



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 07-17735
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff A. Nagel, Esquire, Department Counsel  
For Applicant: Lynn Swenson, Personal Representative

December 8, 2008

---

**Decision**

---

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on June 14, 2007. On May 29 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 June 3, 2008. He answered the SOR in writing on June 13, 2008, and requested a hearing before an Administrative Judge. DOHA received the request on June 17, 2008, and it was assigned to another Administrative Judge on July 9, 2008. DOHA issued a notice of hearing on July 16, 2008. The case was reassigned to me on August 25, 2008, and I convened the hearing

as scheduled on September 9, 2008. By way of stipulation, Government Exhibits (GXs) 1 through 3, were received into evidence. Applicant testified on his own behalf and submitted Exhibit (AppX) A, without objection. DOHA received the transcript of the hearing (TR) on September 19, 2008. The record closed on the date of the hearing, September 9, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

## **Procedural and Evidentiary Rulings**

### **Motion to Withdraw**

Department Counsel moved to withdraw subparagraph 2.b. of the SOR. This motion was granted (TR at page 32 line 15 to page 33 line 12).

## **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations of the subparagraphs of the SOR, other than 2.b. He also provided additional information to support his request for eligibility for a security clearance. The Applicant is a 56 year old Viet Nam Veteran, who served two stints with the Army from 1969~1971, and again from 1979~1991 (TR at page 4 lines 23~25, at page 43 lines 6~12, and at page 46 lines 22~25).

### **Guideline J - Criminal Conduct**

1.a. In May of 1995, the Applicant was arrested for, and subsequently was found guilty of, Driving Under the Influence (DUI) of alcohol (TR at page 24 line 13 to page 25 line 1, and at page 48 line 16 to page 49 line 18). As a result of this conviction, the Applicant was fined and placed on probation (*Id*).

1.b. In July of 2000, the Applicant was again arrested for, and subsequently was found guilty of a DUI (TR at page 25 line 12 to page 25 line 1, and at page 54 line 1 to page 58 line 2). As a result of this misdemeanor conviction, the Applicant served ten days in jail, was fined, his license was suspended, and he was placed on probation for three years (*Id*, and GX 3).

1.c. In August of 2001, the Applicant was cited for speeding, and driving with a suspended license (TR at page 26 line 6 to page 27 line 13, and at page 58 line 3 to page 59 line 14). He was involved in "critical ops [operations]" regarding the assembly of a launch vehicle, and felt he had no other way to get to the Air Force Base (*Id*). As his presence was essential, he chose "the less of two evils," and knowingly drove to work on a driver's license that has been suspended as a result of his 2000 DUI conviction (TR at page 26 line 6 to page 27 line 13, and at page 58 line 3 to page 59 line 14).

1.d. Finally, in March of 2003, was again cited for driving with a suspended license (TR at page 27 line 14 to page 28 line 19, and at page 59 line 15 to page 60 line 18). This was his last act of criminal conduct (*Id*). He was placed on 24 months of unsupervised probation and fined (TR at page 27 line 14 to page 28 line 19, and at page 59 line 15 to page 60 line 18).

### **Guideline E - Personal Conduct**

2.a. The Applicant did not report his July 2000 DUI misdemeanor conviction to his employer (TR at page 28 line 20 to page 29 line 21). He had no affirmative obligation to do so, and no one inquired about it until June of 2007 (TR at page 62 line 24 to page 68 line 3, and at page 68 line 9 to page 69 line 6). In answer to “Section 23: Your Police Record” on his June 2007 e-QIP, the Applicant disclosed all of the requested information regarding his misdemeanor conviction (*Id*, and GX 1 at page 26).

### **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.

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**

Paragraph 30 of the adjudicative guidelines sets out the security concern relating to 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.”

The adjudicative guidelines set out certain conditions that could raise security concerns. Subparagraph 31(a) provides that “*a single serious crime or multiple lesser offenses*” may be disqualifying. As noted above, the Applicant had a DUI in 1995, and again in 2000, and two serious citations, the last one being in March of 2003. However, this is countered by the first Mitigating Condition, as “*so much time has elapsed since the criminal behavior happened . . . that it is unlikely to recur . . .*” Here, the Applicant last act of criminal conduct occurred more than five years ago, and has since led a “positive and productive” life (AppX A at page 1).

### **Guideline E - Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in Paragraph 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.”

Disqualifying Condition under Subparagraph 16(d)(3) arguably applies. It provides that “*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 supports a whole-person assessment of questionable judgment . . .*” Although the Applicant had no affirmative obligation to inform his employer of his misdemeanor conviction, until he executed his June 2007 e-QIP, he

would have been more forthcoming had he done so. This is clearly countered, however, by the Mitigation Condition found under Subparagraph 17(c): “*so much time has passed . . . that it is unlikely to recur and dies not cast doubt on the individual’s reliability, trustworthiness, or good judgment.*” This oversight by the Applicant occurred more than eight years ago.

### **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.” 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.

Those who know the Applicant, both in and out of the work place, speak most highly of him (AppX B at pages 1~5). Of particular note, are the comments of a United States Probation Officer regarding Applicant’s most recent act of Criminal Conduct. He avers, in part, the following: “[The Applicant] . . . satisfactorily completed all terms of his probation, and he was found to meet all statutory and local criteria for ‘early termination’ of his probation. His assigned probation officer petitioned the Court, and on August 20, 2004, Magistrate Judge . . . ordered . . . [the Applicant] discharged from supervision and proceedings in this case terminated” (AppX B the last page).

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Overall, the record evidence leaves me without questions or 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 his Criminal Conduct and related Personal 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:	For Applicant

Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 1, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	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.

Richard A. Cefola  
Administrative Judge