



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-12022
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel Crowley, Esquire, Department Counsel  
For Applicant: Henry L. Young, Union Representative

June 16, 2008

**Decision**

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LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on November 9, 2006. On February 19, 2008, the Defense Office of Hearings and Appeals (DOHA) 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 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 February 28, 2008. He answered the SOR in writing and requested a hearing before an Administrative Judge. I received the case assignment on April 8, 2008. DOHA issued a notice of hearing on April 14, 2008, and I convened the hearing on May 7, 2008. The Government offered Exhibits (GE) 1-3, which were received without objection. Applicant testified on his own behalf. He submitted Exhibits (AE) A-F, without objection. DOHA received the transcript of the

hearing (Tr) on May 15, 2008. Based upon a review of the case file, eligibility for access to classified information is granted.

### **Findings of Fact**

In his Answer to the SOR, dated February 28, 2008, Applicant admitted the factual allegations in ¶¶ 1.a-1.m of the SOR. He also admitted the factual allegations in ¶¶ 2.a 2.b of the SOR with the explanation that it was not a deliberate omission. Applicant provided additional information to support his request for eligibility for a security clearance.

Applicant is a 49-year-old employee of a defense contractor. He graduated from . High school in 1980. After high school, he began work with his current employer. He has been employed with them for 30 years. Applicant married in 1985 but his marriage ended in divorce in 1992 (Tr. 57). He has one child as a result of that marriage. He is father to another child from another relationship. He is currently single. He holds a security clearance (GE 1).

Applicant had a troubled marriage. He and his wife argued violently. In March 1985, during his marriage, Applicant was arrested and charged with four counts of misdemeanor assault, threats to kill, and pointing or brandishing a firearm. His wife went to the police department and sought an arrest warrant for Applicant. Applicant admitted that the charge was filed but he believes he was innocent. He claims his attorney handled the case and told him not to worry about it (Tr 24).

On August 10, 1986, Applicant was arrested and charged with felony larceny. He does not recall the incident but knows the charge was dismissed and his attorney handled the case (T. 26). A few days later on August 18, 1986, Applicant was charged with felony abduction and felony use of a firearm. He says his wife brought the charge against him. He believed he did not appear in court. He recalls no details about the case (Tr. 27).

On July 30, 1990, Applicant was charged with misdemeanor destruction of private property, felony larceny and misdemeanor assault. The assault charge was nolle prossed. Applicant has no details about this except that his lawyer handled the case.

On June 20, 1992, Applicant was charged with misdemeanor assault. He was convicted (AE A). This incident is one of the times that his wife filed charges against him because she wanted him to lose his job. According to Applicant his wife also wanted to get custody of their son when they divorced. Thus, she made up these charges (Tr.29).

On March 4, 1995, Applicant was charged with a misdemeanor obstruction of justice. He was convicted of misdemeanor disorderly conduct. He stated at the hearing that he was guilty of this charge (Tr. 30).

In 1998, Applicant was arrested twice. In August of that year he was living with his girlfriend. According to Applicant she wanted him to sign the title to his car over to her. He did so. In September, he was charged with two counts of misdemeanor assault and battery. The charges were nolle prossed. Applicant stated that both incidents were the result of false charges brought against him by his girlfriend. Again, he stated that his attorney handled the cases (Tr. 32).

On May 14, 1999, Applicant was charged with felony breaking and entering with intent to commit a felony. This charge was nolle prossed. Applicant knows that this was related to his former girlfriend but he has no other details. Again, he stated this was taken care of by his attorney (Tr. 33).

On July 12, 1999, Applicant was charged with felony burglary and misdemeanor assault and battery-family member. The burglary charge was nolle prossed and the remaining charge was dismissed. Applicant does not remember if he appeared in court (Tr. 34).

On July 27, 1999, Applicant was charged with felony grand larceny. The charge was nolle prossed. Applicant did not appear in court (Tr. 35). This incident is also related to his girlfriend who wanted her name on his car. Applicant has a new girlfriend but he lives alone now.

On July 4, 2003, Applicant was charged with misdemeanor possession of marijuana. The charge was dismissed. Applicant had a glass jar in his backyard with a leafy green substance in it. He pled guilty to the charge. He was given a year probation.

On November 9, 2006, Applicant completed his security clearance application. In section 23 - police record, Applicant listed his pending charge for the possession of marijuana. He did not list the above referenced felony convictions or charges. Applicant claimed he did not know that he had a criminal record. He believed because they were dismissed or nolle prossed that they were not on his record. He also stated that he had forgotten about the charges from his marriage. He took leave from work went to the court recently to find his records. He now understands what charges and convictions he has on the FBI record. He explained that because his wife had filed so many complaints and the fact that his lawyer took care of everything, he had no records or real memory of all the 1980 and 1990 incidents.

## **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, 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.

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**

The security concern relating to 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 may be potentially disqualifying. Similarly under AG & 31(b), allegations or probation may raise security concerns. As noted above, Applicant was arrested and charged with a number of incidents over a span of 20 years. He has two misdemeanor convictions for assault and disorderly conduct. These facts are sufficient to raise these potentially disqualifying conditions, requiring a closer examination.

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 current reliability, trustworthiness, or good judgment. Applicant's criminal conduct occurred over a span of more than 20 years. His last charge was in 2003. However, most of the charges were dismissed. His last conviction was in March 1995. The repeated incidents do create some doubt about Applicant's judgment. This potentially mitigating condition is not a factor for consideration in this case.

Under AG & 30(d), it may be mitigating 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." As noted above, Applicant has been employed since 1980 with his employer. He has no recorded disciplinary actions. He has held a security clearance for more than 20 years. He has not had any incidents in five years. I find this potentially mitigating condition applies in this case.

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

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 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. Of special interest is any failure to cooperate with the security clearance process.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(a):

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 eligibility or trustworthiness or award fiduciary responsibilities.

Similarly, under AG ¶ 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-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. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior....

Applicant was credible in his testimony that he did not understand that all the charges that were dismissed over the years were on a criminal record. He had an attorney take care of the many complaint charges and arrest warrants from his first marriage. Many times he did not appear in court. In addition, Applicant testified that his present girlfriend filled out the security form for him because he needed help with the completion. I do not find that Applicant intentionally falsified his SF 86 security clearance application.

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 disqualifying condition is not a factor for consideration because Applicant revealed the incidents during his investigation in 2007.

Paragraph 17 lists conditions that could mitigate security concerns. Specifically, 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 judgement” is a factor for consideration in this case. Moreover, 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” does apply. Thus, AG 17(e) “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress” is a factor for consideration. He has mitigated any personal conduct concerns through his recent actions and behavior.

### **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 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. Applicant is a hard working man. He has been employed since 1980 with his current employer. He has no recorded disciplinary actions. He is a loyal employee. He has held a security clearance during the term of his employment (almost 30 years) with no difficulties.

The numerous criminal charges listed over the years were either dismissed or nolle prossed. Applicant does have two misdemeanor convictions but the last one was in 1995. Applicant listed a 2003 pending charge for possession of marijuana. That charge was also dismissed.

Overall, the record evidence and whole person analysis leaves me without questions and 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 conduct 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 J:	FOR APPLICANT
Subparagraph 1.a-m:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a-b:	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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NOREEN A. LYNCH  
Administrative Judge