



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



In the matter of:

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ISCR Case No. 17-00511

Applicant for Security Clearance

**Appearances**

For Government: Daniel Crowley, Esq., Department Counsel

For Applicant: Ryan Nerney, Esq.

04/16/2018

**Decision**

HARVEY, Mark, Administrative Judge:

Applicant assaulted, battered, and injured his spouse in November 2000, August 2009, and June 2014. On November 30, 2016, he intentionally lied to an Office of Personnel Management (OPM) investigator when he falsely denied that he ever physically hurt or physically injured his spouse. Personal conduct security concerns are not mitigated. Eligibility for access to classified information is denied.

**Statement of the Case**

On January 8, 2015, Applicant completed and signed his Questionnaire for National Security Positions (SF 86) or security clearance application (SCA). (Government Exhibit (GE) 1) On April 10, 2017, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) issued a statement of reasons (SOR) to Applicant under Executive Order (Exec. Or.) 10865, *Safeguarding Classified Information within Industry*, February 20, 1960; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), January 2, 1992; and the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, effective on September 1, 2006 (Sept. 1, 2006 AGs).

The SOR detailed reasons why the DOD CAF did not find under the Directive that it is clearly consistent with the interests of national security to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine

whether a clearance should be granted, continued, denied, or revoked. Specifically, the SOR set forth security concerns arising under Guideline E (personal conduct).

On May 11, 2017, Applicant responded to the SOR. HE 3. On August 9, 2017, Department Counsel was ready to proceed. On October 5, 2017, the case was assigned to another administrative judge. On December 18, 2017, the case was transferred to me. On January 4, 2018, the Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing, setting the hearing for January 17, 2018. HE 1. Applicant waived his right to 15 days of notice of the date, time, and location of his hearing. Tr. 10. Applicant's hearing was held as scheduled.

During the hearing, Department Counsel offered four exhibits; Applicant offered six exhibits; there were no objections; and all proffered exhibits were admitted into evidence. Tr. 13-17; GE 1-4; Applicant Exhibits (AE) A-F. On January 24, 2018, DOHA received a copy of the hearing transcript.

While this case was pending a decision, the Director of National Intelligence (DNI) issued Security Executive Agent Directive 4, establishing in Appendix A the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), which he made applicable to all covered individuals who require initial or continued eligibility for access to classified information or eligibility to hold a sensitive position. The new AGs supersede the Sept. 1, 2006 AGs and are effective "for all covered individuals" on or after June 8, 2017. Accordingly, I have evaluated Applicant's security clearance eligibility under the new AGs.<sup>1</sup>

### **Findings of Fact<sup>2</sup>**

In Applicant's SOR response, he admitted the SOR allegation in ¶ 1.a, and he said he could not remember some of the other information alleged in the SOR. I have concluded that he denied SOR ¶¶ 1.b through 1.m. Tr. 12. He also provided extenuating and mitigating information. Applicant's admissions are accepted as findings of fact. Additional findings of fact follow.

Applicant is a 60-year-old linguist. Tr. 19. He received an associate's degree in Iraq. Tr. 19. In 1991, he married, and he has a 24-year-old son. Tr. 20. A government contractor has employed him in Iraq since 2015 to support the U.S. Army. Tr. 20. Three days after his hearing, he was scheduled to return to Iraq. Tr. 21. He has had multiple assignments as a linguist to Cuba, Europe, Texas, and Iraq. Tr. 38-39. He estimated that he had served about 7 to 10 years with U.S. forces in Iraq. Tr. 38.

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<sup>1</sup> Application of the AGs that were in effect as of the issuance of the SOR would not change my decision in this case. The new AGs are available at [http://ogc.osd.mil/doha/5220-6\\_R20170608.pdf](http://ogc.osd.mil/doha/5220-6_R20170608.pdf).

<sup>2</sup> Some details were excluded to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

## Personal Conduct

In June 2000, the police went to Applicant's residence because of a domestic disturbance complaint made by Applicant's spouse. SOR ¶ 1.i; GE 3 at 2. Applicant did not remember the June 2000 incident. Tr. 21-22. In July 2000, the police went to his residence due to a dispute between Applicant and his neighbor. SOR ¶ 1.k. Applicant called the police because his neighbor threatened Applicant's son. Tr. 22-23; GE 3 at 5, 8. In July 2000, the police went to Applicant's residence because of another verbal dispute between Applicant and his spouse. SOR ¶ 1.j. No one was arrested because of these three incidents. Tr. 23.

In November 2000, the police arrested Applicant, and he was charged with domestic assault and battery. SOR ¶ 1.i; GE 3 at 14; Tr. 24. Applicant's spouse said he assaulted and battered her at Applicant's residence; she left her home and went to her mother's home; and Applicant went to his mother-in-law's residence and struck his spouse on her head two or three times. GE 3 at 10-16. Applicant's mother-in-law called the police. Tr. 24. Applicant's mother-in-law and spouse provided statements to the police about him striking her on the head at his mother-in-law's residence. Applicant said he could not remember the incident. Tr. 25. He denied that he was arrested or convicted. Tr. 25. The report describes his arrest, and indicates the charge was dismissed. GE 3 at 14-16.

In July 2006, the police went to Applicant's residence because of a verbal domestic dispute. SOR ¶ 1.h. Applicant said he did not remember the incident in July 2006. Tr. 25. In October 2006, the police interviewed Applicant because he was involved in an assault and battery over bicycle parking. SOR ¶ 1.g; GE 3 at 20. He denied he assaulted anyone over a dispute concerning a bicycle, and he said he could not remember assaulting anyone. Tr. 26. No one was arrested after the two incidents in 2006. Tr. 27.

In February 2009, the police went to Applicant's residence because of a verbal dispute between Applicant and his spouse. SOR ¶ 1.f. This dispute did not result in an arrest.

SOR ¶ 1.e alleges that in about August 2009, the police went to Applicant's residence because of an allegation that Applicant assaulted his spouse with his cane. In September 2009, Applicant's spouse made a statement to the police that Applicant beat her with his hand and cane. GE 3 at 27. He hit her head, and she started bleeding. GE 3 at 27. He choked her sufficiently to cause her to feel faint. GE 3 at 27. A warrant was issued for his arrest. GE 3 at 30. Applicant provided a handwritten statement indicating he argued with his spouse; she wanted to leave their residence; he tried to stop her; she called the police; and she scratched his chest, face, and neck. GE 3 at 28. The police report indicates Applicant was choking her, and she scratched him to get him to release her. GE 3 at 29. After he released her, he hit her on the head with his cane. GE 3 at 29. The police observed a bump on her forehead and a cut and a scratch on Applicant's neck. GE 3 at 29. The next day she told police that he had been assaulting her for years; however, she did not want him to be charged. GE 3 at 29. Applicant said he did not remember threatening his spouse with a cane. Tr. 27. He remembered that he was under a lot of pain because of an injury he suffered in Iraq. Tr. 28, 40. He denied that he was

arrested or charged. Tr. 28. He did remember going to the police station and completing some paperwork. Tr. 28-29. He went to the police station because his spouse told him the police wanted to see him. Tr. 28. Applicant said he did not appear before a judge because of the incidents in 2009. Tr. 29. The record indicates he received a video arraignment by a magistrate; Applicant pleaded not guilty; and he was given a \$1,000 bond. GE 3 at 29. The case was closed because Applicant's spouse did not want to support the prosecution. GE 3 at 30.

In March 2010, the police went to Applicant's residence due to a dispute between Applicant and his spouse. SOR ¶ 1.d. In April 2010, the police went to Applicant's residence because of a 911 call "hang up." SOR ¶ 1.c. Applicant said he may remember the police coming to his residence. Tr. 29-30. As to the 911 "hang up," Applicant said maybe a mentally handicapped child was in their house, and the child may have dialed 911 and hung up the phone. Tr. 30; AE F.

In June 2014, an assault and battery complaint was filed against Applicant after his spouse went to the hospital with injuries. SOR ¶ 1.b. Applicant's spouse said that she and Applicant argued; he forced her onto the bed; and he kicked her leg. GE 3 at 36. The police observed a small "quarter sized bruise on her left shin." GE 3 at 36. She went to the hospital; she received an X-ray; and there was no fracture. GE 3 at 36. She said she reported the assault because she wanted to use it for the divorce and not for criminal charges. GE 3 at 37.<sup>3</sup> In September 2014, the police went to Applicant's residence after a 911 call "hang up." SOR ¶ 1.a. Applicant said he was a truck driver, and he was away from his residence in June 2014, when the assault and battery allegedly occurred. Tr. 30-31. He did not present employment documentation to corroborate his alibi defense. He conceded he was at home at times in June 2014. Tr. 31. He said that he did not think he assaulted his spouse in June 2014. Tr. 32, 40. He denied knowing that his spouse went to the hospital to obtain treatment for her injury. Tr. 32.

Applicant denied that he was convicted of any crime. Tr. 33. He said the last time he remembered the police coming to his residence was "I don't remember to be honest with you. I don't remember. 2000 maybe. I don't remember. 2000. I don't remember." Tr. 35. When asked if he ever assaulted his spouse, he said, "I don't remember, but I don't think so." Tr. 35. He said no family member or friend had ever told him about being concerned relating to his treatment of his spouse. Tr. 35. He repeated that he did not remember hitting his spouse. Tr. 37. He has never received counseling for spouse abuse. Tr. 37-38.

In Applicant's January 8, 2015 SCA he denied that he had been arrested in the previous seven years; however, in the comments section he said "in 2009 disagreement with my wife I was [held] for about 5 hours and then case [was] dismiss[ed]." GE 1 at 44.

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<sup>3</sup> On January 11, 2018, Applicant's spouse signed a statement relating to the June 2014 incident indicating "I filed a complaint and misled the authorities while I made up the story. I have since then regretted my actions . . . ." AE F. She attributed the "hang up" of the 911 calls in 2010 and 2014 to a child she was babysitting that suffered from down syndrome. AE F.

On November 30, 2016, an OPM investigator interviewed Applicant about the domestic violence allegations. SOR ¶ 1.m alleges Applicant falsely denied that he had ever assaulted his spouse. The OPM summary states, "Subject repeatedly denied that he ever physically hurt or physically injured his wife." GE 2 at 23. In response to DOHA interrogatories, he did not provide any changes or corrections to the OPM summary. In response to the question about what he told the OPM investigator, Applicant said, "I told him, I don't remember. In my knowledge, I don't remember if I assault my wife or not, but in my knowledge, I don't think so. I didn't – my knowledge, I don't think so, I assault my wife." Tr. 33. He said he told the truth to the OPM investigator. Tr. 34. He considers himself to be an honest and trustworthy person. Tr. 34.

Applicant denied remembering the arrest described in the OPM interview where he was arraigned. Tr. 40-41; GE 1 at 44. He did not consider this to be an arrest because it was done to calm the situation, and Applicant was in pain due to his injury in Iraq. Tr. 42.

Applicant agreed that kicking his spouse is a physical assault, and he could not remember whether he kicked his spouse. Tr. 49. He said, "maybe we'll push each other, but not [hitting with his fist] or kicking my foot, no, sir. I don't remember that." Tr. 50. Similarly, he said he did not remember striking her with a cane on her head. Tr. 50.

### **Character Evidence**

Eight character letters from friends, colleagues, supervisors, and officers who served with him and certificates of appreciation laud his diligence, honesty, helpfulness, professionalism, loyalty to the United States, and contributions to the U.S. Government and national security. AE C; AE D. These documents support approval of his security clearance.

### **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." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An

administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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 about potential, rather than actual, risk of compromise of classified information. 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.” See Exec. Or. 10865 § 7. Thus, nothing in this decision should be construed to suggest that it is based, in whole or in part, on any express or implied determination about applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has not met the strict guidelines the President, Secretary of Defense, and DNI have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Personal Conduct**

AG ¶ 15 articulates the security concern for 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. 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.

16. Conditions that could raise a security concern and may be disqualifying in this case including:

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

(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:

(1) untrustworthy or unreliable behavior . . . ;

(2) any disruptive, violent, or other inappropriate behavior;

(3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

The record establishes the disqualifying conditions in AG ¶¶ 16(b), 16(d), and 16(e) requiring additional inquiry about the possible applicability of mitigating conditions.

Six personal conduct mitigating conditions under AG ¶ 17 are potentially applicable in this case:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

The DOHA Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. *See Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. *See Directive ¶ E3.1.15*. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 20(c) applies to the offenses in SOR ¶¶ 1.a, 1.c, 1.d, 1.f, 1.g, 1.h, 1.j, 1.k, and 1.l. The allegations in 2000, 2006, and 2009, involve verbal arguments and are relatively minor and not recent. SOR ¶¶ 1.a and 1.c relate to “hang ups” of 911 calls. The police did not arrest anyone for these nine incidents.

SOR ¶¶ 1.b, 1.e, and 1.i are not mitigated. Applicant physically assaulted (technically an assault and battery) his spouse by striking her on the head in November 2000, by striking her on the head with his cane or his hand in August 2009, and by kicking her in June 2014. These assaults were reported to the police who noted physical injuries or were observed by a third party. The physical injuries and third party witness statement corroborate his spouse’s account of being assaulted and battered on those three occasions. Applicant’s spouse’s statement are close in time to the incidents and are more credible than her statement on January 11, 2018.

SOR ¶ 1.m is not mitigated. The OPM summary states, “Subject repeatedly denied that he ever physically hurt or physically injured his wife.” GE 2 at 23. Applicant intentionally lied to the OPM investigator. He knows and remembers that he hit her on the head in November 2000 and in August 2009, and he kicked her leg in June 2014. Personal conduct security concerns are not mitigated.

### **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 AG ¶ 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 AG ¶ 2(c), “[t]he 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. My comments under Guideline E are incorporated in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under that guideline but some warrant additional comment.

Applicant is a 60-year-old linguist. He received an associate’s degree in Iraq. In 1991, he married. A government contractor has employed him in Iraq since 2015 to support the U.S. Army. He has had multiple assignments as a linguist to Cuba, Europe, Texas, and Iraq. He estimated that he had served about 7 to 10 years with U.S. forces in Iraq.

Eight character letters from Applicant's friends, colleagues, supervisors, and officers who served with him and certificates of appreciation laud his diligence, honesty, helpfulness, professionalism, loyalty to the United States, and contributions to the U.S. Government and national security. These documents support approval of his security clearance.

The evidence against mitigation of security concerns is more substantial. Applicant committed assaults and batteries on his spouse. He hit her on the head in November 2000 and in August 2009, and he kicked her leg in June 2014. In his 2016 OPM interview, Applicant repeatedly and falsely denied that he ever physically hurt or injured his wife. His statement at his hearing about not remembering that he physically injured his spouse is not credible. His false statements were deliberate, improper, and made with intent to deceive. AG ¶ 15 indicates, "Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes." Applicant's falsifications raise serious security concerns. The protection of national security relies on applicants to self-report conduct that jeopardizes security, even when that disclosure might damage the applicant's career. Applicant cannot be trusted to disclose potentially derogatory information related to security issues. He did not establish his reliability, trustworthiness, and ability to protect classified information.

I have carefully applied the law, as set forth in *Egan*, Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole person. Personal conduct security concerns are not mitigated.

### **Formal Findings**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant
Subparagraphs 1.c and 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraphs 1.f, 1.g, and 1.h:	For Applicant
Subparagraph 1.i:	Against Applicant
Subparagraph 1.j, 1.k, and 1.l:	For Applicant
Subparagraph 1.m:	Against Applicant

## **Conclusion**

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

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Mark Harvey  
Administrative Judge