



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 13-01094

**Appearances**

For Government: Richard Stevens, Esquire, Department Counsel  
For Applicant: Emmett W. Hampton, Esquire

03/141/2014

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant has mitigated the security concerns arising from his criminal conduct. Eligibility for a security clearance and access to classified information is granted.

**Statement of the Case**

On June 21, 2013, Applicant applied for a security clearance and submitted an Electronic Questionnaire for Investigations Processing (e-QIP) version of a Security Clearance Application (SF 86).<sup>1</sup> On an unspecified date, the Department of Defense (DOD) Consolidated Adjudication Facility (CAF) issued him a set of interrogatories. He responded to the interrogatories on October 10, 2013.<sup>2</sup> On November 19, 2013, the DOD CAF issued a Statement of Reasons (SOR) to him, 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 and modified (Directive);

<sup>1</sup> GE 1 (SF 86), dated June 21, 2013.

<sup>2</sup> GE 2 (Applicant's Answers to Interrogatories, dated October 10, 2013).

and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) for all adjudications and other determinations made under the Directive. The SOR alleged security concerns under Guideline J (Criminal Conduct) and Guideline E (Personal Conduct) and detailed reasons why the DOD adjudicators were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant received the SOR on November 27, 2013. In a sworn written statement, dated December 13, 2013, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on January 17, 2014, and the case was assigned to me on January 28, 2014. A Notice of Hearing was initially issued on February 3, 2014, but amended on February 4, 2014, and I convened the hearing, as scheduled, by video teleconference, on February 20, 2014.<sup>3</sup>

During the hearing, three Government exhibits (GE 1 through GE 3) and six Applicant exhibits (AE A through AE F) were admitted into evidence without objection. Applicant testified. The hearing transcript (Tr.) was received on March 5, 2014. I kept the record open to enable Applicant to supplement it. Applicant took advantage of that opportunity. He submitted four additional documents, which were marked as exhibits (AE G through AE J), and admitted into evidence without objection. The record closed on March 5, 2014.

### **Rulings on Procedure**

When the SOR was issued, the DOD CAF furnished Applicant with an outdated, superseded version of Enclosure 2 of the Directive. The result of that action was that Applicant relied on incorrect adjudicative guidelines when he responded to the SOR. That error was corrected by Department Counsel in January 2014.<sup>4</sup>

At the commencement of the hearing, Department Counsel moved to amend the SOR by withdrawing the allegation pertaining to Guideline E. There being no objection to the motion, the SOR was amended by deleting SOR ¶ 2 and its subparagraph in their entirety.

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<sup>3</sup> The Directive established that notification as to the time and place of a hearing be furnished to an applicant at least 15 days in advance of the time of the hearing. See, Directive, Encl. 3, § E3.1.8. In this instance, Department Counsel and Applicant, as well as Applicant's attorneys, were in discussions regarding the potential time and location long before the actual Notice of Hearing was issued. Nevertheless, because the period between the issuance of the Notice and the hearing was close to 15 days, I inquired of Applicant if the period of notice was sufficient, and Applicant specifically waived the 15-day notice requirement. See Tr. at 14-15.

<sup>4</sup> GE 3 (Letter, dated January 17, 2014); Tr. at 12-13.

## Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations pertaining to criminal conduct (§ 1.a.) and personal conduct (§ 2.a.). In light of the withdrawal of the personal conduct allegation, Applicant's admissions pertaining to the criminal conduct allegation are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 33-year-old employee of a defense contractor who, since November 2013, has served as a supply clerk. He is also a self-employed cab driver. He was previously a laborer, delivery driver, warehouse worker, and vendor stocker. Applicant was briefly unemployed from September 2009 until November 2009, and from October 2006 until February 2007. He was granted a secret security clearance in August 2008. He has never served with the U.S. military. A 1998 high school graduate, Applicant attended a university from May 2001 until February 2004, but did not receive a degree. In 2009, he briefly attended a technical school for truck drivers. Although Applicant has never been married, he has fathered one daughter and one son (born in 2002 and 2006) as well as twin sons (born in 2009).

## Criminal Conduct

Applicant and a married female neighbor engaged in a tumultuous secret relationship, which included having sexual relations, over the period of two years.<sup>5</sup> At some point, Applicant sought to end the relationship because his girlfriend's behavior proved to be unacceptable to him. She broke into his home when he was not there; vandalized his vehicles; harassed him on the telephone; and physically attacked him on several occasions. When her husband learned of his wife's affair, he threatened Applicant.<sup>6</sup> Shortly after their breakup, Applicant received the news that his girlfriend was pregnant. He was mortified and panicked over the thought of having an "attachment" to her for the rest of his life. He was certain he could not have been the father, and he agreed to take a court-mandated paternity test. He discussed the matter with a very close friend, and in an "immature, irrational, thoughtless, panicked moment of desperation," they agreed that the friend would take the paternity test in lieu of Applicant.<sup>7</sup> About one to two weeks before the scheduled test, Applicant furnished the friend with an expired operator's license and the paternity test paperwork.<sup>8</sup> The friend took the paternity test. Unbeknownst to Applicant or his friend, a photo of the friend was

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<sup>5</sup> Tr. at 71-74.

<sup>6</sup> Applicant's Answer to the SOR, at 1; Tr. at 46-47, 50.

<sup>7</sup> Applicant's Answer to the SOR, at 2. Applicant referred to the moment as an "immature, bizarre, unthinking, rash decision." See Tr. at 49, 75-77.

<sup>8</sup> Tr. at 78.

taken and attached to the paternity test sample. When Applicant's girlfriend saw the photo, she alerted the authorities that something was amiss.<sup>9</sup>

As a result of his conduct, in November 2010, Applicant was charged with forgery in the second degree, a class C felony. He admitted what he had done and entered a plea of guilty. He subsequently attended a hearing of the county Citizen's Advisory Commission on Prosecution, and with the concurrence of the judge, arresting agency, victim, staff, and district attorney, Applicant was entered into the Pre-Trial Diversion Program. The program was established to divert first time non-violent offenders from the traditional court system into a highly individualized and supervised restorative program of the district attorney's office. He paid the \$1,000 program fee, participated in individual and group therapy, and completed 150 hours of community service. Applicant successfully completed the entire program on September 4, 2012,<sup>10</sup> and on the following day, the charge was Nolle Prossed.<sup>11</sup> On February 12, 2014, the charge was expunged.<sup>12</sup>

Applicant had nothing but high praise for the program. While he initially did not feel he needed some segments of the program including therapy, he subsequently realized how beneficial the program actually was for him. It identified common life mistakes, and now that he has put the tools and coping mechanisms he learned from the program into practice, he has noted certain changes in himself.<sup>13</sup>

Applicant's girlfriend gave birth to twins in August 2009, and using the results of a paternity test Applicant had previously taken regarding his eldest child, the state determined that Applicant was the biological father of the twins.<sup>14</sup> The state set Applicant's child support responsibility at \$311.54 per every two week period, and a garnishment was set up to facilitate the payments.<sup>15</sup> Applicant's child support has been withdrawn from his account since July 29, 2011.<sup>16</sup>

## **Work Performance and Character References**

The chief of supply and the supply manager (Applicant's immediate supervisor) of the organization for which Applicant works have characterized him in favorable terms. Applicant is punctual, dependable, efficient, competent, thoughtful, mature, and

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<sup>9</sup> GE 2 (Personal Subject Interview, dated August 9, 2013), at 2.

<sup>10</sup> AE B (Letter, dated December 9, 2013).

<sup>11</sup> AE A (Order to Nolle Pross, dated September 5, 2012).

<sup>12</sup> AE G (Order to Expunge, dated February 12, 2014).

<sup>13</sup> Tr. at 57-58, 86-87.

<sup>14</sup> Tr. at 92.

<sup>15</sup> GE 2 (Child Support Enforcement Division Court Order Payment Summary, dated September 26, 2013); GE 2 (Direct Deposit Advice, dated October 10, 2013).

<sup>16</sup> GE 2 (Child Support Enforcement Division Court Order Payment Summary), *supra* note 15.

dedicated.<sup>17</sup> He is also consistently pleasant and has great rapport with people of all ages.<sup>18</sup> The president of the local child football and cheerleading organization, who also happens to be a correctional sergeant for the state department of corrections, has known Applicant for eight years due to their mutual involvement in the city youth sports programs. Applicant is considered to be a role model for the youth and has been entrusted with a leadership position in youth sports as vice president of the local child football and cheerleading organization. Applicant has great integrity, leadership, and morals.<sup>19</sup> The dean of academic affairs of the local military facility is aware of Applicant's reputation in the community, derived from his own knowledge and the comments of others. Applicant has the capacity for responsibly administering the planning, directing, and evaluating a major supply system. He has strength of character, emotional maturity, integrity, and enthusiasm. In addition, he is resolute and determined to be a good father to his children.<sup>20</sup> Another co-worker considers Applicant to be a hard worker who is pleasant, trustworthy, reliable, and dedicated.<sup>21</sup> Applicant's performance appraisals for 2012-2013 reflect an individual who meets and occasionally exceeds expectations.<sup>22</sup>

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."<sup>23</sup> 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 have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."<sup>24</sup>

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the AG. In addition to brief introductory explanations for each guideline, the AG list potentially disqualifying conditions and mitigating

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<sup>17</sup> AE E (Character Reference, dated January 10, 2014); AE C (Character Reference, dated February 11, 2014).

<sup>18</sup> AE C, *supra* note 17.

<sup>19</sup> AE D (Character Reference, undated).

<sup>20</sup> AE F (Character Reference, dated February 12, 2014).

<sup>21</sup> AE H (Character Reference, dated September 28, 2011).

<sup>22</sup> AE J (Performance Evaluation, dated January 9, 2012); AE I (Performance Evaluation, dated March 20, 2013).

<sup>23</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>24</sup> Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

conditions, which are used in evaluating an applicant's eligibility for access to classified information.

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in 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 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 meaningful decision.

In the decision-making process, facts must be established by "substantial evidence."<sup>25</sup> The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government's case. The burden of disproving a mitigating condition never shifts to the Government.<sup>26</sup>

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 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. Furthermore, "security clearance determinations should err, if they must, on the side of denials."<sup>27</sup>

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."<sup>28</sup> Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict

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<sup>25</sup> "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>26</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>27</sup> *Egan*, 484 U.S. at 531

<sup>28</sup> See Exec. Or. 10865 § 7.

guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

## Analysis

### Guideline J, Criminal Conduct

The security concern under the guideline for Criminal Conduct is set out in AG ¶ 30:

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 guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), *a single serious crime or multiple lesser offenses* is potentially disqualifying. As noted above, shortly after breaking up from his married girlfriend, Applicant received the news that she was pregnant. He was certain he could not have been the father and agreed to take a court-mandated paternity test. Instead, after discussing the matter with a very close friend, it was decided that the friend would take the paternity test in lieu of Applicant. Applicant furnished the friend with an expired operator's license and the paternity test paperwork. The friend took the paternity test. The substitution was subsequently discovered. As a result of his conduct, in November 2010, Applicant was charged with forgery in the second degree, a class C felony. He admitted what he had done and entered a plea of guilty. AG ¶ 31(a) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where *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*. Similarly, AG ¶ 32(d) may apply where *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*. In addition, Applicant has urged me to consider AG ¶ 32(b) where *the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life*.

AG ¶ 32(a) partially applies, AG ¶ 32(d) applies, and AG ¶ 32(b) does not apply. It has not been established when the actual paternity test was administered, but it is clear that it had to have occurred before November 2010, when Applicant was charged with forgery in the second degree. Under normal circumstances, the issue of a paternity test to establish if an individual is the biological parent of a child might be considered an unusual circumstance that it is unlikely to recur. In Applicant's case, before the most recent episode, Applicant had already taken at least one such test related to

establishing his relationship with one of his older children. In attempting to deceive the government over a court-mandated paternity test, and in planning, assisting, and abetting his co-conspirator in actually carrying out that deception, Applicant's actions did cast doubt on his reliability, trustworthiness, or good judgment.

On the other hand, Applicant's actions occurred over three years ago, and there has been no recurrence. He admitted what he had done and entered a plea of guilty to the charge of forgery in the second degree. There is additional substantial evidence of successful rehabilitation, including but not limited to the passage of time without recurrence of any criminal activity, expressions of remorse, evidence of restitution, job training or higher education, good employment record, and constructive community involvement. After comparing Applicant's actions with his reputation, it appears that his actions, at least pertaining to his deception and falsification, were out of character for him. The authorities apparently came to the same conclusion, for Applicant was entered into the Pre-Trial Diversion Program. He paid the \$1,000 program fee, participated in individual and group therapy, and completed 150 hours of community service. Applicant considered the program to be excellent, and he speaks very highly of it. The program identified common life mistakes, and now that he has put the tools and coping mechanisms he learned from the program into practice, he has noted certain changes in himself. He successfully completed the entire program on September 4, 2012, and on the following day, the charge was Nolle Prossed. On February 12, 2014, the charge was expunged. Applicant is now armed with the knowledge that falsifying any response to an official governmental inquiry is unacceptable criminal conduct, and that falsifying a paternity test is illegal. He has incorporated tools and coping mechanisms into his life. With his changed lifestyle, it is unlikely that such criminal behavior will recur, and it no longer casts doubt on his reliability, trustworthiness, or good judgment.

As far as AG ¶ 32(b) is concerned, Applicant is simply misinterpreting the provision. He may have experienced stress and pressure from his girlfriend and her husband over the entire extra-marital relationship, but that pressure differed from the pressure identified in the provision. No one attempted to coerce him by holding a gun to his head and threatened to harm him if he failed to provide a false paternity test.

### **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. The 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) 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.

Under AG ¶ 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. Moreover, I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.<sup>29</sup>

There is some evidence against mitigating Applicant's conduct. Over a multi-year period, Applicant, at that time in his late 20's, and a married female neighbor engaged in a tumultuous secret relationship, which included having sexual relations. After they broke up, she told him that she was pregnant. He agreed to take a court-mandated paternity test, but decided that his close friend would take the paternity test in lieu of Applicant. Applicant furnished the friend with an expired operator's license and the paternity test paperwork. The friend took the paternity test. In November 2010, Applicant was charged with forgery in the second degree, a class C felony.

The mitigating evidence under the whole-person concept is more substantial. Applicant admitted what he had done and entered a plea of guilty to the charge. Applicant was entered into the Pre-Trial Diversion Program. The program was established to divert first time non-violent offenders from the traditional court system into a highly individualized and supervised restorative program of the district attorney's office. He paid the \$1,000 program fee, participated in individual and group therapy, and completed 150 hours of community service. Applicant successfully completed the entire program on September 4, 2012, and on the following day, the charge was Nolle Prossed. On February 12, 2014, the charge was expunged. Applicant has incorporated the tools and coping mechanisms he learned in the program into his life. With his changed lifestyle, it is unlikely that such criminal behavior will recur, and it no longer casts doubt on his reliability, trustworthiness, or good judgment. Since his November 2010 charge, Applicant has avoided any subsequent participation in any criminal activity of any nature. He is a hard worker and is very involved in community activities. Under the evidence presented, I have no questions about Applicant's reliability, trustworthiness, and ability to protect classified information. See AG ¶ 2(a)(1) through AG ¶ 2(a)(9). For all of these reasons, I conclude Applicant has mitigated the security concerns arising from his criminal conduct.

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<sup>29</sup> See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Paragraph 2, Guideline E:	WITHDRAWN
Subparagraph 2.a:	Withdrawn

### **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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ROBERT ROBINSON GALES  
Administrative Judge