



## **STATEMENT OF THE CASE**

On October 25, 2004, Applicant submitted a security clearance application (GE 1).<sup>1</sup> On July 12, 2007, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a statement of reasons (SOR) alleging facts and security concerns under Guideline E (Personal Conduct) and Guideline J (Criminal Conduct). The SOR informed Applicant that DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information and submitted the case to an administrative judge for a security determination.<sup>2</sup> On July 23, 2007, Applicant answered the SOR and requested a hearing.

The case was assigned to me on September 4, 2007. On September 7, 2007, I scheduled the hearing for September 28, 2007. The hearing was convened as scheduled. The government presented four exhibits, marked GE 1-4, to support the SOR. GEs 1 and 2 were admitted without objection. GEs 3 and 4 were admitted over Applicant's objection. Applicant testified on his own behalf, and presented three witnesses and seven exhibits, marked AE 1-7. AE 1-6 were admitted without objection. AE 7 was admitted over the Government's objection. DOHA received the transcript (Tr.) on October 9, 2007.

## **FINDINGS OF FACT**

Applicant admitted the factual allegation in SOR ¶ 1.a. He denied SOR ¶¶ 1.b and 2.a. His admission is incorporated herein as a finding of fact. After a thorough review of all evidence of record, particularly his demeanor and testimony, I make the following additional findings of fact.

Applicant is a 48-year-old senior network administrator.<sup>3</sup> He enlisted in the U.S. Navy in May 1980, achieved the rank of petty officer first class (pay grade E-6), and was honorably discharged in May 1986. After his discharge, Applicant continued working for the Department of Defense (DOD) as a civilian employee until March 1990. He had access to classified information at the secret level while serving in the Navy and as a DOD civilian employee. There is no evidence of misconduct, questionable behavior, or that Applicant failed to comply with rules and regulations concerning the protection of classified information while employed by the DOD.

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<sup>1</sup> Office of Personnel Management, Security Clearance Application, Standard Form (SF) 86.

<sup>2</sup> See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended and revised. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines (AG) to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated January 1987, as amended, in which the SOR was issued on or after September 1, 2006.

<sup>3</sup> GE 1, unless otherwise indicated, is the source for the facts in this paragraph.

Applicant married his wife in October 1987, and apparently they have no children. He attended college from September 1996 to June 1995; however, it is not clear whether he completed a degree.

In March 1990, Applicant was hired by a computer/information technology company as a sustaining engineer. He worked at the company's "final test department" where he and others he supervised tested single in-line memory module (SIMM) chips (computer memory chips) for quality control. He kept and accumulated in his desk drawer SIMM chips that failed the quality control tests. The company had no recycle system, and the faulty chips were thrown in the garbage. Although the SIMM chips did not meet the quality required for the company's equipment and applications, the chips worked for DOS system computers.

In 1993, Applicant advertised for sale on the Internet some of the SIMM chips he had accumulated. He sold to an Internet buyer around 20 SIMM chips for approximately \$500-\$1,000. Applicant had sold other personally-owned computer parts to this same buyer in the past. In October-November 1994, Applicant sold to the same buyer approximately 60 SIMM chips for \$5,000. He mailed the chips to the buyer through UPS. The mailing required delivery confirmation and \$5,000 cash on delivery. Applicant insured the package for \$5,000. After two weeks, Applicant received a \$5,000 check from the buyer. He claimed the check at the UPS office and was required the signature of the UPS office manager to cash the check at a bank. After cashing the check, Applicant spent around \$1,300 and kept the remainder of the money in his car. He testified that once he cashed the check, he "realized that it was not a good thing, and [he] I was embarrassed or scared" about going home to his wife with \$5,000 cash (Tr. 217).

Approximately one month after receipt of the check, Applicant was confronted by an agent of the Federal Bureau of Investigations (FBI), a local law enforcement officer, and one of his company supervisors about the sale of the SIMM chips. The FBI had been called to assist the company to investigate industrial espionage concerning other proprietary custom hardware sold by Applicant's employer. Applicant was aware of the industrial espionage threat against his company because the concern was discussed in company meetings.

During the law enforcement interview, Applicant provided a statement in which he admitted knowing that the SIMM chips he sold were the property of his company, and that he had no authority to sell them (GE 2). Applicant sold the SIMM chips because he believed the company owed him money. His job status had been changed to a supervisor position and he was earning \$10,000 less a year because he was no longer entitled to overtime pay. After he was questioned by the FBI, Applicant reimbursed the \$5,000 he received from the sale of the SIMM chips to his company. He was not arrested or charged as a result of his sale of the SIMM chips. After the investigation, he was fired from his job and required to cooperate with law enforcement.

At his hearing, Applicant disputed parts of the December 1994 statement he provided to the FBI agent. He claimed he sold SIMM chips only one time in the October-November 1994 period. He claimed at the time of the sale he believed the company had no interest in the SIMM chips because they were being thrown away into the garbage (Tr. 160-161); that he did not know the value of the SIMM chips; that he only asked the buyer to pay him what he thought was fair

(Tr. 151); that he did not negotiate the price of the chips and was surprised he received \$5,000 in payment; that he was not upset with the company changing his job status (Tr. 158); and that he did not lose earnings as a result of his change in status in the company.

After he was fired from his job in 1994, Applicant worked for two different companies as an administrator of information technology projects, and then as a senior administrator. In 2000, Applicant began working for another company as a senior consultant. During the summer of 2003, he took scheduled leave with his family. When Applicant returned to work from his scheduled leave, he was fired from his job. He was fired because it had been too difficult for clients and company personnel to reach him over the telephone/e-mail while he was on vacation. Applicant's evidence shows that before he was fired from his job, he was considered a valued employee and respected for his knowledge and work ethic by his co-workers and supervisors. At the time, the company was downsizing due to economic problems and had let go most of its employees. Applicant believed the real reason he was fired was because the company was reducing its employees. Considering the evidence as a whole, I find that the circumstances under which Applicant was fired from his job in 2003 fail to raise security clearance concerns.

In October 2003, Applicant was hired by his current employer, a DOD contractor. He is the senior network administrator and the information security systems manager for his company. He has had access to classified information at the secret level since January 2004 (Tr. 133). Applicant has not been involved in any misconduct or questionable behaviour since the sale of the SIMM chips in 1994. There is no evidence, and the Government did not allege that Applicant was involved in any misconduct or questionable behavior prior to or after the 1993-1994 sale of SIMM chips. Moreover, there is also no evidence to suggest Applicant did not follow rules and regulations pertaining to the handling of classified information when he had access to classified information while working for DOD, or since 2004 while working for his current employer.

Applicant's character witnesses consider him to be a top level performer, dependable, professional, diligent, conscientious, detail oriented, and very security conscious. In their opinion, Applicant displays good judgment and is extremely careful with classified information. He has proven himself to be a reliable employee with exemplary work habits.

## **POLICIES**

The Revised Adjudicative Guidelines sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the disqualifying and mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, and the whole person concept.<sup>4</sup> Having considered the record evidence as a whole, I conclude

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<sup>4</sup> AG ¶ 2(a) provides, “. . . The adjudication process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . .”

Guideline E (Personal Conduct) and Guideline J (Criminal Conduct) are the applicable, relevant adjudicative guidelines.

### **BURDEN OF PROOF**

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>5</sup> The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial evidence.<sup>6</sup> The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the ultimate burden of persuasion.<sup>7</sup>

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the requisite judgment, reliability and trustworthiness of one who will protect the national interests as his or her own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access to classified information in favor of protecting national security.<sup>8</sup>

### **CONCLUSIONS**

Under Guideline E (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 information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. AG ¶ 15.

In 1993-1994, Applicant, without authority, took approximately 80 SIMM chips from his employer and sold them for personal profit. His actions show poor judgment, unreliability, and dishonesty. In 1994, he provided a statement to law enforcement officers describing the circumstances of his actions. In his May 2007 response to DOHA interrogatories (GE 3), Applicant recanted his 1994 statement to the FBI agent. His testimony at the hearing was consistent with his answers to the DOHA interrogatories. I find Applicant's recantation and

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<sup>5</sup> See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>6</sup> Directive, ¶ E3.1.32.1; ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (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. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence).

<sup>7</sup> *Egan*, *supra* n. 5, at 528, 531.

<sup>8</sup> See *id.*; AG ¶ 2(b).

testimony not credible in light of his 1994 statement, and the SIMM chips' mailing receipt. He was not forthcoming with his answers, and was evasive when explaining his 1993-1994 misconduct.

Disqualifying Conditions (DC) ¶ 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 comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior, and (DC) ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . . , apply.*

It has been 13 years since Applicant's misconduct, and there is no evidence that he engaged in any misconduct or questionable behavior prior to, or after the 1993-1994 incidents. Based on the available evidence, except for the larceny of the SIMM chips, Applicant has been an upstanding husband, employee, and citizen. Moreover, there is also no evidence to suggest Applicant does not follow rules and regulations pertaining to the handling of classified information. Under normal circumstances, Personal Conduct Mitigating Condition AG ¶ 17(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,* would apply and would have mitigated the Guideline E concern.

Considering the totality of the circumstances in his case, however, Applicant's failure to provide truthful and candid answers at his hearing (and in his answers to the DOHA interrogatories) create doubts as to his judgment, reliability, and trustworthiness. I find that Applicant's recent lack of honesty and credibility undercut his claims of successful rehabilitation. Moreover, it shows Applicant is still potentially susceptible to pressure or coercion resulting from his 1993-1994 behavior. Some of his character references were not aware of his past questionable behavior. He could be susceptible to manipulation or coercion in order to cover his past questionable judgment and his embarrassing behavior.

Under Guideline J (Criminal Conduct), criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations. AG ¶ 30. In 1993-1994, Applicant, without authority, took from his employer SIMM chips and sold them for personal profit. He knew or should have known that his actions were illegal, and the taking was with the intent to permanently deprive his employer of the use of the chips. Disqualifying Condition (DC) ¶ 31(a): *a single serious crime or multiple lesser offenses* and DC ¶ 31(c): *allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted,* apply.

It has been 13 years since Applicant's misconduct, and there is no evidence that he engaged in similar questionable behavior prior to, or after 1994. Criminal Conduct Mitigating Conditions AG ¶ 32(a): *so much time has elapsed since the criminal behavior happened, or it*

*happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; applies. I considered AG ¶ 32(d): there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement, and determined it does not apply. As discussed under Guideline E, Applicant's lack of credibility and trustworthiness undercut his evidence of successful rehabilitation. On balance, however, I find Applicant has mitigated the Guideline J concerns.*

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. I applied the whole person concept. I specifically considered Applicant's age (both at the time he committed the offense and currently), education, maturity, his years working for DOD and a defense contractor, his job performance, qualifications, and his demeanor and testimony. Considering the totality of Applicant's circumstances, his favorable information fails to convince me that it is clearly consistent with national security to grant him access to classified information. He has failed to mitigate the security concerns raised by his overall behavior.

### **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
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraphs 2.a	For Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

Juan J. Rivera  
Administrative Judge