



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 20-01450  
)  
)  
Applicant for Security Clearance )

**Appearances**

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

March 16, 2022  
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**Decision**  
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CEFOLA, Richard A., Administrative Judge:

**Statement of the Case**

On February 14, 2012, Applicant submitted a security clearance application (SCA). On October 16, 2020, in accordance with DoD Directive 5220.6, as amended (Directive), the Department of Defense issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J. The action was taken 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 (AG) effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing through counsel (Answer) on December 17, 2020, and requested a hearing before an administrative judge. The case was assigned to me on September 14, 2021. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on September 23, 2021. I convened the hearing as scheduled on November 29, 2021. The Government offered Government Exhibits (GXs)

1 through 4, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (TR) soon thereafter. The record was left open until February 7, 2022 for the receipt of additional evidence. On February 4, 2022, Applicant offered Exhibits (AppXs) A~H, which were admitted without objection. The record was closed on February 7, 2022. On February 9, 2022, Applicant offered AppX I; which was marked for identification and not admitted, as the record had already been closed.

### **Findings of Fact**

Applicant admitted, in part, and denied, in part, the allegation in ¶ 1.a. of the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 64-year-old employee of a defense contractor. He has been employed with the defense contractor since September of 2018. He has held a security clearance, off and on, since 1985. (TR at page 24 line 12 to page 35 line 1, and GX 1 at page 25.) He is divorced, and has two children, ages 26 and 29 years old. (GX 1 at pages 13~14, and 19.)

### **Guideline J: Criminal Conduct**

1.a. Applicant was a software engineer at his own company from 2003~2009. (TR at page 27 lines 21~25.) He employed his, then minor, children, at his company, paying them about \$20,000 a year. (TR at page 28 line 6 to page 32 line 6.) When his company failed in 2009, Applicant filed for unemployment benefits on behalf of his minor children, for “99 weeks,” ending in “mid-2011.” (TR at page 32 line 7 to page 35 line 2.) He placed said monies, when received, “into their bank accounts.” (TR at page 15 lines 12~25.)

In December of 2015, Applicant was charged with two counts of False Statement, Representation, or Concealment; two counts of Identity Theft – Obtain Credit with Other’s Identity; and Grand Theft – all felonies. Applicant denies committing these felonies, but did plead guilty to Failure to Post Benefit Rights in his work place, a misdemeanor. (TR at page 15 line 7 to page 22 line 24, at page 23 line 13 to page 24 line 6, and page 37 lines 4~16.) Applicant was ordered to pay \$45,000 in restitution; which he avers has been paid (currently in civil litigation), and was placed on probation until this month, March of 2022. (TR at page 38 line 4 to page 40 line 6, and GX4.)

### **Policies**

When evaluating an applicant’s suitability for national security eligibility, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant’s national security eligibility.

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 AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context 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. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to 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 the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person applying for national security eligibility seeks to enter 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 national security eligibility. 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 or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "[a]ny determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

## **Analysis**

### **Guideline J: Criminal Conduct**

AG ¶ 30 sets forth the security concerns pertaining to criminal conduct:

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 three conditions that could raise a security concern and may be disqualifying in this case:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness;
- (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; and
- (c) individual is currently on parole or probation.

Applicant was convicted of a misdemeanor offense in 2017. He was placed on probation for five years, which ends this month, March of 2022. The evidence establishes the above three disqualifying conditions.

AG ¶ 32 provides two conditions that could mitigate the above security concerns raised in this case:

- (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
- (d) there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

More than ten years have passed since the Applicant's alleged felonious conduct, and his admitted misdemeanor conduct. Within the month of this writing, his probation is ending. He provided evidence of successful work with his employer. (AppXs B~D.) The evidence does establish mitigation under the above conditions. Criminal Conduct is found for Applicant

### **Whole-Person Concept**

Under the whole-person concept, the administrative judge must evaluate an applicant's national security eligibility 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(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.

According to AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility must be an overall commonsense judgment based upon careful consideration of the applicable guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all facts and circumstances surrounding this case. I have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(d) were addressed under those guidelines, but some warrant additional comment. Applicant is well respected in the workplace and in his community. (AppXs B~H.) Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the Criminal Conduct security concerns.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraph 1.a:	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 eligibility for a security clearance. Eligibility for access to classified information is granted.

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Richard A. Cefola  
Administrative Judge