



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



In the matter of: )  
 )  
----- ) ISCR Case No. 09-01617  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Fahryn Hoffman, Esquire, Department Counsel  
For Applicant: *Pro se*

September 15, 2010

**Decision**

HARVEY, Mark, Administrative Judge:

On February 28, 2008, 17 days after Applicant left his employment with corporation B, a classified document was discovered in Applicant's former office at corporation B. He also engaged in inappropriate behavior in the workplace. Handling protected information and personal conduct concerns are not mitigated at this time. Eligibility for access to classified information is denied.

**Statement of the Case**

On July 1, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) or security clearance application (SF 86) (GE 1). On August 28, 2009, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline K (handling protected information). (Hearing Exhibit (HE) 2) The SOR detailed 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 Applicant. The SOR recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked (HE 2).

On September 24, 2009, Applicant responded to the SOR. (HE 3) On April 22, 2010, Department Counsel amended the SOR, and added five allegations under Guideline E (personal conduct). On April 22, 2010, Department Counsel indicated she was ready to proceed on Applicant's case. On May 3, 2010, DOHA assigned Applicant's case to me. On May 7 and 10, 2010, Applicant responded to the Amended SOR. (HE 4) On May 12, 2010, DOHA issued a hearing notice. (HE 1) On June 1, 2010, Applicant's hearing was held. At the hearing, Department Counsel offered 11 exhibits (GE 1-11) (Tr. 23), and Applicant offered 17 exhibits. (Tr. 24-28; AE A-Q) The only objections went to the weight of the evidence not to admissibility, and I admitted GE 1-11 and AE A-Q. (Tr. 23, 28) Additionally, I admitted the hearing notice, SOR, Applicant's response to the SOR, the amended SOR, and Applicant's responses to the amended SOR. (Tr. 22; HE 1-4) At his hearing, Applicant was offered an opportunity to submit additional documentation, especially of his allegations of bias or unethical conduct of his supervisors, after his hearing. (Tr. 50-51, 154) On June 18, 2010, I received the transcript. On July 9, 2010, I received six additional exhibits from Applicant. (AE R-W) The only objection went to the weight of AE U not to admissibility, and I admitted AE R-W. I closed the record on July 10, 2010.

### **Findings of Fact<sup>1</sup>**

Applicant's SOR response denied knowledge of inappropriate storage of classified materials in his former office at corporation B, and discussed a variety of possible explanations to address the allegation of inappropriate storage of classified materials. (SOR ¶¶ 1.a and 1.b; HE 3) He admitted he received four documents from his employer which contained negative information about his job performance at corporation B:

(1) a letter of counseling dated January 25, 2007, regarding his unexcused absence from his workplace on or about January 8, 2007. (SOR ¶ 2.b; HE 4);

(2) a performance evaluation dated January 25, 2005, for rating period January 2004 through September 2004, which stated, "His more recent task load has been light, and questions have been raised as to his 'frequently working at home' or other unexplained absences that are not commensurate with his task responsibilities." (SOR ¶ 2.c; HE 4; GE 10 at 4, Block II);

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<sup>1</sup>Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

(3) a memorandum dated December 9, 2004, regarding his inability or unwillingness to comply with company or section procedures. (SOR ¶ 2.d, HE 4); and

(4) a memorandum dated December 9, 2004, regarding his unprofessional behavior in the workplace. (SOR ¶ 2.e, HE 4)

However, he did not agree that the negative counseling or comments were warranted by his conduct. His admissions are accepted as findings as fact.

Applicant is the 43-year-old employee of a defense contractor working as a Ph.D.-level scientist in analytical chemistry. (Tr. 5, 81) He received his Ph.D. from a well-known U.S. educational institute in 1993. (Tr. 5) He is married, and his two children are ages 14 and 18. (Tr. 6) He was employed at corporation B, a defense contractor, for 9 ½ years. (GE 2 at 3) About two years ago, he began working for his current employer.

Applicant's employer presented a "Key Contributor Award" to Applicant for his contributions to a work-related project on September 5, 2003. (Tr. 90-94; GE 11 at 11; AE G) After the presentation, Applicant sent an email to his supervisors stating, "While I sincerely appreciate the key contributor award presented this morning, I am fairly disappointed that the potential professional development activity (focus group) was only a farce. It might be more prudent to disguise future award ceremonies as some less meaningful activity." (GE 11 at 11) Applicant was disturbed that the presentation was a surprise award ceremony. (Tr. 94) A supervisor, two levels above Applicant's supervisor, responded in a conciliatory and professional manner to Applicant's email, emphasizing his desire to avoid disruption of work and describing the need to hold meetings to explain new organizations and address questions. (Tr. 90-93; GE 11 at 11)

Applicant received a December 9, 2004 memorandum from his manager, GB,<sup>2</sup> regarding Applicant's inability or unwillingness to comply with company or section procedures. (SOR ¶ 2.d, HE 4; GE 11 at 1-4) This memorandum cited: (1) "an unwillingness to present a project review for you[r] project"; (2) issues relating to "compliance with our peer review requirements"; (3) "apparent issues with time card recording policies"; and (4) attacks on a management official for "his method in recognizing and rewarding some staff for their excellent performance (including you)." (GE 11 at 1) The memorandum used various emails as a basis for these complaints about Applicant's lack of compliance with procedures. With the exception of Applicant's complaint in September 2003 for providing a certificate to Applicant without warning him of the presentation, none of the cited emails substantiate management's complaints about Applicant's alleged failure to comply with procedures. (GE 11 at 5-11) Although

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<sup>2</sup> In the late 1990s, Applicant learned that his manager, GB, lied about giving permission to an employee to hold a bake sale. (Tr. 44-45; AE U at 5) When an employee confronted GB about lying about giving permission, GB threatened the employee with disciplinary action for insubordination. (Tr. 45; AE U at 5) After that incident Applicant did not trust GB. (AE U at 5) Applicant listed nine additional reasons why he believed GB was untrustworthy, including that GB had a problem with excessive alcohol consumption. (AE U at 5-6) For example, at a meeting, GB told employees not to play computer games on their office computers. (Tr. 50) Applicant later observed GB playing computer games on his office computer. (Tr. 50)

Applicant bluntly expressed some misgivings about some of the new requirements and policy changes (for example, he indicates the new peer review policy will result in “chaos and inefficiency” and he labels a management decision to change the timecard policy as “outrageous”, “stupidity” and an “incredibly poor decision based on a knee-jerk response” (GE 11 at 9-10)), the attached emails do not contain any refusal by Applicant to comply with any policy or procedure.

Applicant received a December 9, 2004 memorandum regarding Applicant’s unprofessional behavior in the workplace. (SOR ¶ 2.e, HE 4; GE 11 at 1) Under the caption “Unprofessional Behavior” the memorandum included the comment that Applicant posted signs on several occasions with personal comments about management and noted, “these signs show a lack of respect for maintaining a professional work place and a childish and unprofessional attitude.” (GE 11 at 1) Applicant posted a message on the door of his office listing priorities “so that anybody who was requesting [his] time would be able to understand very clearly where my priorities were.” (Tr. 126) Apparently a project manager noticed the sign and was unhappy that his project did not merit a high priority. The memorandum also described Applicant’s negative comments in an email about the career rewards for working on a large project, and asserted Applicant’s comments about the impact on careers was “unprofessional and unfounded.” (GE 11 at 1) Applicant’s email was sent to GB and it described the large program as “chaos, politics, frustration, and high stress” resulting in damage to one’s career or mental state that could ruin one’s attitude toward employment with Applicant’s corporation. (GE 11 at 5) RB responded with the comment, “I need to strongly caution you against advising any staff, especially new staff, that working on [the project] will somehow damage their careers.” (GE 11 at 5) RB also objected to Applicant going over RB’s head to be released from working on a project. (GE 11 at 5)

Applicant received a January 25, 2005 performance evaluation for rating period January 2004 through September 2004, which stated, “His more recent task load has been light, and questions have been raised as to his ‘frequently working at home’ or other unexplained absences that are not commensurate with his task responsibilities.” (GE 10 at 4, Block II) (SOR ¶ 2.c; HE 4) Applicant said that he had no idea what absences from work were being addressed in this evaluation. (Tr. 116-117; HE 4 at 5) Applicant provided a rebuttal to the rating which focused on other performance elements, and the cover letter from GB focused on Applicant’s removal from projects due to disagreements with program managers.<sup>3</sup> Applicant unsuccessfully sought clarification of the basis for the allegation about unauthorized absences from work. (Tr. 122-123) The file is devoid of specific information about any absences from work during 2004.

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<sup>3</sup> A program-manager employee, RS, asked Applicant to certify some analytic chemistry analysis results, and Applicant refused to provide the certification because he did not have time to complete his analysis. (Tr. 46-47) RS reprimanded Applicant for refusing to certify, and Applicant accused RS of misleading the government. (Tr. 47) RS asked GB to remove Applicant from the program. (Tr. 47) GB did not support Applicant’s refusal to comply with RS’ demands, and instead GB ordered Applicant to continue working with RS. (Tr. 48)

There is no adverse documentation pertaining to Applicant from January 25, 2005 until January 25, 2007. Applicant received a positive rating for the period October 2004 through May 2005. (GE 9 at 1-2) This rating did not include the negative comment about absences that was included in his previous evaluation.

Applicant received a letter of counseling on or about January 25, 2007, because of his unexcused absence from his workplace on or about January 8, 2007. (SOR ¶ 2.b; HE 4) Applicant said he was the pilot of a small plane that crashed, and he was one day late for work. (Tr. 121-122) He called several staff members and advised them that he was going to be late; however, he was not sure whether anyone told his supervisor, RB, that he was going to be late. (Tr. 124-125) He was supposed to make a presentation at a conference and his absence caused management some concern. (Tr. 123-124) He provided his slides to someone to ensure the presentation at the conference could be made. (Tr. 121-125)

### **Allegations of Management Bias and Retribution**

Applicant expressed the concern that management may have placed the classified documents in his office then reported him for a security violation as an act of retribution for Applicant's outspoken criticism of management practices and exposure of "corruption at multiple levels." (AE U at 8) Applicant said he was determined to expose the corruption in corporation B. (Tr. 58) Applicant asserted that management has an "intense motive to destroy" Applicant's professional career. (AE U at 2) Management's placement of a classified document in his file cabinet after he departed corporation B presented a "[g]olden opportunity that nobody in the division would ever question what took place in [his] former office after [he] left." (AE U at 2) A security manager, MT, was aggravated and insulted by Applicant. (Tr. 58) MT was a vengeful person, who had the reputation for obtaining retribution against those who upset him. (Tr. 58) GB, RB, and MT could have planted classified information in Applicant's office after he left employment with B because "conditions were ripe for retributions to take place." (Tr. 59) Applicant placed special emphasis on RB as the most likely suspect for placing classified materials in his office to damage Applicant's reputation and career. (AE U at 2-4, Item 11)

Applicant also believed management was upset with him because "they are very sensitive to losing seasoned staff." (Tr. 59) However, Applicant's assertion that this might be a motive for planting the classified documents in his office seems inconsistent with management forcing Applicant to leave employment through a reduction in force (RIF).

Applicant's immediate supervisor, RB, learned that Applicant was invited to an important conference scheduled for May 7 and 8, 2007, and instead of permitting him to attend, went herself. (Tr. 41-42, 78-79; GE 7 at 1; AE O at 1; AE U at 13-15)<sup>4</sup> On May 4,

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<sup>4</sup> Applicant noted another trip that he made on behalf of corporation B that was coveted by RB, stating that when RB learned of his trip, "she gritted [her] teeth, gave [Applicant] a wild stare and said 'I should be on that plane.'" (AE U at 4)

2007, Applicant requested an ethics investigation of RB. (Tr. 41-43; 103-105; GE 7 at 1; AE U at 14-15) He accused RB of “unethical behavior, and the obvious conflict of interest.” (AE O at 3) An ethics investigation found that RB was invited to attend the conference, including an executive session, and Applicant was not invited to attend the executive session. (GE 7 at 1) RB did not violate ethics rules. (Tr. 43) Shortly thereafter, Applicant was removed as task lead on a project for performance reasons unrelated to his complaint about not being permitted to attend the conference (GE 7 at 2); however, Applicant alleged that “evidence was fabricated on behalf of management in order to present a case.” (AE O at 4) He accused management of taking retribution for making the complaint against RB or possibly for leaving his name on a survey form. (AE O at 7) He said he realized “the outrageous nature of [RB’s] apparent ignorance of [the number and timing of sample testing relating to the project where he was task lead revealed] that there was no merit to her [argument], since the topic had been discussed so many times previously.” (AE O at 4) He accused RB and management of making “fabricated accusations” and providing “blatant fabrication of scenarios” against him. (AE O at 5, 6) He labeled management’s actions as a “text book example of the corruption that exists within multiple levels of management on our division.” (AE O at 7) He urged additional investigation of management because many “issues exist that have been simply swept under the carpet.” (AE O at 8)

In July 2007, Applicant sent an email to his corporation’s CEO, who then directed a meeting to address Applicant’s concerns. (Tr. 107-108) Applicant made a PowerPoint presentation at the meeting about the procedures and goals for an investigation of management. (Tr. 108; AE P)

In August 2007, Applicant sought information through a survey from 11 employees in his division about why employees were leaving his company. (Tr. 100-101). Applicant chose his sample population from “people [in his division] who I knew would not turn me in, people who I trusted.” (Tr. 53-55; AE A at 8-9; AE K) There are 50-100 people in his division. (Tr. 100-102) Eight employees responded to his survey. (Tr. 102) He determined from his survey that management practices were poor. (Tr. 54)

In December 2007, the CEO directed additional investigation. (Tr. 109; GE 7 at 3) On December 19, 2007, the ethics committee issued a two-page report reiterating that Applicant’s allegations against management were not substantiated. (Tr. 109-110) On December 20, 2007, Applicant sent a four-page letter, to his CEO, and his letter includes this description of RB:<sup>5</sup>

[She] is a corporate accident waiting to happen. She has demoralized a wide number of staff, has manipulated people into uncomfortable positions, has generated outright lies about the performance of

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<sup>5</sup> On one occasion RB was unhappy with Applicant because he received a compliment from a customer. RB showed her unhappiness by “sitting in the corner with [the] corners of her mouth pushed down as far as they could go displaying intense aggravation over my compliment from the client.” (AE U at 4) Other colleagues described RB to Applicant as “vicious,” “pure evil,” vindictive,” and “untrustworthy.” (AE U at 5)

subordinates, has put large programs at risk, has discredited subordinates in front of other subordinates and managers, has pursued aggressive activities to intimidate staff, has had people threaten to turn in letters of resignation if they are forced to report to her---the list goes on. [RB] is a nasty individual whose character is perfectly aligned to perform the unethical activities that she has committed against me. It is impossible for the ethics committee to have heard relevant testimony and not come up with a shred of evidence to suggest that the events in question happened exactly how I have described them. This is a scenario out of the Twilight Zone. (AE O at 7)

Applicant attached his survey results from August 2007 to the December 20, 2007, letter. (Tr. 110-111) The survey “demonstrated the fact that management [of Applicant’s department] was atrocious and untrustworthy.” (Tr. 55) A significant percentage of responders to his survey described improper conduct by management, including false statements and false employee performance reviews. (Tr. 57) A stamp on Applicant’s December 20, 2007 letter shows it was received by his CEO. (Tr. 55, 103; GE 7 at 5)

Management’s comments on Applicant’s January 8, 2008 performance review indicated Applicant did not meet expectations in the area of communications skills, and that improvement was expected in customer focus, expertise, flexibility, and teamwork. (GE 6 at 1; AE K) Applicant provided the typed comments on page one and described his performance in very positive terms, such as he “demonstrated teamwork most astoundingly . . . ,” whereas he described management as being in panic and overreacting to events. (GE 6 at 1; AE K) He subsequently added handwritten comments on the review itself, contesting the review. (Tr. 111-114) He also attached a copy of his August 2007 survey because he wanted human resources “to be aware that . . . management is completely out of control.” (Tr. 114) He repeatedly described the issues raised in his evaluation as “fabricated performance issues” (AE K at 9, 10, 12)

### **Improper storage of classified material**

SOR ¶ 1.a alleges Applicant improperly stored classified documents in a container in his office. His office and the container were not approved for storage of classified material.

On February 11, 2008, Applicant left employment with B, due to a RIF. (GE 3 at 1) Applicant received about an hour of notice, and an administrative assistant was present while Applicant cleared out his office. (Tr. 146-147) A manager from within Applicant’s division<sup>6</sup> was clearing his office on February 26, 2008, and found four documents in a file cabinet of security concern:

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<sup>6</sup> Applicant alleges RB was the person who discovered the classified material in Applicant’s file cabinet. (Tr. 57; AE U at 4) As indicated previously, Applicant had a personality conflict with RB. (Tr. 57) However, GB also had access to Applicant’s office after he left employment with B. (Tr. 59)

(1) Memorandum from a client dated August 1999, which was attached to a classified cover sheet.

(2) Document dated October 1999 on blue paper describing various processes for chemicals. In 1999, blue paper was used to designate a classified document.

(3) Document dated April 2003, with classified headers and footers removed by tearing. "This was apparently a copy that was being marked up for a work in progress." (GE 3 at 3)

(4) "Another apparent work in progress was a classified document with marker blackouts of some of the classified content." (GE 3 at 3) It is unclear whether additional classified information remained in the document.

The building where the documents were found is not a controlled area. (GE 3 at 1) Applicant's office is not a room where open storage of classified material is permitted. The cabinet where the documents were found is not approved for classified storage. (GE 3 at 1) For item one, Applicant noted that it would violate the NISPOM for a classified cover to be placed on an unclassified document, and that someone should have placed the classification markings on each page of the memorandum itself, if it actually was classified. (Tr. 61-62; AE U at 9)

For item two, Applicant said that blue paper was available near the copiers, and was sometimes used for unclassified purposes. (Tr. 61; AE U at 9) If someone left blue paper in the copier, Applicant could have copied something onto blue paper that was unclassified. (Tr. 61; AE U at 9)

For items three and four, Applicant explained that sometimes documents had specific parts of the documents marked as classified, and the overall document was classified. (Tr. 62-63; AE I, J; AE U at 9) If the user removed or redacted the classified parts, then the user could cross off or tear out the classification markings on the document. (Tr. 63-65, 95, 148) This scrubbing or declassification process was permitted by the employer. (Tr. 65, 128-130, 148; AE V; AE W) Applicant did not have any documentation authorizing this user-level declassification process. (Tr. 95-96) Applicant was a document control officer at B, and never had any instances where he was cited for improper handling of documents, or for losing accountability for assigned documents. (Tr. 77) Applicant was never cited for failing to sign-in or sign-out of controlled-access areas. (Tr. 68)

The security officer conducting the security violation investigation noted, "A detailed accounting of found classified documents was provided under separate cover to affected government agency on 2/28/08 for their assessment." (GE 3 at 3) The response to request for assessment is not part of the record evidence.

Applicant provided an affidavit from his current Director of Security, who indicated in August 2008, a U.S. Government Security Official telephonically advised



Applicant's company that Applicant "had not committed a classified security infraction." (AE B) The rationale for this determination is not part of the record.

Applicant's storage of classified materials was in violation of paragraphs 5-100, 5-303, and 5-306 of Department of Defense Manual 5220.22-M, *National Industrial Security Program Operating Manual (NISPOM)*. (February 28, 2006). The pertinent paragraphs are unchanged from the version in effect from July 31, 1997 to February 28, 2006, except as indicated in footnotes. Those three paragraphs provide:

**¶ 5-100. General.** Contractors shall be responsible for safeguarding classified information in their custody or under their control. Individuals are responsible for safeguarding classified information entrusted to them. The extent of protection afforded classified information shall be sufficient to reasonably foreclose the possibility of its loss or compromise.

**¶ 5-303. SECRET Storage.** SECRET material shall be stored in the same manner as TOP SECRET material without supplemental protection or as follows:<sup>7</sup>

a. A safe, steel file cabinet, or safe-type steel file container that has an automatic unit locking mechanism. All such receptacles will be accorded supplemental protection during non-working hours.<sup>8</sup>

b. Any steel file cabinet that has four sides and a top and bottom (all permanently attached by welding, rivets or peened bolts so the contents cannot be removed without leaving visible evidence of entry) and is secured by a rigid metal lock bar and an approved key operated or combination padlock. The keepers of the rigid metal lock bar shall be secured to the cabinet by welding, rivets, or bolts, so they cannot be removed and replaced without leaving evidence of the entry. The drawers of the container shall be held securely, so their contents cannot be removed without forcing open the drawer. This type cabinet will be accorded supplemental protection during non-working hours.

**5-306. Closed Areas.** Due to the size and nature of the classified material, or operational necessity, it may be necessary to construct Closed Areas for storage because GSA-approved containers or vaults are unsuitable or impractical. Closed Areas must be approved by the CSA and

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<sup>7</sup> The February 28, 2006 version of this subparagraph states, "**5-303. SECRET Storage.** SECRET material shall be stored in a GSA-approved security container, an approved vault, or closed area. Supplemental controls are required for storage in closed areas. The following additional storage methods may be used until October 1, 2012:"

<sup>8</sup> The February 28, 2006 version of this subparagraph states, "a. A safe, steel file cabinet, or safe-type steel file container that has an automatic unit locking mechanism. All such receptacles will be accorded supplemental protection during non-working hours."

be constructed in accordance with Section 8 of this Chapter. Access to Closed Areas must be controlled to preclude unauthorized access. This may be accomplished through the use of a cleared employee or by a supplanting access control device or system. Access shall be limited to authorized persons who have an appropriate security clearance and a need-to-know for the classified material/information within the area. Persons without the appropriate level of clearance and/or need to know shall be escorted at all times by an authorized person where inadvertent or unauthorized exposure to classified information cannot otherwise be effectively prevented. The Closed Area shall be accorded supplemental protection during non-working hours. During such hours, admittance to the area shall be controlled by locked entrances and exits secured by either an approved built-in combination lock or an approved combination or key-operated padlock. However, doors secured from the inside with a panic bolt (for example, actuated by a panic bar), a dead bolt, a rigid wood or metal bar, or other means approved by the CSA, will not require additional locking devices.<sup>9</sup>

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<sup>9</sup> The February 28, 2006 version of paragraph 5-306 states:

**5-306. Closed Areas.** Due to the size and nature of the classified material, or for operational necessity, it may be necessary to construct closed areas for storage because GSA-approved containers or vaults are unsuitable or impractical. Closed areas must be constructed in accordance with section 8 of this chapter. Access to closed areas must be controlled to preclude unauthorized access. This may be accomplished through the use of a cleared person or by a supplanting access control device or system. Access shall be limited to authorized persons who have an appropriate security clearance and a need-to-know for the classified material/information within the area. Persons without the appropriate level of clearance and/or need to know shall be escorted at all times by an authorized person where inadvertent or unauthorized exposure to classified information cannot otherwise be effectively prevented. Closed areas storing TOP SECRET and SECRET material shall be accorded supplemental protection during non-working hours. During non-working hours and during working hours when the area is unattended, admittance to the area shall be controlled by locked entrances and exits secured by either an approved built-in combination lock or an approved combination or key-operated padlock. It is not necessary to activate the supplemental controls during working hours. Doors secured from the inside with a panic bolt (for example, actuated by a panic bar, a dead bolt, a rigid wood or metal bar) or other means approved by the CSA, will not require additional locking devices.

a. Contractors shall develop and implement procedures to ensure the structural integrity of closed areas above false ceilings and below raised floors.

b. Open shelf or bin storage of SECRET and CONFIDENTIAL documents in closed areas requires CSA approval. For SECRET material only areas protected by an approved Intrusion Detection System (IDS) will qualify for such approval. Open shelf or bin storage of TOP SECRET documents is not permitted.

c. The CSA and the contractor shall agree on the need to establish, and the extent of, closed areas prior to the award of the contract, when possible, or when the need for such areas becomes apparent during contract performance.

a. Open shelf or bin storage of classified documents in Closed Areas requires CSA approval. Only areas protected by an approved intrusion detection system will qualify for such approval.

b. The CSA and the contractor shall agree on the need to establish, and the extent of, Closed Areas prior to the award of the contract, when possible, or at such subsequent time as the need for such areas becomes apparent during performance on the contract.

As an example of his timely compliance with security rules, Applicant said when he learned camera-cell phones were not permitted in the work area, he immediately scratched out the lens in his cell phone. (Tr. 74) He was commended by security staff for his conscientious enforcement of security rules. (Tr. 79) There were no security issues over the last two years at his current employment. (Tr. 79-80; AE B) He did not have any timecard violations. (Tr. 75) Applicant does not gamble, use illegal drugs, consume alcohol, or have a criminal record. (Tr. 75) He paid off about \$45,000 in student loans. (Tr. 75)

### **Character references**

On March 7, 2008, one of Applicant's colleagues at corporation B wrote that he was "shocked and appalled" that Applicant was RIF'd from his employment. (AE E) He described Applicant as a "class act" and urged Applicant not to "sink to their level." (AE E)

Applicant's church trusts Applicant to handle church funds. (Tr. 70) Applicant generously contributes \$400 to \$600 a month to his church. (Tr. 70-71)

Applicant received excellent ratings in the areas of reliability and dependability from his current employer. (Tr. 71, 97-98; AE D, AE T) He is proactive with safety and abides by security guidelines. (Tr. 71; AE D; E, T) In his 2009 rating, he received a top-level rating in reliability and dependability. (AE T at 2) Applicant's current employer has entrusted him with great leadership and supervisory responsibilities. (Tr. 72-73)

Applicant's Director of Security at his current employment has an exceptional background in security and counter intelligence, which makes him an extraordinary character witness on Applicant's behalf. (AE S) The Director of Security described Applicant as "100% security compliant", and very honest and trustworthy. (AE S) There were no records of security infractions at his current employment. (AE B) Applicant "has diligently complied with all security requirements, especially as pertains to the handling, maintenance and protection of classified material." (AE B) He makes valuable contributions to his corporations security team. (AE S) He highly recommends that Applicant retain his security clearance. (AE S)

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d. The CSA may grant self-approval authority to the FSO for closed area approvals provided the FSO meets specified qualification criteria as determined by the CSA.

Applicant's current supervisor lauded Applicant's performance of duty, diligence, dependability, reliability, integrity, and trustworthiness. (AE C) Applicant is conscientious about security and follows security procedures. He recommends Applicant for further work with classified materials and projects.

A scientist-colleague, who worked with Applicant at corporation B, has known Applicant for 10 years. He lauds Applicant's "exceptionally high personal and professional ethics" and loyalty to the United States. (AE V) He supports reinstatement of Applicant's security clearance. (AE V)

Another scientist-researcher at B (W) has worked with Applicant for several years. (AE W) W describes Applicant as hardworking, passionate, careful, and helpful. (AE W) W disclosed that W had been disciplined and removed from his position for insubordination in 2000. (AE W) W described improper conduct by MT, GB, and RB. (AE W)

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicant's eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. See *also* Executive Order 12968 (Aug. 2, 1995), § 3.1. Thus, 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. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a security clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996). The DOHA Appeal Board has repeatedly stated:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. "The application of disqualifying and mitigating conditions and whole person factors does not turn simply on a finding that one or more of them apply to the particular facts of a case. Rather, their application requires the exercise of sound discretion in light of the record evidence as a whole."

ISCR Case No. 09-01015 at 3 (App. Bd. July 16, 2010); ISCR Case No. 07-16427 at 2 (App. Bd. Feb. 4, 2010); ISCR Case No. 07-16841 at 4 (App. Bd. Dec. 19, 2008).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guideline K (handling protected information) and E (personal conduct).

## Handling Protected Information

AG ¶ 33 articulates the security concern relating to handling protected information:

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 provides nine handling protected information disqualifying conditions that could raise a security concern:

(a) deliberate or negligent disclosure of classified or other protected information to unauthorized persons, including but not limited to personal or business contacts, to the media, or to persons present at seminars, meetings, or conferences;

(b) collecting or storing classified or other protected information at home or in any other unauthorized location;

(c) loading, drafting, editing, modifying, storing, transmitting, or otherwise handling classified reports, data, or other information on any unapproved equipment including but not limited to any typewriter, word processor, or computer hardware, software, drive, system, gameboard, handheld, "palm" or pocket device or other adjunct equipment;

(d) inappropriate efforts to obtain or view classified or other protected information outside one's need to know;

(e) copying classified or other protected information in a manner designed to conceal or remove classification or other document control markings;

(f) viewing or downloading information from a secure system when the information is beyond the individual's need-to-know;

(g) any failure to comply with rules for the protection of classified or other sensitive information;

(h) negligence or lax security habits that persist despite counseling by management; and

(i) failure to comply with rules or regulations that results in damage to the National Security, regardless of whether it was deliberate or negligent.

On March 7, 2008, a security investigation concluded that four documents found in a filing cabinet, not authorized for storage of classified materials, raised security

concerns: (1) August 1999 memorandum from a client, which was attached to a classified cover sheet; (2) October 1999 document on blue paper describing various processes for chemicals. In 1999, blue paper was used to designate a classified document; (3) April 2003 document with classified headers and footers removed by tearing. "This was apparently a copy that was being marked up for a work in progress;" and (4) "Another apparent work in progress was a classified document with marker blackouts of some of the classified content." The investigation does not establish by substantial evidence that items one, three, and four were classified. They were not properly marked as classified. The employer permits employees to declassify documents by scrubbing or deleting the information they believe is classified and then marking through the classification or removing the classification markings. The file does not contain an "assessment" from the classification authority establishing that the three documents were classified.

I conclude item two was established by substantial evidence to be a classified document. See discussion of "substantial evidence" in Policies section, *supra*. The contents of the document were printed on blue paper, which the employer used for classified documents. "There is a rebuttable presumption of regularity in administrative proceedings." ISCR Case No. 07-15235 at 3 (App. Bd. Oct. 3, 2008). Accordingly, I must presume the blue document was actually classified. I am not convinced that Applicant's supervisor, program manager, or anyone else placed the classified document into Applicant's file cabinet and then "discovered it" after Applicant had already left employment with corporation B. The storage cabinet was not an authorized storage location for the classified document. I conclude Applicant negligently, as opposed to deliberately, failed to comply with the rules for storage of classified material. AG ¶¶ 34(b) and 34(g) apply and further inquiry is necessary about the applicability of any mitigating conditions.

AG ¶ 35 lists three conditions that could mitigate security concerns stating:

(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;

(b) the individual responded favorably to counseling or remedial security training and now demonstrates a positive attitude toward the discharge of security responsibilities; and

(c) the security violations were due to improper or inadequate training.

None of the mitigating conditions fully apply. The classified document was discovered on February 26, 2008, which is relatively recent. Applicant did not accept full responsibility for improper storage of the classified document. Applicant had sufficient training to understand his security responsibilities. He demonstrates a positive attitude towards security; however, the passage of more time without any security violations is necessary before handling protected information concerns can be mitigated.

## 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.

Three personal conduct disqualifying conditions under AG ¶¶ 16(c), 16(d)(2), and 16(d)(3), are potentially applicable. Those three disqualifying conditions provide:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, 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; and

(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:

(2) disruptive, violent, or other inappropriate behavior in the workplace; and

(3) a pattern of dishonesty or rule violations.

AG ¶¶ 16(c) and 16(d)(2) apply; however, AG ¶ 16(d)(3) does not apply. Applicant failed to ensure a classified document was properly stored, which is a rule violation; however, additional rule violations are not established and there is no pattern of rule violations. Applicant missed work on January 8, 2007, and was unsure whether anyone told his supervisor he would not be present for duty. There is insufficient evidence that he intentionally violated a leave policy. (SOR ¶ 2.b) A memorandum alleges Applicant had unexplained absences from January 2004 to September 2004; however, there is no specific evidence about when these absences occurred. They are too vague to be substantiated (SOR ¶ 2.c) The allegation that Applicant failed to comply with procedures as outlined in the December 9, 2004, memorandum is not established by substantial evidence. (SOR ¶ 2.d)



On December 9, 2004, management issued a memorandum alleging Applicant engaged in unprofessional behavior in the workplace. (SOR ¶ 2.e) It alleged he posted a sign on his office door concerning his priorities, and he sent an email to his manager about the stressful, unrewarding work on a particular project. The sign on his door was inappropriate behavior because it was basically a statement that he was not going to work on low priority projects. The tone of the email to his manager was sufficiently negative to constitute inappropriate behavior in the workplace. This conduct shows questionable judgment and establishes AG ¶ 16(d)(2). Additionally, a classified document was discovered in his office in February 2008 after he left employment with corporation B. (SOR ¶¶ 1.a and 2.a) The 2008 security violation and his 2004 inappropriate behavior in combination as part of a “whole-person assessment” establish AG ¶ 16(c).

Four mitigating conditions under AG ¶ 17 are potentially applicable:

(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 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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

Any security concerns raised under SOR ¶¶ 2.b, 2.c, and 2.d is mitigated under AG ¶¶ 17(c), 17(e), and 17(f). For example, when Applicant was absent from work on January 8, 2007, there were excellent extenuating circumstances. He was the pilot of a plane that crashed, and he called colleagues to let them know he would miss one day of duty. His supervisor showed poor judgment when she failed to incorporate extenuating facts in her counseling statement. (GE 8 at 2) The allegation that he had unexplained absences from January 2004 to September 2004 has been rebutted. Applicant said he was not aware of any unexplained absences, and there is no documentation describing a single unauthorized absence during this time period. The allegation that Applicant failed to comply with procedures as outlined in the December 9, 2004 memorandum is unsubstantiated. Applicant provided some evidence of his excellent character for honesty, reliability, and trustworthiness. His evaluations, awards, and character witnesses opine that he is trustworthy and has good judgment.

SOR ¶¶ 2.a and 2.e are established and not fully rebutted. Applicant failed to ensure a classified document was properly stored. Applicant's unprofessional behavior

in the workplace in 2004 would be mitigated but for the unfair, derogatory statements he subsequently made to management that are not listed in the SOR.<sup>10</sup> Applicant's supervisor had a right to ask to go to the conference in lieu of Applicant's attendance. Management had a right to send whomever they wanted to the conference. Applicant's claim that it was unethical or dishonest to send his supervisor to the May 7 and 8, 2007 conference is unwarranted and inappropriate conduct. His refusal to accept the judgment of the ethics investigation and his response to his evaluation shows poor judgment. In July 2007, he wrote a four-page letter to his CEO, and in his response to his January 8, 2008, performance review, he used intemperate, disrespectful language that showed he had not learned that such language was unprofessional and showed poor judgment. His comments in 2007 and 2008 were insubordinate, inappropriate, and disrespectful, and such behavior is likely in the future, if he has a dispute with his employers over decisions the employer makes. More time is necessary without Applicant engaging in abusive conduct before personal conduct security concerns will be fully alleviated.

### **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.

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<sup>10</sup>The SOR did not allege that Applicant made insubordinate, disrespectful, and derogatory comments about his supervisor and manager concerning his supervisor's attendance at the May 7 and 8, 2007 conference, in a four-page letter in July 2007 to his CEO, and in his response to his January 8, 2008, performance review. In ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) the Appeal Board listed five circumstances in which conduct not alleged in an SOR may be considered stating:

- (a) to assess an applicant's credibility;
- (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances;
- (c) to consider whether an applicant has demonstrated successful rehabilitation;
- (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or
- (e) to provide evidence for whole person analysis under Directive Section 6.3.

(citing ISCR Case No. 02-07218 at 3 (App. Bd. Mar. 15, 2004); ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003)). I have considered the non-SOR misconduct for purposes of (a), (b), (c), and (e), and not for any other purpose.

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. AG ¶ 2(c). I have incorporated my comments under Guidelines K and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Although the rationale for reinstating Applicant's clearance is insufficient to support access to classified information at this time, there are several factors tending to support approval of his clearance. Applicant is 43 years old. He is sufficiently mature to understand and comply with his security responsibilities. He has a lengthy history of timely compliance with security rules, with only one documented exception. He was commended by security staff for his conscientious enforcement of security rules. The Security Director at his present employment has an extraordinary security background, and he vouches for Applicant's trustworthiness and reliability. There were no security issues over the last two years at his current employment. He did not have any timecard violations. Applicant does not gamble, use illegal drugs, consume alcohol, or have a criminal record. He deserves substantial credit for volunteering to support the U.S. Government as an employee of a contractor. There is every indication that he is loyal to the United States and his current employer. His previous employment was a stressful environment for him, and providing some extenuation for the intemperate comments he made to his supervisory chain. Several character witnesses laud his diligence, professionalism, and responsibility. I give Applicant credit for admitting that he made the insubordinate, disrespectful statements about management at the company where he was previously employed. I accept his statement as truthful that he does not remember ever storing the classified document (on blue paper) in his filing cabinet. These factors show some responsibility, rehabilitation, and mitigation.

The whole-person factors against reinstatement of Applicant's clearance are more substantial at this time. He stored a classified document in an improper container at some time prior to its discovery in February 2008, risking its compromise. He has a history of intemperate, insubordinate, and disrespectful comments to management in 2004, 2007, and 2008. His relationship with management at corporation B raises questions about his judgment reliability, trustworthiness and ability to protect classified information.

I have carefully applied the law to the facts and circumstances in the context of the whole person, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs. I conclude Applicant has not fully mitigated the handling protected information and personal conduct concerns at this time. The passage of more time is necessary without conduct raising a security concern before granting access to classified information will be warranted.

## 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 K:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraphs 2.b to 2.d:	For Applicant
Subparagraph 2.e:	Against Applicant

## Conclusion

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

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MARK HARVEY  
Administrative Judge