



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



In the matter of: )  
)  
) ISCR Case No. 09-07352  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: David F. Hayes, Esquire, Department Counsel  
For Applicant: *Pro se*

March 9, 2011

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant’s immaturity led to his questionable behavior. He was forthcoming and candid during the security clearance process. He received training about ethical behavior dealing with information technology (IT) and the handling of classified and proprietary information. He expressed sincere remorse for his past questionable behavior and understands that it could adversely impact on his ability to hold a security clearance. He has matured into a good husband and responsible employee. His questionable behavior is not recent, it is unlikely to recur, and it does not cast doubt on Applicant’s current judgment, reliability, and trustworthiness. Applicant mitigated security concerns under Guideline E.

**Statement of the Case**

Applicant submitted a security clearance application on February 19, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary

affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

On June 23, 2010, DOHA issued Applicant a statement of reasons (SOR), which specified the basis for its decision – security concerns under Guideline E (Personal Conduct) of the adjudicative guidelines (AG).<sup>2</sup>

Applicant responded to the SOR allegations (undated) and requested a hearing before an administrative judge. The case was assigned to me on September 23, 2010, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on October 4, 2010, and the hearing was convened as scheduled on October 15, 2010.

The Government offered exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified, and he presented exhibits (AE) 1 through 3, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on October 22, 2010.

### **Procedural Issues**

Applicant agreed to his hearing date 15 days in advance of his hearing. At hearing, he also waived his right to 15 days notice of his hearing. (Tr. 15)

### **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a and 1.c, with explanations. He denied the factual allegations in SOR ¶¶ 1.b through 1.b(vi). His admissions are incorporated here as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following findings of fact.

Applicant is a 28-year-old computer engineer working for a large government contractor. He graduated from high school in 2000. Between 2000 and 2004, he attended a preeminent U.S. university and received a bachelor's degree in computer engineering with a 3.5 grade point average (GPA). He completed his master's degree in computer engineering in 2009, with a 4.0 GPA. He married his wife in 2009. They have no children. His wife works for a government agency. He testified she has access to classified information at the top secret level.

While in college, during the summer of 2003, Applicant worked for a military agency and received access to classified information at the secret level. In late 2003,

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<sup>1</sup> Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

<sup>2</sup> Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

Applicant was hired while still at college by his current employer, a government contractor. He was detailed to work on a government agency's contract and considered for access to classified information. Applicant's request for access was denied in 2004 because of his misuse of information technology systems and questionable personal conduct while in college.

During 2004 background interviews with the agency, Applicant voluntarily disclosed that during his first year in college (age 18), he illegally downloaded software valued at about \$500 for personal use. He also engaged in multiple infractions of the university's computer network rules and regulations. Specifically, he sent a computer program to his roommate's computer and another student's computer in another university, to annoy them, monitor their keystrokes, and read their email correspondence. He used a program to intercept other people's e-traffic communications and transferred that traffic to his computer where he gleaned other people's passwords and private information. During 2003, he accessed school correspondence, and school department's web pages with information on old tests and school projects not accessible to the general public. He also viewed pornography online that possibly depicted underage individuals.

After his access was denied by the government agency in 2004, Applicant continued to work for the government contractor for two more years. Between February 2006 and August 2006, Applicant worked for a military agency as a systems engineer. Unchallenged by the work, he returned to work for his first employer where he has remained until present.

Applicant explained that while in college, he and a friend experimented with computers and what they were learning, and they tested programs and their own abilities. He acknowledged that his behavior was improper, and he took responsibility for his actions. He credibly testified that his actions were not intended to cause harm or to be malicious. He was young and immature and simply was not fully aware of the consequences of his actions. The program he sent to his roommate's computer was intended as a prank. After a couple of jokes, the program was removed.

After his interview with the agency and his access was denied in 2004, Applicant fully learned the consequences of his actions. He has not engaged in any questionable behavior concerning information technology systems or questionable personal conduct since 2003. His supervisors are aware of his past questionable behavior. As a result of his job for the government contractor, since 2004, he has received yearly training about computer ethics and the handling of classified and proprietary information.

Applicant now understands that his questionable behavior was unethical and possibly illegal. Moreover, he understands that such behavior could adversely impact on his ability to hold a security clearance, to keep his current job, or to work in the information technology field. Applicant expressed sincere remorse for his past behavior. He has matured during the last eight years. He is now married and holds a full-time

position with his employer, a large government contractor. He is dedicated to his wife and his work.

Applicant disclosed his questionable behavior on his 2009 SCA, and was candid during his 2009 background interviews. He also disclosed his past questionable behavior to his supervisors. Applicant presented numerous favorable character reference statements. He is considered to be honest, trustworthy, dependable, and reliable. Professionally, he is respected by co-workers and leaders for his technical expertise and skills. He has handled classified, proprietary, and sensitive information since 2004. He has established a reputation for following security policies and procedures, and for protecting sensitive information. All of his references recommend his access to classified information without reservations. He is considered to be a valuable employee with good performance.

### **Policies**

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. 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).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision,

in whole or in part, on any expressed or implied determination about Applicant's allegiance, loyalty, or patriotism. It is merely an indication that 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 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996); and ISCR Case 08-06605 at 3 (App. Bd. Feb. 4, 2010).

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 or her] 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**

### **Guideline E, 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.

During his first year in college, Applicant illegally downloaded software and engaged in multiple infractions of the university's computer network rules and regulations. He illegally uploaded programs into other students' computers to annoy them, monitor their keystrokes, and read their email correspondence. He intercepted other people's e-traffic communications and transferred that traffic to his computer where he accessed private information. During 2003, he accessed school correspondence, and school department's web pages with information on old tests and school projects not accessible to the general public. He also viewed pornography online

that possibly depicted underage individuals. His actions trigger the applicability of the following disqualifying conditions:

AG ¶ 16(c): credible adverse information in several adjudicative 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

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: . . . (3) a pattern of dishonesty or rule violations.

AG ¶ 17 lists seven conditions that could potentially mitigate the personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant's questionable behavior occurred while he was in college, and can be attributed, to a certain extent, to his immaturity and youthful exuberance. He voluntarily disclosed his questionable behavior during his 2004 background interviews, on his 2009 SCA, and was candid during his 2009 background interviews. He stopped his questionable behavior in 2004, when he started working for his current employer, and disclosed his past questionable behavior to his supervisors. Since he started working for his current employer in 2004, he has received yearly training about his computer-related ethical responsibilities, and the proper handling of proprietary and classified information. He has handled classified, proprietary, and sensitive information since 2004. There is no evidence that he has compromised or caused others to compromise classified information, or that he has failed to follow his employer's rules and regulations.

Applicant expressed sincere remorse for his past behavior. He is now a responsible husband. He is considered to be a good worker and a valuable employee. Applicant has matured during the last eight years. He is dedicated to his wife and his work. He is considered to be a technically proficient, valuable employee. He now clearly understands that his past questionable behavior was unethical and illegal. Moreover, he also understands that such behavior could adversely affect on his ability to hold a security clearance. I find Applicant's questionable behavior is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and judgment. AG ¶¶ 17(c) and (e) apply.

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the 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.

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 Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(c) were previously addressed under that guideline, but some warrant additional comment.

Applicant's questionable behavior is primarily attributed to his immaturity as a college student. He was forthcoming and candid during the security clearance process and at his hearing. He stopped his questionable behavior in 2004, when he started working for his current employer. He received yearly training about ethical behavior and the handling of classified and proprietary information. He understands that his past questionable behavior was unethical and illegal. Moreover, he clearly understands that such behavior could adversely affect his ability to hold a security clearance.

Applicant expressed sincere remorse for his past behavior. He is now a responsible husband. He has held his full-time job since March 2008, and he is considered to be a good worker and a valuable employee. Applicant has matured during the last eight years. On balance, I find that Applicant's questionable behavior is not recent, it is unlikely to recur, and it does not cast doubt on Applicant's current judgment, reliability, and trustworthiness.

### **Formal Findings**

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

Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraphs 1.a to 1.c:	For Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Security clearance is granted.

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JUAN J. RIVERA  
Administrative Judge