DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
----------	)	ISCR Case No. 17-02667
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: Mark S. Zaid, Esq.

08/24/2018

_____

Decision

_____

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny his eligibility for access to classified information. An Iraqi citizen by birth and a U.S. citizen since 2015, Applicant did not meet his burden to present evidence to rebut, explain, extenuate, or mitigate the security concerns under the foreign influence and personal conduct security guidelines. Accordingly, this case is decided against Applicant.

Statement of the Case

Applicant completed and submitted a Questionnaire for National Security Positions (SF 86 format) on February 11, 2016.[1] This document is commonly known as a security clearance application. Thereafter, on September 14, 2017, after reviewing the application and the information gathered during a background investigation, the Department of Defense Consolidated Adjudications Facility, Fort Meade, Maryland, sent Applicant a statement of reasons (SOR), explaining it was unable to find that it was

[1] Exhibit 1.

clearly consistent with the national interest to grant him eligibility for access to classified information. The SOR is similar to a complaint. It detailed the factual reasons for the action under the security guidelines known as Guideline B for foreign influence and Guideline E for personal conduct. The former concerned Applicant's connections to Iraq via his family ties. The latter concerned an allegation that he, while working as an linguist for the U.S. armed forces in Iraq, deliberately concealed his knowledge of people participating in insurgent activities against the U.S. armed forces.

With assistance of counsel, Applicant answered the SOR on October 6, 2017. He admitted without explanation the foreign influence allegations; denied without explanation the personal conduct allegation; and requested a hearing before an administrative judge.

The case was assigned to me on November 27, 2017. Applicant's security clearance was suspended in late December 2017 or early January 2018, and he has since been on an unpaid leave of absence.[2] The hearing took place as scheduled on March 20, 2018. Both Department Counsel and Applicant offered documentary exhibits, which were admitted as Government Exhibits 1-6 and Applicant's Exhibits A-K and N; Exhibits L and M were not admitted. The hearing transcript was received on March 29, 2018.

At the close of evidence, I directed counsel to submit proposed findings of fact concerning the SOR allegation under Guideline E, with an April 19, 2018 deadline.[3] Both counsel made timely submissions; Department Counsel's proposed findings of fact are made part of the record as Appellate Exhibit I, and Applicant's proposed findings of fact are made part of the record as Appellate Exhibit II.

Findings of Fact

Applicant, a native of Iraq, is a 37-year-old employee who requires a security clearance for his job as a linguist in support of the U.S. armed forces. His formal education includes a bachelor's degree in mechanical engineering awarded in 2003 by an Iraqi university. He was granted permission to immigrate to the United States under a program called Special Immigrant Visas for Iraqi and Afghan translators/interpreters, which is administered by the U.S. Department of State. He arrived here in January 2014, and he obtained U.S citizenship in 2015. He married a native of Iraq in 2008. They have two children, both of whom attend public elementary school. His wife is a U.S. permanent resident, and his two children are U.S. citizens.

Like nearly all first-generation immigrants, Applicant has several family members who are citizens of and residents in his country of birth. In particular, his father, mother, one brother, two sisters, parents-in-law, and multiple sisters-in-law are in Iraq. Applicant has a younger brother who also served as a linguist in Iraq and who has immigrated to

[2] Tr. 57-59.

[3] Tr. 124-126.

the United States. The younger brother was called as a witness (telephonically) during the hearing and provided detailed information about their family members in Iraq, and he also provided information about Applicant. The brother also served in the U.S. Army as a linguist and deployed to Iraq in support of a Special Forces unit. The brother was medically retired from the Army in 2017; he currently works as a research analyst for a defense contractor and holds a high level security clearance; and he is currently going through the hiring process with a federal law enforcement agency. The family members in Iraq fled Baghdad in 2006, after receiving threatening calls based on Applicant's and his younger brother's work as linguists on behalf of the U.S. armed forces.[4] The family has since lived in the northern part of Iraq. The brother described his family as an educated, open-mind family, and he described Applicant as an honest, quiet person focused on family, self-employment, learning, and education.

Applicant's employment history goes back to shortly after he was awarded his university degree in 2003, and it includes working in both Iraq and the United States. Beginning in late 2003 or early 2004, he worked as a translator for a company that was a subcontractor to a U.S. company. His job ended in 2005 when the subcontractor ceased working for the prime contractor due to the unstable security situation in Iraq. A few months later in December 2005, he began working as a local-hired linguist in support of the U.S. armed forces.[5] He had that job, with two different companies, until July 2008 when the team he was working with completed its tour and returned to the United States. He began another job as a local-hired linguist in support of the U.S. armed forces a few months later in August 2008. He had that job until October 2009, when the contract concluded. That ended his employment as a linguist for the next several years.

Still living in Iraq, Applicant worked part-time as a service advisor for an automobile dealership from November 2009 to the end of 2013. He also worked part-time as a maintenance supervisor for a municipality during 2010-2013.

Applicant was initially unemployed for several months after his arrival in the United States in January 2014. He enlisted as a solider in the U.S. Army Reserve, and he was on active duty for training in the field of logistics from September 2014 through February 2015, when he was honorably discharged.[6] He then worked as a sales associate for a large retail store beginning in about July 2015 and continuing until about February 2016. He then obtained a job with a federal contractor working at the U.S. Embassy in Iraq.

After about a year, he accepted a job with another federal contractor, Applicant's current employer. This job was a sensitive position requiring a higher level of clearance, which required him to take a counterintelligence polygraph examination.[7] The

[4] Tr. 26, 31-32.

[5] Tr. 52; Exhibits 1 and N.

[6] Exhibit B.

[7] Tr. 76.

examination occurred over three days in May and June 2017. After the third session, the examiner issued a June 15, 2017 report, which was admitted as Exhibit 2. In the report the term Examinee refers to Applicant. Because the report is a central item of evidence, it is quoted in relevant part below:

> Since 2004, EXAMINEE admitted to deliberately concealing the fact that HE knew several individuals affiliated with anti-US insurgent activities in Iraq. Beginning in 2004, EXAMINEE has worked for the US Forces as a local national, first as a Category I linguist then later as a Category II linguist. EXAMINEE stated HE is presently a member of the US Army Reserve. EXAMINEE noted HE had undergone the required security interviews and counterintelligence screening process through the years in order to become a linguist; obtain HIS US citizenship; and enlisted in the US Army Reserve. However, EXAMINEE claimed HE deliberately withheld HIS personal knowledge of the insurgent activities and individuals because if this information became known it would make HIM "look bad." HE thought it would also "negatively impact" HIS ability to become a US citizen and obtain a security clearance. In late 2004, HE discovered one of his friends was an Improvised Explosive Devise (IED) maker in Baghdad, Iraq. The individual's first name was Wameed and his last name was either [omitted] both phonetic. Wameed's father first name was [omitted]. EXAMINEE found out that not only did Wameed make IEDS for Al-Qaeda, but he also placed them specifically to target US Forces in the Baghdad area. EXAMINEE worked as a local national linguist for the US Forces at the time and lived on a US base when HE found out about Wameed, but HE intentionally did not report Wameed to the US Forces. According to the EXAMINEE, Wameed allegedly died in 2005 or 2006 while placing an IED. He heard this from HIS friends. EXAMINEE also had several neighbors who were involved in attacks against US Forces during Operation Iraqi Freedom. EXAMINEE and HIS neighbors lived on a road in the Baghdad area that was frequently the location of insurgent attacks against US Forces. EXAMINEE knew which neighbors were involved in the attacks and who also worked for US Forces in Iraq, but HE did not report any of the activities to anyone. At that time, EXAMINEE was neighbors with these people for approximately 13 years, but when questioned in detail for specific names by the undersigned HE claimed HE could not remember any of them. When questioned whether HE ever had personal involvement in attacks on Coalition Forces, EXAMINEE denied any such activity.
>
> In 2006, EXAMINEE had another friend, Muhand (LNU), who regularly attended a radicalized Mosque in Iraq. Muhand told EXAMINEE the Mosque was operated by Al-Qaeda, and after each prayer session the Imam (no name) would advocate violence against the US and provided instructions on how to attack US Forces. EXAMINEE told Muhand that HE worked for the US Forces; had access to US bases; and showed Muhand photos of HIMSELF wearing a US military uniform. EXAMINEE did this as a means to encourage Muhand to obtain work with the US Forces.

> EXAMINEE noted HE has not had contact with Muhand since 2006. On multiple occasions, EXAMINEE again reiterated that HE deliberately concealed all of the above information from US screening and investigative personnel because HE thought it "looked bad" and it would have a negative impact on HIS US citizenship and US residency. EXAMINEE maintained HE was worried about the above information during each previous polygraph session and now regretted not divulging this information to the previous polygraph examiner.

Department Counsel did not call the author of the report as a witness during the hearing, but instead relied on the report itself.

Administrative or official notice is taken of certain facts about Iraq as described in Department Counsel's written request.[8] The situation in Iraq is well known within the Defense Department and it is unnecessary to discuss those facts at great length here. In general, the overall security situation in Iraq is fluid and at times quite unstable if not deadly after many years of war. The risk of terrorism remains high.

Law and Policies

This case is adjudicated under Executive Order (E.O.) 10865*, Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AG), effective June 8, 2017.[9]

It is well-established law that no one has a right to a security clearance.[10] As noted by the Supreme Court in *Department of the Navy v. Egan*, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."[11] Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security. In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of evidence.[12] The Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.[13]

---

[8] Exhibit 6.

[9] The 2017 AG are available at http://ogc.osd.mil/doha.

[10] *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988) ("it should be obvious that no one has a 'right' to a security clearance"); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

[11] 484 U.S. at 531.

[12] 484 U.S. at 531.

[13] ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.[14] An unfavorable clearance decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.[15]

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.[16] The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.[17] An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.[18] In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[19]

Discussion

Under Guideline E for personal conduct,[20] the primary concern is that conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about a person's reliability, trustworthiness, and ability to protect classified or sensitive information. In analyzing the facts and circumstances of this case, I have considered the following disqualifying and mitigating conditions:

> AG ¶ 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 company 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 to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or governmental protected information . . . ; and
>
> AG ¶ 17(f) the information was unsubstantiated or from a source of questionable reliability.

[14] Directive, ¶ 3.2.

[15] Directive, ¶ 3.2.

[16] ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

[17] Directive, Enclosure 3, ¶ E3.1.14.

[18] Directive, Enclosure 3, ¶ E3.1.15.

[19] Directive, Enclosure 3, ¶ E3.1.15.

[20] AG ¶ ¶ 15, 16, and 17 (setting forth the concern and the disqualifying and mitigating conditions).

As established by substantial evidence (Exhibit 2),[21] Applicant made damning admissions during the course of a counterintelligence polygraph examination. His admissions epitomize both untrustworthiness and unreliability within the meaning of AG ¶ 16(d). Although the Government's case likely would have been stronger had they called the author of the report as a witness, the report is still persuasive and compelling because the information therein is clearly stated, detailed, and unequivocal.

Addressing the mitigating condition at AG ¶ 17(f), the report is not undermined because it is from a source of questionable reliability. Just the opposite is true, because the report is from a trained polygraph examiner employed by the U.S. Army who is skilled in interrogation. That is not a source of questionable reliability. Likewise, the report is not undermined because the information therein was unsubstantiated. Again, just the opposite is true. In reaching that conclusion, I considered Applicant's lengthy testimony in which he explained the circumstances of the third session of the polygraph examination, the interrogation process, and his efforts to minimize or put in context (or both) the information in the report, including the cultural context of how the word "friend" is commonly used in Iraq.[22] I also considered that, during cross-examination, he admitted many but not all the statements in the report.[23] And I considered that the report may have errors or omissions as pointed out by Applicant (the 2004 start date as opposed to a December 2005 start date for his employment in support of the U.S. armed forces, and the omission of his reporting of another linguist for misconduct to an Army officer). Although those matters are not trivial or minor, they do not rise to a level where they constitute material errors or omissions that fatally undermine the information in the report as whole.

The gravamen of the SOR under Guideline B for foreign influence is whether Applicant's family ties to Iraq should disqualify him from access to classified information. Under Guideline B for foreign influence,[24] the suitability of an applicant may be questioned or put into doubt due to foreign contacts and interests. In an ordinary or standard Guideline B case involving an applicant who has served in a combat zone under difficult and dangerous circumstances, as this Applicant has,[25] I would decide the Guideline B matters in their favor. But this is not an ordinary case. The negative security implications from the damning admissions Applicant made during his June 2017 polygraph examination logically spillover and taint the foreign influence matters. Given these circumstances, I am not persuaded that Applicant can be expected to resolve any potential concern or potential conflict of interest caused by his family ties to Iraq in favor of the U.S. interest.

[21] Department Counsel's burden of proof to establish facts controverted by an applicant is substantial evidence, which is a very low standard, less than a preponderance of the evidence, and far less than proof beyond a reasonable doubt.

[22] Tr. 76-97.

[23] Tr. 99-108 (*See* Department Counsel's is-it-accurate questions).

[24] AG ¶¶ 6, 7, and 8 (setting forth the concern and the disqualifying and mitigating conditions).

[25] Tr. 61-64, 120-123 (describing the dangerous conditions).

Following *Egan* and the clearly-consistent standard, I have doubts and concerns about Applicant's reliability, trustworthiness, good judgment, and ability to protect classified or sensitive information. In reaching this conclusion, I weighted the evidence as a whole and considered if the favorable evidence outweighed the unfavorable evidence or *vice versa*. I also considered the whole-person concept. In doing so, I considered the strong evidence of Applicant good employment record working as a linguist under difficult and dangerous conditions and his many highly favorable recommendations.[26] He has an outstanding record as a linguist. Nevertheless, I conclude that he did not meet his ultimate burden of persuasion to show that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

Formal Findings

The formal findings on the SOR allegations are:

Paragraph 1, Guideline B:	Against Applicant
Subparagraphs 1.a – 1.e:	Against Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

It is not clearly consistent with the national interest to grant Applicant access to classified information.

Michael H. Leonard
Administrative Judge

[26] Exhibits A-K.