

Paul L. Aswell

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RE: DCS G-1 MAVNI—SPC

Dear Mr. Aswell,

My name is J. I am an Army soldier who received an “unfavorable” Military Service Suitability Recommendation (“MSSR”). I have been given thirty (30) days to “submit written matters to refute, correct, explain, extenuate, mitigate, or update the unfavorable information. . .” The date of my “Notification of Adverse Military Service Suitability Recommendation” (MSSR) was June 18, 2019. My reply is timely.

As an initial matter, I elect to be fully and fairly advised of the reasons supporting the adverse MSSR, including but not limited to being given all documents, reports, findings, and/or internal memoranda and copies of the statutory documentation informing this decision. Further, I demand the appointment of an Army Legal Assistance Attorney, at no cost to me, to review the documents with me and to help me make a fully informed decision on my rights involved in this determination.

The referential documents cited in support of your determination were not provided with the determination letter. Several of the documents are unavailable to me. At least two have been superseded.

1. Department of Defense Instruction 1304.26 (Qualification Standards for Enlistment, Appointment, and Induction) 23 March 2015 Change 2, 11 April 2017. (Unavailable and superseded by Department of Defense Instruction 1304.26 (Qualification Standards for Enlistment, Appointment, and Induction) 23 March 2015 Change 3, 26 October 2018).
2. Department of Defense Manual 5200.02, Procedures for the DoD Personnel Security Program (PSP), April 3, 2016. (Unavailable and apparently superseded by Department of Defense Manual 5200.02, Procedures for the DoD Personnel Security Program (PSP), April 3, 2017).

3. Memorandum, Acting Assistant Secretary of the Army, (Manpower and Reserve Affairs), 27 October 2017, subject: Military Accessions Vital to the National Interest (MAVNI) Pilot Program Military Service Suitability Review and Determination (MSSD). (Unavailable)
4. Memorandum, Deputy Chief of Staff, G-1, 2 November 2017, subject: Delegation of Authority to Make a Military Service Suitability Review and Determination (MSSD). (Unavailable)
5. Memorandum, Acting Assistant Secretary of the Army (Manpower and Reserve Affairs), 26 October 2018, subject: Resume Separation Actions Pertaining to Members of the Delayed Entry Program (DEP) and Delayed Training Program (DTP) Recruited Through the Military Accessions Vital to National Interest (MAVNI) Pilot Program. (Unavailable)

I cannot determine how or if the Army is (or I am) governed or directed by materials that are effectively secret from me. I do note that if the Army has based its actions on rescinded policies, it may wish to reconsider. For example, Department of Defense Manual 5200-02 §5.8 specifically provides “The subject of investigation will be given access to PSI reports in accordance with E.O. 12968, DoD 5400.11-R and DoDM 5200.01, as applicable.” See also, §§10.2 and 10.4. The relevant portion of E.O. 12968 calling for disclosure to me is found in Part 5, §5.2(a)(2-4). See also, AR 135–178, Ch.3 §3-5(a)(4).

Because I understand that an adverse MSSR is a revocation of my eligibility to hold the national security position in which I currently serve, I request a Statement of Reasons (SOR). Department of Defense Manual 5200-02 §5.8 specifically provides “The subject of investigation will be given access to PSI reports in accordance with E.O. 12968, DoD 5400.11-R and DoDM 5200.01, as applicable.” See also, §§10.2 and 10.4. The relevant portion of E.O. 12968 calling for disclosure to me is found in Part 5, §5.2(a)(2-4). See also, AR 135–178, Ch.3 §3-5(a)(4). To put it another way, neither the Army nor I can comply with EO 12968, Department of Defense Manual 5200-02, or AR 135–178 if we do not both know what we are discussing. This requirement is found in Department of Defense Manual 5200-02 §10.4(a)(1 and 2), among other places. I am requesting no more than the courtesy, recognition, and consideration deserved by the nature of the service I have performed. AR 135–178, Ch.1 § 1-7. Any future separation process will ultimately require that I be given notice of, and access to, this information. AR 135–178, Ch.3 §3-5(a)(4).

The fundamentals of due process of law are twofold: 1) notice; and 2) an opportunity to respond. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). While your office has provided me with notice of the opportunity to respond, I have not been given notice of that to which I am to respond. Without notice of what derogatory information DoD is relying upon there is no meaningful “notice” or “opportunity to respond.” Particularly in my case, where it seems the information you are relying upon is false, unless DoD or the Army first provides me with a SOR and a subsequent opportunity to respond, DoD and/or the Army is depriving me of due process of law.

Consequently, please clarify if your office intends to provide me with adequate effective notice of the derogatory information being used against me. Further, please clarify if your office intends to provide me with an opportunity to respond to that derogatory information by giving me 30 days in which to do so after I have been provided adequate effective notice of the derogatory information. AR 135–178, Ch.3 §3-7.

I request that the Army grant me at least 30 days from my receipt of the above-requested information to prepare a response. If the Army declines to provide the information, please let me know immediately and explain the basis for withholding the information I need and have requested, in writing.

The single “disqualifying” condition listed as the basis for the adverse MSSR determination is that I am “financially dependent on my mother and my sister who are both citizens of India.” The criteria for disqualification is purported to be Guideline B of the National Security Adjudicative Guidelines, which sets forth “Foreign Influence” as the disqualifying condition. But your adverse determination memorandum does not inform me of how receiving money from my mother and sister makes me “vulnerable to be manipulated or induced to help a foreign state....” I respectfully request that you provide clarification of this allegation, including any and all documents and statutes upon which you have based your decision, so that I can understand the basis for the MSSR and be in a position to fully respond.

The sister who was assisting me is a lawful resident of the United States, not India. She no longer provides me with financial assistance. My mother’s financial assistance to me ended in 20 after my graduation from University. I have a job with and I am supporting myself. My family no longer provides me with any financial support. Because of this, “foreign influence” is inapplicable to my situation.

As a practical matter, having foreign ties does not equate to being subject to “foreign influence.” This is clear from the from the National Security Adjudicative Guidelines. The focus and concern is:

Foreign contacts and interests, including, but not limited to, business, financial, and property interests, are a national security concern ***if they result in divided allegiance.*** They may also be a national security concern if they create circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest. ***Assessment of foreign contacts and interests should consider the country in which the foreign contact or interest is located, including, but not limited to, considerations such as whether it is known to target U.S. citizens to obtain classified or sensitive information or is associated with a risk of terrorism.***

National Security Adjudicative Guidelines p. 9 [Emphasis added].

India is not a country known for targeting the US for espionage. The Government of India is not a source of terrorist activity and in fact conducts joint military exercises with the United States to counter terrorism, see <https://economictimes.indiatimes.com/news/defence/india-united-states-to-carry-out-joint-military-exercise-on-september-16/articleshow/65771735.cms>. While I love my mother and sister and respect the importance of the military information to which I have access, it is extremely unlikely anyone will use my mother or my sister to force me to divulge secrets. Nor have I been secretive about being a foreign national: I am a MAVNI soldier and an applicant for naturalization.

Even were my mother and sister valid security concerns, those concerns are “mitigated.” National Security Adjudicative Guidelines §8(e) credits my prompt disclosure of all foreign ties when asked to do so. Further, any money I received in 20 is unlikely to cause any misbehavior in 2019. I no longer receive money from my sister, who is an in New York City, USA, which is not a foreign country. Nor is it likely I will ever have to choose between India, my mother, and the US. Were that to occur, I have sworn to protect and defend the US and have never given any cause to doubt the sincerity of that oath. National Security Adjudicative Guidelines §8(a) and (b). My contacts with my mother are casual, although I hope they are not infrequent. In any event, “there is little likelihood that it could create a risk for foreign influence or exploitation.” National Security Adjudicative Guidelines §8(c). As for National Security

Adjudicative Guidelines §8(f), the value of my family's support, while appreciated, is not particularly impressive. The United States is where I earn my living.

I am a MAVNI soldier who has not yet been allowed to naturalize (because of my pending MSSD). By definition that means I am a foreigner. In fact, that "foreignness" is the very quality valued and pursued by the Army through the MAVNI program. With the exception of orphans, all MAVNIs have "foreign ties" in the form of parents and relatives. Disqualification of MAVNIs on the grounds of such ties has nothing to do with national security and amounts to simply "changing one's mind." That is hardly rational or just.

Army Regulation 135-178, Ch. 2. § 2.2 expressly counsels consideration of several factors prior to initiating a separation action. The seriousness of the circumstances forming the basis for separation would seem to counsel my retention. My retention will in no way hinder military discipline, good order, and morale. My history and profession give rise to no concerns about a continuation or recurrence of any problem. My service history proves it will be highly unlikely that I will be a disruptive or undesirable influence in present or future duty assignments. I have to date been able to perform my duties effectively in the present and will continue to do so in the future. Finally, my entire military record counsels retention. At all times my service in the U.S. military has been honorable. I remain committed to that service. I remain loyal to the United States, reliable, and trustworthy. I do not wish to be discharged from service.

Whatever "influence" my "foreign" mother and US resident sister have with me derives from their being my mother and sister, not money.

The United States Army recruited me as an "F-1" visa holder. "F-1" visa holders are admitted into the United States to attend school. "F-1" visa holders are allowed very limited civilian employment (generally, on-campus jobs) in the United States. As a practical matter, it also means that the money for my education had to come from my family. Virtually all F-1 MAVNIs have foreign financial support and limited or no income, because this is a requirement to qualify for the visa in the first place. I am no exception in this. No "F-1" visa holder MAVNI is an exception to this. Having the support of one's family does not seem to be one of the "Conditions that could raise a security concern and may be disqualifying" set forth in the National Security Adjudicative Guidelines, Appendix A, paragraph 19. Going to school is neither frivolous, nor irresponsible, nor has receiving familial support been considered living "beyond one's means." As noted in the "mitigating factors," a person's parents would

generally be considered a "legal source of income." A US-based big sister can be no different. National Security Adjudicative Guidelines, Appendix A, paragraph 20(f). See also, EO 12968 paragraph 20.

Under the "whole person concept," a fair examination of my familial and financial condition provides no reason to believe I am any risk to the National Security of the United States. The nature, extent and seriousness of familial support does not counsel otherwise. National Security Adjudicative Guidelines, Appendix A, paragraph 2(d). The potential for pressure, coercion, exploitation, or duress arising therefrom is nil. *Id.*

The Army has made a substantial investment in my training, time, equipment, and related expenses. Separation prior to completion of my obligated period of service is wasteful because it results in loss of this investment and generates a requirement for increased accessions. My effort to retain my enlistment is not just for me: it is for the good of the service and for the good of the country I have taken an oath to defend. Not only is this a matter of simple fairness, it will save the Army from the loss of the significant investment it has already made in me.

Please grant me the assistance of Army Legal Assistance Attorney. Please give me, and my supplied Army Legal Assistance Attorney additional time to address the adverse MSSR. Please provide the materials referenced as forming the basis for the policy calling for my separation from service. Please provide me the requested "derogatory" information and adequate time to respond to that information. Ultimately, I want the Army to cancel the proposed separation. Thank you for your consideration.

Signed,

E-4, U.S. Army