

KEYWORD: Personal Conduct

DIGEST: Applicant is a 32-year-old case reviewer employed by a federal contractor. In 2001 and 2002, he had disciplinary problems while employed by a county police department. Testimony by a fellow officer painted a picture of a police force run by harassment, intimidation, and favoritism, resulting in a hostile work-place environment. Most of Applicant's "rule" violations lacked common sense and he was picked out for persecution. The more serious violation was over five years ago, was not recent, and Applicant has been rehabilitated. He successfully mitigated the security concerns about personal conduct. Clearance is granted.

CASENO: 05-06723.h1

DATE: 07/19/2007

DATE: July 19, 2007

_____)	
In re:)	
)	
-----)	ISCR Case No. 05-06723
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

Fahryn Hoffman, Esq., Department Counsel

FOR APPLICANT

Joyce E. Peters, Esq.

SYNOPSIS

Applicant is a 32-year-old case reviewer employed by a federal contractor. In 2001 and 2002, he had disciplinary problems while employed by a county police department. Testimony by a fellow officer painted a picture of a police force run by harassment, intimidation, and favoritism, resulting

in a hostile work-place environment. Most of Applicant's "rule" violations lacked common sense and he was picked out for persecution. The more serious violation was over five years ago, was not recent, and Applicant has been rehabilitated. He successfully mitigated the security concerns about personal conduct. Clearance is granted.

STATEMENT OF THE CASE

On February 28, 2004, Applicant submitted a Security Clearance Application (SF 86).¹ The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, DOHA issued a Statement of Reasons (SOR) on February 10, 2006, detailing the basis for its decision – security concerns raised under Guideline E (Personal Conduct) of the Directive. The President issued revised adjudicative guidelines (AG) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the AG are to be used in all cases when the SOR is dated on or after September 1, 2006. Because the SOR was dated before September 1, 2006, DOD policy requires that this case proceed under the former guidelines.

Applicant answered the SOR in writing on March 27, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on March 22, 2007, and a Notice of Hearing was dated on April 17, 2007. I convened a hearing on May 17, 2007, to consider whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. The government offered ten exhibits, marked as Exhibits 1-10. Applicant offered eighteen exhibits, marked as Exhibits A-R. The government objected to Exhibit R which was overruled. The remaining exhibits were admitted without objection. DOHA received the transcript (Tr.) on May 30, 2007.

FINDINGS OF FACT²

Applicant admitted the allegations contained in the SOR. The admissions 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 32-year-old case reviewer employed by a federal contractor.³ He is married and has two children.⁴ He earned a bachelor's degree.⁵ He served in the United States Coast Guard

¹Government Exhibit 1 (Security Clearance Application (SF 86), dated February 28, 2004).

²After reviewing the transcript, I have decided to adopt Applicant's answers to the SOR as the basis for my findings of fact. His answers state the case and present the issues much more succinctly than trying to cobble together gleanings from the transcript.

³*Id.* at 1, 3; Tr. at 16.

⁴Tr. at 16.

⁵*Id.*

Reserve from April 1995 to April 2003. He attained the rank of petty officer third class (E-4), and received an honorable discharge. He held a security clearance in the Coast Guard.⁶

In January 2002, Applicant was demoted from police corporal to police officer by a county police department, for making a false statement to an investigator in the course of an internal investigation of another police officer. In September 2001, an investigator asked him his knowledge of events and conversations that he had with another officer about the investigation. In October 2001, the investigator re-interviewed him, and he corrected his misstatement and told the investigator that he had earlier conversations with a police dispatcher and the police officer under investigation. When he made the first statement in September, he was trying to protect the dispatcher (now his wife), who had discussed with the incident involving the other police officer (who was his neighbor). Applicant wasn't sure if he was supposed to know about the incident at that time, and attempting to protect the dispatcher got himself in trouble. He admits what he did was wrong. He was demoted as punishment. It did not seem consistent with what he had observed as punishment for similar conduct within the department, and it seemed harsh to both his attorney and to him. He filed a grievance about it and appealed through the various levels within the county government, but the demotion was affirmed.

The chief of police concluded that the misconduct was not so egregious that Applicant should be fired and that he should be given an opportunity to work harder and use better judgment in the future. The assistant county manager told him that the chief of police recognized his potential and concluded that Applicant knew he had made a mistake. The county manager also reviewed the file. He noted that Applicant had taken full responsibility for his conduct, and thought about the seriousness of his actions, and that he guaranteed that such conduct would not happen again.

In May 2002, Applicant received a shift level counseling for failing to complete an accident report. One of the individuals involved in the accident was from out of town, and Applicant did not have a local number, a cell number, or any other telephone contact information other than his home telephone number. He was unable to contact the person, because that person had not returned home. When he told his sergeant that it was impossible for him to get the information for the report, the sergeant demanded that he submit the accident report that night with all of the information. He submitted the report with the information that he had. Several days later, he contacted the individual for the remainder of the information, and added it to the report.

In June 2002, Applicant received a supervisory contact for improper use of sick leave. During the period covered by the contact, Applicant was being treated more harshly by his supervisors than others under his supervision. The supervisor was known by other officers as a man who would single out one person, and "ride" that person on every aspect of that person's activities. He would pick one officer, and then another and treat them in this manner, yet there was nothing anyone could do as there were racial issues involved. Applicant admitted that at this time, he tended to call in sick when he could no longer stand the harassment. Notwithstanding, he was still considered proficient in his duties and was receiving letters of commendation from members of the community.

⁶Government Exhibit 1, *supra*, note 1, at 5-6, 8.

In 2001, Applicant received a supervisory notice (also known as a "contact card") for failing to turn in property. In the course of towing a vehicle, he removed the license plate and put it in the trunk of the police car so that he could turn it in later. When he went off duty, he left the license plate in the trunk, and turned the car over to the assigned officer, placing the keys through a mail slot. When the department called him about the license plate, he attempted to contact the assigned officer to retrieve the plate and discovered she was out of town. The department had to use another key to open the car later that evening.

Applicant also received a supervisory notice or contact card regarding unauthorized use of emergency equipment, because he placed an extra emergency blue light on an unmarked police car. He had noticed other officers using these extra lights on unmarked cars to make them more visible. He purchased his own personal "blue light" and used it when he made traffic stops in an unmarked vehicle so that the stopped police car would be more visible, and thus safer for other drivers. The department manual only permitted use of attached equipment, which his was not, so he stopped using it.

In January 2003, Applicant arrested a person for possession of crack cocaine. The suspect stated that Applicant used excessive force during the arrest, which he vigorously denied. The government alleges that he was investigated by the internal affairs department, and it was recommended that he be terminated. Applicant never received any written notice about the action, his final performance review summary makes no mention of the incident, and he would have been entitled to present evidence in his own defense, but was never given notice of or an opportunity to be heard in connection with any termination proceeding. As a result of all this, Applicant submitted a voluntary resignation from the police department on March 25, 2003.

In the spring of 2004, Applicant commenced work for a motorcycle dealer. He now works part-time, mostly selling obsolete parts inventory on e-bay. As such, he handles thousands of dollars in inventory. The general manager testified that Applicant was honest, had the highest degree of integrity, was reliable, and exercised sound judgment. Asked if he and would hire him back full-time, he replied "in a heartbeat."⁷

The program manager (PM) for a company that did background investigations for security clearances testified about her observations of Applicant over an 18-month period. Applicant began as a case reviewer, then quickly moved up as an investigator. The PM said Applicant was person of integrity and displayed that characteristic throughout his service with the employer.⁸

An acquaintance of Applicant, who did basic training with him in the Coast Guard, was also a police officer with the same department as Applicant. He encouraged Applicant to apply for the police force. He witnessed the incident with the accident report and said the sergeant was unreasonable. He observed that there was no cohesive leadership management training or competency among the front-line supervisors. There was a culture that if a sergeant didn't like a particular officer, he would harass that officer and the other sergeants would assist in riding the officer. This "riding" of Applicant commenced before the internal affairs investigation incident.

⁷*Id.* at 156-167.

⁸*Id.* at 168-188.

After the incident and Applicant's demotion, he felt Applicant was frustrated and had not been treated fairly. It would have done no good for Applicant to appeal his treatment, as the witness had seen this treatment of officers before, and grievances went nowhere. Punishments were not consistent. They depended on whether you were liked. The witness left the department two and one-half years ago, and now holds a Top Secret/SCI clearance. He believed that Applicant had changed, had become more mature. He considers him to be a serious person, honest, trustworthy, and knew no reason why Applicant should be denied a clearance.⁹

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider Enclosure 2 of the Directive, which sets forth adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines are divided into Disqualifying Conditions (DC) and Mitigating Conditions (MC), which are used to determine an applicant's eligibility for access to classified information.

These adjudicative guidelines are not inflexible ironclad rules of law. Instead, recognizing the complexities of human behavior, an administrative judge should apply these guidelines in conjunction with the factors listed below. An administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision.

Because the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept," an administrative judge should consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

Specifically, an administrative judge should consider the nine adjudicative process factors listed at Directive ¶ E2.2.1: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Since the protection of the national security is the paramount consideration, the final decision in each case is arrived at by applying the standard that the issuance of the clearance is "clearly consistent with the interests of national security." 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.

In the decision-making process, facts must be established by "substantial evidence." The government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive. Once the government has produced substantial evidence of a disqualifying condition, the burden shifts to the applicant to produce evidence and prove a mitigating

⁹*Id.* at 189-207.

condition.¹⁰ Directive ¶ E3.1.15 provides, “The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” The burden of disproving a mitigating condition never shifts to the government.¹¹

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. It is a relationship that transcends normal duty hours and endures throughout off-duty hours as well. It is because of this special relationship 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 under this Directive include, by necessity, consideration of the possible risk an applicant may deliberately or inadvertently fail to protect or 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.

The scope of an administrative judge’s decision is limited. Applicant’s allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides industrial security clearance decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” Security clearance decisions cover many characteristics of an applicant other than allegiance, loyalty, and patriotism. 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.¹²

CONCLUSIONS

The Directive ¶ E2.A5.1.1. The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The government established its case under Guideline E. Personal Conduct Disqualifying Conditions (PC DC) E2.A5.1.2.1. (*Reliable, unfavorable information provided by associates,*

¹⁰“Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge’s] finding from being supported by substantial evidence.” *Consolo v. Federal Maritime Comm’n*, 383 U.S. 607, 620 (1966). “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).

¹¹*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, [evaluates] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and [decides] whether Applicant [has] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

¹²*See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant’s past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15.” ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

employers, coworkers, neighbors, and other acquaintances), (PC DC) E2.A5.1.2.3. (*Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other official representative in connection with a personnel security or trustworthiness determination*), and E2.A5.1.2.5. (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*) apply in this case. Applicant admitted his previous conduct with the police department that established a pattern of rule violations.

None of the mitigating conditions apply because none of them are relevant to the issues before us. Some of the rule violations are vacuous but typical of bureaucratic agencies that are devoted to rules rather than common sense. A perfect example is the “blue light.” Rather than reward initiative, the department is more concerned that the light be “attached” instead of concern for safety of its officers or the public.

Applicant was a young, immature officer. I do not doubt for a minute that harassment and an oppressive work place environment existed in that police department. Eyewitness testimony corroborates Applicant’s contentions. Applicant has finished his college education, gotten married, become a father, and has excelled with his subsequent employers. The events raising the security concerns are mostly over five years’ old. They are not recent and I find that Applicant is rehabilitated. I conclude Guideline E for Applicant.

Whole Person Analysis

“The adjudicative process is an examination of a sufficient period of a person’s life to make an affirmative determination that the person is eligible for a security clearance.”¹³“Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”¹⁴ In evaluating Applicant’s case, in addition to the disqualifying and mitigating conditions, I also considered the “whole person” concept in determining Applicant’s risk and vulnerability in protecting our national interests.¹⁵ I considered his age (32), his education, his employment, his military service, and what he has done since the incidents in question. He has matured, he is now a husband and a father, and he has held two successful jobs since leaving the police force. The testimony of his fellow officer tells the tale of a police force that is not managed professionally, where favoritism and harassment of young police officers is *de rigeur*.

This case raises no questions about his reliability and judgment. He made mistakes but has matured and moved on with his life. The totality of the record raises no reasonable and persistent doubts about Applicant's ability to protect classified information and to exercise the requisite good judgment and discretion expected of one in whom the government entrusts its interests. I conclude it is clearly consistent with the national interest to grant or continue Applicant’s security clearance.

¹³Directive ¶ E.2.2.1.

¹⁴*Id.*

¹⁵*Id.*

FORMAL FINDINGS

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

Paragraph 1. Guideline :	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Christopher Graham
Administrative Judge