



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



In the matter of:

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) ISCR Case No. 12-05949  
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Applicant for Security Clearance

**Appearances**

For Government: Pamela Benson, Esquire, Department Counsel

For Applicant: *Pro se*

June 24, 2014

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**Decision**

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CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on September 26, 2011. On December 23, 2013, the Department of Defense (DOD) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E for Applicant. 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 adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

Applicant answered the SOR in writing on January 6, 2014, and requested an Administrative Determination by an administrative judge. Department Counsel issued a File of Relevant Material (FORM) on February 25, 2014. Applicant acknowledged receipt of the FORM on March 18, 2014, but issued no response. The case was assigned to me on May 15, 2014. Based upon a review of the pleadings and exhibits, eligibility for access to classified information is denied.

## Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations in all the Subparagraphs of the SOR, without explanations.

Applicant is a 33 year-old employee of a defense contractor. (Item 4 at pages 5 and 9.)

### Guideline J - Criminal Conduct & Guideline E - Personal Conduct

1.a.~1.f. and 2.a. In **October of 2005**, Applicant was cited for violation of rules governing a state park and beach, by riding a dirt bike on state property. He was fined \$300 and assessed court costs. Three months later, In **January of 2006**, Applicant was arrested and subsequently pled *nolo contendere* to reckless driving. (Item 4 at pages 19~20.) In part, he was placed on probation for six months, and fined \$300. (*Id.*) Two months later, in **March of 2006**, Applicant was arrested and subsequently pled *nolo contendere* to trespassing, failure to stop on oral law enforcement command, and again for violation of rules governing a state park and beach, by riding a dirt bike on state property. (Item 4 at pages 20~21.) He was placed on probation for one year, and fined \$300. (*Id.*)

In **2010**, Applicant was arrested and subsequently pled *nolo contendere*, again, to failure to stop on oral law enforcement command. He was fined \$500. The following year, in **January of 2011**, Applicant was cited a third time for failure to stop on oral law enforcement command. (Item 4 at page 21.) More recently, in **April of 2011**, Applicant was arrested and subsequently pled guilty to assault on a person over the age of 60, and trespassing. (Item 4 at page 23~24, and Item 5.) In January of 2012, he was sentenced to 20 years in prison for the assault, and to one year in prison for the trespass. (Item 5.) The prison sentence was deferred for five years. (*Id.*) Applicant is still under probation as a result of the deferred prison sentence.

### Guideline E - Personal Conduct

2.b.~2.f. In **October of 2005**, Applicant was issued a verbal warning by his current employer for un-excused absenteeism. (Item 6 at page 5.) In **June of 2008**, Applicant was issued a written warning by his current employer for a violation of safety policy. (Item 6 at page 5.) In **August of 2008**, Applicant was suspended for three days by his current employer for inattention to duty. (Item 6 at page 5.) In **May of 2009**, Applicant was suspended for an additional three days by his current employer for having a prohibited cell phone while at work. (Item 6 at pages 4~5.) Finally, in **April of 2010**, Applicant was suspended for an additional five days by his current employer for horseplay. (Item 6 at page 4.)

## 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 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. (AG Paragraph 2.) The administrative judge's over-arching adjudicative goal is a fair, impartial and commonsense decision. According to AG Paragraph 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 Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph 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.

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).

## **Analysis**

### **Guideline J - Criminal Conduct**

Paragraph 30 of the adjudicative guidelines sets out the security concern relating 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.

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 31(a) provides that "*a single serious crime or multiple lesser offenses*" may raise security concerns. Under Subparagraph 31(d) when an "*individual is currently on parole or probation*" that fact may raise security concerns. Applicant has been cited or arrested on six separate occasions. As a result of his last arrest in April of 2011, he was convicted of a felony. He is still under probation as a result of that conviction. I find no countervailing mitigating condition that is applicable here. Subparagraph 32(a) requires 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.*" That is not the case here, as Applicant's last arrest, which was his fourth arrest, was only three years ago. The mitigating condition under Subparagraph 32(d) requires that "*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity . . . good employment record . . .*," That is not the case here, as Applicant is still on probation; and as will be discussed under Personal Conduct, his employment record is less than sterling.

## **Guideline E - Personal Conduct**

The security concern for Personal Conduct is set out in AG Paragraph 15:

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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 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-man assessment of questionable judgment, untrustworthiness, unreliability . . . . This includes but is not limited to consideration of: (2) disruptive, violent, or other inappropriate behavior in the workplace; and (3) a pattern of . . . rule violations.*" may be disqualifying. Above and beyond Applicant's above-mentioned acts of criminal conduct, he has five rule violations in the work place, for which he has been suspended from work for a total of 11 days. I also find no countervailing mitigating condition that is applicable here. Subparagraph 17(c), requires that "*the offense is so minor, or so much time has passed . . . or it happened under such unique circumstances that it is unlikely to recur and does not cast a doubt on the individual's reliability, trustworthiness, or good judgment.*" Such is clearly not the case here.

## **Whole-Person Concept**

Under the whole-person concept, the 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. Under AG Subparagraph 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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) 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.

I have considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his admitted Criminal Conduct and Personal 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:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant

Subparagraph 2.d:	Against Applicant
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Subparagraph 2.e:	Against Applicant
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Subparagraph 2.f:	Against Applicant
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### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Richard A. Cefola  
Administrative Judge