



## **STATEMENT OF THE CASE**

On June 14, 2007, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, as amended, issued a Statement of Reasons (SOR) to the Applicant. The SOR detailed reasons why DOHA could not make the preliminary affirmative finding required under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for the Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether a clearance should be granted, denied or revoked.

On July 19, 2007, Applicant responded to the allegations set forth in the SOR, and elected to have a decision made after a hearing before a DOHA Administrative Judge. The matter was assigned to me on September 12, 2007. A Notice of Hearing was issued on October 9, 2007, setting the hearing for November 8, 2007. At the hearing, the Government introduced three (3) exhibits (Government's Exhibits (GX) 1-3). Applicant testified and introduced exhibits (Applicant's Exhibits (AX)). The transcript was received at DOHA on November 26, 2007.

## **FINDINGS OF FACT**

Applicant is a 35-year-old industrial engineer. The June 14, 2007 SOR contains two (2) allegations under Guideline E (Personal Conduct), and two (2) allegations under Guideline J (Criminal Conduct). Applicant's responses are a combination of admissions and denials, along with comments and explanations. Only the specific admissions are accepted and incorporated herein as Findings of Fact. After considering the totality of the evidence, I make the following FINDINGS OF FACT as to the status of each SOR allegation.

### ***Guideline E (Personal Conduct)***

1.a. While in college in 1996-2000 (ages 24-28), Applicant's roommate vacated their joint residence and left behind a TV satellite dish, which contained a "card" that allowed access to the satellite network. He purchased another dish and card on E-bay. In about July 2001, he attempted to sell the equipment on his company's computer network, which apparently allowed employees to advertise personal items for sale. Applicant knew that at least the "cards" could not legally be sold, since they allowed access to the satellite network without having to pay the satellite company.

1.b. the attempted sale was detected by company security. Applicant admitted what he was doing and was terminated by the company in July 2001 because of the improper use of the computer network to sell the "illegal" cards.

### ***Guideline J (Criminal Activity)***

2.a. In about June 1998, Applicant was working as a checker in a food market. A friend came into his line and Applicant intentionally did not charge the friend for 10-15 items. This conduct was observed by store security and resulted in Applicant's arrest. He was charged with Misdemeanor/Petty Theft and *pleaded nolo contendere* to the charge. He was fined, placed on probation for three years and sentenced to serve one day in jail.

2.b. In or about August 2004, Applicant was arrested for driving a boat on a local lake, while under the influence of alcohol. He pleaded No Contest and was fined, placed on probation for two years, and ordered to attend an alcohol awareness class.

## POLICIES

The eligibility criteria established by Executive Order 10865 and DoD Directive 5220.6 require an analysis under the whole person concept, which requires DOHA Administrative Judge s to identify personal characteristics and conduct that are reasonably related to the ultimate question of whether it is "clearly consistent with the national interest" for an individual to hold a security clearance. An applicant's admission of the information in specific allegations relieves the Government of having to prove those allegations. If specific allegations and/or information are denied or otherwise controverted by the applicant, the Government has the initial burden of proving those controverted facts alleged in the Statement of Reasons.

In evaluating the relevance of an individual's conduct, under the Directive's "whole person" concept, the adjudicator should consider the following nine generic factors: (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 voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent 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 (Directive, Enclosure 2, Section 2, on pages 18, 19). I have considered all nine factors, individually and collectively, in reaching my overall conclusion.

If the Government meets its burden (either by the Applicant's admissions or by other evidence) and proves conduct that creates security concerns under the Directive, the burden of persuasion then shifts to the Applicant to present evidence in refutation, extenuation or mitigation sufficient to demonstrate that, despite the existence of conduct that falls within specific criteria in the Directive, it is nevertheless consistent with the interests of national security to grant or continue a security clearance for the Applicant.

A person seeking access to classified information enters into a fiduciary relationship with the Government based upon trust and confidence. As required by DoD Directive 5220.6, as amended, "any doubt as to whether access to classified information is clearly consistent with the interests of national security will be resolved in favor of the nation's security."

## CONCLUSIONS

### ***Guideline E (Personal Conduct)***

1.a. and 1.b. Applicant used his company computer to attempt to sell two "satellite programming cards" from satellite equipment not legitimately purchased by him. He was terminated by his employer because of this conduct.

Disqualifying Conditions - applicable are 16.( c) credible adverse information in several adjudicative areas that is not sufficient for an adverse determination under any other single guideline, but 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 the person may not properly safeguard protected information;

16.(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 the person may not properly safeguard protected information. This includes but is not limited to consideration of the following:

- (2) . . . inappropriate behavior in the workplace;
- (3) a pattern of dishonesty or rule violation;
- (4) evidence of significant misuse of . . . other employer's time or resources.

Mitigating Conditions - 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.

**Guideline J (Criminal Conduct) - The Concern:** 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.

2.a.. As to the 1998 arrest, the SOR allegation that Applicant was charged with Grand Theft is derived from the FBI Identification record (GX 3). There are two entries for that year, "1998/05/19," which cited "Petty Theft" and "1998/06/03," which cites "Grand Theft." Both entries are captioned "Arrested Or Received." As I read the two entries and those for the 2004 arrest as well, it is clear that the first entry was for the day the arrest was reported and the second entry was the date the court action occurred. The second entry does say "Grand Theft." FBI Identification Records are generally, but not always, correct. They are only as accurate as the information transmitted to the FBI and the correct transfer of that information onto the Identification Record.

Applicant denies he was charged with Grand Theft. His contention is supported by an official court document. Attached to Applicant's response to the SOR is the Complaint, the official charging document. Count 1 alleges that Applicant committed Petty Theft, a Misdemeanor, on March 15, 1998. The Complaint was signed and date stamped on April 16, 1998. The "Grand Theft" entry in the FBI History, dated "1998/06/03" is unsupported by any original evidence and is incorrect. I conclude that the arrest and conviction was for a misdemeanor.

2.b. The August 2004 offense occurred as alleged. Applicant was in a friend's speed boat and had consumed about eight beers during the day. The friend asked Applicant to drive the boat while he, the friend, used the water ski. The boat's erratic movements were observed by a Deputy Sheriff and Applicant was stopped.

Disqualifying Conditions include 31(a) a single serious crime or multiple lesser offenses; and 31.(c) an allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted, are both applicable. Applicable Mitigating Conditions include 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; and 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.

On three occasions in Applicant's life of 35 years, he used poor judgment in making decisions involving his personal conduct: the 1998 Petty Theft; the 2001 misuse of a company computer, which

led to his termination, and the 2004 DUI Watercraft arrest and conviction. Without meaning to minimize Applicant's personal and criminal misconduct, the three incidents involve different types of misconduct, most of which can all be classified as relatively minor, unconnected, and the result of decisions made without reasonable consideration. Overall, Applicant's personal history suggests an extended period of immaturity that substantially ended some years ago, as is demonstrated by his excellent work record and letters of commendation.

Under the two specific Guidelines and the Directive's whole person concept, Applicant has been shown to have a history of one act of personal misconduct during 1996-2000; and two "lesser" criminal offenses, in 1998 and 2004. Since 1998, the only incident is one of operating a boat on a lake while under the influence of alcohol, conduct that Applicant credibly regrets. There is no other evidence of alcohol abuse or alcohol-related misconduct. Consequently, the 2004 arrest appears to be an aberration in a life otherwise free of alcohol-related problems. Overall, I conclude that Applicant has adequately mitigated the Government's concerns.

In summary, Applicant has demonstrated that he currently possesses the good judgment, reliability, and trustworthiness required of someone seeking access to the nation's secrets.

### **FORMAL FINDINGS**

Formal Findings as required by Section 3, Paragraph 7 of Enclosure 1 of the Directive are hereby rendered as follows:

Guideline E (Personal Conduct)	For the Applicant
Subparagraph 1.a.	For the Applicant
Subparagraph 1.b.	For the Applicant
Guideline J (Criminal Conduct)	For the Applicant
Subparagraph 2.a.	For the Applicant
Subparagraph 2.b.	For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.

**BARRY M. SAX**  
**ADMINISTRATIVE JUDGE**