

KEYWORD: Personal Conduct

DIGEST: Applicant is a 45-year-old supply technician employed by a federal contractor. He received non-judicial punishment for adultery in 1992. This was outside the time limitation on questions about criminal activity on his security clearance application (SF 86) but it is reliable, unfavorable information within the purview of Guideline E. He received non-judicial punishment for non-consensual sodomy and making a false official statement in 2003. He did not mitigate the security concerns for personal conduct. Clearance is denied.

CASENO: 06-22273.h1

DATE: 08/31/2007

DATE: August 31, 2007

In re:	)	
	)	
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SSN: -----	)	ISCR Case No. 06-22273
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
CHRISTOPHER GRAHAM**

**APPEARANCES**

**FOR GOVERNMENT**

Ray T. Blank, Jr., Esq., Department Counsel

**FOR APPLICANT**

*Pro Se*

**SYNOPSIS**

Applicant is a 45-year-old supply technician employed by a federal contractor. He received non-judicial punishment for adultery in 1992. This was outside the time limitation on questions

about criminal activity on his security clearance application (SF 86) but it is reliable, unfavorable information within the purview of Guideline E. He received non-judicial punishment for non-consensual sodomy and making a false official statement in 2003. He did not mitigate the security concerns for personal conduct. Clearance is denied.

## STATEMENT OF THE CASE

On February 27, 2004, Applicant submitted a Security Clearance Application (SF 86).<sup>1</sup> 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 January 7, 2006, detailing the basis for its decision – security concerns raised under Guideline E (Personal Conduct) of the Directive. The President issued revised adjudicative guidelines (Guidelines) on December 30, 2005. DoD implemented them on September 1, 2006. Pending official amendment/reissue of DoD Directive 5220.6, the Guidelines 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 February 9, 2007, and requested a decision without a hearing. Department Counsel submitted a file of relevant material (FORM) in support of the government's case, a copy of which was received by Applicant on July 17, 2007. Applicant was afforded the opportunity to file objections and submit material in refutation, extenuation, or mitigation by August 16, 2007. He filed a response which was received by DOHA on August 11, 2007. The case was assigned to me on August 20, 2007.

## FINDINGS OF FACT

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 45-year-old supply technician employed by a federal contractor.<sup>2</sup> He has been married since January 1984.<sup>3</sup> He has three children.<sup>4</sup> He has a high school education.<sup>5</sup> He served in the United States Army from July 1982 to March 2004. He held one prior security clearance from 1982 to 2004.<sup>6</sup>

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<sup>1</sup>Item 5 (Security Clearance Application (SF 86), dated February 27, 2004).

<sup>2</sup>Item 4 (Electronic Questionnaires for Investigations Processing (e-QIP) (SF 86 Format), dated November 14, 2005) at 1, 12.

<sup>3</sup>*Id.* at 20.

<sup>4</sup>Item 5, *supra*, note 1, at 3.

<sup>5</sup>*Id.* at 1.

<sup>6</sup>*Id.* at 4.

Applicant was cited on April 13, 1992, for adultery in violation of Article 134 of the Uniform Code of Military Justice (UCMJ). He received non-judicial punishment and was sentenced to forfeiture of \$200 for one month and reduced in grade from E-6 to E-5.<sup>7</sup> The wife of the complaining witness admitted having consensual sexual intercourse with Applicant 10 to 15 times within a two-month period from November 15, 1991, to January 19, 1992.<sup>8</sup>

On September 24, 2003, Applicant was charged with sodomy. He received non-judicial punishment on October 16, 2003, for sodomy and making a false official statement. He was sentenced to five days restriction and forfeiture of \$1459 for two months.<sup>9</sup> On September 20, 2003, Applicant helped the extremely intoxicated victim to her room. He then proceeded to perform cunnilingus on the victim, in spite of her asking him to stop. When questioned about the incident, he stated that the act was consensual.<sup>10</sup> On both the SF 86 and the e-QIP, questions about UCMJ proceedings required Applicant to list incidents for the past 7 years.<sup>11</sup> He did so.

### 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 in the adjudicative process provision in Section E2.2, Enclosure 2, of the Directive. 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

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<sup>7</sup>SOR ¶ 1.b.

<sup>8</sup>Item 7 (Commander's Report of Disciplinary Action (DA Form 4833), dated April 13, 1992, and Military Police Report (DA Form 3975), dated January 28, 1992).

<sup>9</sup>SOR ¶ 1.a.

<sup>10</sup>*Id.*

<sup>11</sup>Item 4, *supra*, note 2, at 32; Item 5, *supra*, note 1, at 5.

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.”<sup>12</sup> 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. 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. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).<sup>13</sup>

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.

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<sup>12</sup>“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 (4<sup>th</sup> Cir. 1994).

<sup>13</sup>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).

## CONCLUSIONS

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.

E2.A5.1.2. Conditions that could raise a security concern and may be disqualifying include:

E2.A5.1.2.1. Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

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.A5.1.2.4. 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;

Applicant was not required to list the 1992 non-judicial punishment because it does not fall within the seven year time period requested on both the SF 86 and the e-QIP concerning his police record. The government established its case under SOR subparagraph 1.b., because it is reliable, unfavorable information or increases his vulnerability because it would affect his community standing.

The 2003 non-judicial punishment falls within the seven year time frame. The misconduct is serious. Applicant took advantage of the victim's intoxication. Further, when first asked about the incident, he lied to investigators and told them the act was consensual. The government established its case under Guideline E as to this incident.

E2.A5.1.3. Conditions that could mitigate security concerns include:

E2.A5.1.3.1. The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

E2.A5.1.3.2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

E2.A5.1.3.3. The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts;

E2.A5.1.3.4. Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;

E2.A5.1.3.5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

E2.A5.1.3.6. A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information; and

E2.A5.1.3.7. Association with persons involved in criminal activities has ceased.

Although the 1992 incident is old in time, it is not isolated because it is evidence of Applicant's proclivity to extramarital affairs, and is a pattern of rule violations of the UCMJ. None of the mitigating conditions apply to the 2003 incident.. The conduct was recent. It is a pattern of UCMJ violations. There was no evidence that he sought or received counseling that indicates he will not participate in these activities again. Lying to the criminal investigators is not evidence of a responsible or trustworthy individual. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in extramarital sexual activity, consensual and not, which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail. I conclude Guideline E against 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.”<sup>14</sup> “Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination.”<sup>15</sup> 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.<sup>16</sup> I considered his age (45), his education, his employment, and what might motivate him to be less than truthful. Applicant supplied false answers to criminal investigators. This is problematic because candor with the government about a person’s negatives is the crux of a trustworthiness determination. If a person discloses the adverse information about himself, then he may be trusted with confidential or classified information. This case raises questions about his reliability and judgment. The totality of the record raises 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 not clearly consistent with the national interest to grant or continue Applicant’s security clearance.

## **FORMAL FINDINGS**

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<sup>14</sup>Directive ¶ E.2.2.1.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.*

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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant

**DECISION**

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

Christopher Graham  
Administrative Judge