



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 08-02346
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Department Counsel  
For Applicant: *Pro Se*

April 28, 2009

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**Decision**  
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LOKEY-ANDERSON, Darlene D., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 21, 2006. On October 10, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 (as amended), and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to the Applicant, which detailed the reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant and recommended referral to an Administrative Judge to determine whether a clearance should be denied or revoked.

The Applicant responded to the SOR in writing on November 4, 2008, in which he elected to have the case determined on a written record in lieu of a hearing. Department Counsel submitted the Government’s File of Relevant Material (FORM) to the Applicant on January 28, 2009, which contained seven separate Government Exhibits, referred to as Government Exhibits 1 through 7 that were admitted into evidence. The Applicant was instructed to submit information in rebuttal, extenuation or mitigation within 30 days of receipt. Applicant received the FORM on February 9, 2009, and he submitted a reply within the required time period, consisting of thirty-seven separate Applicant’s Exhibits, referred to as Applicant’s Exhibits 1 through 37 that were

admitted into evidence. The case was assigned to the undersigned for resolution on March 16, 2009.

### **Findings of Fact**

The Applicant is 44 years old and divorced. He is employed by a defense contractor as a Contract Investigator who conducts personnel security background investigations, and is applying for a security clearance in connection with his employment.

The Government opposes the Applicant's request for a security clearance, on the basis of allegations set forth in the Statement of Reasons (SOR). The following findings of fact are entered as to each paragraph and guideline in the SOR:

Paragraph 1 (Guideline E - Personal Conduct). The Government alleges in this paragraph that the Applicant is ineligible for clearance because he engaged in conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that raise questions about his ability to protect classified information.

The Applicant admits in part and denies in part the allegation set forth in the SOR under this guideline.

The Applicant served on active duty in the United States Army from September 1982, to August 1985, and again from November 1986, to November 1994. (See Government Exhibit 5). He received an honorable discharge on November 14, 1994. (See Applicant's Exhibit 15).

From December 1998 to December 2001, the Applicant was employed as a criminal investigator for the United States Army Criminal Investigation Command's Major Procurement Fraud Unit. He admits that in May 2001, while working as a criminal investigator for the Army military police, allegations were made against him for making false statements, tampering with a witness/victim/informant, and theft. As a result of the investigation, the Applicant's access to classified information was suspended, he was assigned to desk work, and eventually terminated from his position. The United States Attorney declined criminal prosecution. Applicant denies the underlying conduct. (See Government Exhibits 4 and 7).

Excerpts from Army investigative reports indicate that on December 29, 2000, the Applicant was contacted by a woman (referred to as Mrs. M.), who asked him to help her regarding a shoplifting investigation involving her brother-in-law. Applicant knew the woman and her husband because they operated the day care center that the Applicant hired to watch his children. Mrs. M.'s brother-in-law had been apprehended for shoplifting at the PX on the fort. Mrs. M. called the Applicant for help because she knew that the Applicant was in law enforcement on the base. The investigation disclosed that the Applicant made several verbal false statements to two AAFES Exchange detectives and two Department of the Army police officers, identifying Mrs. M. as his "informant" and "source" in an apparent attempt to have Mrs. M. receive special

treatment during the processing of her and her brother-in-law during the shoplifting incident. The investigation revealed that Mrs. M. was not in fact an "informant" or a "source". (See Government Exhibit 7).

During an interview on June 26, 2001, the Applicant admitted identifying Mrs. M. as his "source" and stated that he considered her an "open, unwitting source." He contends that even though he had not yet opened a local source file on her, he considered Mrs. M a "source". He admits, however, that she never provided him with any information, that he never asked her for any information concerning an ongoing investigation, and that he did not list her as an "open source" in the USACIDC ACIRS source program. He denied identifying her as a source in an attempt to receive special consideration. (See Government Exhibit 7).

In May 2001, Mrs. M.'s husband e-mailed USACIDC, his concerns about an improper relationship he believe existed between the Applicant and his wife. Mrs. M.'s husband also claimed that the Applicant assisted his wife with the incident at the PX and also stated that the Applicant had provided his wife with his Government calling card so that she could contact the Applicant when he was out of town. This e-mail from Mrs. M.'s husband prompted the investigation into the Applicant's affairs. When the Applicant learned of the investigation, he contacted Mr. M. and requested a meeting at the Applicant's apartment. During the meeting, the Applicant was said to have threatened Mr. M. by asking him to withdraw his complaint to USACIDC regarding his improper relationship with Mr. M.'s wife. The Applicant was also said to have threatened Mr. M. with a Mexican police report that he had received from Mrs. M's brother. The incident concerned a situation that occurred between Mrs. M and her husband while they were in Mexico. The Applicant told Mr. M. that he had checked with his FBI friends and determined that the incident in Mexico could be considered a kidnaping and an international incident that could have consequences. After the Applicant made these threats, Mr. M. called the Special Agent in Charge of the Applicant's investigation and asked him to stop the investigation. He later recanted, stating that his request to stop the investigation had been due, in part, to the Applicant's threats to blackmail him. (See Government Exhibit 7).

Army investigative reports further disclose that the Applicant made 28 personal phone calls, or otherwise unauthorized phone calls to Mrs. M. over a five month period between January 2001 and May 2001, using his United States Government issued telephone calling card. Applicant has no recollection of using his Government card for any personal matters. He stated that he gave Mrs. M. his personal MCI calling card to use to make calls to him. (See Government Exhibit 7).

As a result of these allegations and the ensuing investigation, on July 18, 2001, Applicant's access to classified information was suspended. On December 10, 2001, the Applicant was terminated from his employment at USACIDC. As a result of this alleged misconduct, his security clearance was suspended, and he was terminated from his job. (See Government Exhibits 5 and 7).

Since February 2007, the Applicant has been employed as a contract investigator conducting personnel security background investigations on behalf of a government agency. In this capacity, he states that he has conducted 260 background

investigations from March 1, 2007, through February 2009. (See Applicant's Reply to the FORM dated March 6, 2009). Applicant's most current performance evaluation dated September 25, 2008, reflects ratings of "above average" in all categories, except one that is rated "superior". (See Applicant's Exhibit 24).

Letters from the Chief of a United States government agency and from a supervisor of the same agency, both dated February 11, 2009, who have known the Applicant professionally for the past two years, state that the Applicant is extremely professional, courteous, a man of good character, dedicated to his job, and extremely trustworthy and reliable. They have never had any occasion to question the Applicant's integrity and they highly recommend him for a position of trust. (See Applicant's Exhibit 32).

A letter from a retired United States Army Lieutenant Colonel dated October 27, 2008, for whom the Applicant has been taking care of her annuities and revocable trust since 2004, reflects that the Applicant is trustworthy and reliable. She has entrusted the Applicant with her investment of over \$600,000.00 and has always found the him to keep her best interests in mind. (See Applicant's Exhibit 31).

Applicant's military NCO performance evaluations and Senior System Civilian Evaluation Reports for the years 1991, 1992, 1999, and 2001 rate the Applicant in every category as "excellent", and with the overall potential for promotion as "among the best". (See Applicant's Exhibits 20, 21, 22 and 23).

Numerous letters of recommendation from past and current business and professional associates and friends of the Applicant attest to his high level of integrity, professionalism, candor, reliability and trustworthiness. (See Applicant's Exhibit 30).

During both his military and professional business career, the Applicant received numerous awards, and commendations for his extraordinary service. His military awards include, but are not limited to the Army Achievement Medal, the Army Commendation Medal, the Army Good Conduct Medal, the Army Southwest Asia Service Medal with 3 service stars, and the Army NCO Professional Development Ribbon. He has also received many Certificates of Achievement. (See Applicant's Exhibits 16, 17, 19 and 33).

## **Policies**

Security clearance decisions are not made in a vacuum. Accordingly, the Department of Defense, in Enclosure 2 of the 1992 Directive sets forth policy factors and conditions that could raise or mitigate a security concern; which must be given binding consideration in making security clearance determinations. These factors should be followed in every case according to the pertinent guidelines. However, the conditions are neither automatically determinative of the decision in any case, nor can they supersede the Administrative Judge's reliance on her own common sense. Because each security clearance case presents its own unique facts and circumstances, it cannot be assumed that these factors exhaust the realm of human

experience, or apply equally in every case. Based on the Findings of Fact set forth above, the factors most applicable to the evaluation of this case are:

### **Guideline E (Personal Conduct)**

15. *The Concern.* 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.

#### Conditions that could raise a security concern:

16.(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

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.

#### Condition that could mitigate security concerns:

None.

In addition, as set forth in Enclosure 2 of the Directive at pages 16-17, in evaluating the relevance of an individual's conduct, the Administrative Judge should consider the following general factors:

- a. The nature and seriousness of the conduct and surrounding circumstances
- b. The circumstances surrounding the conduct, to include knowledgeable participation
- c. The frequency and recency of the conduct
- d. The individual's age and maturity at the time of the conduct
- e. The voluntariness of participation
- f. The presence or absence of rehabilitation and other pertinent behavior changes

- g. The motivation for the conduct
- h. The potential for pressure, coercion, exploitation or duress
- i. The likelihood of continuation or recurrence.

The eligibility criteria established in the DoD Directive identify personal characteristics and conduct which are reasonably related to the ultimate question, posed in Section 2 of Executive Order 10865, of whether it is “clearly consistent with the national interest” to grant an Applicant’s request for access to classified information.

The DoD Directive states, “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. Eligibility for access to classified information is predicted upon the individual meeting these personnel security guidelines. The adjudicative 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. The Administrative Judge can draw only those inferences or conclusions that have reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature. Finally, as emphasized by President Eisenhower in Executive Order 10865, “Any determination under this order . . . shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the Applicant concerned.”

The Government must make out a case under Guideline E (Personal Conduct) that establishes doubt about a person's judgment, reliability and trustworthiness. While a rational connection, or nexus, must be shown between Applicant's adverse conduct and his ability to effectively safeguard classified information, with respect to sufficiency of proof of a rational connection, objective or direct evidence is not required.

Then, the Applicant must remove that doubt with substantial evidence in refutation, explanation, mitigation or extenuation, which demonstrates that the past adverse conduct, is unlikely to be repeated, and that the Applicant presently qualifies for a security clearance. The Government must be able to place a high degree of confidence in a security clearance holder to abide by all security rules and regulations, at all times and in all places.

## **CONCLUSION**

Having considered the evidence in light of the appropriate legal standards and factors, and having assessed the Applicant's credibility based on the record, this Administrative Judge concludes that the Government has established its case as to all allegations in the SOR, and that Applicant's questionable personal conduct has a direct and negative impact on his suitability for access to classified information.

The Applicant denies that he rendered false statements to the military police, specifically that he told police that Mrs. M. was his "source" in an attempt to gain favor for her. He denies that he threatened Mr. M. with a Mexican Police Report or in any other fashion. He also denies ever using a United States Government issued calling card to place 28 personal telephone calls. There is significant evidence in the record to the contrary. Records from the Department of the Army criminal investigation of the matter indicate that the Applicant engaged in this misconduct, and as a result, his security clearance was suspended and he was terminated from his employment. Seven years later, the Applicant still denies the misconduct and will not admit to his wrongdoing. He refuses to take responsibility for his past inappropriate actions. Thus, his behavior is not mitigated by the passage of time and continues to cast doubt on his reliability, trustworthiness, and good judgment.

It is recognized that the Applicant has many outstanding achievements that include his exceptional service to the United States reflected by his numerous military decorations, awards and accomplishments, letters of appreciation and recommendation, as well as the fact that he volunteered and served in the Middle East in support of Operations Desert Shield and Desert Storm. His favorable character reference from his current supervisor has also been considered. However, under the particular circumstances of this case, the fact that the Applicant continues to deny the incidents of misconduct places his credibility in serious question.

With respect to the Applicant's personal conduct, Under Guideline E, *Disqualifying Conditions 16.(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative and, 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. . . apply.* None of the mitigating conditions are applicable.

I have also considered the "whole person concept" in evaluating the Applicant's eligibility for access to classified information. Under the particular facts of this case, the totality of the conduct set forth under all of the guidelines viewed as a whole, support a whole person assessment of poor judgement, untrustworthiness, unreliability, an unwillingness to comply with rules and regulations, and/or other characteristics indicating that the person may not properly safeguard classified information.

Considering all of the evidence presented, Applicant's behavior is not mitigated by his favorable evidence. Applicant has not come clean with the Government concerning these incidents, and therefore he cannot be trusted to properly safeguard classified information. On balance, it is concluded that the Applicant has not overcome the Government's case opposing his request for a security clearance. Accordingly, the evidence supports a finding against the Applicant as to the factual and conclusionary allegations expressed in Paragraph 1 of the SOR.

## **FORMAL FINDINGS**

Formal Findings For or Against the Applicant on the allegations in the SOR, as required by Paragraph 25 of Enclosure 3 of the Directive are:

Paragraph 1: Against the Applicant.

Subparagraph 1.a.: Against the Applicant

## **DECISION**

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

Darlene Lokey-Anderson  
Administrative Judge