



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 12-03509  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minster, Esq., Department Counsel  
For Applicant: Alan V. Edmunds, Esq.

08/07/2013

**Decision**

MARSHALL, Arthur E., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline E, personal conduct. Applicant's eligibility for a security clearance is granted.

**Statement of the Case**

On February 21, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E (Personal Conduct). 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 DOD on September 1, 2006.

In a March 18, 2013, response to the SOR, Applicant denied the three allegations raised under Guideline E and requested a hearing before an administrative judge. The case was assigned to me on May 9, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 23, 2013, setting the hearing for June 13, 2013. It was rescheduled on June 20, 2013, for a July 15, 2013, hearing.

The hearing was convened as scheduled. The Government offered Exhibits (GX) 1-4. The exhibits were accepted without objection. Applicant offered testimony and four documents, which were accepted without objection as Exhibits (AX) A-D. Applicant was given until July 26, 2013, to submit any additional information. On July 23, 2013, the transcript of the proceeding (Tr.) was received. On August 5, 2013, the Government forwarded Applicant's material without objection. That material was accepted as AX E-G and the record was closed. After a thorough review of the testimony, exhibits, and the case file as a whole, I find that Applicant mitigated personal conduct security concerns.

### **Findings of Fact**

Applicant is a 39-year-old senior network security engineer who has worked for the same defense contractor for a decade. He attended college for four years and graduated from a variety of DOD schools and programs, including those related to signals intelligence and electronic warfare, cryptology, and foreign language. He was honorably discharged from the U.S. Army in 2001 after six years of service, during which time he maintained a security clearance. He has continued to maintain a security clearance without incident until recently, when the underlying SOR was issued in February 2013. At work he is regarded for his skills, diligence, and dedication. He is divorced, has no children, and lives within his means.

This case involves three personal conduct allegations, which Applicant denies. The SOR alleges that Applicant intentionally falsified material facts during security testing and an interview at Another Government Agency (AGA) in 2004 and 2005, respectively. The SOR also alleges that, during a 2007 interview, Applicant admitted to intentionally withholding the full extent of the activities discussed in 2004 and 2005. It is noted that references to Applicant's hacking or conducting computer-related misconduct in the SOR were performed within the scope of his studies, employment, or in furtherance of a government assignment. (Tr. 17)

In January 2004, Applicant underwent security testing. His comments were poorly summarized. (Tr. 52-58) He noted that as a teen in 1991-1992, he had an intense interest in computers and their programming. He would reverse engineer web sites and programs to see how they worked. (Tr. 19-21) In doing so, he would sometimes inadvertently access other computer programs or systems. No websites were harmed. (Ex. 3 at 3) Applicant derived no benefit from such exploration except knowledge and what he earned as an employee. The technology was new; such exploration was the best way for young computer enthusiasts to learn and test theories; and controlling laws were evolving or ambiguous. (Tr. 31-32) At that time, it did not occur to those in the engineering field that their work might be illegal. (Tr. 34) Nearly a decade would pass before the laws were interpreted to make some such activity illegal. (Tr. 35) The state of the law has since progressed further, particularly in the area of engineering and scientific study. Under the law as it is today, none of Applicant's acts are questioned or prohibited: "Both with the downloading of this media and the reverse engineering. . . the law has caught up with what engineers had been doing for five, ten, 15 years." (Tr. 32)

During the 1991-1992 timeframe, Applicant helped an older peer with developing or refining a computer program by pointing him to a public bulletin board service (BBS) on the Internet. (Tr. 22) This was in the early days of the Internet, and it was not uncommon for fellow computer aficionados to collegially aid others in dissecting, examining, or building programs or software to learn and compare methods for creating such programs. It was not uncommon for such research to be legitimate and purely intellectual, but devoid of practical purpose or planned application. (Tr. 40-41) Applicant stated:

In the early days of the Internet this was all very new to us and collecting this information was almost a kind of badge of honor so to speak. So we would write programs and exchange information and ideas, it was a very collegiate [sic] you know research and development type of environment among . . . young scientists I guess you could say. These were hobbies of ours. . . . The having of the information was more important to us than the impulse to act upon it, for the vast majority of us anyway. (Tr. 41-42)

Unbeknownst to Applicant at that time, this elder peer had a “nefarious” motive behind developing his project. (Tr. 42) He was not simply building a program as an intellectual exercise involving the generation of numbers. Rather, he was developing a program that he intended to actively use as an instrument for credit card scams. Applicant’s own knowledge of what this older peer was doing “grew with time.” (Tr. 49) When Applicant later learned of the peer’s intent and illegal purpose sometime between 1992 and 1993, he and others reported the peer to the authorities. (Tr. 42-43, 45) The peer was subsequently charged with what Applicant guessed to be about 1,000 counts of felony electronic trespassing. In disclosing these facts in 2004, Applicant considered this dated information to be “very minor. It was something that happened when I was young, 20 years ago. I certainly answered any question they asked me. I didn’t realize I’d be held accountable for every detail.” (Tr. 46)

About a year-and-a-half later, in May 2005, Applicant was interviewed by security representatives. During the interview, he reported that during his January 1991 to January 2000 research, he had downloaded 50 movies and 2,000 mp3 files valued at about \$10,000 for work. (Tr. 24) These files were readily available and used for sampling by Applicant’s employer.

A subsequent interview with Applicant from October 2007 was summarized in a May 2008 denial letter. During the October 2007 interview, Applicant reported that, during the time at issue above, he had downloaded thousands of songs, movies, games, software, and other multimedia material valued at an estimated \$380,000. In arriving at this larger sum, Applicant’s disclosure included many more media forms than just the movies and mp3s he noted in 2005. Indeed, he pointed out that a single software package, alone, might be worth \$50,000 or more. (See, e.g., Tr. 65-68)

The 2008 letter went on to state that “[Applicant] also admitted that [he] intentionally withheld the full extent of [his] activities during previous security interviews.” Applicant vigorously denies the veracity of this attribution. (Tr. 58) He notes, to the

contrary, he was complemented on his honesty and candor throughout the interview. (Tr. 58) Applicant never considered that his estimates of the value of unspecified materials were a great concern. (Tr. 68) He notes that the more recent and expansive disclosure from 2007 does not demonstrate a prior attempt to conceal; rather, the more recent disclosure endeavors to be more comprehensive and accurate in response to the more expansive questions that were developed in response to his previous admissions in 2004 and 2005. (See, e.g., Tr. 69) Applicant did not contemporaneously receive a copy of the letter, thus denying him of his ability to contest the letter's conclusions or note his objection to this attribution. Had he been afforded a copy, he would have appealed its contents or noted its discrepancies contemporaneously. (Tr. 58-62) His counsel, who was retained shortly thereafter on a related matter, confirmed that had they known of the letter, objections would have been made as to its veracity at the time. (Tr. 60-63)

At the end of the 2007 interview, Applicant stated that he did not want to continue with the investigative process. He had already undergone three polygraph tests and several interviews over multiple years and "was tired of taking them." (Ex. 2 at 2 (back)) When the purpose for another test was explained to him, he expressed his willingness to take the test, but no further exam was offered. (Ex. 2 at 8 (front); Tr. 58-60)

### **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 not drawn 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 those to whom it grants access to classified information. Decisions include consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard 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**

The security concern for personal conduct 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. 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.

Applicant’s answers to investigators became increasingly elaborate over time, suggesting he had been less than forthcoming in previous interviews. In addition, one 2008 letter flatly states that he admitted to having been less than forthcoming in his investigatory answers. If true, the following disqualifying conditions under AG ¶ 16 are relevant:

AG ¶ 16 (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

AG ¶ (b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

For AG ¶¶ 16(a) and 16(b) to apply, Applicant’s omissions must be deliberate. The Government established that Applicant’s disclosure of facts regarding his early Internet and program systems work grew more complete as time passed, thus implying

that he was less than forthcoming during his earlier interviews. It also points to a statement written in a 2008 letter summarizing his 2007 interview, in which it states Applicant admitted that he intentionally withheld the full extent of his activities during previous security interviews.

In his responses and at the hearing, Applicant demonstrated that he answers questions directly and in a straightforward manner. He credibly denied the suggestion that he intentionally gave less than forthcoming answers during any part of the investigative process. He sensibly posited that his answers grew more elaborate at each subsequent meeting because the questions, based as they were on his most recently solicited interview answers, became more detailed and precise. This explanation is highly plausible given the circumstances. As for the written 2008 attribution that he admitted that he previously had been less than forthcoming, the circumstances suggest that he never received the 2008 letter, obviating his ability to timely object or correct any inaccuracies. In turn, the argument that he did not receive the letter is supported by his counsel's assertion that, as his legal representative, he personally would have seen that it was disputed as part of a related matter he conducted on Applicant's behalf shortly after the letter was apparently issued. When the allegation of falsification is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred. (See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 1, 2004)(explaining ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

As noted, Applicant's explanations are credible and plausible, a factor fortified by a record that indicates he has been forthright throughout this process. It is logical that subsequent questions based on previous answers would naturally yield even more detailed responses. As for the 2008 letter and its statement that he admitted being less than forthcoming, this was his first opportunity to object to its contents. His objection was credible and is consistent with the on-going relationship he has with his counsel to keep the record in this and related matters straight.

There is no direct evidence that Applicant was intentionally untruthful during the investigative process. The Government did not produce the author of the 2008 letter in rebuttal, or provide contradictory evidence showing he received the letter. Given the totality of the facts and circumstances, I find the Government has not established that the Applicant intentionally withheld information during his investigation. AG ¶¶ 16(a) and 16(b) are not established and Personal Conduct concerns are mitigated. Had such evidence been existent under these unique circumstances, however, Personal Conduct Mitigating Conditions AG ¶ 17(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) and AG ¶ 17(f) (the information was unsubstantiated or from a source of questionable reliability) would 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 relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). 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 in 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 is a 39-year-old senior network security engineer who has worked for the same defense contractor for 10 years. He is well educated and has highly complex and unique training related to his field. He was honorably discharged from the U.S. Army in 2001 after six years of service, during which time he maintained a security clearance. He has continued to maintain a security clearance without incident until the underlying SOR was issued in February 2013. Applicant is highly regarded for his skills. As a witness, he was highly straightforward, precise, credible, and informative.

Much of the difficulty of this case is based on the specialized engineering field involved. Those familiar only with today's Internet usage may be unaware as to how early computer enthusiasts gained their experience and pushed the science's development. Despite Applicant's best efforts to explain the more arcane aspects of his field and practice, some degree of confusion was inevitable. Apparently, a similar degree of confusion was shown by the investigators who met with Applicant between 2004 and 2007 in terms of terminology, the evolving law in the field, and other areas.

The fact that Applicant's answers became more elaborate over time reflects how the precision of his answers grew with the increasingly detailed questions investigators asked, based on his previous answers. It does not provide evidence that Applicant was initially less than forthcoming. Similarly, his strong objection to an unsubstantiated comment that he admitted to having been less than forthcoming does not overcome facts in his favor. Overall, the record evidence leaves me with no doubts about Applicant's eligibility and suitability for a security clearance given the unique facts presented in this case. For all these reasons, I conclude Applicant mitigated the security concerns arising under the personal conduct guideline.

## **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-1c:                      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 a security clearance. Eligibility for access to classified information is granted.

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Arthur E. Marshall  
Administrative Judge