



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



In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 08-08677
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Allison O'Connell, Esq., Department Counsel  
For Applicant: *Pro Se*

July 16, 2009

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline E (Personal Conduct). Clearance is denied.

**Statement of the Case**

Applicant submitted a Security Clearance Application (SF-86) on January 11, 2008. On December 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing 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 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 January 5, 2009, and requested a hearing before an administrative judge. DOHA received his response on January 8, 2008. Department Counsel was prepared to proceed on February 10, 2009, and I received the case assignment on February 12, 2009. DOHA issued a notice of hearing on March 12, 2009, scheduling the hearing for April 9, 2009. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 11, which were received without objection. The Government also offered a List of Government Exhibits, (Ex) I. The Applicant offered Applicant Exhibits (AE) A through E, which were received without objection, and testified on his own behalf. DOHA received the hearing transcript (Tr.) on April 17, 2009.

## **Procedural Rulings**

### **Amendment of SOR**

Department Counsel moved to amend the SOR to reflect the correct spelling of Applicant's last name. Without objection from the Applicant, I granted Department Counsel's motion. Tr. 8-9.

## **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a. – 1.b., 1.d. – 1.k., and denied SOR ¶ 1.c. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 49-year-old custodian<sup>1</sup>, who has worked for his defense contractor employer since February 2008. GE 1, Tr. 14, 19-20. He seeks a security clearance to enhance his position within his company. Without a clearance, he is only authorized to enter unsecure spaces. If his duties require him to enter a secure space, he is required to have an escort. Tr. 20-22.

Applicant graduated from high school in June 1978. He later attended "a couple of semesters" at a local community college "two or three years ago." Tr. 18-19. He was previously married from May 1980 to April 1987, and that marriage ended by divorce. GE 1, 14-15. Three children were born during that marriage, a 28-year-old daughter, a 27-year-old daughter, and a 25-year-old son. GE 1, Tr. 16. Applicant has not had any contact with his children since his divorce and has "no idea" where his children are. He stated, "[m]y ex was so mad with me that she just didn't let me see them." Tr. 17.

The SOR alleged 11 separate incidents involving Applicant that required law enforcement intervention. These incidents spanned a 22-year period from January 1986 to February 2008. With the exception of a March 1999 incident, which Applicant denied,

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<sup>1</sup> Applicant described his duties as a custodian to consist of vacuuming, cleaning, dusting, and emptying the trash. Tr. 20.

the remaining incidents were established either by Applicant's admissions and/or evidence presented. They are summarized below.

<b>Incident/arrest</b>	<b>Result</b>	<b>Record</b>	<b>Comments</b>
1. 1/86 – Arrested for disorderly conduct.	Convicted & fined \$69.00.	Tr. 25-27.	SOR ¶ 1.k. - Admitted.
2. 2/90 – Arrested & charged with driving under the influence & hit & run.	Both charges either set aside and/or dismissed by city atty.	Tr. 27-35, GE 4.	SOR ¶ 1.j. – Admitted.
3. 3/90 – Arrested & charged with shoplifting & criminal trespass.	Convicted of criminal trespass & sentenced to 21 hours community service & fined \$110.75.	Tr. 35-37, GE 5.	SOR ¶ 1.i. – Admitted. As of hearing date, fines not paid & community service not completed.
4. 4/91 – Arrested & charged with fail to yield from private road or drive.	Convicted & fined \$63.88.	Tr. 37-38, GE 6.	SOR ¶ 1.h. – Admitted. As of hearing date, fine not paid.
5. 6/91 – Arrested for false report to law enforcement, no license, no insurance, & failure to appear.	Convicted of false report & failure to appear & fined \$453.24.	Tr. 38-45, GE 7.	SOR ¶ 1. g. – Admitted. As of hearing date, fine not paid.
6. 1/92 – Cited for possession of marijuana & drug paraphernalia & failure to appear.	Convicted & fined \$358.00.	Tr. 45-50, GE 8.	SOR ¶ 1.f. – Admitted. As of hearing date, fine not paid.
7. 1/93 – Arrested for possession of marijuana.	Convicted, fined & sentenced to 28 hours community service & six months unsupervised probation.	Tr. 50-53, GE 9.	SOR ¶ 1.e. – Admitted. As of hearing date, community service not completed.
8. 10/95 – Arrested for 3 <sup>rd</sup> degree criminal trespass & aggravated criminal damage.	Fined \$204.68 & sentenced to 25 hours community service.	Tr. 53-57, GE 10.	SOR ¶ 1.d. – Admitted. As of hearing date, fine not paid & community service not completed.

9. 3/99 – Arrested for sexual battery.	Released with no charges ever filed.	Tr. 57-64, GE 3.	SOR ¶ 1.c. – Denied. Explained at hearing “was falsely accused.”
10. 4/05 – Cited for driving with suspended license & no evidence of financial responsibility.	Convicted of suspended license & fined.	Tr. 64-67, GE 11, AE A.	SOR ¶ 1.b. – Admitted. Paid fine 1/06.
11. 2/08 – Cited for public nuisance.	Charge dismissed after completion of Adult Responsibility Class.	Tr. 67-71.	SOR ¶ 1.a. – Admitted. Applicant stated he was drunk while crossing street.

Applicant adamantly denies any wrongdoing stemming from his October 1999 arrest for sexual battery (SOR ¶ 1.c.). He explained at the time he was living with his girlfriend and her teenage children, a daughter and a son. Tension developed between Applicant and his girlfriend’s children, which resulted in his girlfriend’s daughter filing a false accusation of sexual battery against him. Shortly after the incident, his girlfriend sent him a letter of apology. Applicant has had no communication with his former girlfriend since receiving the letter of apology. Tr. 57-64, GE 3.

Regarding his unpaid fines accumulated throughout the years, Applicant testified that he is making payments “when [he] can,” that the courts are “working with [him],” he estimates he has made “three or four” payments towards his unpaid fines, and estimates he owes “[o]ver 1,000 [dollars]” balance in unpaid fines. He also understands he has to address the community service he has yet to perform from previous sentences throughout the years. Tr. 72-73, 91-92.

Applicant recently had his driver’s license reinstated in March 2009, which he lost after his February 1990 DUI arrest. Tr. 76-77. Applicant has been involved in a nine-year relationship with his fiancé, who works in the area of behavioral health. They live together and share expenses. Applicant stated his fiancé “wouldn’t agree on marrying me until I got a permanent job that’s steady, and I don’t blame her.” Tr. 78-80.

Applicant stated he is different today from the person who was arrested 11 times over a 22-year period:

Well, back then, like I said, I was going through a lot with my parents’ illnesses. My dad had cancer, and my mom [had] heart problems and diabetes. I did a lot of dumb things, you know. My head wasn’t right. Now that – excuse me. Now that they’re gone, I can straighten out my life and better myself. And that’s what I want to do. I want to make them proud. Excuse me for the outburst.

And that's the difference, I think, that I'm learning. You know, it's a long process. It was a long process for me to learn, but I do learn from my mistakes. Sorry about that. Tr. 86-87.

Since working, Applicant has reduced a \$36,000 child support arrearage to \$30,000 in the last three to four years through recoupment from his tax refunds and wage garnishment. Tr. 88-90, AE C.

Applicant submitted a work-related reference from a supervisor, who complimented him on his work ethic and job performance. AE D. He also submitted two Team Achievement Awards from 2008 and 2009 in recognition of his "ongoing commitment to outstanding job performance." AE F, AE E.

### **Policies**

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information.<sup>2</sup>

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 controlling 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 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."<sup>3</sup> 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.

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

<sup>3</sup> *Egan*, *supra*, at 528, 531.

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 E (Personal Conduct)**

Under Adjudicative Guideline ¶ 15, the security concern is:

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 sets out one condition that could raise a security concern and may be disqualifying in this case:

(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.

The Government established through Applicant's admissions and evidence presented that he has had numerous arrests/citations from January 1986 to February 2008, spanning a 22-year period. His most recent citation occurred one month after submitting his SF-86. His arrests/citations cover a wide range to include drugs and drug paraphernalia, driving under the influence, hit and run, criminal trespassing, aggravated criminal damage, disorderly conduct, shoplifting, driving with a suspended license, failure to have proof of insurance, and public nuisance.

He has yet to pay fines and perform community service going back to his February 1990 arrest. His recent attempts to address past due court fines and unperformed community service fall short when considering the length of time involved since they became due and/or were imposed.

Potential mitigating conditions listed under AG ¶ 17 are:

(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;

(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.

For reasons discussed *supra*, none of the potential mitigating conditions under this concern are applicable.

Under the totality of the circumstances, I find Applicant's behavior is recent and not isolated. Considering his behavior, the nature and seriousness of his misconduct, his exercise of repeated poor judgment culminating in his recent citation for public nuisance one month after submitting his SF-86, and other factors identified *supra*, I find his favorable information is not sufficient to mitigate Guideline E security concerns. His conduct raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. His conduct also raises serious doubts and questions about his judgment. Further time and additional evidence is needed before I can overcome my concerns/doubts regarding Applicant's questionable judgment, reliability, and trustworthiness.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or refute personal conduct security concerns. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole person concept was given due consideration and that analysis does not support a favorable decision.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my “careful consideration of the whole person factors”<sup>4</sup> and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government’s case. For the reasons stated, I conclude he is not eligible for access to classified information.

### **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:	AGAINST APPLICANT
Subparagraph 1.a. – 1.b.:	Against Applicant
Subparagraph 1.c.:	For Applicant
Subparagraph 1.d. – 1.k.	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 eligibility for a security clearance. Clearance is denied.

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ROBERT J. TUIDER  
Administrative Judge

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<sup>4</sup> See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).