



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



In the matter of: )  
)  
) ISCR Case No. 11-08584  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Candace L. Garcia, Esq., Department Counsel  
For Applicant: Rocky Gonzalez, Personal Representative

04/23/2012

**Decision**

COACHER, Robert E., Administrative Judge:

The evidence fails to establish some disqualifying conduct and Applicant mitigated the remaining security concerns under Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is granted.

**Statement of the Case**

On December 7, 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 after September 1, 2006.

Applicant answered the SOR on January 2, 2012, and requested a hearing before an administrative judge. The case was assigned to me on February 27, 2012.

DOHA issued a notice of hearing on February 28, 2012, with a hearing date of March 7, 2012. The hearing was held as scheduled.<sup>1</sup> The Government offered Exhibits (GE) 1 through 6, which were admitted into the record without objection. Department Counsel's exhibit index was marked as Hearing Exhibit (HE) I. Applicant testified and offered exhibits (AE) 1 through 35, which were admitted into the record without any objection.<sup>2</sup> DOHA received the hearing transcript (Tr.) on March 16, 2012.

### **Procedural Ruling**

Applicant moved to dismiss all the allegations stated in the SOR. The motion was denied.<sup>3</sup>

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.d, and 1.e, with extenuating circumstances. He denied the allegation in SOR ¶ 1.c. The admissions are adopted as findings of fact. After a thorough and careful review of the pleadings and evidence, I make the following additional findings of fact.

Applicant is 66 years old. He is married and has two adult step-children. He works as a consultant for a defense contractor. From December 2008 until April 2010, he worked for a defense contractor and held a secret security clearance. He holds master's degrees in business and engineering. He served in the Army from 1965 to 1967 and is a Vietnam combat veteran and received an honorable discharge.<sup>4</sup>

The allegations arose from his employment with a defense contractor from 2008 to 2010. A series of personnel-related incidents led to his resignation in 2010. Specifically, the incidents involved an allegation that in June 2009 Applicant made unprofessional and inappropriate comments for which he was counseled (SOR ¶ 1.a); that in December 2009 he was given a written warning for violations of company policy involving respect in the workplace (SOR ¶ 1.b); that in March 2010 he was disciplined for yelling at a co-worker (SOR ¶ 1.c); and that, in April 2010, he yelled at his supervisor and resigned (SOR ¶¶ 1.d and 1.e).

Applicant began working for a defense contractor in December 2008. Essentially, he dealt with the integration of tactical military systems. He was physically located in a small area of about 100 square feet where four work-cubicles were located. There was

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<sup>1</sup> Applicant's Personal Representative requested a hearing and waived the 15-day notice requirement because his client wanted to have his case heard as quickly as possible. This position is reflected in an email from Department Counsel. See Hearing Exhibit (HE) III.

<sup>2</sup> An exhibit index was offered by Applicant and marked as HE II. That exhibit was misplaced and is not part of the record. Since, it was not a substantive exhibit, but rather an identifying document, I find that there is no harm to the Applicant by its absence from the record.

<sup>3</sup> Tr. at 14.

<sup>4</sup> GE 5, AE 12b.

no privacy within this room and telephone calls were routinely overheard by others. He occupied one of the cubicles. There were two other contractor employees who shared the small room with Applicant (Mr. D and Mr. M). Both of these employees were former military officers. Applicant's supervisor occupied the fourth cubicle (Mr. JM). He was an officer in the Army Reserve. Applicant observed that these three engaged in loud non-work related conversations (politics, sports, etc.) on a regular basis. Applicant did not care to participate in their non-work related conversations. In January 2009, shortly after being hired, Applicant expressed some misgivings he had about working for Mr. JM and documented this sentiment in an email to an upper level supervisor. The supervisor asked Applicant to give Mr. JM a chance. Applicant decided to do so rather than resign.<sup>5</sup>

In June 2009, Applicant was in a dispute with his health insurance provider about paying for certain medication. Applicant talked to the insurance representative on his work phone. He went through various persons on the line before he talked to the appropriate person. He admitted being frustrated by the process. He testified that in talking to the representative he was direct and pointed. He believed she was impolite and he may have been impolite in return. He was not violent or disruptive during this conversation. This conversation was overheard by co-workers in the small room, but no one complained at the time. Several days later Mr. JM asked Applicant if the situation was resolved. Applicant did not consider this a counseling session. His personnel file does not show a written counseling before it was referred to in Mr. JM's December 7, 2009 "Employee Counseling Report."<sup>6</sup> (SOR ¶ 1.a)

On December 7, 2009, Applicant was part of a telephone conversation with Mr. JM and an upper-level supervisor who was on the telephone. Mr. JM asked the other employees in the blue room to leave. Applicant was given an Employee Counseling Report describing several incidents that were noted in the report. He was told an investigation was conducted and this report was the result. He was surprised to hear about an investigation because he was never sought out by an investigator, nor were several other coworkers who were part of his team. The two coworkers who provided input to the investigation were Mr. D and Mr. M, along with Mr. JM. All the incidents referred to in the counseling report involved Applicant's interaction with other employees. He believes the information was inaccurate and that the problem was mostly a personality clash between himself and Mr. D, Mr. C, and Mr. JM. None of the reported incidents involved allegations of security concerns or performance issues.<sup>7</sup> (SOR ¶ 1.b)

The Government failed to present documented evidence that Applicant was disciplined after yelling at a coworker in March 2010. Applicant denied yelling at anyone during that time frame. The source of that allegation was Mr. M who related to a defense investigator that the incident happened when he (Mr. M) was at the office. Mr M

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<sup>5</sup> Tr. at 53-57; AE 1, 4.

<sup>6</sup> Tr. at 58-63; GE 5, AE 1.

<sup>7</sup> Tr. at 65-68; AE 1, 10.

also disputed that Applicant was a Vietnam veteran, however, Applicant's DD-214 proved otherwise. Applicant admitted that he and Mr. M did not get along.<sup>8</sup> (SOR ¶ 1.c)

The final two allegations arose as a result of Applicant's resignation in April 2010. Applicant was part of a conference call with Mr. JM and an upper level supervisor who was on the telephone. Applicant was told that his travel plans to a training conference and his personal leave in conjunction with that training was disapproved. Applicant described the supervisor as yelling at him. Applicant realized he should just listen and not ask the supervisor any questions. When the call was over, Applicant asked Mr. JM in a loud voice what was going on. He did use an expletive. Mr. JM did not respond. He then told Mr. JM that if he wanted his resignation, all he had to do was ask. After some back and forth Applicant offered his resignation by saying, "You got it, asshole!" He then walked to his cubicle, packed his briefcase, turned in his badges to Mr. JM, and said, "I'll see you around." He denies making any threats to Mr. JM. He even confronted Mr. JM in an email threatening legal action if Mr. JM did not retract his statements to others that Applicant threatened him. A witness to the event verified that he heard no threats and that the conversation took place behind a closed door. He also recalled that neither Mr. D nor Mr. M were present that day (See AE 21). Applicant was not escorted from the facility by security. Later, while at home, he contacted a human resources representative and described what happened. He was asked to send an email documenting his resignation, which he sent.<sup>9</sup> (SOR ¶¶ 1.d and 1.e)

Applicant presented a letter from his treating psychiatrist stating that he was being seen because of depression and anxiety over the loss of his security clearance. He sought treatment to deal with his current situation and to understand why he became angry and resigned his job in April 2009. He has received therapy in dealing with his anger and temper issues. He understands that he has alternatives to getting angry and losing his temper. His prognosis is good and it is highly unlikely that he will exhibit this behavior again.<sup>10</sup>

Applicant introduced several character letters from current and former colleagues who described him as honest, trustworthy, a hard worker, having good judgment, and reliable. He was also known for his professionalism and showing proper respect for others. One statement pointed out that Applicant was hearing impaired, which may have contributed to some misunderstandings.<sup>11</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

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<sup>8</sup> Tr. at 72-77; AE 1, 12b.

<sup>9</sup> Tr. at 77-87, 108; AE 1, 21-23.

<sup>10</sup> AE 29.

<sup>11</sup> AE 27, 30-35.

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.

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 that an applicant may deliberately or inadvertently fail to 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 expresses the security concern for 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

(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 regulation, or other characteristics indicating that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be 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.

Applicant's alleged conduct does not fall within any other adjudicative issue areas. All the alleged conduct falls into personnel related issues, more specifically whether he can follow rules and regulations. AG ¶ 16(c) does not apply.

Applicant did engage in some disruptive behavior in the workplace, specifically raising his voice to his supervisor and calling him an expletive in April 2010 when he resigned. However, there is no substantial evidence to support the allegation in SOR ¶ 1.c. AG ¶ 16(d) applies to the remaining allegations.

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

(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; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior ... and such behavior is unlikely to recur.

Applicant's actions were unique to the personnel dynamics that existed in the small room where he worked. He was viewed as an outsider by his supervisor, Mr. JM, and his coworkers Mr. D and Mr. M, who had more in common with Mr. JM. The work

environment was also a fishbowl because of the physical layout providing little privacy to anyone. As a result, Applicant let his temper get the better of him on one occasion, which led to his resignation. Professionally, Applicant is viewed as honest, trustworthy and reliable. Applicant presented sufficient mitigation to show that this was a unique circumstance that is unlikely to recur and it does not cast doubt upon his reliability, trustworthiness, or good judgment. AG ¶ 17(c) applies.

Applicant recognized he had a problem with anger and controlling his temper so he sought professional help. His treating psychiatrist described his treatment and the insight he has gained. He feels that Applicant is now equipped to avoid similar situations in the future and gave him a positive prognosis by stating that it was unlikely a similar incident would recur in the future. AG ¶ 17(d) applies.

### **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 considered Applicant's military record as a Vietnam combat veteran and his numerous character letters attesting to his honesty, trustworthiness and reliability. I also considered Applicant's relationship with his supervisor and the work conditions that existed at his former employer's location. I further considered that he no longer works for the same company. Applicant met his burden and provided sufficient evidence to mitigate the security concerns.

Overall the record evidence leaves me without questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under Guideline E, 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:	For APPLICANT
Subparagraphs 1.a-1.e:	For Applicant

### **Conclusion**

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

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Robert E. Coacher  
Administrative Judge