

KEYWORD: Personal Conduct

DIGEST: Applicant is a 64-year-old consultant employed by a federal contractor. He served four years in the Marine Corps, and 20 years as a federal law enforcement agent. The government failed to present evidence to prove its case that he was suspended for disclosing confidential information, and that he harassed and threatened a coworker, as alleged in violation of Guideline E (personal conduct). Clearance is granted.

CASENO: 05-10363.h1

DATE: 06/30/2007

DATE: June 30, 2007

In re:)	
)	
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SSN: -----)	ISCR Case No. 05-10363
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
CHRISTOPHER GRAHAM**

APPEARANCES

FOR GOVERNMENT

Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 64-year-old consultant employed by a federal contractor. He served four years

in the Marine Corps, and 20 years as a federal law enforcement agent. The government failed to present evidence to prove its case that he was suspended for disclosing confidential information, and that he harassed and threatened a coworker, as alleged in violation of Guideline E (personal conduct). Clearance is granted.

STATEMENT OF THE CASE

On March 1, 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 ¶ E3.1.2 *Defense Industrial Personnel Security Clearance Review Program (Directive)*, dated January 2, 1992, as amended, DOHA issued a Statement of Reasons (SOR) on August 25, 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 effective 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 issued on or after September 1, 2006. Because the SOR was issued prior to September 1, 2006, DOHA policy requires that this case proceed under the former guidelines.

Applicant answered the SOR in writing on November 7, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on January 26, 2007, and a Notice of Hearing was dated on February 16, 2007. I convened a hearing on March 5, 2007, to consider whether it is clearly consistent with the national interest to grant or continue Applicant's security clearance. The government offered one exhibit, marked as Exhibit 1. Applicant offered no exhibits. DOHA received the transcript (Tr.) on March 19, 2007.

FINDINGS OF FACT

Applicant denied all allegations in the SOR. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following findings of fact:

Applicant, a 64-year-old consultant, is employed by a federal contractor.² He is married with two grown children.³ He has a bachelor's degree in sociology, and is about 50% complete towards earning a master's degree, also in sociology.⁴ He served in the United States Marine Corps from 1960 to 1964, and received an honorable discharge.⁵ He held a security clearance while a Marine, and later held a clearance for 20 years working as a federal law enforcement agent. The current application is for a new security clearance.⁶

Subparagraph 1.b. of the SOR alleged that Applicant was suspended from employment with a federal agency, on February 26, 1996, for disclosing confidential information. It also alleged that he voluntarily retired following this suspension. The internal affairs office of the agency

¹Government Exhibit 1 (Security Clearance Application, dated March 1, 2004).

²Tr. at 13, 18.

³*Id.* at 13.

⁴*Id.* at 14.

⁵*Id.* at 15.

⁶*Id.* at 14-18.

interviewed him and suggested that he not talk to anyone about the investigation. Applicant called X to see if she knew anything about an investigation. X indicated she had heard of an investigation, but revealed no other information.⁷ Applicant revealed nothing to her about his involvement with it. At this time, Applicant did not know that X was also a subject in the investigation. Applicant learned that Y made allegations about Applicant and X disclosing confidential information, following X's promotion over Y. Several people later apologized to Applicant for their role in the investigation. Later, Y was investigated, suspended, and possibly fired.⁸

The agency never gave Applicant the specifications of the charges against him and never suspended him.⁹ A second allegation involved his alleged revealing or uncovering or giving information to someone he didn't even know. The agency dismissed this charge. His employer planned to transfer him to another area of the country, to a dangerous assignment where other agents had been killed. Because he was 55, he and his wife decided it would be better for him to retire.¹⁰

Subparagraph 1.a. of the SOR alleged that Applicant re-signed as Chief of Internal Affairs, in a municipality's inspector general's office, on February 21, 2003, following an internal investigation. Allegations arose in 2001, that he had harassed and threatened a coworker by leaving a note with a bullet on top of it. He had worked with the coworker for about six months, and had actual contact with her four or five times in that period of time during a Medicaid fraud investigation. Because she was a bookkeeper, she helped Applicant retrieve financial information to assist with his investigations. He accepted employment with another agency within the city. On his last day on this job, he unloaded his weapon at home, took a bullet out, and put it in his pocket. At work, he turned in his weapon, ammunition, badge and other such items. His supervisor then told he had to go back to his office and retrieve some documents. Another investigator accompanied him. He wanted to leave a token of appreciation to the bookkeeper for her cooperation, in hopes that she would cooperate with him in his new job. He wrote her a note, put his name on it, put the bullet on top of the note and left.¹¹ Her supervisor made a big deal out of it. The coworker made no allegations against Applicant.¹² The agency never allowed Applicant to read the report against him. He was told it was null and void, and that they wouldn't pursue it.¹³

POLICIES

In an evaluation of an applicant's security suitability, an administrative judge must consider

⁷*Id.* at 19-22.

⁸*Id.* at 24.

⁹*Id.* at 26.

¹⁰*Id.* at 33-34.

¹¹*Id.* at 26-30.

¹²*Id.* at 38.

¹³*Id.* at 30.

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 condition.¹⁴ 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.¹⁵

¹⁴"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).

¹⁵*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

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.¹⁶

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 following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

The government argued that Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2.1. (*Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances*), and (PC DC) E2.A5.1.2.4. (*Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*) apply in this case.

When an allegation involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations is controverted, the government has the burden of proving it. Applicant denied the allegation. With respect to the 1996 employment investigation, the government produced no evidence of such charges, suspension, or disciplinary action against Applicant of any kind. He did not retire as a result of the investigation, but retired because he was asked to transfer to a dangerous assignment, with the chances of getting killed realistic. I find no evidence that Applicant disclosed any confidential information. His job as a federal agent was

Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

¹⁶See 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).

extremely hazardous, and one in which disclosure of confidential information could often prove fatal. The government failed to make its case, and I conclude SOR subparagraph 1.b. for Applicant.

The government also failed to provide evidence which supports its case under SOR subparagraph 1.a. The only credible evidence was supplied by Applicant, and there was no suspension, and Applicant did not leave employment with the city as a result of the investigation about the note to the bookkeeper. The bookkeeper's supervisor initiated an investigation. The bookkeeper saw nothing improper in Applicant's note. Nothing came of the investigation. His testimony is insufficient to establish the government's case, because he did not resign his position, but transferred to another job before the allegations were made. He retired two years after the incident happened. I find SOR subparagraph 1.a. 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.”¹⁷ “Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”¹⁸ In evaluating Applicant's case, in addition to the disqualifying and mitigating conditions, I also considered the “whole person” concept in evaluating Applicant's risk and vulnerability in protecting our national interests.¹⁹ I considered his age (64), his education which includes partial completion of a masters degree, his service in the Marine Corps, and his 20 years service as a federal law enforcement agent under some hazardous conditions.

I observed Applicant during the hearing, and especially during his testimony. I find his testimony to be believable and find him to be a sincere and credible witness, because he answered questions directly, completely, and honestly. The totality of the record raises no reasonable or 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.

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 E: FOR APPLICANT

¹⁷Directive ¶ E.2.2.1.

¹⁸*Id.*

¹⁹*Id.*

Subparagraph 1.a:
Subparagraph 1.b:

For Applicant
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