



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



In the matter of: )  
)  
) ISCR Case No. 08-11379  
SSN: )  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Francisco J. Mendez, Jr., Esq., Department Counsel  
For Applicant: Mark F. Riley, Esq.

November 8, 2010

**Decision**

COACHER, Robert E., Administrative Judge:

The evidence fails to establish some disqualifying conduct and Applicant mitigated the remaining security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is granted.

**Statement of the Case**

On December 3, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOHA acted 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 adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on January 15, 2010, and requested a hearing before an administrative judge. The case was assigned to me on May 27, 2010. DOHA issued a notice of hearing on June 2, 2010 with a hearing date of June 30, 2010. The hearing was rescheduled to accommodate a witness's availability. DOHA issued a second notice of hearing on June 29, 2010, and the hearing was convened as scheduled on August 10, 2010. The Government offered Exhibits (GE) 1 through 6, which were admitted except as noted.<sup>1</sup> Department Counsel's exhibit index was marked as Hearing Exhibit (HE) I. Applicant testified, presented three witnesses, and offered exhibits (AE) A-H that were admitted without any objections. Applicant's exhibit index was marked as HE II. DOHA received the hearing transcript (Tr.) on August 17, 2010.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted ¶¶ 1.a–1.b, 1.c (partially), 1.d, and 1.k. He denied ¶¶ 1.e–1.n. After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 50 years old. He is married and has one child. Since 2004, he has worked as an information systems engineer for a local university that also does government contracting work. He holds a bachelor's degree and is working on a master's degree. He has no military experience. He has held a security clearance since 1995.<sup>2</sup>

Applicant's conduct raised in the SOR includes: (1) being fired from a job for stealing money from a cash register in 1976 (SOR ¶ 1.a); (2) using, purchasing, and selling various drugs between 1979 and 1984 (SOR ¶¶ 1.b-1.c); (3) being arrested in 1984 on a theft charge (SOR ¶ 1.d); (4) using a prescription drug, Percocet, for non-prescribed use in 1997 and 2000, and while holding a security clearance (SOR ¶¶ 1.e-1.g); (5) taking a computer chip home from work without authorization (SOR ¶ 1.h); (6) making false statements on security clearance applications, to investigators, and in interrogatories concerning his Percocet misuse (SOR ¶¶ 1.i-1.j, 1.l-1.n); (7) being denied access to a classified program by another government agency in 2003 (SOR ¶ 1.k).

Applicant admits to unacceptable behavior when he was younger. He wrongfully took money from an employer when he was 16 years old. He paid the money back and was fired for his actions. When he was in college, between 1979 and 1984, Applicant

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<sup>1</sup> GE 1 and 5-6 were admitted in total. GE 2 was admitted except for pages 6-10 of the exhibit. I sustained an objection to those pages based upon there being no authenticating witness for these Department of Defense reports as required by Directive ¶ E3.1.20. GE 3 was admitted except for pages 20-23 of the exhibit. I sustained an objection to those pages based upon there being no authenticating witness for these Department of Defense reports as required by Directive ¶ E3.1.20. GE 4 was not admitted for the same reason stated above.

<sup>2</sup> Tr. at 32-33; GE 1.

engaged in extensive drug involvement including using and purchasing drugs such as marijuana, cocaine, amphetamines, mushrooms, Quaaludes, opium, and hashish. Applicant maintained that while he engaged in accommodation transfers to his friends for money, he did not engage in the sale of drugs for profit. He was also drinking heavily then. He was 19 to 23 years old when he engaged in this behavior. His school work also suffered because of his drug and alcohol activities. In 1984, he was arrested and charged with shop lifting. As part of his probation, he was required to attend Alcohol Anonymous (AA) meetings. He completed his probation, but realized that AA was something he needed to help get his life under control. It was in either late 1983 or early 1984 that Applicant stopped using drugs and his last drink was in February 1984. He also began regular AA attendance.<sup>3</sup>

In February 1997, Applicant had surgery and was prescribed Percocet for the pain he experienced during his recovery. He took only about half the prescribed amount of Percocet because, given his alcoholic background, he was concerned how taking this drug might affect his sobriety. The leftover Percocet remained in his medicine cabinet. He did not take any Percocet outside of the prescribed use. In October of 2000, Applicant fell off a ladder while working at his home. He broke two ribs from the fall and was once again prescribed Percocet for the pain. He only took half of the prescribed dosage because he felt uncomfortable taking this medicine because of his alcoholic background and because it caused him to be nauseous. The remaining Percocet remained in his medicine cabinet. He only took the Percocet for the prescribed purpose to relieve the pain from the broken ribs he suffered.<sup>4</sup>

In 2003, Applicant sought eligibility to access sensitive compartmented information (SCI) through another government agency. He was interviewed during this process. Those interviews, in a summarized fashion, formed the basis for the denial of Applicant's request for SCI access on October 1, 2003. The interview characterized Applicant as misusing the Percocet on several occasions outside of the prescribed use because Applicant used the term "make himself feel good" when he described using the Percocet. Applicant admitted he may have used a poor choice of words, but what he meant was he used the Percocet for the prescribed purpose to make him feel better.<sup>5</sup>

The Government did not offer any written statements by the Applicant concerning this interview. Additionally, the Government agent conducting the interview did not testify at hearing. Alternatively, Applicant did testify at the hearing about his Percocet use and was subject to cross-examination by Department Counsel. I found his testimony, that he only used Percocet as prescribed, credible.

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<sup>3</sup> Tr. at 36-44.

<sup>4</sup> GE 5; Tr. at 66-69.

<sup>5</sup> GE 2; Tr. at 39-42.

In April 2000, Applicant took home a company computer chip so he could use it on his personal computer. The chip had been discarded by his company and was going to be donated to charity. There was no classified information on the chip. Once Applicant got the chip home, he started thinking about whether he was authorized to take the chip home. With this thought in mind, he returned the chip and talked to his computer security manager about what the policy was for this sort of thing. The security person was not sure what the policy was, but he did not think Applicant had done anything wrong. The chip had minimal intrinsic value. Applicant decided to leave the chip in a surplus bin at work and never took it home again. No disciplinary action resulted against him by his company for taking the chip.<sup>6</sup>

Four coworkers/supervisors submitted character letters for the Applicant. Additionally, two witnesses testified to Applicant's good character. Applicant is held in high regard for his professional work and his reputation for honesty, trustworthiness, and dependability. Applicant also presented the testimony and written report of a psychologist who interviewed him for the purpose of this action. I found minimal value to this information.<sup>7</sup>

### **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 are used 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 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.

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<sup>6</sup> GE 5, Tr. at 74-78, 128.

<sup>7</sup> AE C-F; Tr. at 130-149, 153-166.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “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 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 that an applicant may deliberately or inadvertently fail to 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.

Section 7 of Executive Order 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 *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline E, Personal Conduct**

AG ¶ 15 expresses the security concern for 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 ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;
- (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

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

Applicant's admitted drug involvement from 1979 to 1984 and his 1976, 1984, and 2000 thefts and unauthorized taking of a computer chip reflect personal conduct that creates a vulnerability to his personal standing. AG ¶ 16(e) applies to SOR ¶¶ 1a. - 1.d and 1.h.

I found Applicant's denial of improper use of Percocet credible. Additionally, the Government's evidence to prove unauthorized use was based upon a report that summarized an interview by an agent who did not testify and was not subject to cross-examination. I gave this evidence less weight than Applicant's testimony. Therefore, the evidence does not support the allegations in SOR ¶¶ 1.e – 1.g and AG ¶¶ 16(e) does not apply.

All the false statement allegations (SOR ¶¶ 1.i, 1.j, 1.l, 1.m, and 1.n) are premised on Applicant misusing Percocet. Since I concluded that Applicant did not misuse Percocet, there is no factual basis to support these allegations. AG ¶¶ 16(a) and (b) do not apply. Finally, the conduct alleged in SOR ¶ 1.k is the same conduct as alleged in the remaining allegations.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

- (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;
- (d) the individual has acknowledged the behavior and obtained counseling to change the behavior; and
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation or duress.

Applicant's drug abuse ended 26 years ago. Since then he has remained sober through the support of AA. Likewise, the two theft incidents occurred over 25 years ago when Applicant was young and immature. The computer chip incident was minor in nature, Applicant self-reported his actions, and no consequences resulted. Applicant's

reliability, trustworthiness, and good judgment are not in doubt. I am convinced that these types of action will not recur. AG ¶¶ 17(c), (d), and (e) all apply.

### **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) 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 considered Applicant's age when he engaged in his drug abuse and thefts, and the passage of time since the acts. Additionally, I considered his current work environment and the strong recommendation he received from a coworker regarding Applicant's reliability and trustworthiness. Applicant met his burden and provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline E, 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:	For APPLICANT
Subparagraphs 1.a-1.n:	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 eligibility for a security clearance. Eligibility for access to classified information is granted.

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Robert E. Coacher  
Administrative Judge