



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



In the matter of: )  
 )  
 ) ISCR Case No. 09-05052  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: William T. O'Neil, Esquire, Department Counsel  
For Applicant: *Pro se*

July 13, 2011

**Decision**

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ANTHONY, Joan Caton, Administrative Judge:

After a thorough review of the pleadings and exhibits in this case, I conclude that Applicant failed to rebut or mitigate the Government's security concerns under the personal conduct adjudicative guideline. His eligibility for a security clearance is denied.

**Statement of Case**

Applicant completed a Questionnaire for National Security Positions (SF 86) on June 4, 2007. On January 13, 2011, the Defense Office of Hearings and Appeals (DOHA) issued 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.

On February 22, 2011, DOHA received Applicant's written answer to the SOR. He requested that his case be determined on the written record in lieu of a hearing. On April 15, 2011, the Government compiled its File of Relevant Material (FORM). The FORM contained documents identified as Items 1 through 7. By letter dated April 15, 2011, DOHA forwarded a copy of the FORM to Applicant, with instructions to submit any additional information or objections within 30 days of receipt. Applicant received the FORM on May 3, 2011. His response was due on June 2, 2011. Applicant filed additional information within the required time period. On June 24, 2011, DOHA assigned the case to me for a decision. I marked Applicant's submission as Item A and admitted it, without objection, to the record.

### **Findings of Fact**

The SOR contains eight allegations of disqualifying conduct under Guideline E, Personal Conduct (SOR ¶¶ 1.a. through 1.h.). In his Answer to the SOR, Applicant admitted seven of the eight allegations (SOR ¶¶ 1.a., 1.b., 1.d., 1.e., 1.f., 1.g., and 1.h.). He denied the allegation at SOR ¶ 1.c. Applicant's admissions are entered as findings of fact. (Item 1; Item 4.)

Applicant is 41 years old and employed by a government contractor. He has been married twice. He is the father of two children. Applicant pays child support to his first wife for his older child, who resides with his mother in another state. Applicant's second wife, his younger child, and a stepchild reside in his household. (Item 5.)

Applicant earned a Bachelor of Science degree in May 2001. He has worked for his present employer since August 2007. (Item 5; Item 6.)

In November 1989, Applicant enlisted in the United States military and was trained as a patient administration specialist. The SOR alleges at ¶ 1.h. that in 1990, when he was about 20 years old, Applicant was charged with vandalism. The SOR further alleges that when Applicant failed to appear in court, authorities in the county where he was charged issued a warrant for his arrest. The warrant was later purged and the case was dismissed. Applicant admitted that allegation and reported that his grandmother ordered him out of her house when she learned of the vandalism charge. He provided additional information about dismissal of the case. (Item 1; Item 4; Item 7.)

In 1993, Applicant and his wife had a serious argument which resulted in Applicant assaulting his wife. He was charged with assault, pursuant to Article 128 of the Uniform Code of Military Justice (UCMJ). He was subjected to administrative discipline, given a written reprimand, and referred to social work services by his command. This personal conduct is alleged at SOR ¶ 1.g. (Item 1; Item 4; Item 7.)

Applicant's military records show that in November 1995, he was disrespectful to an appointed leader, his floor sergeant, and he was also disrespectful toward a commissioned officer. His military records also show that in December 1995, Applicant

failed to report for duty on time, and he showed disrespect toward a noncommissioned officer. This personal conduct is alleged at SOR ¶ 1.f. (Item 1; Item 4; Item 7 at 2.)

The SOR alleges at ¶ 1.e. that, in May 1996, Applicant violated unit policy by taking a Government vehicle, without authorization, and driving it to another military installation for the purpose of visiting his friends there. He was charged with misappropriation of a Government vehicle. His security clearance was suspended. Under Article 15, UCMJ, Applicant was reduced in rank to private first class and discharged under Other Than Honorable Conditions. He was barred from reenlistment. (Item 4; Item 6 at 9; Item 7.)

In November 1998, Applicant was terminated from a position when he failed to perform according to standards. This personal conduct is alleged at SOR ¶ 1.d. (Item 1; Item 4; Item 5 at 8.)

Applicant returned to military service in June 2001 and served on active duty as an officer. He was deployed to war zones from January through July 2004 and from January to October 2005. In September 2005, one of Applicant's subordinates filed a written complaint against him alleging sexual harassment. In October 2005, a general officer memorandum of record of sexual harassment was issued against Applicant. In November 2005, Applicant resigned from military service. This personal conduct was alleged at SOR ¶ 1.b. (Item 1; Item 4; Item 6 at 6-7, 10, 12-13.)

In September 2006, Applicant was terminated from a civilian job following a sexual harassment complaint from a female coworker. This personal conduct was alleged at SOR ¶ 1.a. (Item 1; Item 4; Item 5 at 8; Item 6 at 5-6.)

At ¶ 1.c., the SOR alleged that, in about January 1999, Applicant was charged with Peace Disturbance at a military installation. Applicant denied the allegation. I could find nothing in the record to corroborate the allegation. (Item 1; Item 4.)

In his response to the FORM, Applicant acknowledged the personal conduct that raised security concerns. He denied that this conduct was related to any compromise of classified information, and he asserted that he always gave national security top priority. He opined that those who were serious security risks were not investigated as thoroughly as he was. He did not discuss how he would prevent recurrence of the personal conduct in the future. (Item A.)

Nothing in the record establishes that Applicant received counseling to change the behavior that raised security concerns. He did not provide information indicating that he had otherwise attempted to alleviate the stressors that had caused the behavior, thereby making the behavior less likely to recur.

## 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 that “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 applicants 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.

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). 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, the administrative judge applies these guidelines 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.

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. . . .” The applicant has the ultimate burden of persuasion in seeking 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 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.

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 explains why personal conduct is a security 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.

The SOR alleges that Applicant is responsible for eight specific acts that raise security concerns under the personal conduct adjudicative guideline. Applicant admitted seven of the eight allegations. He denied the allegation at SOR ¶ 1.c. I was unable to find record evidence in the FORM establishing the controverted facts in allegation 1.c. (See Directive ¶ E3.1.14.) Accordingly, I conclude allegation 1.c. for Applicant.

However, the record does establish that between 1990 and 2006, Applicant’s personal conduct, on at least seven occasions, demonstrated questionable judgment and an unwillingness to comply with rules and regulations. This personal conduct created in Applicant a vulnerability to exploitation and, if known, could affect his personal and professional standing. Applicant’s personal conduct raises security concerns under AG ¶¶16(d)(2), 16(d)(3), and 16(e). AG ¶ 16(d) reads, in pertinent part, as follows:

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(e) reads, in pertinent part: “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 . . . .”

AG ¶¶ 17(c), 17(d), and 17(e) provide conditions that could mitigate security concerns in this case. AG ¶ 17(c) reads: “the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment. AG ¶ 17(d) reads: “the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” AG ¶ 17(e) reads: “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.”

The record establishes that the personal conduct that raised security concerns began in about 1989 and continued until at least 2006, one year before Applicant completed his SF 86. The alleged actions, which Applicant admitted, were serious and included allegations of sexual harassment in the workplace, a job termination for failure to perform according to standards, misappropriation of Government property, disrespect directed at individuals in his military chain of command, reporting late for military duty, spousal assault, and vandalism.

Nothing in the record establishes that Applicant obtained counseling or took positive steps to alleviate the stressors that led to his inappropriate behavior in the workplace and his pattern of rule violations that spanned a period of at least 16 years. Additionally, Applicant failed to demonstrate that he had taken positive steps to reduce or eliminate the vulnerability to exploitation, manipulation, or duress that his personal conduct could generate. Accordingly, I conclude that AG ¶¶ 17(c), 17(d), and 17(e) do not apply in mitigation to the facts of Applicant’s case.

### **Whole-Person Concept**

Under the whole-person concept, an administrative judge must evaluate an applicant’s eligibility for a security clearance by considering the totality of the applicant’s conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual’s age and maturity at the time of the conduct;
- (5) the extent to

which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

The SOR alleged personal conduct over a period of 16 years that raised security concerns. In his response to the FORM, Applicant acknowledged the personal conduct but did not address its ongoing seriousness or discuss how he intended to ensure that it would not recur. Applicant requested a decision on the written record. The written record in this case is sparse. Moreover, without an opportunity to assess Applicant's credibility at a hearing, I am unable to conclude that he met his burden of persuasion in mitigating the Government's allegations under the Personal Conduct adjudicative guideline.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For these reasons, I conclude Applicant failed to mitigate security concerns arising from his personal conduct.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a. - 1.b.:	Against Applicant
Subparagraph 1.c.:	For Applicant
Subparagraphs 1.d. - 1.h.:	Against Applicant

### **Conclusion**

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

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Joan Caton Anthony  
Administrative Judge