



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



In the matter of: )  
)  
) ISCR Case No. 14-03997  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Adrienne Strzelczyk, Esq., Department Counsel  
For Applicant: William F. Savarino, Esq.

02/03/2016

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**Decision**

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NOEL, Nichole L., Administrative Judge:

Applicant contests the Defense Department’s intent to deny his eligibility for a security clearance to work in the defense industry. Applicant’s removal from a federal contractor position in January 2011 does not reflect negatively on his current security worthiness. Furthermore, he did not provide false or misleading information on his security clearance application about the circumstances of his removal. Clearance is granted.

**Statement of the Case**

On December 4, 2014, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing security concerns under the personal conduct guideline.<sup>1</sup> DOD

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<sup>1</sup> This case is adjudicated under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended; as well as DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the *Adjudicative Guidelines for Determining Eligibility for Access to Classified Information* (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue Applicant's security clearance and recommended that the case be submitted to an administrative judge for a determination whether to revoke or deny Applicant's security clearance.

Applicant timely answered the SOR and requested a hearing. On July 22, 2015, I issued a pre-hearing order to the parties regarding the exchange and submission of discovery, the filing of motions, and the disclosure of any witnesses.<sup>2</sup> The parties complied with the terms of the order.<sup>3</sup> At the hearing convened on August 13, 2015, I admitted Government's Exhibits (GE) 1 through 3, and Applicant Exhibits (AE) A through R, without objection. In addition to his exhibits, I asked Applicant to prepare a demonstrative exhibit identifying the individuals likely to be discussed during the hearing.<sup>4</sup> I received the transcript (Tr.) on August 21, 2015.

### **Procedural Issues**

The SOR ¶ 1.c alleges that Applicant intentionally falsified section 13C: Employment Record on his November 2012 security clearance application by failing to disclose that he left a position in January 2011 under unfavorable circumstances. However, this employment does not fall within the scope of the question, which is limited to employment activities not previously listed in section 13A: Employment Activities. Applicant disclosed the details of the employment under Section 13A, so he did not need to disclose it again under Section 13C. Accordingly, the SOR ¶ 1.c is decided in Applicant's favor.

### **Findings of Fact**

Applicant, 53, has worked for his current employer, a federal contractor, since May 2012. The issues in the SOR involve the circumstances surrounding the termination of his employment by a former employer, a federal contractor, in January 2011.<sup>5</sup>

From September 2009 to September 2010, Applicant served as an unpaid fellow for another government agency (agency), specializing in social media analysis for East Asia. After completing the fellowship, Applicant transitioned into a contract analyst position and was assigned to a team at the agency supervised by a federal employee. Under this arrangement, Applicant's supervisor did not have the authority to discipline, reprimand, institute a performance plan for Applicant, or terminate him. That authority lay with the contract's program manager, an employee of the same company as Applicant, who handled the human resources issues related to contractor employees.

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<sup>2</sup> The prehearing scheduling order is appended to the record as Hearing Exhibit (HE) I.

<sup>3</sup> The discovery letter, dated July 6, 2015, is appended to the record as HE II.

<sup>4</sup> The demonstrative exhibit is appended to the record as HE III.

<sup>5</sup> GE 1.

Applicant's supervisor could only make recommendations to the program manager about the resolution of any performance or disciplinary issues.<sup>6</sup>

In his contract position, Applicant was tasked with monitoring, analyzing, and disseminating information about the East Asian blogosphere. His duties often required him to translate foreign-language social media posts into English. Applicant, who disseminated his work throughout the agency and to agency staff worldwide, believed that his work was well received by his audience. Applicant also believed that he developed a good rapport and working relationships with executive-level employees in the agency. In January 2011, Applicant's supervisor requested that the program manager remove Applicant from the contract. Applicant's supervisor believed that Applicant was trying to sabotage his team. He also considered Applicant's effort at building relationships with executive-level agency employees inappropriate. In time, he came to think of Applicant as being untrustworthy.<sup>7</sup>

Days earlier, Applicant sent an e-mail to several people, including the assistant secretary of the agency implying that another team member, a longtime federal employee originally from East Asia, was operating under an improper foreign influence. Applicant felt so strongly about the perceived foreign influence that he attempted to file a report with the agency's security office. Applicant's supervisor viewed this allegation as unfounded, offensive, and malicious. In support of his request for Applicant's removal, Applicant's supervisor forwarded the program manager five examples of e-mails written and sent by Applicant between July 2010 and January 2011 to various high-level agency employees that Applicant's supervisor believed showed Applicant's poor judgment. In his email, Applicant's supervisor told the program manager that he spoke with Applicant on each occasion about the inappropriate nature of his actions, but it does not appear that Applicant's supervisor documented any of these issues before making the removal request in January 2011. Applicant acknowledged that these conversations occurred, but he did not see them as reprimands or admonishments about his work, behavior, or judgment, but as the normal discourse that occurs during the editorial process as the two discussed translations and content. The program manager agreed to remove Applicant from the team, but did not inform Applicant of this decision.<sup>8</sup>

After Applicant reported to work the following day, his supervisor ordered him to pack up his personal belongings. Agency security came to his work area to confiscate Applicant's building access badge and escort him out of the building. Shocked, Applicant asked his supervisor if his chain of command at the agency was aware of Applicant's removal. Applicant's supervisor confirmed that the decision had been properly vetted. Once outside the building, Applicant called his program manager and his supervisor's boss. Both acknowledged that they were aware of his impending removal. Later, the program manager explained to him that the agency exercised an "at-

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<sup>6</sup> Tr. 28.

<sup>7</sup> Tr. 26, 95-96; GE 1; AE D-E, G-H.

<sup>8</sup> Tr. 24-26, 46-48, 62-66, 116, 130-143; GE 3.

will” clause to request his removal from the contract, meaning the agency could request Applicant’s removal from the contract at any time for any reason without having to establish cause for termination or providing any advance warning. Applicant had never been disciplined for any rule or security violations by the agency or his employer. The program manager assured Applicant that he remained in good standing with the company and that they would try to place him on another contract. However, less than two weeks later, the company terminated Applicant’s employment because they did not have another position for him.<sup>9</sup>

Six months later, Applicant reached out to a former coworker at the agency. The coworker, a federal employee, informed Applicant that the team he used to work on was dismantled, his former supervisor was reassigned, and that contractors were being let go as part of a large restructuring effort within the agency. Based on this conversation, Applicant assumed that his removal was prompted by the restructuring.<sup>10</sup>

Applicant completed his most recent security clearance application in November 2012. In Section 13A: Your Employment Activities, Applicant disclosed his employment with the agency from September 2009 to September 2010 as an unpaid fellow and October 2010 to January 2011 as a contractor and answered the corresponding follow-up questions. He cited an agency restructuring that resulted in the termination of several contractor positions as the reason he left the contract position in January 2011. The final question related to this particular employment activity asks,

“For this employment have any of the following happened to you in the last seven years: fired; quit after being told you would be fired; left by mutual agreement following charges or allegations of misconduct; [or] left by mutual agreement following notice of unsatisfactory performance?”

Applicant responded, “no.”<sup>11</sup>

In January 2013, a background investigator interviewed Applicant about this employment, and Applicant reiterated that he left the position because of the agency restructuring.<sup>12</sup> Shortly after the interview, the background investigator contacted the Applicant’s former supervisor at the agency, who followed up their conversation with an e-mail stating:

I’m attaching all the emails I sent to [Applicant’s employer] detailing the reasons I fired [Applicant] in January 2011. I’ve also attached a message from my boss . . . informing our principal deputy coordinator (the #2

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<sup>9</sup> Tr. 26-29, 65, 116-118, 120-125, 145-146, 162-166; AE K.

<sup>10</sup> Tr. 127-130, 146-148.

<sup>11</sup> GE 1.

<sup>12</sup> GE 2.

person in the bureau) that we planned to terminate [Applicant's] contract and a message from [a team member] explaining what [Applicant] did.<sup>13</sup>

Applicant's former supervisor testified at the hearing as a witness for the Government. He acknowledged that there was a majoring restructuring in the agency after Applicant was removed from his position. However, Applicant's supervisor explained that the restructuring was not a consideration in the decision to remove Applicant from the contract. In discussing the email he sent to the background investigator, Applicant's supervisor admitted that he used the word "fired" colloquially. He also acknowledged that he did not have the authority to fire Applicant, only to request his removal from the contract and that he had no say in whether the company kept Applicant as an employee after the removal from the contract.<sup>14</sup>

### **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an Applicant's eligibility for access to classified information.

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." 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 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 the applicant may deliberately or inadvertently fail to protect classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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).

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<sup>13</sup> GE 3.

<sup>14</sup> Tr. 26-31, 40-42, 57-58, 67-70.

## Analysis

An applicant's personal conduct becomes a concern when his actions show questionable judgment, an unwillingness to comply with rules or regulations, or raises questions about an applicant's ability to protect classified information.<sup>15</sup> The SOR ¶ 1.a alleges that Applicant "was terminated for cause from [his] assignment as a contractor with the [another agency]." This allegation is inaccurate. Applicant was removed from his contractor position at the request of the client agency. He was not terminated by his employer as a result of this request. Applicant was let go by his employer, in good standing, because the company did not have another position for Applicant. However, the pleadings in these adjudications are not held to a standard of perfection. All that is required is that the allegation put the Applicant on notice of the subject matter of security concern.<sup>16</sup> The overall gist of the allegation in SOR ¶ 1.a is that Applicant was removed from his contractor position for exhibiting conduct that raises security concerns.

Typically, disruptive or inappropriate behavior in the work place is disqualifying when it supports a negative 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.<sup>17</sup> Here, Applicant's supervisor believed that Applicant displayed a lack of judgment in the content and distribution of the e-mails he sent in the course of executing his duties as a social media analyst and that Applicant made serious and baseless accusations against another federal employee. The instances of poor judgment cited by Applicant's supervisor involve differences between the two men about the execution of the team's objectives, not behavior that can be objectively classified as disruptive, a breach, malfeasance, or other inappropriate conduct by Applicant. Furthermore, Applicant's actions, as described by his former supervisor, are not indicative of an inability to properly handle or handle safeguard information.

A favorable finding for Applicant on SOR ¶ 1.a does not resolve the falsification allegation in SOR ¶ 1.b, that Applicant intentionally failed to disclose on his November 2012 security clearance that he left his contractor position with the agency under unfavorable circumstances. The information available to the Government before the hearing provided a good-faith basis for the allegation. Specifically, GE 3, an e-mail from Applicant's former supervisor to the background investigator indicated that Applicant had been fired from his contractor position. The e-mail also suggested that Applicant engaged in some kind of misconduct. At hearing, the Government's evidence revealed that Applicant did not leave his contract position at the agency on his own accord. He was approached by agency security in front of his co-workers, relieved of his building badge, and escorted out of the building. These events were undoubtedly shocking and

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<sup>15</sup> See AG ¶ 15.

<sup>16</sup> See ISCR Case No. 01-26479 at 2 (App. Bd. Sept. 16, 2003).

<sup>17</sup> See AG ¶ 16(d).

embarrassing for Applicant. Considered in isolation, these facts support a finding that Applicant left the position under unfavorable circumstances.

However, this type of piecemeal analysis is inappropriate. Taking such an approach to the evidence has the potential to result in findings that do not reflect a reasonable, plausible interpretation of the record.<sup>18</sup> As unpleasant as being escorted out of the agency may have been, this event alone was not enough for Applicant to conclude that the reason for his removal was related to his performance or some kind of misconduct. Applicant was not given any explanation for his removal that suggested such. Unable to obtain a clear answer from the agency or his employer, Applicant assumed that he lost his position because of the agency restructuring plan. Although Applicant's assumption was incorrect, it was not unreasonable. Accordingly, it was not unreasonable for Applicant to report on his security clearance application that he did not leave the position under unfavorable circumstances. He did not act with any intention to provide false or misleading information to the Government. It is also worth noting that any question regarding Applicant's removal from his contract position arose only after Applicant's former supervisor inaccurately used the word "fired" to describe it. Accordingly, SOR ¶ 1.b is also found in Applicant's favor.

Based on a careful consideration of the record, I find that Applicant did not engage in conduct that is disqualifying under the personal conduct guideline. I have also considered the alleged conduct under the whole-person factors at AG ¶ 2 and have determined that a negative assessment is not warranted. It is clear from the record that despite his qualifications, Applicant was not a good fit for his contractor position at the agency. His former supervisor believed that Applicant was trying to sabotage his team and tarnish the reputation of an agency employee that the supervisor held in high regard. Applicant believed that a member of his team was operating under an improper foreign influence. This disparate view of the work environment led to a personnel issue for Applicant's supervisor, which he remedied by having Applicant removed from the contract. The incident does not reflect negatively on Applicant's ability to properly handle or safeguard classified information.

### **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, Personal Conduct:	FOR APPLICANT
Subparagraphs 1.a – 1.c:	For Applicant

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<sup>18</sup> See, e.g. ISCR Case No. 02-05988 (App. Bd. December 18, 2003); ISCR Case No. 99-0005 (App. Bd. April 19, 2000).

## **Conclusion**

In light of all of the circumstances presented, 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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Nichole L. Noel  
Administrative Judge