



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 06-22081
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nichole Noel, Esquire, Department Counsel  
For Applicant: *Pro se*

January 16, 2008

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**Decision**  
\_\_\_\_\_

FOREMAN, LeRoy F., Administrative Judge:

Applicant submitted a Security Clearance Application (SF 86) on November 30, 2005. On July 17, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision deny his application, citing security concerns under Guidelines J (Criminal Conduct) and E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), 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 August 6, 2007; answered the SOR on August 16, 2007; and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on September 21, 2007. The case was assigned to an administrative judge on September 24, 2007, and reassigned to me on October 24, 2007, based on workload. DOHA issued a notice of hearing on November

1, 2007, and I convened the hearing as scheduled on November 15, 2007. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified on his own behalf and submitted one exhibit, Applicant's Exhibit (AX) A, which was admitted without objection.

I kept the record open to enable Applicant to submit additional matters. He timely submitted AX B, C, and D, and they were admitted without objection. Department Counsel's comments regarding AX B, C, and D are attached to the record as Hearing Exhibit (HX) I. The record closed on November 30, 2007. DOHA received the transcript of the hearing (Tr.) on December 13, 2007. Based upon my review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Procedural Ruling**

The hearing was convened less than 15 days after the notice of hearing was issued. I advised Applicant of his right under Directive ¶ E3.1.8 to written notice 15 days before the hearing. Applicant affirmatively waived his right to 15 days written notice. (HX II; Tr. 18.)

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the factual allegations in ¶ 1.a and part of ¶ 1.b with explanations. He denied the factual allegations in ¶¶ 1.c and 2.a. His admissions in his answer to the SOR and at the hearing are incorporated in my findings of fact. I make the following findings:

Applicant is a 51-year-old field engineer for a defense contractor. He served on active duty in the U.S. Army from December 1974 to December 1977 and from October 1980 to December 1997. He held a security clearance while he was on active duty. He has bachelor's degrees in organizational management and counseling (Tr. 8). He has worked for his current employer since December 1997, and he has held his current security clearance for about 10 years. His operations manager, who has known him for more than 20 years, describes him as a level-headed person of integrity, responsibility, and character above reproach (AX C at 2).

Applicant was married in November 1980. He has two sons, ages 27 and 26, and a 14-year-old daughter (Tr. 31). His younger son was born severely handicapped, unable to walk until he was four years old. He still is incapable of living alone. Applicant was on active duty for the first 16 years of his disabled son's life, leaving his wife almost solely responsible for his care (Tr. 59-60).

In July 2004, Applicant voluntarily disclosed to his security manager that he was receiving psychiatric counseling for depression and had been prescribed anti-depressant medication (Tr. 34-35; AX A). His medical records reflect a diagnosis of major depression, moderate, recurrent, and history of alcohol abuse (GX 6). With his

psychiatrist's approval, Applicant stopped taking anti-depressant medication in April 2006 (Tr. 55). He now deals with stress by participating in a therapy group at his church, doing yoga, meditating, and participating in vigorous physical exercise (Tr. 56).

When Applicant executed his SF 86, he answered "no" to question 19, asking if he had consulted with a mental health professional in the last seven years (GX 1 at 5). He testified that his negative answer to question 19 was an inadvertent mistake. He had discussed his criminal record with his security manager a few minutes before completing the SF 86 and was focused on updating his criminal record. He also was comparing his answers to a previous SF 86, on which question 19 was correctly answered in the negative. These factors caused him to incorrectly answer "no" to question 19, even though he had previously disclosed to his security manager that he was receiving psychiatric counseling (Tr. 34).

Applicant believes that the stress of caring for their handicapped son was a major problem in his marriage (Tr. 59). The marriage began to deteriorate rapidly around the summer of 2003, with numerous arguments about many issues (Tr. 40).

During the summer of 2004, Applicant was contacted by a woman with whom he had a serious romantic relationship when he was younger and before he met his wife. The woman, although married, invited Applicant to visit her at her home in another state. Applicant seriously considered accepting the invitation but then thought better of it. His wife found out about the invitation. Applicant admitted to his wife that he had received the invitation and contemplated accepting it. According to Applicant, his wife would not give him the opportunity to explain their previous relationship (Tr. 39).

In early December 2004 Applicant and his wife again argued. On the night of December 7, 2004, they made up, and Applicant went to work on December 8, thinking everything was fine. He did not know his wife complained to the police and obtained a temporary restraining order prohibiting all contact. He was served with the restraining order at work, and he moved to a hotel (Tr. 36).

On December 21, 2004, the day the temporary restraining order was to expire, Applicant sent an email to his wife, saying they needed to talk (Tr. 38).; GX 4 at 2). In the email (GX 4 at 2), he told his wife he backed out of the other woman's invitation, "because you are the one that I love." He explained: "In spite of thinking about sinning, I did not sin. I was going to tell you. Sorry for lying." Applicant and his wife were due in court for a hearing to determine whether the restraining order should be continued or terminated, and Applicant expected the restraining order would be terminated and his wife would not read the email until after the hearing (Tr. 39-40). His wife showed the email to the police, who arrested Applicant for violating the restraining order, a misdemeanor (GX 4 at 1, 3).

On January 8, 2005, his wife obtained a permanent restraining order. Three days later, his wife invited him to her house to talk, and he accepted the invitation. They met and talked more than 60 times, met several times at restaurants, his place of work,

and her residence. He broke off contact in late February or early March 2005, after his wife's attorney called him and told him his wife was very upset by his conduct. In April 2005, the police arrested Applicant for violating the restraining order, harassment, and stalking (GX 2 at 4; GX 4 at 6). All the charged offenses were misdemeanors (GX 5 at 3).

The stalking charge was based on Applicant's wife's claim that he was following her. According to Applicant, his wife drove to the park where he had been running for 15 years, went to the YMCA where he exercised, and went to another YMCA when Applicant switched locations to avoid his wife (Tr. 43).

The district attorney offered to dismiss the violation of the first restraining order if Applicant would plead guilty to violating the second restraining order, harassment, and stalking. Applicant agreed, contrary to the advice of his lawyer (Tr. 45). He was fined \$1,500, spent 17 days in jail on work release, and was placed on probation for two years (GX 2 at 4).

At the hearing, Applicant denied harassing or stalking his wife. He testified he thought he was pleading guilty only to violating the second restraining order, and did not realize until a couple of weeks later that he had pleaded guilty to harassment and stalking (Tr. 44-45).

In October 2005, the restraining order was modified to permit both parents to attend school events and to communicate by cell phone about their minor daughter (Tr. 53-54; AX C). Applicant and his wife were divorced in November 2005. His probation was terminated in March 2007 (AX D at 4). He and his wife now meet in a public place to arrange visits with his daughter. His handicapped son lives with him for six months and his ex-wife for six months (Tr. 58). There have been no incidents between Applicant and his ex-wife since the restraining order was modified (Tr. 57).

Applicant disclosed his criminal record to his security manager and reported it in response to question 26 on his SF 86 (Tr. 34; GX 1 at 7). His supervisor, coworkers, two sisters, and several close friends also know about his criminal record; and his ex-wife, supervisor, coworkers, security manager, and friends know about his psychiatric counseling (GX 2 at 3-4).

## **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec.

Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Clearance 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.

Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Guideline J, Criminal Conduct

The SOR alleges Applicant was arrested in December 2004 for violating a restraining order (SOR ¶ 1.a), and arrested in April 2005 for violating a restraining order, harassment, and stalking (SOR ¶ 1.b). The first charge was dismissed pursuant to a plea agreement and the second resulted in a conviction pursuant to Applicant's guilty plea.

The SOR also alleges Applicant falsified his SF 86. The allegation of falsification is alleged as both criminal conduct under Guideline J (SOR ¶ 1.c) and personal conduct under Guideline E (SOR ¶ 2.a). His alleged falsification is discussed below under Guideline E.

The concern raised by criminal conduct is that it "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. Conditions that could raise a security concern and may be disqualifying include "a single serious crime or multiple lesser offenses" and "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted." AG ¶¶ 31(a) and (c).

SOR ¶ 1.a alleges a single violation of a restraining order. SOR ¶ 1.b alleges multiple violations of a second restraining order. Applicant admitted both allegations. Based on his admissions and the evidence of record, I conclude AG ¶¶ 31(a) and (c) are raised.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 31(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline can be mitigated by evidence that "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." AG ¶ 32(a). Applicant's criminal conduct was preceded by more than 27 years of honorable military service while holding a security clearance. The causes of Applicant's criminal behavior are no longer present. The criminal conduct occurred while Applicant was undergoing psychiatric counseling for major depression, and it was motivated by his desire to save his marriage. He finally realized that he could not save his marriage, and he was divorced in November 2005. Since that time, the restraining order has been modified; he and his ex-wife have agreed on visitation arrangements for their minor daughter; and

they have agreed to share care-giving for their disabled son. No further incidents between them have occurred.

Applicant has responded successfully to psychiatric counseling, no longer requires anti-depressant medications, and has found alternate ways to cope with stress. Throughout his domestic difficulties, he continued to demonstrate integrity, responsibility, and good character at work. He continued to hold a security clearance without incident. I conclude that his criminal conduct is unlikely to recur, and it does not cast doubt on his present reliability, trustworthiness, or good judgment. Accordingly, I conclude AG ¶ 32(a) is established.

Security concerns arising from criminal conduct also can be mitigated if “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.” AG ¶ 32(d). Applicant’s conviction is almost three years old. He has completed his period of probation, and the court has modified the restraining order to allow limited contact with his wife. No misconduct has occurred since his conviction. His work performance has never faltered in spite of his difficulties. He is actively involved in a counseling and support group sponsored by his church. He has changed his lifestyle to deal with stress in a productive and acceptable manner. At the hearing, he expressed embarrassment and remorse for his conduct. I conclude AG ¶ 32(d) is established.

### **Guideline E, Personal Conduct**

The SOR ¶¶ 1.c and 2.a alleged Applicant falsified his SF 86 by deliberately failing to disclose his psychiatric treatment and medication. The concern under Guideline E is as follows: “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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.” AG ¶ 15.

The relevant disqualifying condition in this case is “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities.” AG ¶ 16(a).

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission, standing alone, does not prove an applicant’s state of mind when the omission occurred. An administrative judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning an applicant’s state of mind at the time of the

omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004) (explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant's denial of intent to falsify his SF 86 is corroborated by his voluntary disclosure of his psychiatric counseling more than a year before he executed his SF 86. He presented himself at the hearing as sincere and open. I found his explanation for his negative answer to question 19 plausible and credible. I am satisfied his negative response to question 19 was an inadvertent mistake and not an intentional falsification. Accordingly, I conclude that AG ¶ 16(a) is not raised. Applicant has refuted the allegation in SOR ¶¶ 1.c and 2.a, and I resolve them in his favor.

### **Whole Person Concept**

Under the whole person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance 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 eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept. Some of these factors were addressed above, but some warrant additional comment.

Applicant is a mature, well-educated adult. He has spent most of his adult life in government service, either as a soldier or as an employee of a defense contractor. He has held a security clearance for most of his professional life, without incident. His criminal conduct arose as the culmination of a troubled marriage, exacerbated by his bouts of depression and triggered by his confession to his ex-wife that he had considered infidelity but decided against it because of his continuing love for her. Although Applicant knew he was violating the restraining orders, it appears that his ex-wife was complicit in his violations and used them to extract revenge for his thoughts of infidelity. Applicant has overcome his problems with depression and ended his marriage, thereby removing the causes of his criminal conduct. He is remorseful for his thoughts of infidelity and ill-advised attempts to save his marriage. At the hearing, he was sincere, open, and credible.

Applicant has been rehabilitated and has changed his life-style to avoid further problems with depression. The likelihood of recurring criminal conduct is very remote. He has been candid with his family, supervisors, security officer, coworkers, and friends about his criminal record and his treatment for depression, eliminating his vulnerability to pressure, coercion, exploitation, or duress.



After weighing the disqualifying and mitigating conditions under Guideline J and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has refuted the allegation that he falsified his SF 86, and he has mitigated the security concerns based on his violations of the restraining orders. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

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

Paragraph 1, Criminal Conduct:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Personal Conduct:	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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

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LeRoy F. Foreman  
Administrative Judge