



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



In the matter of: )  
)  
) ISCR Case No. 18-00176  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Andrew Henderson, Esq., Department Counsel  
For Applicant: *Pro se*

10/22/2018

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**Decision**

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COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the Government's security concerns under Guideline E, personal conduct. The concerns under Guideline J, criminal conduct, were mitigated. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On March 29, 2018, the Department of Defense Consolidated Adjudications Facility (DOD CAF) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, personal conduct and Guideline J, criminal conduct. DOD CAF acted under Executive Order (EO) 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 effective June 8, 2017 (AG).

Applicant answered the SOR with an undated response, and requested a hearing. The case was assigned to me on July 26, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on July 26, 2018, and the hearing was convened as scheduled on August 7, 2018. The Government offered exhibits (GE) 1 through 5, which were admitted into evidence without objection. The Government's exhibit list was marked as a hearing exhibit (HE I). Applicant testified and offered exhibits (AE) A through C, which were admitted without objection. I left the record open until September 7, 2018, to allow Applicant to submit additional evidence. She submitted AE D through J, which were admitted without objection. DOHA received the hearing transcript (Tr.) on August 15, 2018.

### **Findings of Fact**

In Applicant's answer, she admitted SOR ¶¶ 1.a-1.d. She denied ¶ 1.e and ¶ 2.a (same underlying conduct for both allegations). Her admissions are adopted as findings of fact. After a thorough and careful review of all the pleadings and evidence, I make the following additional findings of fact.

Applicant is 35 years old. She has worked for a government contractor since 2013 as an electronics technician. She is engaged and has two children and a stepchild. She has an associate's degree.<sup>1</sup>

The allegations raised in the SOR include: (1) In March 2013, Applicant struck a coworker while on the job and was told not to return to work (SOR ¶ 1.a); (2) In August 2016, Applicant ripped a thermostat on the wall at her work location for which she received a written warning for damaging company property (SOR ¶ 1.b); (3) From 2016 to about February 2017, Appellant engaged in a pattern of unprofessional communications within the workplace for which she was repeatedly counseled (SOR ¶ 1.c); (4) In December 2016 and January 2017, Applicant violated a direct order from her supervisor to refrain from discussing with coworkers an internal investigation for which she was placed on 90 days of probation for unprofessional behavior and insubordination (SOR ¶ 1.d); and (5) In May 2017, Applicant struck her cohabitant in the face during a domestic dispute for which she was arrested and charged with third-degree assault (SOR ¶ 1.e, cross alleged as criminal conduct in SOR ¶ 2.a).

In March 2013, while Applicant was working as a server at a local bar/restaurant, she got into an argument with a coworker. When Applicant perceived the coworker as "getting in her face" and grabbing her arm, Applicant slapped the coworker. Her manager called her into the office and asked what was going on with the coworker. Applicant was scheduled to resign from her server job in two days to take another job (her current position). She claims she told her manager that she "was done" today. He told her to go home and come back tomorrow to talk with the owner about what happened. Later that day, the manager called her to tell her not to come back. She

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<sup>1</sup> Tr. 6, 21; GE 1.

admitted that she became emotional and lost her cool with the coworker. She has been back to that establishment since the incident on numerous occasions as a customer.<sup>2</sup>

In approximately August 2016, Applicant was performing her duties at her work location. The time was after five p.m., and Applicant was working alone. While working, she became uncomfortably cold because of the temperature setting of the central air conditioning unit (ACU). The ACU had a central control panel that was locked by a plastic cover. Applicant claimed she was so cold she could not properly perform her duties. She then knocked the cover off of the control panel so she could adjust the temperature. When she did this, the screws holding the locking cover came out of the wall. She claims that the cover was not properly installed and that her action did not damage the unit. She reported her action to her supervisor the next day. She received a written warning from her supervisor for “ripping the thermostat cover off the wall in order to change the temperature.” The warning was placed in her personnel file.<sup>3</sup>

On at least two occasions, November 10, 2016 and January 10, 2017, Applicant sent unprofessional emails to coworkers. She was formally counseled for these instances and told to apologize. She sent an apology email to the original recipients.<sup>4</sup>

In December 2016, Applicant’s fiancée, who worked at the same company, was being investigated by the company for inappropriate conduct at the recent holiday party. Applicant was made aware of the investigation by the company and was specifically directed not to discuss the investigation with other company employees. In January 2017, Applicant sent text messages to two company employees discussing aspects of the investigation. In addition to violating the direct order not to discuss the investigation, Applicant used crude and vulgar language in the texts to the employees. During her hearing testimony, Applicant acknowledged violating the order by texting the two employees. Applicant was placed on a 90-day probation period for her insubordination upon her return from maternity leave.<sup>5</sup>

In May 2017, Applicant was arrested for third degree assault for striking her fiancé in the face. There is conflicting evidence in the record as to what actually happened between Applicant and her fiancée on this occasion. Applicant told a police officer on the day of the incident that during a verbal argument with her fiancé she scratched him on the nose with her fingernail because he threw a towel at her. The officers observed bleeding on the fiancé’s nose and scratches on his cheeks. Her fiancé told the officer that he cut himself shaving or from being scratched while doing yardwork earlier. In Applicant’s October 2017 statement to a defense investigator, she said she accidentally scratched her fiancé when he waved a towel in her face. After Applicant

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<sup>2</sup> Tr. 23; SOR answer (Ans.); GE 2.

<sup>3</sup> Tr. 26; Ans.; GE 3.

<sup>4</sup> Tr. 27-29; GE 3; AE A-B.

<sup>5</sup> Tr. 31-33; GE 3.

attended an unspecified period of court ordered counseling, her criminal case was dismissed with prejudice in August 2017 and the arrest and other criminal records pertaining to the case were ordered sealed. Applicant has had no further arrests since this incident.<sup>6</sup>

Applicant explained that from 2016 through 2017 she was going through a difficult emotional time. She was pregnant, then breast-feeding her baby, which caused hormonal issues during this time. She received pastoral counsel from March 2016 to July 2017 (32 sessions) for marriage, anger, and parenting issues. She resumed this counseling in August 2018 and has had three sessions for anger and childhood/family impact issues. She also is an active client in an additional counseling practice. She has attended this counseling “for the last several months.” No specific diagnoses, prognosis, recommended treatment regimes, or other substantive information about Applicant’s counseling sessions was contained in the record. Applicant participates in her church’s women’s group study and marital group sessions. Her current supervisor provided a letter in which she noted the growth in Applicant’s professionalism over the past several months. She also noted that Applicant “stepped up” to mentor a newer team member. Her supervisor deems her an asset to their department.<sup>7</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(a), the entire process is a careful weighing 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 national security eligibility will be resolved in favor of the 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.

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<sup>6</sup> Tr. 48-49; Ans.; GE 2, 4-5.

<sup>7</sup> Tr. 50; AE C, E-I.

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 about potential, rather than actual, risk of compromise of classified information.

Section 7 of EO 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 personal conduct security concern:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

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 regulations, or other characteristics indicating that the individual may not properly safeguard classified or sensitive information; and

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's assaults in 2013 and 2017 and her unprofessional and insubordinate behavior at work in 2016 and 2017 support the application of both the above disqualifying conditions.

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 or taken other positive steps to alleviate the stressors, circumstances, or factors that contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

Applicant struck two different people, in the heat of the moment, vented her emotional rage using text messages to coworkers, and displayed other unprofessional and insubordinate conduct in the workplace on multiple occasions in 2016 and 2017. These are not infrequent occurrences for Applicant. Her most recent incident occurred in May 2017. It is too soon to determine whether Applicant has changed her behavior when under stress. Her willingness to attend counseling is a positive sign. However,

because the record contains no evidence of the progress she has made while attending counseling, specifically on dealing with her anger issues, it is too soon to determine whether the stressors or other circumstances that led to her inappropriate behavior have been ameliorated because of her counseling. AG ¶ 17(c) does not apply, but AG ¶ 17(d) has some application.

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following is potentially applicable:

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

The record contains sufficient evidence that Applicant assaulted her fiancé in May 2017. I find AG ¶ 31(b) applies.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and considered the following relevant:

(a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

Applicant has not been involved in a domestic issue since her arrest in May 2017. Her arrest occurred under unusual circumstances and the charges were ultimately dropped by the prosecution. AG ¶ 32(a) applies.<sup>8</sup>

### **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

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<sup>8</sup> I found the Guideline J allegation mitigated, but I also found the same conduct not mitigated under Guideline E because I viewed the conduct under Guideline E as an additional act in her pattern of overall behavior, while under Guideline J, I viewed it as a single act.

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

(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 years of contractor service, her counseling, and her supervisor's statement. However, I also considered that she engaged in unwanted physical contact with others and unprofessional conduct while on the job on multiple occasions. Applicant failed to provide sufficient evidence to mitigate the security concerns.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, although Applicant mitigated the Guideline J, criminal conduct concerns, I conclude she failed to mitigate the security concerns arising under the 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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline E: | AGAINST APPLICANT |
| Subparagraphs 1.a – 1.e:  | Against Applicant |
| Paragraph 2, Guideline J: | FOR APPLICANT     |
| Subparagraph 2.a:         | For 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

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Robert E. Coacher  
Administrative Judge