



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



In the matter of:	)	
	)	
	)	ISCR Case No. 11-03452
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel F. Crowley, Esquire, Department Counsel  
For Applicant: Mark F. Riley, Esquire

February 17, 2012

**Decision**

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METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,<sup>1</sup> Applicant's clearance is granted.

On 29 September 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, Personal Conduct.<sup>2</sup> Applicant timely answered the SOR, requesting a hearing. DOHA assigned the case to me 8 December 2011, and I convened a hearing 23 January 2011. DOHA received the transcript (Tr.) 30 January 2012.

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<sup>1</sup>Consisting of the transcript (Tr.), Government exhibits (GE) 1-9, and Applicant exhibits (AE) A-C.

<sup>2</sup>DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

## Findings of Fact

Applicant denied the SOR allegation. He is a 54-year-old business manager employed by a Government contractor since January 2002. He seeks reinstatement of the security clearance he was issued in January 2007.

Applicant was the subject of a favorable background investigation in January 2007. Consequently, he had both clearance and access, as necessary, until his access to Sensitive Compartmented Information (SCI) was denied in April 2009 (GE 3). Applicant's May 2009 appeal of that decision (GE 4) was affirmed in August 2009 (GE 5). Applicant contested this action at a personal appearance in March 2010 (GE, 6, 7). The agency upheld its initial decision and Applicant did not appeal that action to the final decision authority.

In September 2008, Applicant's company nominated him for SCI access at another Government agency (AGA). SCI access required him to pass a polygraph. Applicant attended two company briefings about polygraphs and how to pass them. In October 2008, Applicant underwent the first polygraph. The polygrapher told him that the results were inconclusive and he would have to have another polygraph. Applicant found the process nerve-wracking.

The week before his second polygraph, Applicant was interviewing a prospective hire for the company. During the course of their conversation, the prospective employee told Applicant about a website—polygraph.com—where he could view information about passing a polygraph. The day before his polygraph, Applicant visited the site, bought the materials, and reviewed them. He thought that what he was purchasing was in the same vein as his company briefings. He discovered that much of the material covered countermeasures to defeat the polygraph, something he was not interested in. He concluded that he had wasted his money.

At his second polygraph, the polygrapher asked Applicant if he had done any online research about polygraphs. Applicant fully disclosed the research he had done. The polygrapher told Applicant he had passed the counterintelligence portion of the polygraph, but as the polygraph continued she confronted him about his breathing and asked him more questions about any countermeasures Applicant was taking to influence the polygraph. This only made Applicant more nervous. The polygrapher repeatedly instructed Applicant to breath normally and relax. The polygrapher became increasingly agitated and angry, and by the end of the polygraph, the polygrapher was "spitting mad." (Tr. 54). His unsuccessful due process procedure ensued.

Applicant's work and character references consider him honest and trustworthy. They recommend him for his clearance, although his continued employment is not contingent on his getting his clearance. His work performance is excellent (AE A-C).

## Policies

The adjudicative guidelines (AG) list factors for evaluating a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also reflect a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). Any one disqualifying or mitigating condition is not, by itself, conclusive. However, specific adjudicative guidelines should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guideline is Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an applicant's suitability for access in favor of the government.<sup>3</sup>

## Analysis

The Government failed to establish a case for disqualification under Guideline E. Even if I found that the Government proved its allegation as stated—that Applicant researched and used techniques for influencing polygraph examination results during a polygraph in February 2009, I am not convinced that Applicant's conduct constitutes a failure to cooperate with the security clearance process that normally results in an unfavorable clearance action.<sup>4</sup> Nor does it constitute deliberately providing false or misleading information, as argued by Department Counsel. Contrary to Department Counsel's argument, a polygraph examination is neither a medical nor psychological evaluation. It is a tool of questionable reliability authorized for use in some Government agencies. Finally, it does not constitute an unwillingness to follow rules or regulations.

However, Applicant denied the SOR allegation as stated, and I conclude, based on his statements made during the course of his AGA appeals and his testimony, that

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<sup>3</sup>See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>4</sup>¶ 15(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to . . . cooperation with medical or psychological evaluation;

he did not attempt to improperly influence the polygraph results. Applicant found the polygraph.com materials unhelpful, and ultimately there is little difference between looking up polygraph information on the internet and attending the company's polygraph briefings. Further, I am not bound by the Government's characterizations—either in the SOR or AGA decisional documents—in making a decision, and I conclude that those characterizations are not reasonable based on a reading of the entire record.

Regarding the SOR allegation, the facts or characterizations of AGA in revoking Applicant's clearances and access are entitled to little weight. While AGA is free to make its own conclusions, the fact remains that the agency decisional document is an advocacy document based, not on any irrefutable recording of Applicant's statements (i.e. sworn statement) but on a polygrapher's (if not others) distillation of what Applicant said, colored by an assessment of what the polygraph charts meant. Put another way, not every twitch under a polygrapher's gaze reveals nefarious intent. But a polygrapher has no incentive to conclude benign intent, and a decisional document concluding nefarious intent requires no marshaling of facts consistent with benign intent. Indeed, that decisional document constitutes a statement of conclusions, not of fact.

Finally, Applicant has consistently stated—statements which I find credible—that although he paid for and reviewed the materials he obtained at polygraph.com, he quickly concluded that they were worthless. He told the polygrapher that, and the polygrapher's urgings to Applicant to relax only made him more nervous. Applicant would not be the first honest subject to fail a polygraph because of nervousness. In addition, AGA's decision to deny Applicant's access to SCI was ultimately based on the conclusion that Applicant was unlikely to be able to get through the polygraph as required, not necessarily on his attempt to manipulate the polygraph results. I resolve Guideline E for Applicant.

### **Formal Findings**

Paragraph 1. Guideline E:	FOR APPLICANT
Subparagraph a:	For Applicant

### **Conclusion**

Under the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

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JOHN GRATTAN METZ, JR  
Administrative Judge