



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS and APPEALS**



In the matter of: )  
)  
) ISCR Case No. 14-02552  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Braden M. Murphy, Esq., Department Counsel  
For Applicant: Louis Leichter, Esq.

12/19/2014

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**Decision**

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HEINY, Claude R., Administrative Judge:

Applicant contests the Department of Defense's (DoD) intent to deny his eligibility for a security clearance to work in the defense industry. When he retired from the U.S. military, he took home a classified binder. The security violations and personal conduct security concerns have been mitigated. Clearance is granted.

**History of the Case**

Acting under the relevant Executive Order and DoD Directive,<sup>1</sup> on July 28, 2014, the DoD issued an SOR detailing security concerns. DoD adjudicators could not find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance. On August 25, 2014, Applicant answered the SOR and requested a

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<sup>1</sup> Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on September 1, 2006.

hearing. On September 17, 2014, I was assigned the case. On October 6, 2014, the Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing for the hearing convened on October 23, 2014. I admitted Government's Exhibits (Ex) 1 and 2 and Applicant's Exhibits A-1 through A-7, without objection. Applicant testified at the hearing, as did four additional witnesses on his behalf. On November 3, 2014, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

In Applicant's Answer to the SOR, he admitted the factual allegations in the SOR. His admissions are incorporated herein. After a thorough review of the pleadings, exhibits, and testimony, I make the following additional findings of fact:

In 2006, Applicant mishandled classified information. When he retired from the military he took a binder containing classified information with him and stored it in a closet at his home. (Tr. 20) He stated, "I can't defend what I did, I can't justify what I did, in retrospect it was an incredibly stupid decision." (Tr. 45) In 2010, the material was returned to a military criminal investigative organization (MCIO).

Since February 2011, Applicant, age 48, has been a fraud investigator for a state attorney general's office, and seeks to obtain a security clearance. (Ex. A-1, Tr. 13, 65, 66) From 1986 through 2006, he was on active duty in a MCIO. At the time of his honorable discharge, he was a master sergeant (E-7). His decorations and medals he received while on active duty included the Meritorious Service Medal, a Commendation Medal with four devices, and an Achievement Medal. (Ex. A-5, Ex. A-7) His enlisted performance reports are outstanding and indicated exceptional judgment, duty performance, and job knowledge, each recommending his immediate promotion. (Ex. A-6, Tr. 75-84) In 2003, he was rated in the top 5% of all senior noncommissioned officers in the command. (Ex. 6, page 26, Tr. 80) He received a special memorial award at a military training course for his excellence of character, integrity, and dedication to duty as determined by the staff and course attendees. (Ex. A-8, Tr. 28)

During the last seven years of service, Applicant was responsible for technical surveillance operations. Applicant's last active-duty commander<sup>2</sup> stated Applicant is highly ethical, professional, with a perfectionist's nature, with integrity above reproach, and has high moral character. (Ex. A-2, Tr. 114) His work product and reports were exceptional and his dedication to the mission and the United States was exemplary. (Tr. 114) When Applicant told his prior supervisor of the loss of his security clearance, he took full responsibility for his actions and was ashamed of his poor decision. (Ex. A-1)

A coworker states Applicant is highly intelligent, very professional, extremely dedicated to his job, and a loyal public servant. (Ex. A-3) This coworker would trust Applicant "even with my own life." (Ex. A-3) Another coworker stated Applicant was a "man of integrity, intelligence and loyalty" and that Applicant showed his integrity and

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<sup>2</sup> Applicant's commander served 43 years with the military, 30 of which were in a MCIO.(Tr. 117)

willingness to accept responsibility for his actions, thereby revealing Applicant's high moral character. (Ex. A-4)

While in the military, Applicant was trained in electronics. (Tr. 22) He worked in an electronic laboratory repairing equipment. (Tr. 25) In 1999, he was promoted to technical sergeant (E-6) and changed career fields, transferring to a MCIO. (Tr. 27) He became a technical services agent involved in classified surveillance and surveillance countermeasures. (Tr. 29, 31, 42) While in the service, he produced a "first of its kind instrument" used in death scene reconstruction. (Tr. 31) He had numerous overseas deployments including the Korea, Japan, Panama, and Middle East. (Tr. 32, 40) His actions were instrumental in his unit being selected detachment of the year. (Ex. A-5, page 14, Tr. 40) He was a supervisor for most of his MCIO career. (Tr. 44)

In 2000, one year after transferring to the MCIO, Applicant was sent for training in technical surveillance operations and countermeasures. (Tr. 45) During training, at a facility for intelligence professionals, he received a three-volume set of training material in three-ringed binders containing secret, confidential, and for official use only (FOUO) material. (Tr. 47, 52, 98, 99, 106) The set of books was prepared specifically for Applicant and for each individual attending the course. (Tr. 46) Applicant's name was printed on the reference material. The participants were told to maintain and care for the material because they would not be issued another set. (Tr. 46, 50, 106)

After receiving the binders, Applicant had no requirement to use the reference material and never opened the material during his time in the MCIO. (Tr. 47) The material referenced antiquated material and was to be used should the individual come across "really old technology." (Tr. 47) Although unused, Applicant properly maintained the material in his offices from 2003 through 2006. Agents, such as Applicant, who have served at least five years, are allowed to keep their toolkits, which consist of hand tool, test equipment, and other tools. (Tr. 48) Additionally, they are allowed to take all reference material. (Tr. 48)

In 2006, as Applicant was packing up his material and cleaning out his office in preparation for retirement, his commander told him to be sure to take his things because all that was left behind would be destroyed. (Tr. 48) Applicant was not told, nor did he ask, to take the classified binder home. (Tr. 48) When he retired, a number of positions were opened up to civilians and Applicant competed for one of those openings. (Tr. 49) He was motivated to protect the material from being destroyed so that it would be available when he returned to MCIO employment. (Tr. 93) He wanted to keep his reference library and toolkit intact so that he could immediately return to work unimpeded. His attitude was "I'm keeping that all as a set, I'm going to be back in a couple of months and I'll protect it and put it back where it belongs." (Tr. 100) He was not selected for an MCIO position.

While Applicant's application was pending with the MCIO, as a back-up plan, he obtained a job providing electronic countermeasures to a major computer company. (Tr. 34) He worked for the company from 2006 through 2008. (Tr. 61) In 2008, he changed

employers and went to work on a surveillance team with world-wide missions. Of the operations performed, 80 to 90 were top secret. (Tr. 124) The mission coordinator stated, while on foreign assignments, he and Applicant relied on each other for their lives. (Tr. 126) While working together, Applicant's suggestions and advice were invaluable in developing and implementing devices used in the field. (Tr. 128)

Once it was double boxed, Applicant took the material home and stored it in a bedroom closet with his uniforms and other paraphernalia. (Tr. 50) For four years, the box sat in the closet, unopened and untouched. (Tr. 51, 95) In 2010, during a pre-polygraph interview he was asked if he had ever taken classified information home. He answered "no," not counting his student handbooks. (Tr. 51) He took responsibility and discussed the material. (Tr. 52) He was told to retrieve the material, which he did. (Tr. 52) He offered to return the FOUO and confidential material, but the MCIO was not interested in that material. (Tr. 53) At that point, the MCIO asked that he be removed from the contract, which resulted in the termination of his employment. (Tr. 53, 101) There is no indication Applicant's clearance was denied or revoked. (Tr. 121)

Applicant asserts he would never again take classified material home. (Tr. 94) He stated:

Obviously, I made a bad decision and on paper I've been trained, I understood the rules, and I did, I'm not saying I did not, and yet I made a faulty decision, so I could see where that would cast doubt on my future decisions. One could argue that you make a mistake, maybe that's just the way you operate. At first blush it looks like disregard for the rules. That wasn't the case. I wasn't cavalier about it. I thought I was doing the right thing by protecting the documents. Like I said, in retrospect, that sounds ridiculous coming out of my mouth, but I don't think that activity, that one time [breach] over my entire career is indicative of what the future will bring. (Tr. 87)

In 1985, Applicant was 19 years old when he married his wife. They have two children, ages 23 and 25. (Tr. 14, 54) He married, following high school graduation, and prior to enlisting in the military. (Tr. 22) In 2000, he received a letter of counseling (LOC) for identifying himself as a special agent in a personal situation because so doing could be considered abusing his position. (Ex. A-6, page 35, Tr. 57) The LOC did not affect his annual evaluation. He acted as he did out of concern for his daughter. (Tr. 59)

In 2000, Applicant's children were 8 and 11. (Tr. 54) One day in 2000, when he met the bus to pick up his children, his son got off, but not his daughter. His son told him the bus driver had kicked his sister off the bus. (Tr. 55) Earlier, in March 2000, Applicant received a letter from the school stating his son's bus privileges had been revoked and Applicant would have to provide transportation for one week, which was the appropriate method to inform parents a child would not be allowed on the bus. (Tr. 55)

Applicant questioned the bus driver, asking where his 11-year-old daughter was. (Tr. 56) His daughter had been put off the bus at an off-base location some seven miles from their home. The driver stated she did not have to talk to him. He told the bus driver she could not put a child off the bus the way she did. The bus driver said she had been a bus driver for 14 years and knew the laws. (Tr. 56) Applicant then stated he was a federal agent and also knew the law. He had been an MCIO agent about 7 months at the time. (Tr. 57) He asked where his daughter had been put off the bus and then retrieved his daughter.

Applicant's command told him that had the child not been his child but someone else's child, his conduct would have been entirely appropriate. (Tr. 92) Because it was his child, his conduct was personal in nature.

Applicant's coworker, an attorney in the state attorney general's office, stated Applicant has a desire to do things correctly and seeks out attorney advice. (Tr. 139) She stated, Applicant has a cautious, well-reasoned approach to things and wants to make sure that what he is doing is not only legal, but also correct. (Tr. 139, 142) A sergeant criminal investigator working with Applicant stated Applicant is a great investigator with much experience and integrity. (Tr. 150) This coworker would trust Applicant with his life. (Tr. 152)

In 2011, Applicant attended and completed the eight-month police academy course. (Tr. 66) He was president of his class and graduated second in class ranking. (Tr. 66)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which must be considered 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 overarching adjudicative goal is a fair, impartial, and commonsense 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 interests of 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.

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 to obtain 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order (EO) 10865 provides that 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.” See *a/so* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline K, Handling Protected Information**

The security concern for handling protected information is set out in AG ¶ 33:

Deliberate or negligent failure to comply with rules and regulations for protecting classified or other sensitive information raises doubt about an individual’s trustworthiness, judgment, reliability, or willingness and ability to safeguard such information, and is a serious security concern.

AG ¶ 34 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (b) collecting or storing classified or other protected information at home or in any other unauthorized location; and
- (g) any failure to comply with rules for the protection of classified or other sensitive information.

Applicant had classified information stored in his home. The evidence raises the above disqualifying conditions.

Conditions that could mitigate handling protected information security concerns are provided under AG ¶ 35. The following is potentially applicable:

(a) so much time has elapsed since the behavior, or it has happened so infrequently or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.

Security violations are one of the strongest possible reasons for denying or revoking access to classified information, as they raise very serious questions about an applicant's suitability for access to classified information. Once it is established that an applicant has committed a security violation, he or she has a very heavy burden of demonstrating that he or she should be entrusted with classified information. Because security violations strike at the very heart of the industrial security program, an administrative judge must give any claims of reform and rehabilitation strict scrutiny. In many security clearance cases, applicants are denied a clearance for having an indicator of a risk that they might commit a security violation (e.g., alcohol abuse, delinquent debts, or drug use). Security violation cases reveal more than simply an indicator of risk. The frequency and duration of the security violations are also aggravating factors.

While on active duty, Applicant received three binders of reference material, one of which contained material classified secret. While on active duty, he properly maintained the material. While packing up his material and cleaning out his office in preparation for retirement, his commander told him to be sure to take his things because all that was left behind would be destroyed. Applicant had hoped to shortly obtain a civilian tech agent position. Being motivated to protect the material from being destroyed and wanting to keep his reference library and toolkit intact for his return to the MCIO, he took the reference binders with him.

Applicant's thoughts were, "I'm keeping that all as a set, I'm going to be back in a couple of months and I'll protect it and put it back where it belongs." When he was not selected for a position, the material sat untouched in his closet with his other military paraphernalia for four years. He acknowledged that, "I can't defend what I did, I can't justify what I did, in retrospect it was an incredibly stupid decision." In 2010, when asked about classified material at home, he revealed the reference material and returned it.

Applicant has not tried to hide his conduct and was credible in his testimony. He acknowledged he made a bad decision and, in retrospect, acknowledged his thoughts of attempting to protect the material were ridiculous. I am convinced that Applicant is remorseful for his actions, and he will not repeat the behavior. He possesses a positive attitude toward the discharge of his security responsibilities.

There was the single event of taking the material home, which was continuing in nature until the material was returned. The material was returned more than four years ago. The unusual nature of the reference material having been made just for each of the

participants in the course and the warning to maintain the material because there would be no replacements are unusual circumstances. It is unlikely the conduct of taking classified material home would recur. His prior commander, prior mission coordinator, and current coworkers speak highly of Applicant's duty performance, dedication, professionalism, integrity, and high moral character. Two of them stated they would, and have, trusted Applicant with their lives. The mitigating condition set forth in AG ¶ 35(a) applies.

## **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

The Government cross-referenced the allegations in SOR ¶ 1 as a security concern under Guideline E. Additionally alleged were his 2010 termination and a 2000-letter of counseling. In 2010, after the material had been returned to the MCIO, the MCIO asked that Applicant be removed from the contract, resulting in the termination of his employment. This conduct and the initial taking home of the material were previously addressed under Guideline K and those facts will not be repeated in the discussion under Guideline E.

AG ¶ 17 provides a condition that could mitigate security concerns:

(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.

In 2000, Applicant received a LOC for identifying himself as an MCIO special agent when trying to locate his daughter. He was a concerned father attempting to locate his 11-year-old daughter. Had he been attempting to locate a neighbor's child, his conduct would have been perfectly correct and acceptable. However, because he was attempting to locate his daughter he should not have announced that he was a special agent. The matter was appropriately handled at a low level with the LOC. The conduct occurred 14 years ago and was never repeated. The mitigating condition set forth in AG ¶ 17(c) applies.



## **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 relevant 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) the 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 commonsense 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. I have incorporated my comments under Guidelines K and E in this whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. I considered Applicant's honorable and outstanding military service. His conduct and work performance since leaving the service has also been outstanding. Numerous individuals spoke highly of his character and work. I found Applicant to be honest and candid about taking the classified material home. Applicant showed his integrity and willingness to accept responsibility for his actions, which reveals high moral character.

I believe the returning of the material, the termination from employment, and the experience of going through the adjudicative process had an additional value, in that Applicant is more cognizant that he must be more diligent in his responsibilities for safeguarding classified information. He has met his heavy burden of demonstrating that it is clearly consistent with the national interest to grant his security clearance. Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant has mitigated the handling protected information and personal conduct security concerns.

## **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, Security Violations:                      FOR APPLICANT

Subparagraph 1.a:	For Applicant
Paragraph 2, Personal Conduct:	FOR APPLICANT
Subparagraphs 2.a – 2c:	For Applicant

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

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CLAUDE R. HEINY II  
Administrative Judge