



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



In the matter of: )  
)  
) ISCR Case No. 07-10415  
)  
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Applicant for Security Clearance )

**Appearances**

For Government: D. Michael Lyles, Esquire, Department Counsel  
For Applicant: *Pro Se*

May 14, 2008

**Decision**

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DAM, Shari, Administrative Judge:

Applicant rebutted or mitigated the Government’s security concerns raised under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct. His eligibility for a security clearance is granted.

On June 12, 2006, Applicant submitted a Security Clearance Application (EPSQ). On November 16, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guidelines J and E. The action was taken pursuant to 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.

On December 10, 2007, Applicant answered the SOR in writing and elected to have the case decided on the written record in lieu of a hearing. On February 11, 2008,

Department Counsel prepared a File of Relevant Material (FORM), containing seven Items, and mailed Applicant a complete copy on February 13, 2008. Applicant received the FORM on February 21, 2008, and had 30 days from its receipt to file objections and submit additional information. Applicant submitted a Response to the FORM and additional exhibits on or about March 16, 2008, that I marked, as Applicant Exhibits (AE) 1 through 7.<sup>1</sup> Department Counsel had no objection to the documents. DOHA assigned the case to me on March 27, 2008.

### Findings of Fact

In his Answer to the SOR, Applicant admitted the factual allegations contained in ¶¶ 1.a and 1.b. He admitted the allegations contained in ¶ 2.a, and denied the allegation contained in ¶ 2.b. His admissions are incorporated herein as findings of fact. He provided additional information to support his request for eligibility for a security clearance.

Applicant is 38 years old. He has been married for 19 years and has two children. In November 1998, he began working as a test engineer for his current employer, a federal contractor. In January 1999, he received a Secret security clearance. In June 2006, he submitted an EPSQ, in which he disclosed three offenses, occurring in 1988, 2004 and 2006. He also listed two delinquent debts. (Item 4).

In 1988, Applicant was charged with Driving Under the Influence. He was fined and his driver's license was suspended. He was 18 years old, immature, and was associating with the "wrong crowd." (Item 3). He earned an Associate in Applied Science degree in March 1990, and has "been gainfully employed ever since." (*Id.*).

In June 2004, Applicant was charged with Passing a Stopped School Bus and later fined. At the time of the incident, he was driving on a four-lane divided highway and did not notice that a school bus had stopped until it was too late. He did not intentionally fail to stop when he mistakenly passed the bus. He reported the incident to his security officer. This was the only traffic violation that he had in many years. (Item 3). He "wholeheartedly" appreciates the gravity of the situation and the potential risk he created for people at the time of his driving error. (Response to FORM at 3).

In May 2006, Applicant and his wife became embroiled in a domestic argument while he was intoxicated. He subsequently left the house, but returned within minutes to retrieve some of his personal belongings and found the doors locked. He knocked the door down and his wife called the police. Before leaving the house, he grabbed his two guns. He then fled the scene and hid his guns in the wooded area behind his house. He then returned to his house and became involved in an argument with the police, during which he broke the police car's windshield with a brick. The police arrested him and charged him with (1) Breaking and Entering, amended to Criminal Mischief, and (2) Menacing. In July 2006, he pleaded guilty to Criminal Mischief, and was sentenced to

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<sup>1</sup> Applicant referred to his exhibits as Items and numbered them 1 through 7. For purposes of clarity, I will refer to them as AE 1 through 7.

365 days confinement, suspended, and placed on two years of probation. He was fined and ordered to pay restitution, in addition to attending an anger management program. He also pleaded guilty to Menacing and was sentenced to 180 days, suspended, and two years of probation. He was ordered to enroll in a drug/alcohol program. On July 31, 2007, his probation was terminated early on both charges. (AE 4).

Applicant disclosed the May 2006 criminal charge on his June 2006 EPSQ. In December 2006, a government investigator interviewed him about that incident. Prior to the interview, he conferred with his local security officer, who advised him to give “a specific answer to a specific question.” (Response to FORM). Applicant told the investigator that he had thrown a brick through a police car window. He did not disclose, at the time, that he had brandished a firearm during the confrontation with the police or that he had hidden the gun prior to his arrest. He did not mention the gun because he was not charged with any crime related to the possession of a handgun. (Item 3). “I would have willingly and openly discussed the events of May 26, 2006 if the interview would have lent itself to such a format. Instead the format was nothing more than a ‘question and answer’ session.” (*Id.*). He denied that he intentionally attempted to withhold information from the government. Although he had not seen the police report, he knew the investigator would obtain a copy of it and had no reason to lie. (*Id.*). His explanation for omitting the details regarding the gun is credible.

Applicant acknowledges major changes occurred in his life as a result of that incident. He participated in counseling and completed the recommended treatment plan. (AE 7). After doing so, he “made adequate changes in [his] lifestyle in an effort to permanently remove the stressors that led to the events of May 26, 2006.” (Item 3). He lost weight through exercising and renewed his interests in hobbies. He completely removed alcohol from his life. He stated that “I don’t ever want to commit another act like I did on May 26, 2006 and I’m actively pursuing things that make me a better person for my family, friends and employer.” (*Id.* at 4).

Applicant submitted character letters from his wife, a family friend, and his supervisor. His wife refers to him as a “caring and loving husband and father.” (AE 1). She believes the May 2006 incident was completely out of character for him and was the result of his consuming alcohol while taking prescribed pain medication for dental problems. The incident subsequently had a positive effect on their family. (*Id.*). His friend has also witnessed a positive change in Applicant since the event. (AE 3). Applicant immediately informed his supervisor of the incident after it occurred in May 2006. The supervisor, who has known Applicant for over 10 years, has great confidence and praise for Applicant. He has heard Applicant express remorse for the incident several times and finds the event out of character for Applicant. He considers Applicant to be an “exemplary employee.” (AE 2).

### **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 used to evaluate 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 over-arching 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." 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 ¶ 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 to obtain a favorable security decision. 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."

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.

## **Analysis**

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

The Government's concerns regarding criminal conduct are set forth 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."

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Based on the evidence, including Applicant's admissions regarding the criminal conduct in 1988 and 2006, the Government established a potential security concern under two Criminal Conduct Disqualifying Conditions: "a single serious crime or multiple lesser offenses," and an "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted." AG ¶¶ 31(a) and (c). In July 2007, the court terminated Applicant's probation early; hence, AG ¶ 31(d) that is applicable when an "individual is currently on parole or probation" does not apply.

After the Government produced substantial evidence of those two disqualifying conditions, the burden shifted to Applicant to produce evidence and prove mitigation. There are five Criminal Conduct Mitigating Conditions under AG ¶ 32, one of which applies to the 1988 DUI conviction. AG ¶ 32(a) provides mitigation when "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." This charge occurred approximately 20 years ago when Applicant was 18 years old. Since that time, he earned a college degree, maintained employment, and undergone significant changes in his life, such that similar incidents are unlikely to recur.

AG ¶ 32 (d) has some application to the allegations set forth in ¶ 1.b of the SOR, as "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." Since his 2006 conviction, Applicant has participated in counseling, successfully complied with all the terms of the court-imposed probation, including making restitution and paying his fine, expressed remorse for his mistakes, and presented letters from his boss, wife and friend, asserting that his misconduct was aberrational. Recognizing the gravity of his conduct, he has since made significant life changes. There is no evidence of any criminal misconduct since May 2006, approximately two years ago.

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

AG ¶ 15 sets forth the Government's personal conduct concern: "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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."

The Government alleged in SOR ¶ 2.a that Applicant was fined for illegally passing a stopped bus in 2004, and in ¶ 2.b that he was not completely candid during an investigative interview about the 2006 criminal charge. Based on the evidence in the record pertaining to these two allegations, including Applicant's admissions, the Government raised a potential Personal Conduct Disqualifying Condition under AG ¶ 16(d). The security concern is based on "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 considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information." Taken together, these allegations demonstrate instances of questionable judgment on Applicant's part.

The Government argued that Applicant's failure to disclose information related to his possession and brandishing of a handgun on May 26, 2006, was deliberate, and thus raised a potential disqualification under AG ¶ 16(a), which reads "the 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." Applicant denied the allegation and attributed the omission to the advice he received from his security officer regarding the manner in which he should respond to the investigation, and, the fact that because he had not been charged with a crime involving the possession of a handgun he did not include information about it. Coupled with his honest disclosure of the above three offenses and adverse financial information, I found those explanations credible, and hence, that he did not deliberately conceal information from the Government.

Seven Personal Conduct Mitigating Conditions are set forth in AG ¶ 17. After reviewing all of the conditions, I conclude two of them apply to the two disqualifications:

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant acknowledged his misconduct in both instances and expressed remorse and embarrassment about them. He received counseling after the 2006 criminal incident, which gave him insight into the stressors underlying it, and has subsequently helped him manage stress. He has made other changes in his life, and has no intention of repeating similar behaviors in the future. Hence, AG ¶17 (d) applies. He disclosed the 2004 driving violation to his supervisor and the 2006 criminal

misconduct to his supervisor and a good friend, which reduces his vulnerability to exploitation, and warrants the application of AG ¶17 (e).

### **Whole Person Concept**

In addition to evaluating the disqualifying and mitigating conditions under each guideline, the adjudicative process requires thorough consideration and review of all available, reliable information about the applicant, past and present, favorable and unfavorable, to arrive at a balanced decision. The essence of scrutinizing all appropriate variables in a case is referred to as the “whole person” analysis. In evaluating the conduct of the applicant, the Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a). They include: (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 commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a 38-year-old man, who has successfully worked for his current employer since 1998, during which time he has held a security clearance. Throughout the record, he expressed, repeatedly, his great remorse and shame over the 2006 criminal misconduct, and acknowledged his previous immature behavior in 1988 and the careless driving event in 2004. He stopped consuming alcohol in 2006, a factor in the 1988 and 2006 incidents. His wife and good friend have witnessed a positive change in him since the 2006 incident. His employer finds him an exemplary employee. The court terminated his probationary term one-year early. All of these facts are indications that it is unlikely that similar behaviors will occur in the future.

Overall, the record evidence leaves me without doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from personal conduct and criminal conduct.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J: FOR APPLICANT

Subparagraphs 1.a and 1.b: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 2.a and 2.b: For Applicant

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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SHARI DAM  
Administrative Judge