



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



In the matter of: )  
 )  
----- ) ISCR Case No. 07-06830  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Francisco Mendez, Esquire, Department Counsel  
For Applicant: *Pro se*

May 29, 2009

**Decision**

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the government's security concerns raised under Guideline J, Criminal Conduct. Clearance is denied.

On July 14, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J. 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 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 answered the SOR, admitting all of the allegations, on August 19, 2008, and requested a hearing. The case was assigned to me on March 5, 2009. On March 16, 2009, a Notice of Hearing was issued scheduling the case for April 9, 2009. It

was held as scheduled. At the hearing, I received 10 government exhibits and Applicant's testimony. The transcript was received on April 15, 2009.

### **Findings of Fact**

Applicant is a 39-year-old man with three children, ages 19, 12, and eight. He is currently separated from his wife, the mother of the 12-year-old (Tr. 14). The other two children are from other relationships.

Applicant has a high school education. He served in the U.S. Navy from 1988 to 1991. His discharge was honorable. For the past 11 years, he has worked for a defense contractor as an industrial applicator. His job duties include painting, lead inspection, and sandblasting of Navy vessels (Tr. 16). For the past four to five years, he has been a supervisor.

On April 17, 1996, Applicant was charged with assault and battery after an altercation with his wife (Answer). The charge was later dismissed (Answer to SOR subparagraph 1.a).

On or about April 7, 1998, Applicant's wife accused him of assaulting her, and later making threats to her life over the phone (Answer to SOR subparagraph 1.b). At the time, they were separated, and a protective order was in place. Subsequently, Applicant was arrested and charged with assault and battery, using profane, threatening language over a public airway, violating emergency protective orders, and threatening bodily harm (Answer). He was found guilty of misdemeanor domestic assault, and the remaining charges were *nolle prossed*.

On February 24, 1999, Applicant was arrested and charged with contempt of court (Answer to SOR subparagraph 1.c). There is no record evidence either identifying the court order that Applicant allegedly violated, or detailing the outcome of the charge.

On March 18, 2000, Applicant was charged with malicious wounding and carrying a concealed weapon after a nightclub brawl with several bouncers (Answer to SOR subparagraph 1.d, at 2). The concealed weapon was a small knife attached to his key chain (Tr. 32). The charges were *nolle prossed*.

In 2000, Applicant's friend devised a scheme where he would print counterfeit checks using his computer. The checks were written to various friends, including Applicant. Over a two to three month period, Applicant cashed approximately \$18,000 of counterfeit checks at a local credit union (Tr. 20).

On June 30, 2000, Applicant was arrested and charged with multiple counts of forging bank notes, and obtaining money by false pretenses (Answer at 2, SOR subparagraph 1.f). He was found guilty of the latter charge, sentenced to three years, suspended, and ordered to pay restitution.

On October 6, 2000, Applicant was found guilty of driving on a suspended license and failure to appear (Answer at 2). For each charge, he was sentenced to 10 days in jail with five days suspended pending 12 months of good behavior, and payment of costs.<sup>1</sup>

On February 12, 2002, Applicant was arrested and charged with felony probation violation for not paying restitution as ordered in 2000 (SOR subparagraph 1.h, Answer at 2; Tr. 21). He was found guilty and required to start serving his prison sentence. After approximately one month, he was released, and re-sentenced to three years, suspended, pending his successful completion of five years probation and payment of restitution.

On March 26, 2002, Applicant fell asleep at the wheel of his car while driving home from work, and hit a telephone pole (Answer, SOR subparagraph 1.i; Tr. 33). He had not been drinking alcohol before the accident. The police arrived and charged him with reckless driving (Answer at 2). The outcome of this charge is unknown from the record.

On or about April 1, 2002, Applicant was arrested and charged with failure to appear on a misdemeanor charge (SOR subparagraph 1.j, Answer at 2). The court concluded that Applicant was not notified properly of the charge. Consequently, the charge was dismissed (Tr. 24).

On May 20, 2004, Applicant was arrested and charged with probation violation for allegedly not making his restitution payments from the 2000 felony conviction (SOR subparagraph 1.k). Applicant pleaded not guilty, and provided evidence that he had been making payments (Tr. 35). The charge was then dismissed.

In 2005, Applicant fell behind on his restitution payments. In approximately July 2005, he was arrested and charged with violation of probation (SOR subparagraph 1.l). This charge was dismissed after Applicant satisfied his back restitution payments.

Since 2005, Applicant has satisfied all of the restitution payments. He is no longer on probation.

On February 11, 2008, Applicant's estranged wife attacked him in the parking lot of his job (Tr. 38). An altercation ensued. Subsequently, both Applicant and his wife pressed charges (SOR subparagraph 1.m). They then both agreed to drop the charges (Tr. 39).

Applicant attributes the domestic incidents to his volatile ex-wife. He contends that his physical contact during their altercations has been limited to pinning her down or restraining her after she attacked him. During some episodes when she got physical,

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<sup>1</sup>The "failure to appear" charge, as listed in SOR subparagraph 1.g, is a duplicate of SOR subparagraph 1.e.

Applicant left the home. She has pressed charges against him after both types of situations. Their divorce is pending.

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised 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. The administrative judge's overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 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 ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security."

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ 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.

## **Analysis**

### **Guideline J, Criminal Conduct**

Under this guideline, "criminal activity creates doubt about a person's judgment, reliability, and trustworthiness [and] by its very nature, . . . it calls into question a person's ability or willingness to comply with laws, rules, and regulations" (AG ¶ 30). Between 1996 and 2008, Applicant was arrested 12 times and charged with numerous crimes. The most serious was a felony that resulted in a three year suspended sentence and five years of probation. AG ¶ 31(a), "a single serious crime or multiple lesser offenses," and AG ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," apply.

Applicant's most recent arrest occurred less than 18 months ago. Consequently, AG ¶ 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," does not apply.

There is no record evidence either identifying the court order that Applicant allegedly violated, or detailing the outcome of the charge listed in SOR subparagraph 1.c. Consequently, I have resolved this subparagraph in his favor.

SOR subparagraph 1.j fails to identify the misdemeanor for which Applicant allegedly failed to appear in court. The record contains no additional clarifying evidence, and the charge was dismissed. SOR subparagraph 1.j is resolved in Applicant's favor.

Applicant was arrested in 2004 and charged with violation of probation after the state alleged he was not making restitution payments related to his 2000 conviction. He successfully proved that he had been making the payments, and the court dismissed the charge. SOR subparagraph 1.k is resolved in his favor.

Many of Applicant's legal troubles stemmed from his tempestuous relationship with his currently estranged wife who may have precipitated much of their conflict. Their divorce is pending. AG ¶ 32(b), "the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life," is partially applicable.

Applicant has paid restitution and served probation for his most serious crime, the 2000 felony. His restitution payments, however, were inconsistent, leading to an arrests in 2002 and 2005 for probation violation. Also, as described above, Applicant's most recent arrest occurred less than 18 months ago. Under these circumstances, AG ¶ 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," applies, but has limited probative value.

### **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) 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."

Much of Applicant's criminal conduct stemmed from his troubled relationship with his estranged wife. Because their divorce is being finalized, these domestic-related offenses are unlikely to recur. Applicant's most serious offense, the check cashing fraud, did not involve his wife, however. In that Applicant was 32-years-old when he participated in the fraudulent check cashing scheme, immaturity is not a mitigating factor. In light of the nature, extent, and seriousness of Applicant's criminal conduct, together with its frequency and recency, I conclude the possibility of recurrence is unacceptably high. Applicant has not mitigated the criminal conduct security concern. Clearance is denied.

### **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
Subparagraphs 1.a - 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d - 1.i:	Against Applicant
Subparagraphs 1.j - 1.k:	For Applicant
Subparagraphs 1.l - 1.m:	Against Applicant

### **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.

MARC E. CURRY  
Administrative Judge