four decades earlier and subsequently medically discharged. He credibly said he did not actually serve in the Austrian Army. It was also alleged that Applicant was discharged by an employer for unsatisfactory performance, an allegation which Applicant disputed and denied when he said he departed the position at the end of contract. While there is evidence of early poor performance, there is zero evidence that the employer discharged him for poor performance, especially when his Program Quality Control Director acknowledged that Applicant successfully completed the PIOW. Applicant steadfastly contends that he resigned two weeks before his contract ended, and before he ever received notice of termination. Applicant's Program Quality Control Director believes that Applicant's e-mail complaining about the so-called food policy snowballed into an employee termination.

Deliberately providing false or misleading information, or concealing or omitting information, requires some evidence of intent to deceive. Furthermore, errors in facts or misunderstandings do not necessarily rise to the level of deliberate falsifications, omissions, or concealments. Nevertheless, as to the allegations regarding the alleged criminal conduct, AG ¶ 16(c) has been established. As to the two allegations pertaining to the deliberate falsifications on the e-QIP, neither disqualifying condition has been established.

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

(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; and

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

AG ¶ 17(c) applies. AG ¶¶ 17(d) and 17(f) partially apply. My comments associated with the criminal conduct section also applies in an assessment of personal conduct concerns. As noted above, without citing any information source, or source documents, there are allegations in a variety of ROIs that Applicant was, on a number of occasions, between January 1990 and March 2010, arrested and charged, or charged without being arrested with a variety of crimes. However, so much time has elapsed since that alleged criminal behavior happened – at least eight years since the last alleged incident – and they happened under such unusual circumstances, and there has been no more recent similar behavior of conduct, it appears that it is unlikely to recur. Most of those who know him attest to his trustworthiness, reliability, and outstanding performance. It is unlikely that Applicant's alleged personal conduct, especially that which was associated with his criminal conduct, will recur.

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.[63]

There is some evidence against mitigating Applicant's conduct. On a number of occasions between January 1990 and March 2010, Applicant was arrested and charged, or charged without being arrested with a variety of crimes. He also had problems with one employer.

The mitigating evidence under the whole-person concept is more substantial. Applicant is a 61-year-old employee of a defense contractor. He has been with his current employer since June 2017, serving in a flexible position inspecting and repairing airplanes and boats, and fabricating parts. He had been an FSR or engineer with other employers until mid-2015, when he was let go because the security clearance review process was not concluded fast enough to retain him. He has also owned a company since 1989, working on European automobiles. In 1981 he enlisted in the Air National Guard and he remained in an active capacity until he was honorably discharged one year later. Applicant was granted a secret security clearance in 1981, and maintained it until 1991, and again in 2012, and in 2014, he was granted a MRPT in 2014.

Applicant has spent a substantial amount of time working overseas in a civilian capacity in support of U.S. military objectives in Iraq and Afghanistan. He was assigned to Iraq from April 2005 until April 2006; from April 2006 until November 2007; and from November 2007 until November 2010. He was assigned to Afghanistan from July 2012 until February 2013; and from April 2013 until July 2013. He was a well-respected member of the MRAP teams.

In addition, while I had the opportunity to review Applicant's statements, his Response to the SOR, and listen to his testimony, I have concluded that Applicant is unusually sensitive, defensive, and verbally combative when confronted with unfavorable information or allegations. His responses to police authorities, security guard authorities, and even investigators, are to contest their assertions, especially when he feels that they are unjustified. His comments in his Response to the SOR and during the hearing about what he considered a poor investigation or prosecution simply fortify my impressions. Nevertheless, while Applicant may present as a rather testy individual, that impression does not, by itself, establish a reason for denying him a security clearance. The combination of Applicant's actions, explanations, and beliefs no longer cast doubt on Applicant's reliability, trustworthiness, and good judgment. *See* AG ¶ 2(a)(1) through AG ¶ 2(a)(9).

Overall, the evidence leaves me without questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all of these reasons, I conclude Applicant has mitigated the security concerns arising from his criminal conduct and personal conduct. *See* SEAD 4, App. A, ¶¶ 2(d)(1) through AG 2(d)(9).

[63] *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).

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:	FOR APPLICANT
Subparagraphs 1.a. through 1.j.:	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Paragraph 3, Guideline C:	WITHDRAWN
Subparagraph 3.a.:	Withdrawn

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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ROBERT ROBINSON GALES
Administrative Judge