



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



In the matter of:	)	
	)	
	)	ISCR Case No. 07-12008
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Braden M. Murphy, Esquire, Department Counsel  
For Applicant: *Pro Se*

December 19, 2008

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**Decision**

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CREAN, Thomas M., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on April 2, 2007. On March 28, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns for Applicant for personal conduct and criminal conduct under Guidelines E and 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 acknowledged receipt of the SOR on April 2, 2008.

Applicant answered the SOR in writing on May 30, 2008. He admitted one and denied three allegations under Guidelines E with explanations. He admitted seven and denied three of the allegations under Guideline J with explanations. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on October 27, 2008, and the case was assigned to me on October 28, 2008. DOHA

issued a notice of hearing on November 3, 2008, for a hearing on November 19, 2008. I convened the hearing as scheduled. The government offered six government exhibits, marked (Gov. Ex.) 1 through 6. Applicant objected to Government Exhibits 5 and 6, reports of personal conduct and criminal incidents, as not being relevant to his security worthiness since the incidents happened long ago and he has matured. The objection was overruled and all government exhibits were received and admitted to the record (Transcript 17-21). Applicant submitted three Applicant Exhibits, marked (App. Ex.) A-C, which were received without objection. Applicant testified on his behalf. DOHA received the transcript of the hearing on December 2, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Procedural Issues**

Department Counsel did not proceed with presentation of information for SOR allegation 1.c for lack of evidence. SOR 1.c alleges a falsification of a Questionnaire for National Security Position signed by Applicant on April 30, 1996. The document is not readable and Applicant's answers on the form cannot be determined. Department Counsel also did not proceed on the criminal conduct allegation of falsification of this Questionnaire in SOR 2.b. Findings for Applicant are entered for these two allegations.

### **Findings of Fact**

Applicant is a 30-year-old server administrator for a defense contractor. He received a degree in computer science in 2003 and has worked for the defense contractor for approximately 18 months. Applicant was in the Navy for three years from June 1996 until August 1999 as an automatic data processor. He was denied a security clearance while on active duty. Applicant tried to learn why he was denied a clearance but his request for information did not produce an investigative file. Applicant believes his clearance was denied based upon information provided by his associates in the community and church that he is introverted and anti-social. The reason for the denial is not contained Applicant's file (Tr. 42-47; App. Ex. A, NCIS Letter, dated January 3, 2008; Gov. Ex. 1, e-QIP, dated April 2, 2007; Gov. Ex. 2, Answer to Interrogatory, dated January 7, 2008 at 4).

Applicant admitted that he was charged with inappropriate sexual activity with his younger siblings when he was fifteen years old. He admitted he was placed in a youth offender program and received some counseling (Tr. 26-32; SOR 1.a). Applicant denied that he deliberately failed to list the charge on his enlistment papers for the Navy (SOR 1.b). He also denied that he deliberately failed to list an arrest for assault and battery on his April 2007 security clearance application (SOR 1.d). Applicant also denied criminal conduct arising from the falsification (SOR 2.a and 2.c). Applicant admitted to being arrested and charged with five driving offenses (SOR 2.d, 2.f, 2.h, 2.i., and 2.j), and two arrests and charges for assault and battery (SOR 2.e and 2.g).

Applicant's parents divorced and he and his younger siblings lived with his father for about a year in 1992-1993, and then his mother for about a year in 1993-1994. He admitted that during this time when he was approximately fifteen years old he had inappropriate sexual contact with his six year old sister and younger brother a number of times over the period of a few months. His mother caught him and his sister having the inappropriate sexual contact and notified the police. Applicant was placed in a youth offender home and he was required to attend counseling. His parents took him out of the youth offender home and program after a few months for reasons he does not know. The counseling was discontinued at the halfway house when he left the group home. He did receive counseling intermittently from the time he left the halfway house until the time he entered the Navy. He has continued to voluntarily receive counseling for social issues since then. He considers such counseling to be more of a check and sounding board for him. He has not been involved in any inappropriate sexual activity since this incident (Tr. 32-34, 47-53, 53-56; Gov. Ex. 5, Applicant's Statement, dated December 13, 1996 at 3).

Applicant entered active Navy duty in June 1996 after completing high school. When he was completing his paperwork to join the Navy, he discussed the juvenile sexual charges with the recruiter and was advised that he did not have to include it on his application since the incident was a sealed juvenile issue. Applicant was advised by the security specialist at boot camp, to include the offense on his security clearance application. Applicant completed a full statement and disclosure of his prior residences, education, employment, criminal conduct, counseling, and alcohol and drug use (Tr. 35, 56-57; Gov. Ex. 5, Statement, dated December 13, 1995).

Applicant admitted he was charged with driving on a suspended operator's license on January 3, 1999 (SOR 1.j). He was fined and paid court costs. Applicant was charged with reckless driving on August 11, 1999 (SOR 1.f). He was fined and paid court costs. Applicant was charged with driving on a suspended license on October 21, 1999 (SOR 1.i). He was fined and paid court costs. He was again arrested and charged with driving with a suspended license on November 5, 1999 (SOR 1.h). He was sentenced to a suspended jail term of ten days and fined and paid court costs (See Gov. Ex. 4, Court Information, dated March 25, 2008 at 1-5).

Applicant had no other driving offenses until January 21, 2007 when he was charged with driving on a suspended license. Applicant had not timely paid his vehicle personal property tax. His license was suspended by motor vehicle authorities on January 19, 2007. However, the notice of suspension was not mailed to Applicant until January 23, 2007, two days after he was charged with driving on his suspended license. Since he had not been notified at the time of his arrest that his license was suspended, the case was dismissed (Tr. 58-59; Gov. Ex. 4, Court Information, dated March 25, 2008, at 6).

Applicant lived with and had a child with another sailor when he was in the Navy. They were on different deployment schedules. Applicant was discharged from the Navy so he could care for the child (App. Ex. C, DD 214, Discharge for Parenthood, dated

August 17, 1999). The female sailor returned from a cruise with another sailor as her boyfriend. Applicant and the girlfriend continued to live together for a time since neither could afford to move out. However, the situation became difficult and the female sailor charged him with assault and battery to force Applicant to move. The charges were dismissed (Tr. 61-64; Gov. Ex. 3, Federal Bureau of Investigation Criminal Justice Report; Gov. Ex. 4, Court Information, dated March 25, 2008, at 9).

Applicant was married in December 2002 to "S". The marriage was difficult and Applicant and "S" fought often. At one time, "S" threw an ashtray at him shattering it against the wall. Applicant grabbed her arm to stop her from trying to hit him. "S" talked to a friend who informed her that she should file charges for assault against Applicant since he grabbed her arm. "S" filed the charges. About a week later, "S" decided she did not want to press charges. However, Applicant had to attend a court session where the charges were not prosecuted. Applicant and "S" separated in April 2003 and their divorce was final on October 9, 2008. Applicant did not include the arrest and charges for assault and battery on his e-QIP because he had forgotten about the offense since it was not prosecuted. He had checked court record in one jurisdiction for the above traffic and other assault and battery offense. This assault and battery offense was in another jurisdiction so it did not come up on his search (Tr. 65-69; Gov. Ex. 4, Court Information, dated March 25, 2008, at 7-8).

Applicant's immediate supervisor stated that Applicant has been a true professional in all aspects of his job. He is an integral part of their team and is one of their valuable leaders. He has no reason to doubt Applicant's loyalty, trustworthiness, dependability, and judgment. He believes Applicant should be granted a position of trust (App. Ex. B, Letter, dated November 14, 2008).

### **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 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 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.

## **Analysis**

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

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness, and ability to protect classified information. There are two issues of Applicant's personal conduct that raise security concerns, his inappropriate sexual actions with his younger siblings in 1993, and his failure to report the incident on his Navy enlistment application as well as his failure to report an assault and battery on his April 2007 security clearance application. 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) Personal conduct is always a security concern because it asks the central question does the person’s past conduct justify confidence the person can be entrusted to properly safeguard classified information.

Applicant's inappropriate sexual contact with his young siblings that caused him to be charged with criminal conduct and being placed in a youth offender program raises Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16 (e) (personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing . . .).

This personal conduct by Applicant could affect his professional, personal, or community standing and make him vulnerable to exploitation or manipulation.

In regard to the his conduct of inappropriate sexual incidents with his younger siblings in 1993 when he was fifteen years old, Applicant raises Personal Conduct Mitigating Conditions (PC MC) AG ¶ 17(c) "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment"; PC MC AG ¶ 17(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 PC MC AG ¶ 17(e) "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress." The incidents are certainly not minor. Inappropriate sexual conduct with his younger siblings is serious and grave. At the time of the incidents, Applicant was fifteen years old and his family was involved in difficult times caused by the divorce of the mother and father and the children being shuffled between the parents. Applicant was sent to a halfway house and received some type of counseling. He was withdrawn from the halfway house and counseling by his parents for unknown reasons. He and his siblings are on good terms which show the incidents did not adversely affect them. He has continued to seek counseling not necessarily for this incident but for managing everyday social issues. Applicant is now 30 years old and has a child of his own. He completed college and is employed. His supervisor notes that he is an excellent worker. While there is no bright line rule as to how much time must pass and the extent of positive steps that must be taken to mitigate such an offense, it is clear that a person must show reasonableness, prudence, and honesty in their dealings with people, and adherence to a social sense of duty and obligation. Applicant over the fifteen years since the incidents with his siblings has taken positive steps towards rehabilitation. While there may be incidents of traffic offenses and relationship issues with a girlfriend and a spouse, he has not had any incidents that raise to the level of inappropriate contact with minors. Applicant provided sufficient information to mitigate this personal conduct.

The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government. Applicant's failure to report the above incident on his Navy enlistment papers and his failure to report a 2003 assault and battery arrest and charge on his 2007 security clearance application raise security concerns under Personal Conduct Disqualifying Condition (PC DC) AG ¶ 16(a) "the deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness"; and PC DC AG ¶ 16(b) "deliberately providing false and misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative".

Applicant twice did not provide full and complete information on documents submitted to government authorities, his Navy enlistment papers and his April 2007 security clearance application. In regard to these failures, Applicant raised by his testimony PC MC AG ¶ 17(a) "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; PC MC AG ¶ 17(b) "the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or in adequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully"; and PC MC AG ¶ 17(c) "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment".

Appellant denied intentional falsification. Applicant informed the recruiter of the incident involving his siblings. He was advised that he did not have to include the information on his enlistment papers since it was a juvenile offense and the records were sealed. When he was advised by security personnel during boot camp that the instruction received from the recruiter was not correct, he provided full and complete information concerning the incident as well as other actions (See, Gov. Ex. 5, Applicant's Statement, dated December 13, 1996). As for the failure to list the assault and battery on his April 2007 security clearance application, Applicant had forgotten about the incident since it was dismissed. He checked the court records in one district for his offense and he listed the traffic offenses from that district on his application. He did not check the records of a nearby district where the assault and battery was adjudicated and dismissed. While there is a security concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, every omission, concealment, or inaccurate statement is not a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully. Applicant did not report the inappropriate sexual incident on his Navy enlistment papers because of improper advice. He did not include the assault and battery because he did not remember the incident since it was dismissed. Applicant did not deliberately fail to report the incidents to government official with intent to deceive. Applicant has mitigated security concerns for his personal conduct.

## **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. (AG ¶ 30) The SOR alleges that Applicant violated federal law by knowingly and willfully providing false information on his Navy enlistment papers and his April 2007 security clearance application (18 U.S.C. § 1001). Since I have found that Applicant did not deliberately provide false information on either

document, I find for Applicant on these two criminal conduct allegations concerning falsification.

Applicant's arrest and charges for the inappropriate sexual conduct with his younger siblings, the five arrests and charges for traffic offenses, and the two arrests and charges for assault and battery raise Criminal Conduct Disqualifying Conditions (CC DC) AG ¶ 31 (a) (a single serious crime or multiple lesser offenses), and CD DC AG ¶ 31 (c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted). These incidents raise security concerns even though the two assault and batteries were dismissed or not prosecuted, and the five other incidents are basically traffic offenses.

Appellant has raised by his testimony Criminal Conduct Mitigating Conditions (CC MC) 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"; CC MC 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"; CC MC AG ¶ 32 (c) "evidence that the person did not commit the offense"; and CC MC 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." As noted under the personal conduct security concern, the inappropriate sexual conduct in 1993 happened over fifteen years ago when the circumstances of the family were unusual. Applicant presented sufficient information to show he has been rehabilitated. The two assault and battery charges were based on allegations from his then girlfriend and his former wife. The circumstances of both incidents show that Applicant was involved in mutual assaultive conduct with his alleged victim. The decision not to prosecute or the dismissal of the charges together with how the incidents happened is sufficient to conclude that Applicant's conduct did not amount to a criminal offense of assault and battery. The traffic incidents happened mostly in the 1999 to 2001 timeframe. These incidents were minor and sufficient time has passed that they do not cast doubt on Applicant's reliability, trustworthiness or good judgment. The incident in 2007 seems to be more a mistake of timing since Applicant was not notified that his license was temporarily suspended until after he was cited by police. Based on all of the information presented as to criminal conduct, I find that Applicant has provided sufficient information to mitigate the criminal conduct security concerns.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an applicant's security eligibility 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 a security clearance must be an overall common sense 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. I considered Applicant's three years on active duty in the Navy. Applicant's security clearance denial while in the Navy appears to be a proper action based on the circumstances at the time. However, the circumstances have changed and Applicant's conduct and circumstances must be examined to determine if he is now reliable, trustworthy, and displays good judgment. I considered that Applicant completed college after the Navy and is gainfully employed by a defense contractor. His conduct with his siblings is serious and reprehensible. But it happened when he was a juvenile under some unusual family circumstances. He received counseling and more than fifteen years has expired with no further incidents. He did not deliberately provide false information on documents for the government with intent to deceive. The two assault and battery charges were either not prosecuted or dismissed and happened under the unusual circumstances of his relationship with his girlfriend and his wife. The incidents do not now adversely affect his reliability, trustworthiness, or good judgment. Most of the traffic offenses happened over seven years ago and they also do not now reflect on his reliability, trustworthiness, or good judgment. Applicant has established that these criminal and personal conduct incidents are unlikely to recur. Overall, on balance the record evidence leaves me with no questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his personal and criminal 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 E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant

Paragraph 2, Guideline J:

FOR APPLICANT

Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	For Applicant
Subparagraph 2.e:	For Applicant
Subparagraph 2.f:	For Applicant
Subparagraph 2.g:	For Applicant
Subparagraph 2.h:	For Applicant
Subparagraph 2.i:	For Applicant
Subparagraph 2.j:	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 grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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THOMAS M. CREAN  
Administrative Judge