



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



In the matter of:

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) ISCR Case No. 10-04990  
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Applicant for Security Clearance

**Appearances**

For Government: Kathryn MacKinnon, Esq., Department Counsel

For Applicant: *Pro se*

April 5, 2011

**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

On December 9, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E. The action was taken 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 on September 1, 2006.

Applicant answered the SOR on December 13, 2010, and requested a hearing before an administrative judge. The case was assigned to me on February 8, 2011. DOHA issued a Notice of Hearing on February 10, 2011. I convened the hearing as scheduled on March 9, 2011. The Government offered exhibits (GE) 1 through 9. Applicant did not object, and they were admitted into evidence. Applicant offered exhibits (AE) A through D into evidence. Department Counsel (DC) objected that AE A

was not relevant or material. Her objection was sustained and the AE A was not admitted. The remaining exhibits were admitted into evidence. Applicant and three witnesses testified on his behalf. DOHA received the hearing transcript (Tr.) on March 17, 2011.

### **Findings of Fact**

Applicant denied the sole SOR allegation. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 57 years old. He is a high school graduate and has some college credits, but did not earn a degree. He married in 1976 and divorced in 1983. He remarried in 1985 and divorced in 2004. He has three children, ages 32, 20 and 14 years old. He pays child support for his youngest child. He served in the Navy from 1972 to 1980, and was honorably discharged in the pay grade E-5. He has held a top secret security clearance since 2004 and a secret security clearance for about 20 years.<sup>1</sup>

The sole SOR allegation relates to Applicant's conduct during a polygraph examination. It is alleged that during an August 2008 polygraph examination, conducted by a Government agency to determine his eligibility for access to Sensitive Compartmented Information (SCI), he attempted to manipulate the results of the examination by using physical countermeasures to conceal drug-related information.<sup>2</sup> As a result, Applicant's eligibility for access to SCI was denied and his security clearance was suspended.

In Applicant's appeal he explained why he made movements during his polygraph exam. He stated:

[T]he movements were not done to conceal relevant information regarding past drug involvement. After being told to sit totally motionless, squeezing my anal cavity was the only way to channel my nervousness. However, it educated me on the sensitivity of the [p]olygraph and given another opportunity I would not do that again.<sup>3</sup>

At his hearing, Applicant was asked if he used countermeasures during his polygraph examination. He stated:

If he asked---once the examiner asked me a question, I can't say exactly every question ma'am, but most of the questions that he asked me I would

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<sup>1</sup> Tr. 132-136.

<sup>2</sup> My decision is based solely on Applicant's conduct regarding his polygraph, and I have not considered any of the factual information about drug involvement for disqualifying purposes.

<sup>3</sup> GE 8.

use a countermeasure I guess. That's the term that he used. But not for every single question. And like I said I was nervous at the time.<sup>4</sup>

Applicant further testified as follows:

DC: So he detected this. He confronted you. You initially denied attempts to manipulate the polygraph but when he asked you a little bit more you admitted that you did manipulate your physiology, you did use this countermeasure, this anal sphincter squeezing thing, as you just said not for every question, but at various questions throughout the polygraph?

Applicant (A): Most of the questions.

DC: All right, Now in that interview you also admitted that you had started to research how to deal with a polygraph on the Internet after your first poly[graph] right?

A: Yes, ma'am.

DC: And that was true?

A: Yes ma'am.

AJ: I'm sorry, you researched what? Ask the question again, I didn't quite get it.

DC: You started researching how to deal with a poly[graph] on the Internet correct?

A: Yes ma'am.

DC: And specifically what did you look at on the Internet, did you do a Google search or something like that?

A: Yes, ma'am.

DC: And so you googled something like "beat polygraph test" or "how to beat polygraph test" or "how to take a polygraph test?"

A: No, just "polygraph testing."

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<sup>4</sup> Tr. 28.

DC: Okay, You just read the material, you read the material probably from antipolygraph.org. They have a lot of stuff out there.

A: Ma'am, I'm not sure exactly what web site it was.

DC: You don't remember, All right. But you do remember that specific technique that you learned was anal sphincter contraction correct?

A: Yes, ma'am. I did read something relative to that but that---

\* \* \*

AJ: And you learned that from the web site?

A: Yes, ma'am.

AJ: And what is that supposed to do?

A: It's supposed to help you pass the test was my thoughts. That's all.

DC: All right. Is it not true that what these articles state is that the contraction of the anal sphincter muscle is a countermeasure that's to be applied not just with the security questions but also in the control questions, right?

A: I can't verify that that's what I read. And actually, no, I can't verify that.

DC: You can't verify that?

A: No, I don't remember reading the words. See, I wasn't trying to fool anybody. I was just trying to pass the test based on things that I'd read. That's all I was trying to do.

\* \* \*

DC: What did you think the anal sphincter manipulation was going to do to help you pass the polygraph test?

A: I didn't know. I didn't know. I didn't know.

DC. So it's your testimony here today that you just thought that if you did this technique throughout the polygraph that it would somehow mysteriously help you pass the polygraph?

A: That was my understanding, ma'am, that's all. That was my understanding.

\* \* \*

AJ: You thought that you needed to somehow use your body to help you pass the test?

A: Yes, ma'am.<sup>5</sup>

Applicant went on to say he was not lying about anything and all the information he gave during his polygraph was the truth. However, when asked directly, if he squeezed his anal sphincter, he stated he had no reason to do it, but yes, he did. He was specifically asked:

AJ: So you used these body movements intentionally during your polygraph examination?

A: Yes, ma'am.

AJ: And the purpose was to help you pass it?

A: Yes, ma'am, but the answers that I gave the examiner was the truthful answer. I did not lie as far as the answers that I gave. I was just falsely---

AJ: I'm sorry. What? You mumbled there. I was just what?

A: I was just falsely under the impression that that you know, I don't understand why but I did that and that was my error. That was my error in judgment.<sup>6</sup>

\* \* \*

DC: Let me word it differently, You gained enough information from the web site that you believed that doing this anal sphincter squeeze might help the poly[graph] somehow look better for you?

A: Yes, ma'am. That's it.

DC: All right. So you knew that you were not relying just on your answer to get you through the polygraph right?

A: My answers [were] truthful.

DC: That's not my question.

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<sup>5</sup> Tr. 29-36.

<sup>6</sup> 36-39.

A: But it's –

DC: That's not my question. You knew that you were deliberately doing some motions that at a minimum you thought would supplement your ability to pass the test, right?

A: Yes, ma'am.<sup>7</sup>

Applicant admitted that he was told by the polygraph examiner to sit totally motionless. Applicant did not follow these instructions. Instead, he intentionally moved his body.<sup>8</sup> He admitted he made earlier statements and said that he made involuntary movements during the polygraph test because he was nervous, which is inconsistent with his hearing testimony.<sup>9</sup> He did not tell the polygraph examiner before the test that he was nervous and would be using an anal sphincter squeeze to help him calm himself. He admitted he was told to sit still.<sup>10</sup>

In Applicant's answer to the SOR, he stated he was not trying to conceal anything during the polygraph, but it was "pure nervousness." He confirmed at his hearing he was not trying to conceal anything, but he did intentionally move. He stated "It was done as an attempt to assist in taking the test you know."<sup>11</sup>

Applicant was aware that he had information about a former girlfriend whom he unwittingly loaned money to so she could pay a bill. He learned later she used the money to buy cocaine. He terminated the relationship after learning this. Applicant stated that this information had bothered him for a long time and he wanted to be forthright with the polygraph examiner. He did not disclose this information during a previous polygraph. He did not disclose it initially during his second polygraph, but eventually did disclose it. He explained he failed to disclose it initially because he was ashamed and embarrassed.<sup>12</sup> Applicant claims he was not trying to intentionally conceal this information. I did not find his testimony credible.

Three character witnesses testified on Applicant's behalf. They described him as a person with integrity, who stays out of trouble, and has good solid values. He can be counted on to do the right thing. He is a team player, a patriot, and a person who can be trusted. A former supervisor testified that he was pleased with Applicant's work and would take him back as an employee. He is known to abide by rules and was never

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<sup>7</sup> Tr. 38-39.

<sup>8</sup> Tr. 40-41.

<sup>9</sup> Tr. 41-42, 89-93.

<sup>10</sup> Tr. 93-97.

<sup>11</sup> Tr. 45-46.

<sup>12</sup> Tr. 64-72, 100.

disciplined while working for him. Another supervisor stated that Applicant was a dependable excellent worker who was well liked. He has never received any complaints about Applicant. He trusts him to provide truthful information. I have also considered the information in Applicant's exhibits.<sup>13</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an "applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk 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.

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<sup>13</sup> Tr. 106-131.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

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

AG ¶ 15 expresses the security concern pertaining to personal conduct;

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility: (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluations; (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I have specifically considered:

(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 or regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior . . . ; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging activities which, if known, may affect the person's personal, professional, or community standing.



While taking a polygraph, Applicant intentionally engaged in countermeasures, by manipulating his body in order to alter the findings. Applicant was told not to make any movements and he deliberately failed to comply with the directions of the polygraph examiner. His failure to cooperate during the security process raises questions about his judgment, trustworthiness, reliability, and willingness to comply with rules. His testimony lacked candor and was at times not credible. His personal conduct created a vulnerability to exploitation and manipulation. I find both disqualifying conditions apply.

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

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

There is no evidence that Applicant received improper or inadequate advice prior to taking the polygraph. I find AG ¶ 17(b) does not apply. Applicant intentionally attempted to manipulate a polygraph he took to determine his eligibility for access to SCI. His actions cannot be construed as minor. Although he admitted that he was using physical countermeasures during the polygraph, he continues to claim it was merely to help him better pass the test. He has failed to take full responsibility for his actions. His actions cast doubt on his reliability, trustworthiness, and good judgment. He has not taken positive steps toward addressing his transgressions. I am not convinced his behavior is unlikely to recur. I find AG ¶¶ 17(c), 17(d), and 17(e) do not apply.

### **Whole-Person Concept**

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

conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant served in the Navy and received an honorable discharge. He has 33 years experience in his field of expertise. His supervisors and coworkers consider him a trusted valued employee. Applicant was required to take a polygraph to obtain access to SCI. He researched the Internet to learn how to pass the polygraph. He learned that by using certain physical movements, he could manipulate the results. He was told by the polygraph examiner not to make any movements. Applicant deliberately made movements, after being told not to, so he could manipulate the results. Applicant was nervous about information about a former girlfriend who was involved in drugs. He was initially attempting to conceal the information about his girlfriend. Applicant's testimony at times was convoluted and lacked candor. Applicant was aware of the importance of the polygraph test and failed to follow the specific directions of the polygraph examiner. Applicant's behavior creates serious doubts as to his reliability, good judgment, and trustworthiness. Applicant failed to meet his burden of persuasion. Overall, the record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guideline for 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**

Subparagraph 1.a:

**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 grant Applicant a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge