



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 06-22273

**Appearances**

For Government: Ray T. Blank Jr., Esquire, Department Counsel

For Applicant: Pro Se

March 28, 2008

**Decision**

CREAN, Thomas M., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on February 27, 2004. On January 27, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing a security concern for Appellant based on personal conduct under Guideline E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on February 1, 2007. He answered the SOR in writing on February 9, 2007. He admitted both allegations under Guideline E with explanation. He elected to have the matter decided on the written record in lieu of a hearing. Department counsel submitted the Government's written case on July 9, 2007. Applicant received a complete file of relevant material (FORM) on July 17, 2007,

and was provided the opportunity to file objections, and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant responded to the FORM on August 11, 2007.

An Administrative Judge issued an unfavorable security decision on August 31, 2007. Appellant appealed that decision noting that the date on the SOR was incorrect and the date should have been January 27, 2007 and not January 27, 2006. If the actual date of the SOR was in 2007, the new adjudicative guidelines were in effect and the decision should have been rendered using the new guidelines. The DOHA Appeal Board remanded the case to the Administrative Judge for a determination when the SOR was written and a decision based on the correct guidelines. Since that Administrative Judge is no longer assigned to DOHA, the case was assigned to me on January 17, 2008.

I ordered Department Counsel to present an affidavit from the official who signed the SOR concerning the correct date of the SOR, and provide additional argument if appropriate. The individual that signed the SOR provided an affidavit that the 2006 date was in error and the SOR was in fact issued on January 27, 2007. Department Counsel served Applicant with a copy of the affidavit and Department Counsel's Reply to the Order on February 5, 2008. Applicant was provided an opportunity to comment and provide additional information. Applicant received the Department Counsel's reply to the Order and Affidavit of the SOR signer on February 23, 2008. As of March 24, 2008, Applicant has not provided additional information. Based on a review of the case file, pleadings, and exhibits, eligibility for access to classified information is denied.

### **Findings of Fact**

Applicant admitted the two factual allegations under Guideline E of the SOR, with explanations. (Item 2) I thoroughly reviewed the case file, record, and exhibits and make the following findings of fact.

Applicant is a 45-year-old high school graduate who has worked for a defense contractor as a supply technician since 2004. He previously served over 22 years on active duty with the Army in the area of supply. He held a security clearance while on active duty. He has been married since 1984, and has three children. (Items 4 and 5, Security clearance applications)

Applicant, while on active duty with the Army, received non-judicial punishment for adultery in April 1992. A fellow soldier complained that Applicant was having consensual sexual intercourse with the soldier's wife. The woman admitted the sexual intercourse which took place over a two month period from November 1991 to January 1992. Applicant was reduced in grade and required to forfeit pay. (Item 8, Commander's report of disciplinary action, dated April 13, 1992)

Applicant again received non-judicial punishment, while on active duty in the Army, for sodomy and making a false official statement in October 2003. While

stationed in Honduras, Applicant assisted an intoxicated female soldier to her room. He performed cunnilingus on her even though she claims she asked Applicant to stop. Applicant claimed the sexual act was consensual. The false official statement was based on Applicant's statement that the act was consensual. Applicant received a letter of reprimand, was restricted to his base, and forfeited two-thirds of his pay for two months. Applicant included this offense on his security clearance application. (Item 6, Federal Bureau of Investigation Criminal Justice Report; Item 8, Record of Proceeding under Article 15, UCMJ, dated October 14, 2003, and Report of Investigation, dated October 7, 2003)

## **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, 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. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of

the possible risk the 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.

## **Analysis**

### **Personal Conduct**

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Applicant's conduct consisting of extra marital sexual acts and lying about one of them raise security concerns. Personal Conduct Disqualifying Conditions AG ¶ 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 to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3) a pattern of dishonesty or rules violations; (4) evidence of significant misuse of Government or the employer's time or resources); and AG ¶ 16(e) (personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, . . .) apply. The records of non-judicial punishment are credible adverse information and are admitted by Applicant. His actions, particularly the false official statement, raise issues of questionable judgment, untrustworthiness, unreliability, and unwillingness to comply with rules and regulations. These characteristics show the individual may not protect classified information.

I have considered Personal Conduct Mitigating Conditions 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); AG ¶ 17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur); AG ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress); and AG ¶ 17(f) (the information was unsubstantiated or from a source of questionable reliability). I determine that none of these mitigating conditions apply. The actions are substantiated by records of the non-judicial punishments and Applicant's admissions. Adultery, false official statement and sodomy are not minor offenses, but serious offenses against law

and military discipline. Even though the adultery happened 16 year ago, the false official statement and sodomy happened within the last five years showing a pattern of inappropriate conduct of sexual activity and a false statement. Applicant's adultery was a falsification to his wife and his statements the sodomy was consensual was false. They cast doubt on his reliability and trustworthiness. Applicant acknowledges his actions but does not appear to acknowledge the behavior was wrong. Applicant has not shown that he sought counseling for his actions or changed his behavior. I find against Applicant as to Personal Conduct.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant was involved in extra-marital sexual activity. He lied about one of the actions being consensual placing the blame on the other person. He has shown that he will not follow rules and regulations and that he will lie about events for his own benefit. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his personal conduct.

### **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:	Against Applicant
Subparagraph 1.b:	Against Applicant

## **Conclusion**

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

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THOMAS M. CREAN  
Administrative Judge