DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
(Redacted)	)	ISCR Case No. 09-07132
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Eric Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

February 11, 2011

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines E (Personal Conduct) and J (Criminal Conduct). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on March 10, 2009. On July 21, 2010, the Defense Office of Hearings and Appeals (DOHA) sent her a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny her application, citing security concerns under Guidelines E and J. 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) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on July 27, 2010. She answered it on the same day, denied all the allegations, and requested a determination on the record without a

hearing. DOHA received the request on August 2, 2010. Department Counsel requested a hearing on August 10, 2010, and was ready to proceed on October 31, 2010. The request for a hearing is attached to the record as Hearing Exhibit I. The case was assigned to me on November, 3, 2010. DOHA issued a notice of hearing on November 12, 2010, scheduling it for December 9, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified but presented no witnesses or documents. DOHA received the transcript (Tr.) on December 20, 2010.

Findings of Fact

Applicant is a 38-year-old property administrator employed by a federal contractor since January 2009. She was employed by another federal contractor from February 1989 until November 2008, and she was granted a security clearance in July 2006, while working for her former employer.

Applicant was married in September 1989 and separated in November 2002. She has a 15-year-old son who lives with her.

In March 1990, while working for another employer, Applicant received a written warning for "[p]articipating in the harassment of co-workers," "[r]idiculing and embarrassing co-workers," and "[i]n general, participating in actions that created a negative [and] counter-productive atmosphere in the work area." (GX 4 at 5.) Applicant testified that she received the warning because she and a coworker were laughing and joking while working on an assembly line, and a third coworker thought they were laughing at her and filed a complaint. (Tr. 41-42.) There is no other evidence in the record pertaining to the March 1990 warning. The warning is alleged in SOR ¶ 1.b.

The conduct alleged in SOR ¶ 1.a occurred in November 2008, while Applicant was working for her previous employer. Applicant and her coworkers frequently brought snacks to work and shared them. The snacks usually were placed on a table in her work area. Their supervisor was temporarily assigned from another location to replace the regular supervisor, who was called to active duty in the Army Reserve. (Tr. 45.) The temporary supervisor participated in consuming the snacks, and he quickly gained a reputation for voracious and indiscriminate eating. Applicant and her coworkers often joked that he would eat anything, even if it fell on the floor or was dropped into dog feces. (GX 3 at 2; Tr. 38.) They joked about urinating on a lollypop and leaving it on the snack table to see if he would eat it. They also joked about smearing raw chicken juice on his computer keyboard, injecting raw chicken juice into cookies, and smearing dog feces on the handle of his car door. Applicant testified that the conversations did not go beyond joking, because it would be "insane" to seriously plan any such conduct. (GX 4 at 13; Tr. 47-49.)

One of Applicant's coworkers was a former boyfriend, now a platonic friend. He was a prankster, and he once put Tabasco sauce into a soft drink being consumed by

Applicant's 15-year-old son. (Tr. 61.) He participated in the joking about their supervisor's eating habits.

On the morning of November 17, 2008, Applicant brought a box of cookies to work. The cookies were a variety that their supervisor especially enjoyed. (Tr. 44.) She put them on the desk behind her instead of the usual snack table. During their morning break, she and her friend speculated how much time would pass before their supervisor ate the cookies. Shortly thereafter, the supervisor asked her for some of the cookies. (Tr. 36.) After the supervisor departed with the cookies, Applicant sent an email to her friend, saying, "OMG he just ASKED me for the cookies . . . . HOLY (expletive)." Her friend responded, "HA HA HAAAA . . . YOU ASK FOR IT . . . YOU GOT IT! HA HA HAAAAA." (GX 4 at 7.)

Applicant testified at the hearing that she capitalized "asked" in her email because it was unusual for their supervisor to ask permission to share the snacks. Usually, he simply took them and ate them. (Tr. 57.)

About a week earlier, Applicant's prankster friend had conducted multiple Internet searches on topics such as food poisoning, salmonella, and e-coli. The searches were discovered on his company computer during the investigation into suspected food contamination. (GX 4 at 3.)

On the afternoon of November 19, 2008, two days after consuming the cookies, the supervisor told Applicant that his stomach was a "little upset." He cancelled a lunch date at a pizza restaurant and left work toward the end of the day. (Tr. 46.)

On the same afternoon, Applicant had an email exchange with another former boyfriend, who had lived with Applicant for about a year. This boyfriend's email address indicates that he was deployed overseas and working for the same supervisor. Two days earlier, the supervisor had commended Applicant for "doing a lot to keep him on track." (GX 4 at 21.) Applicant testified she "got along very well" with her supervisor. (Tr. 55.)

Applicant and the deployed former boyfriend engaged in a sexually suggestive email dialog in which the former boyfriend addressed Applicant as "cookie girl," leading investigators to suspect a relationship between the email exchange and the cookies consumed by the supervisor on November 17, 2008. (GX 4 at 8-12.) Applicant testified that the former boyfriend referred to a part of her body as her cookie, and that the email exchange had nothing to do with the cookies consumed by their supervisor. (Tr. 40.)

On November 20, 2008, a female coworker who had participated in the joking about the supervisor's eating habits told the supervisor and the human relations office that she suspected Applicant and her friend of tainting the cookies. She reported that she had asked Applicant "if they had done that thing to the cookies," and Applicant had admitted it. (GX 5.) At the hearing, Applicant remembered the female coworker asking the question, but she denied admitting that she did anything to the cookies. To the

contrary, Applicant testified that when she realized her female coworker was serious, she answered, "No." (Tr. 48-49, 51.)

Applicant was interviewed by company investigators at her home on November 21, 2008. According to the investigator's summary of the interview, Applicant denied discussing pranks, but admitted that she and her coworkers often joked among themselves. She denied talking about doing anything to their supervisor. She denied knowing anything about bringing raw chicken to work. The investigator asked if the female coworker asked her if she did "that thing to the cookies." According to the interview summary, Applicant responded, "Hmmm. No, we were joking around." (GX 4 at 13.) When Applicant said that the cookies were store wrapped, the investigator said they were injected through the wrapping paper. Applicant replied, "No . . . Is [the supervisor] really sick?" (GX 4 at 17.)

When the investigator showed Applicant the email she sent to her prankster friend after her supervisor took the cookies, Applicant responded: "Oh, that is about how he eats everything. Everyone knows that he eats everything. I just thought that it was funny." Regarding her friend's response to her email, she commented, "Oh, it could have been about anything." The investigator asked, "Like what?" and she responded, "I don't remember." When the investigator asked why she did not remember an event only a few days ago, Applicant said, "[W]e are always joking around." (GX 4 at 13-17.) At the hearing, Applicant disputed the accuracy of the investigator's summary, and she adhered to her benign characterization of the email exchange. (Tr. 57-58.) The investigator did not testify.

The investigator's notes, which are separate from the summary of the interview, recite that Applicant's female coworker asked her if she did "the thing with the cookies," and Applicant responded, "Yes, [Applicant's friend] injected so much in." (GX 4 at 19.) Applicant testified that this conversation never happened. (Tr. 51.)

Applicant was asked at the hearing if she knew whether her friend contaminated the cookies. She responded, "I do not know." She was then asked, "Did you ever ask him?" She responded: "I believe I have asked him. And he said no, he did not. He just likes to joke around, you know." (Tr. 53.)

Applicant was fired for email abuse and for conspiring with her prankster friend and carrying out a plan "to taint or poison" the cookies intended for consumption by their supervisor. (GX 4 at 1.) Her prankster friend also was fired. The female coworker who reported the incident was suspended for one week for encouraging Applicant and her friend and for waiting at least 18 hours to report it. (GX 5.) In December 2008, Applicant's former employer filed an adverse information report with the Defense Industrial Clearance Office, setting out its report of the facts underlying her termination. (GX 4 at 3.) Her termination and the reasons for it are alleged in SOR ¶ 1.a.

The SOR recites that "email abuse" was one of the two grounds for terminating Applicant. The notice of termination refers to Applicant's email exchange with her

deployed former boyfriend on November 19, 2008. Applicant testified she was told that the email abuse recited in her termination notice was based on the fact that she had received and forwarded email with "curse words" and jokes. (Tr. 52.)

Applicant applied for unemployment benefits and was determined to be eligible for benefits effective December 1, 2008. Her former employer objected and requested a hearing before an administrative law judge, contending that she was ineligible for benefits because she had been fired for misconduct. The company investigator who interviewed Applicant attended the hearing, but the coworker who accused Applicant and her friend of giving their supervisor a tainted cookie did not attend. The administrative law judge accepted Applicant's sworn denial of misconduct over the "hearsay contentions of the employer" and awarded Applicant unemployment benefits. (Attachment to Applicant's Answer to the SOR.)

In March 2009, Applicant applied to continue her security clearance after starting her current job. In an interview with a security investigator in September 2009, Applicant denied tainting the cookies or planning to do anything to her supervisor. She stated that she was falsely accused by a jealous and troubled female coworker. (GX 3 at 2-3.)

Policies

"[N]o 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "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. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a 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 (4th 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. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

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). "[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

Guideline E, Personal Conduct

The SOR alleges that Applicant was terminated in November 2008 for "[her] role in conspiring with another employee to taint or poison a package of oatmeal cookies" intended for consumption by a coworker and "for using the company intranet to send an email of an inappropriate nature." (SOR ¶ 1.a.) It also alleges that she received a written warning from her employer in March 1990 for participation in the harassment of coworkers, ridiculing and embarrassing coworkers, and "participation in actions that created a negative and counter-productive atmosphere in the work area." (SOR ¶ 1.b.)

The security concern under this guideline is set out in AG ¶ 15: "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." The relevant disqualifying conditions under this guideline are:

> AG ¶ 16(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;
>
> AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and
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> AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The administrative law judge's determination to award unemployment benefits to Applicant is not binding on me. Nevertheless, I share his concern about the lack of credible evidence of misconduct.

During the company investigation, Applicant indicated she was unaware of her supervisor's ailment, but at the security clearance hearing she described her conversation with him about his upset stomach. When questioned by the company investigator, she denied discussing possible pranks among her coworkers, but at the hearing she described the joking about their supervisor's eating habits and joking about various unsanitary pranks.

I have considered Applicant's exclamatory email to her prankster friend, her implausible explanation for the exclamatory email, the fact that she positioned the cookies at a different location other than the snack table where coworkers other than her supervisor might consume them, her evasiveness during her interview by company investigators, and the fact that she asked her friend if he had done something to the cookies. These facts, considered together, suggest that she suspected that her prankster friend had done something to the cookies. There is no evidence that she personally contaminated the cookies.

Neither the supervisor nor the company investigator testified. There is no evidence showing what, if anything, was injected into the cookies, and no indication that anything particularly toxic was ingested by the supervisor. The fact that their supervisor did not exhibit any symptoms for two days makes the connection between his consumption of the cookies and his upset stomach tenuous. There is no evidence, medical or otherwise, of the nature of his ailment. Even considering the evidence in the

light most favorable to the Government, the most that it establishes is the possibility that Applicant suspected a prank and did nothing to stop it or report it.

The warning letter delivered to Applicant in 1990 is 20 years old. The only evidence reflecting the basis for it is Applicant's testimony, and she portrays a benign event.

The sparse evidence pertaining to SOR ¶ 1.a raises a question whether there is substantial evidence of misconduct of the type contemplated by Guideline E. Mindful of my obligation to err on the side of national security, I have concluded that the disqualifying conditions in AG ¶ 16(c), (d), and (e) are raised by the evidence showing Applicant's questionable judgment on the morning of November 17, 2008; the inappropriate email exchange on November 19, 2008; and the resulting damage to her professional standing. Thus, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Security concerns based on personal conduct may be mitigated if "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(c). All the incidents at issue involved minor misconduct in the workplace. None occurred under unique circumstances. On the other hand, the warning letter is 20 years old. Applicant worked for her former employer for almost 20 years and held a security clearance for 15 years, apparently without incident. After evaluating these incidents in the context of her entire employment record, I conclude that they do not cast doubt on her current reliability, trustworthiness, and good judgment. Thus, I conclude that AG ¶ 17(c) is established.

Security concerns raised by personal conduct may be mitigated if "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." AG ¶ 17(d). Applicant has denied any involvement in the cookie incident, but she acknowledged her inappropriate email correspondence and her conduct underlying the 1990 warning. She is working in a different environment with different coworkers and a different supervisor. I conclude that AG ¶ 17(d) is established for the March 1990 incident but not for the November 2008 incident.

Finally, security concerns under this guideline may be mitigated if "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." AG ¶ 17(e). This mitigating condition is established by Applicant's disclosure of her unfavorable termination of employment on her security clearance application and during the ensuing background investigation.

Guideline J, Criminal Conduct

The SOR cross-alleges the conduct in SOR ¶ 1.a under this guideline, apparently on the theory that contaminating a person's food constitutes a battery. No specific criminal statute or theory of criminality is alleged. There is no evidence that Applicant conspired to contaminate the cookies or participated in actual contamination of the cookies. There is no evidence that Applicant did anything to conceal a crime or prevent the capture of the criminal. She may have failed to act on her suspicions, but that failure was not a crime. There is no evidence that her inappropriate email exchange violated any criminal statutes.

The SOR also cross-alleges the conduct in SOR ¶ 1.b, but the conduct described by Applicant as the basis for the letter of warning does not rise to the level of criminal conduct. I conclude that the Government did present substantial evidence of criminal conduct. Thus, I resolve the cross-allegations in SOR ¶ 2.a in Applicant's favor.

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

Applicant worked for her former employer for almost 20 years and held a clearance for almost 15 years without incident. I have considered the 20-year-old warning letter and determined that it has minimal probative value. The inappropriate email exchange was a minor infraction. The cookie incident appears to have been an isolated incident that occurred in an informal and loosely disciplined workplace. I have considered Applicant's apparent evasiveness when she was interviewed by a company investigator. Either she did not take the incident seriously, or she was protecting her

prankster friend. Since the SOR did not allege that she made false statements to the investigator, I have considered her apparent evasions for the limited purpose of evaluating her credibility and in my whole-person analysis.

I have weighed Applicant's possible involvement in an inappropriate prank, her evasive responses to a company investigator, her implausible explanation for her email exchange with her prankster friend, and her use of inappropriate language in internal emails. I have weighed this adverse information against her long service while holding a security clearance, her positive attitude, and her desire to continue serving, and I have concluded that the evidence is insufficient to raise doubts about her current reliability, trustworthiness, and good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines E and J, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has mitigated the security concerns based on personal conduct. The allegations of criminal conduct are not supported by substantial evidence. Accordingly, I conclude she has carried her burden of showing that it is clearly consistent with the national interest to continue her eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

I conclude that it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge