



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



In the matter of:

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ISCR Case No. 08-08570

Applicant for Security Clearance

**Appearances**

For Government: Julie Mendez, Esq., Department Counsel  
For Applicant: Julie Perkins, Esq.; William Bransford, Esq.

April 6, 2011

**Decision**

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LYNCH, Noreen, A. Administrative Judge:

On September 30, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) alleging security concerns arising under Guideline J (Criminal Conduct). An amended SOR, dated November 18, 2010, added security concerns under 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 Adjudicative Guidelines (AG).

On October 25, 2010, Applicant answered the original SOR and requested a hearing. DOHA assigned the case to me on December 23, 2010. DOHA issued a Notice of Hearing on January 26, 2011, and I convened the hearing on February 15, 2011. Department Counsel offered four exhibits, which were admitted as Government Exhibits (GE) 1-4. Applicant testified, presented two witnesses, and submitted three exhibits (AE) A through C which were admitted into the record. DOHA received the transcript on February 28, 2011. Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

## Findings of Fact

In his answer to the amended SOR, Applicant admitted the factual allegation under Guideline J (Criminal Activity), and denied the factual allegation under Guideline E (Personal Conduct).

Applicant is a 47-year-old employee of a defense contractor. He graduated from college in 1986 and obtained a graduate degree in 2001. Applicant is married and has no children. He has worked for his current employer since 2006. Applicant served in the information technology field with defense contractors from 1991 for 15 years. He held a security clearance from 1994 until 2007, when it was denied by another agency. His interim security clearance was withdrawn in 2008. (GE 3)

### Criminal Conduct

Applicant owns a gun collection, including antique guns such as rifles, shotguns, and pistols. He began purchasing guns in his late 20s. (Tr. 38) He admitted that he illegally carried pistols, with varying frequency, (sometimes daily), from 1991 until about the summer of 2006. Applicant had a permit for a firearm in one state but not for the states in which he carried the concealed pistols.

Applicant's explanation for carrying a firearm was because he "started hanging out with the self-defense crowd" (police officers and "people who were in the concealed carry movement"). (Tr. 19) He also explained that he taught martial arts and attended training classes (defensive pistol classes). Everyone he met was carrying a gun and he decided to do the same thing. He referred to a "lifestyle" and a community of people who realized how ineffective hands are against a weapon for safety. (Tr. 57) He also admitted that he knew it was illegal. (Tr. 19)

At the hearing, Applicant recalled that on September 11, 2001, he was not carrying a gun, but thought it would be a good day to have one. (Tr. 44) He does not recall when he actually stopped carrying guns on a regular basis. (Tr. 18) He also acknowledged that he probably carried a weapon to work on some occasions. (Tr. 47) Applicant believed that since he was trained and highly proficient with a gun, if there were a "deadly situation," he would be better off with a gun. (Tr. 60) He was adamant that he never touched a gun when he drank alcohol.

Applicant stated that he stopped carrying a concealed weapon prior to September 2001, but in 2006 he again carried an illegal firearm. (Tr. 20) He attributes that action to a mugging that happened to him. He stated that he started to take a gun to work the next day, but decided to leave the gun in the car. He acknowledged that was the last time he carried a concealed weapon. Applicant was never arrested or charged with any crime. (Tr. 22)

Applicant applied for sensitive compartmented information (SCI) access in October 2006. During the investigation, Applicant was given a polygraph. In response to

a question about any felony offenses, he recalled that he had carried a handgun with him without having a license to do so, and told the polygraph technician. (GE 2)

At the hearing, Applicant acknowledged that his security clearance is important to him so that he can keep the job that he enjoys. He stated that he never realized his behavior was endangering his security clearance. He believes that he is an asset to the Government. (Tr. 33) When questioned about future intentions concerning illegally carrying a gun, he thought “how can you ever guarantee anything like that.” He states that it is not part of his lifestyle anymore, but he also recognizes that it is illegal. (Tr. 34) He noted that it was wrong to do what he did. He does not want to break the law.

Applicant provided three letters of recommendation from friends and students. They attest to his responsibility, integrity and judgment. Each characterizes Applicant as an honest and candid person who is a good role model. (AE A-C)

At the hearing, Applicant’s supervisor testified that she has known him for two or three years. (Tr. 68) His supervisor describes Applicant as reliable and honest with good insight. Applicant’s supervisor noted that Applicant has a good reputation in the company and follows company law.(Tr. 72) She acknowledged that most defense contractors have a “no weapons” policy.

A retired military officer and friend of Applicant testified that he has known Applicant since 1994. Applicant taught martial arts, and his friend was once a student of Applicant. He describes Applicant as an “upright” guy. (Tr. 77) Applicant’s friend knows about the security concerns at issue and that his clearance was denied. Applicant’s friend also reported that he has never seen Applicant carry a weapon. He recommends Applicant for retention of a security clearance.

### **Policies**

When evaluating an applicant’s suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” An 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.

The Government must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”<sup>1</sup> The burden of proof is something less than a preponderance of evidence.<sup>2</sup> The ultimate burden of persuasion is on the applicant.<sup>3</sup>

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”<sup>4</sup> “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”<sup>5</sup> Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.<sup>6</sup> The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

## Analysis

### Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining to criminal conduct, “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its

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<sup>1</sup> See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

<sup>2</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

<sup>3</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>4</sup> See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

<sup>5</sup> ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

<sup>6</sup> *Id.*

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:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.

Applicant’s admission that he carried a concealed weapon, without having a license, from 1991 until the summer of 2006, with varying frequency, is sufficient to raise AG ¶¶ 31(a) and (c).

AG ¶ 32 provides four conditions that could mitigate security concerns:

- (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; and,

After reviewing the mitigating conditions, I find that none of them apply in this case. Applicant’s illegal carrying of a handgun is behavior that has been longstanding and continuous. He acknowledged that it may happen again - or that there is no guarantee that it will not happen again. He knew his behavior was illegal but it did not stop him. His last incident was in 2006. Based on the record evidence and Applicant’s testimony, I find that he has not mitigated the security concern under criminal conduct.

## Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

(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 clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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;

(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; and

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

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

(f) violation of a written or recorded commitment made by the individual to the employer as a condition of employment; and

(g) association with persons involved in criminal activity.

Applicant's poor judgment over a period of many years gives rise to disqualifying condition AG ¶ 16(e). He knowingly broke the law, sometimes on a daily, basis until 2006. He held a security clearance during that time. He admitted that he sometimes took the weapon to work, which was against company policy. His conduct shows a pattern of dishonesty and rule violations.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate 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;

(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;

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

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant admitted that he illegally carried a handgun from 1991 until 2006 during an investigation. He disclosed this information for the first time during a polygraph test in 2006. This illegal behavior occurred over a long period of time. It was not a minor offense or an isolated one. His behavior has shown a disregard for laws and regulations. I have doubts about his judgment and reliability.

After considering the mitigating conditions outlined in AG ¶ 17, I conclude Applicant has not mitigated the security concern under personal conduct.

### **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 an 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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is a contractor who has held a security clearance since 1994. He has good references and his current employer recommends him. He is an educated, mature individual. He has letters of recommendation. His security clearance is currently suspended.



Applicant states that the last time he carried a concealed weapon was in the summer of 2006. He has not had any arrests or incidents of security violation. However, despite his claim that he will follow the law in the future, I have doubts about his judgment and reliability. Any doubts must be resolved in favor of the Government. Applicant has not met his burden in this case. He has not mitigated the security concerns under criminal conduct and personal conduct. Clearance is denied.

### **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
Subparagraph 1.a:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

### **Conclusion**

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

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NOREEN A. LYNCH.  
Administrative Judge