



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



In the matter of:	)	
	)	
	)	ISCR Case No. 07-15226
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esq., Department Counsel  
For Applicant: *Pro Se*

December 31, 2008

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the Criminal Conduct and Personal Conduct security concerns. Eligibility for access to classified information is denied.

On June 23, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline J, Criminal Conduct and Guideline E, Personal Conduct. 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 in writing on July 9, 2008, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the government's written case on July 23, 2008. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file

objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on August 21, 2008. As of October 21, 2008, he had not responded. The case was assigned to another administrative judge on October 21, 2008, and reassigned to me on December 15, 2008.

### **Procedural and Evidentiary Rulings**

The Government offered Exhibit (GE) 11, which purports to be a certified result of interview. It includes a signed affidavit from Applicant dated February 15, 2008, stating “that the information [he] provided to an investigator in May 21, 2007 is true and correct.” Attached are Office of Personnel Management (OPM) reports of investigation (ROI). An ROI stated that a personal subject interview (PSI) was conducted on February 15, 2008, to obtain a signed affidavit. The PSI of May 21, 2007 was not included in GE 11. There were additional ROIs about information apparently obtained by the OPM investigator. The only item that Applicant certified as true was the information provided to the OPM investigator on May 21, 2007, and that information was not included in GE 11. The other information in GE 11 is inadmissible without an authenticating witness under ¶ E3.1.20 of the Additional Procedural Guidance. Since there is nothing admissible contained in GE 11, it will not be admitted or considered.

### **Findings of Fact**

Applicant is a 36-year-old employee of a defense contractor. He has worked for his current employer since September 2006. He is a high school graduate. He was married in 1991 and divorced in 1993. He has two children, ages 16 and 12.<sup>1</sup>

Applicant was arrested in August 1990, and charged with possession of stolen property. He pled guilty and was sentenced to a fine, 30 days confinement, with 4 days converted to community service, and 12 months probation. Applicant indicated that he was in a friend’s car, which had a stolen stereo installed in it, when the car was stopped by the police.<sup>2</sup>

Applicant was cited in January 1994 for public nuisance. He and a friend were playing loud music on a portable stereo at about 4:30 am in the parking lot next to a high school football field. He and the friend were exercising on the field and did not realize the music would carry as far as it did. He was found guilty of the infraction, fined, and given a 10-day suspended sentence.<sup>3</sup>

Applicant let two girls drive his car in September 2001. The car was involved in an accident when they hit a mail box and the car ended up in a ditch. The girls left the scene of the accident. Applicant came back and removed the car from the ditch and left.

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<sup>1</sup> GE 9.

<sup>2</sup> GE 3, 4, 10.

<sup>3</sup> GE 3, 5.

When he was contacted by the police he provided them false information and stated that he was the driver of the vehicle. He was arrested and charged with obstruction of law enforcement. He was convicted, fined, and sentenced to 365 days in jail, with 364 days suspended.<sup>4</sup>

An Order for Protection was issued against Applicant on June 30, 2003, ordering him to have no contact with an ex-girlfriend except by U.S. mail, and to remain 500 feet from her residence and place of employment. He was investigated in August 2003, for violating the Order of Protection. He admitted to the police officer that he left a vulgar note on her windshield and that he went to see her at her new boyfriend's house. He was charged on September 3, 2003, with criminal trespass which occurred in May 2003, prior to the issuance of the Order of Protection. Prosecution was deferred for two years pending payment of a fine and completion of a mental health evaluation and an alcohol evaluation. Applicant completed the terms of the deferred adjudication and the charge was dismissed in December 2005.<sup>5</sup>

Applicant was arrested in June 2006, and charged with rape of a child, third degree. He pled guilty in August 2006, to communicating with a child for immoral purposes. He was sentenced to a fine, 365 days confinement with 363 days suspended for two years, two years probation, and he was ordered to register as a sexual offender. Applicant indicated that a neighbor wanted to drive his car. She told him that her friend wanted to have sex with him. He let the neighbor drive the car. He stated that he thought the age of consent was 16, and both girls told him that the friend was 16 years old. He also stated that "the girl lied about her age." The age of the girl is not in evidence, but she must have been under 16 years old.<sup>6</sup>

### **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 to be used 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, administrative judges apply the guidelines 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

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<sup>4</sup> GE 3, 6.

<sup>5</sup> GE 3, 7, 8.

<sup>6</sup> GE 3, 4, 9, 10.

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 the 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 adverse 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 an Applicant’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. The following are potentially applicable:

(a) a single serious crime or multiple lesser offenses; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant's arrests and convictions raise AG ¶¶ 31(a) and (c) as disqualifying conditions.

Four Criminal Conduct mitigating conditions under AG ¶¶ 32(a)-(d) are potentially applicable:

(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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; and

(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.

Applicant's most recent conviction is the most serious. He was on probation for two years, which at best, just ended a few months ago. He is a registered sexual offender. Applicant did not submit sufficient evidence to raise any mitigating condition.

### **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 provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions are potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single

guideline, 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; and

(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 to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources; and

(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.

An Order for Protection was issued against Applicant, ordering him to have no contact with an ex-girlfriend. I do not find that the issuance of the Order of Protection independently raises any disqualifying condition. SOR ¶ 2.a is found for Applicant. There is evidence that Applicant on at least two occasions violated the Order of Protection. Those illegal actions are sufficient to raise AG ¶ 16(c) and (e) as disqualifying conditions.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(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;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability.

Applicant violated the Order of Protection in 2003. He was convicted in 2006, of communicating with a child for immoral purposes. None of the mitigating conditions are applicable.

### **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 has a lengthy history of criminal acts. He is a registered sexual offender arising from a 2006 conviction. His explanation for the 2006 act is that he mistakenly thought the girl was 16 years old.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Criminal Conduct and Personal Conduct security concerns.

## 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.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	Against Applicant

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interest of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Edward W. Loughran  
Administrative Judge