



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



In the matter of: )  
)  
) ISCR Case No. 07-05060  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: John B. Glendon, Esquire, Department Counsel  
For Applicant: Pro Se

September 30, 2008

**Decision**

CREAN, Thomas M., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on February 22, 2006. On May 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns for Applicant for personal conduct and criminal conduct under Guidelines E and J. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on May 20, 2008.

Applicant answered the SOR in writing on July 14, 2008. He admitted the allegations under both Guidelines J and E with explanation, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on July 28, 2008, and the case was assigned to me on July 30, 2008. DOHA issued a notice of hearing on August 6, 2008, for a hearing on September 10, 2008. I convened the

hearing as scheduled. The government offered nine government exhibits, marked (Gov. Ex.) 1 through 9, which were received without objection. Two other administrative exhibits (Gov. Ex. 10-11) were received. Applicant submitted two Applicant Exhibits, marked (App. Ex.) A-B, which were received without objection. Applicant and one Applicant witness testified on his behalf. The record was left open for Applicant to submit additional documents. Applicant timely submitted four documents marked App. Ex. C-F. The documents were admitted into the record without objection (Gov. Ex. 11). DOHA received the transcript of the hearing (Tr.) on September 18, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted

### **Findings of Fact**

Applicant is 43 years old. He entered active duty with the Navy after high school at age 17 and served as a cryptologist for 20 years from 1983 until retiring as a petty officer first class (E-6) in July 2003. He held a security clearance with access to sensitive compartmented information (SCI) while on active duty. When Applicant retired and started work for a defense contractor in July 2003, he reapplied in August 2003 for his security clearance to be continued. It was granted in November 2003. He started working as an analyst for his present defense contractor employer in October 2005. He provided his e-QIP in February 2006 as a periodic up-date of his security clearance (Tr. 28-30, 33-34; Gov. Ex 1, Electronic Questionnaire for Investigation Processing (e-QIP), dated February 22, 2006).

Applicant married his first wife while he was on active duty in 1990. They separated in late 1999. She filed for divorce in July 2001, and the divorce was granted in September 2001. There were no children from this marriage. (Tr. 28-32; App. Ex. A, Civil summons, dated July 10, 2001; App. Ex. B, Judgment, dated September 7, 2001).

Applicant had four heart-related medical problems. He suffered a heart attack while on active duty in 1993. He had another heart attack while on active duty in 1998. He received a triple coronary bypass while on active duty in 2002. His fourth cardiac incident was in 2006 after he retired and working for the defense contractor. Plaque broke from his arteries causing a blockage. His oxygen supply to the brain was cut for about 17 minutes and he almost expired. He experienced brain anoxia and short term memory loss. He awoke thinking that he was back in the Navy, and asking for his former girlfriend Ms. B. He was in rehabilitation for over six months from April until October 2006 before returning to work with normal neurologic function and judgment (Tr. 26-28, 43-45; App. Ex. C, Psychologist Letter, dated September 23, 2008; App. Ex. D, Treatment Letter, dated September 22, 2008; App. Ex. E, Doctor's Letter, dated September 26, 2008).

Applicant and his first wife lived in State A when he was on his penultimate assignment on active duty. His wife left the home but Applicant continued to live in the house because the housing market was not favorable for sellers. Applicant's last duty assignment on active duty was in neighboring State B. He remained in his house in

State A and commuted to work. After his wife left him, he met in 2000 through a mutual friend Ms. B who lived and worked close to Applicant's duty station in State B. Applicant was able to rent his house in State A and eventually sell it. He moved to a condominium in State B in 2002. Applicant and Ms. B never lived together but did visit each other. Applicant and Ms. B had a relationship until they became estranged and parted company in July 2002. This was shortly after his April 2002 by-pass operation. Applicant did not know why Ms. B left but indicated she told him after his by-pass operation the he "had changed." Applicant was angry at Ms. B because she never adequately explained the reason why she terminated their relationship (Tr. 37-39). Applicant moved in with his mother in neighboring State C to recover and rehabilitate from his by-pass operation. After leaving active duty, he stayed in State C, purchased a home, met another woman in August 2005, and married her in September 2006 (Tr. 42-43).

Applicant was angry with Ms. B about her leaving him in July 2002. In November 2004, he sent her an e-mail message stating "X (former boyfriend of Ms. B), asked me to make your life hell, and so it shall be. Your mistake will live with you forever" (Tr. 41, Gov. Ex. 5, e-mail message, dated November 14, 2004). Applicant was still angry with Ms. B even after he married his present wife in September 2006. He was at the time still recovering from the brain anoxia. He sent Ms. B an e-mail on October 13, 2006, threatening to inform her employer about certain of her actions. He used indecent, vulgar, profane and lewd language. He accused Ms. B of having taken inappropriate actions against him (Tr. 48-49; Gov. Ex. 6, e-mail, dated October 13, 2006; Gov. Ex. 7, same e-mail forwarded to Ms. B's employer by her, dated October 13, 2006). Applicant sent Ms. B another e-mail in November 2006 that was similar in nature again using indecent, vulgar, profane, and lewd language (App. Ex. 8, e-mail, dated November 3, 2006). On November 8, 2006, Ms. B swore out a warrant of arrest for Applicant for violation of State B's criminal statute against use of a computer to communicate obscene, vulgar, profane, lewd, lascivious, or indecent language or threaten an illegal or immoral act with the intent to coerce, intimate, or harass another person (Gov. Ex. 3, Warrant of Arrest, dated November 8, 2006, See, Hearing Exhibit 1, State B Statute § 18.2-152.7.1 Harassment by computer, penalty, Class 1, Misdemeanor). Applicant's employer filed the necessary incident report concerning Applicant's arrest with security authorities (Gov. Ex. 10, Incident History, dated November 15, 2006).

Applicant learned of the arrest warrant when he was questioned by security investigators for the periodic update of his security clearance in January 2007. Thereafter, he sent Ms. B a fourth e-mail threatening to disclose to her employer and the local criminal authorities a theft of material from the employer unless she withdrew the warrant of arrest (Gov. Ex. 9, e-mail, dated March 16, 2007). Ms. B swore out a second warrant of arrest against Applicant based on the latest e-mail (Gov. Ex. 4, Warrant of Arrest, dated March 22, 2007). Applicant voluntarily turned himself into authorities in State B on October 30, 2007. He pled guilty in December 2007 to Harassment by computer (See, Gov. Ex. 3 and Gov Ex. 4, Warrant of Arrest, dated November 8, 2006 and March 22, 2007). He received deferred adjudication for six months, charged court costs, and directed not to have any contact with Ms. B for six

months. Applicant completed the period of deferred adjudication and the charges were dismissed on June 19, 2008 (See, Attorney letter, dated June 22, 2008, attached to the Response to the SOR, dated July 14, 2008). Applicant did not know that sending profane, lewd and threatening e-mails was a criminal offense. He now knows that and stated he would never again send such an e-mail (Tr. 28)

Applicant had not been in contact with or seen Ms. B since their breakup in July 2002. He had been in contact with her mother and brother and the mutual friend who introduced them. They left him with the impression he should still try to get back together with her. He does not know why he sent the November 2004 e-mail except he was still in love with her and was the distant ex-boyfriend waiting for her to change her mind. He learned that Ms. B was getting married to a person she had known and even dated while Applicant was in the hospital and at home recovering from his brain anoxia. Applicant does not know why he sent the e-mails except he was the rejected suitor of Ms. B. He was recovering from his recent brain injury when he sent the e-mails but did not entirely consider this as the reason for his action in sending the e-mails (Tr. 65-71; Gov. Ex. 2, Applicant Affidavit, dated February 21, 2008).

Applicant's supervisor testified that Applicant worked for him both before and after his April 2006 heart incident. The witness was permitted to see the Applicant in the hospital about a week after the heart incident when Applicant woke up. He was advised by the hospital staff the Applicant would act slightly strange. When he saw Applicant, Applicant was very much living in the past. He could tell that Applicant was about eight or ten years in the past when he thought the witness was his Navy chief. Applicant over time did return to the present and his medical condition improved. It took him about two months to be solidly in line with his current life, and four to six months to be back to normal. He had no concerns about Applicant's reliability and trustworthiness before his April 2006 heart incident. He believes Applicant can be entrusted with access to classified information (Tr. 80-90)

The government integrated product team leader on Applicant's projects has known Applicant since August 2003 when Applicant started working for defense contractors on projects under his authority. He noted Applicant's heart-related medical problem in April 2006 and Applicant's recovery and returning to work on the project. He has continued full trust in Applicant in his work and in safeguarding classified information (App. Ex. F, Letter, dated September 23, 2008).

### **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining 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 protect or 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.

## **Analysis**

### **Criminal Conduct and Personal Conduct**

The e-mails sent by Applicant to Ms. B on October 17, and November 3, 2006, and March 16, 2007, were charged by State B as violations of the state criminal statute for harassment by computer. Applicant pled guilty to these offenses in the same trial and was sentenced. The SOR allegation concerning Criminal Conduct under Guideline J is based on this conviction. The personal conduct Guideline E allegation is also based on the acts involved in this conviction. I have not considered the November 2004 e-mail as a violation of criminal law since it was not charged by State B. However, I will consider it in the context of the whole person in regard to a personal conduct Guideline

E security concern. Since the same acts raise both a criminal conduct and personal conduct security concern, I will consider them together.

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 ¶ 30). Personal 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 (AG ¶ 15). Appellant's action in sending obscene, vulgar, lewd, and threatening e-mail in violation of a state statute raises Criminal Conduct Disqualifying Conditions (CC DC) ¶ 31(a) (a single serious crime or multiple lesser offenses), CD DC ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted); Personal Conduct Disqualifying Conditions (PC DC) ¶ 16(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, or other characteristic indicating that the person may not properly safeguard protected information); and PC DC ¶ 16(e) (personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, . . . ). Applicant's admission to and conviction of the criminal offense of harassment by computer for sending three e-mails in violation of state statute are multiple lesser offenses and allegations of criminal conduct. The act of sending threatening e-mail using profane and vulgar language is activity that could affect Applicant's personal, profession, or community standing.

Appellant has raised by his testimony Criminal Conduct Mitigating Conditions (CC MC) ¶ 32 (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); CC MC ¶ 32(d) (there is evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of criminal activity, remorse, or restitution, job training or higher education, good employment record, or constructive community involvement); Personal Conduct Mitigating Conditions (PC MC) ¶ 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 it is unlikely to recur and does not cast doubt on the individual's reliability trustworthiness, or good judgment); and PC MC ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress). The mitigating conditions for both the personal conduct and criminal conduct security concerns under the circumstances are similar. They involve consideration of the minor nature of the offense, the passage of time, and the unusual or unique circumstances of the events to show that the events are unlikely to recur. Also the mitigating conditions under both guidelines consider that rehabilitation or positive steps can establish mitigation.

Applicant's actions in sending the e-mails were those of a spurned suitor who was upset that he was rejected by the victim. There were three e-mails sent to Ms. B that violated the criminal statute and amount to inappropriate personal conduct. They were vulgar and obscene and threatening. However, Applicant did not act on his threats and did nothing more than let his frustrations out in the e-mails. He did not check the e-mails or his frustration level before hitting the send button. The offenses are minor as shown by the sentence of deferred adjudication and dismissal of the case after the period of deferment. The events happened under unique circumstances. Applicant had a severe heart condition and almost expired. He had short term memory loss. Since then, he recovered medically and is successfully working for his employer. He has shown remorse for his action in sending the e-mails. All of these factors show that his action amounting to criminal and person conduct of security concern are unlikely to recur. Applicant has presented sufficient information to mitigate the personal conduct and criminal conduct security concerns.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an applicant's security eligibility by considering the totality of the applicant's conduct and all the circumstances. An 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) 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 a security clearance must be an overall common sense 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 served 20 years on active duty in the Navy and successfully held a security clearance during that time. I considered that Applicant has been successful since leaving the Navy. I have considered Applicant's heart-related medical condition and his recovery. I note the opinion of both his supervisor and the government representative on his projects that he can be trusted to protect classified information. Applicant's conduct in sending the inappropriate e-mails to his former girlfriend are criminal and wrong, but I consider his actions as minor criminal and personal conduct transgressions. At the time that he sent the messages, he did not know they were considered by the state as criminal acts in violation of a statute. Applicant now knows that his actions are criminal, he is remorseful, and he established that he is rehabilitated. He has established that this type of criminal and personal conduct is unlikely to recur. Overall, on balance the record evidence leaves me with no questions or doubts as to Applicant's eligibility and

suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his personal and criminal 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 J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

**Conclusion**

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

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THOMAS M. CREAN  
Administrative Judge