



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 09-02753  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minster, Esquire, Department Counsel  
For Applicant: *Pro se*

February 24, 2010

**Decision**

CURRY, Marc E., Administrative Judge:

Applicant failed to mitigate the security concern generated by his criminal conduct and financial problems. Clearance is denied.

On August 20, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines J, Criminal Conduct, and F, Financial Considerations. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on September 10, 2009, admitted all of the allegations except SOR subparagraphs 2.a and 2.b, and requested a hearing. The case was assigned to me on September 28, 2009. On November 25, 2009, a notice of hearing was issued scheduling the case for December 9, 2009. The hearing was

conducted as scheduled. I received eight government exhibits, identified as Government Exhibits (GE) 1 through 8, and the testimony of two Applicant witnesses. At the conclusion of the hearing, I left the record open at Applicant's request to allow him to submit exhibits. Within the time allotted, he submitted seven exhibits that I received as Applicant Exhibits (AE) A through G. DOHA received the transcript on December 16, 2009.

### **Findings of Fact**

Applicant is a 36-year-old man with two children, ages 15 and 13. The oldest child is from a previous relationship, and the youngest child is from his marriage, which ended in divorce after 12 years in 2006. Both mothers have physical custody of their respective children (Tr. 36).

Applicant finished high school in 1992 and has earned one year of college credit over the years (Tr. 24; AE 1 at 2). He served in the U.S. Marine Corps from 1992 through 2000. While in the Marines, he served honorably earning a Certificate of Commendation in 1994, a Certificate of Good Conduct in 1995, a Navy and Marine Corps Achievement Medal in 1997, and a Certificate of Good Conduct in 1998 (GE F at 1 through 4).

Since leaving the Marines, Applicant has worked for a defense contractor as an engineer (Tr. 27). His duties include testing communications systems and radar (Tr. 27). He is well respected on the job. According to a coworker, data used to conduct tests is sometimes contaminated because of unforeseen circumstances (AE E). Rather than informing supervisors of the problem and repeating the testing, some employees, motivated by fear of reprisal have used the contaminated data (*Id.*). Applicant, however, has always acted appropriately by informing his supervisor and repeated the testing (*Id.*).

In 1990, when Applicant was 17, went on a joyride with a friend who had stolen a car (Tr. 28). Later, the friend, an adult, was apprehended by the police and accused Applicant of stealing the car. Applicant was then charged in juvenile court with grand theft of a motor vehicle (Answer). He pleaded guilty and the court withheld adjudication, placing him in a community service program (Answer; Tr. 41). Applicant successfully completed the program.

In May 1995, Applicant and his then wife engaged in a public, heated argument that turned physical, leading to Applicant's arrest (GE 7). Applicant was not awarded nonjudicial punishment. Instead, his supervisor, a first sergeant, restricted him to his barracks for two weeks (Tr. 43, 67).

In 2005, Applicant and his wife separated. Later that year, Applicant's wife erroneously sent him a sexually suggestive text message that was intended for another man (GE 3 at 6). Enraged, Applicant drove to his wife's home to confront her (*Id.* at 7). After a friend of his wife answered the door and refused to allow him to enter, Applicant

kicked the door open, then left the home (*Id.*). Later, Applicant was charged with entering property with intent to damage, and destruction of property (*Id.*). Also, the court entered a 15-day protective order (Tr. 47). The protective order expired without incident, and the court subsequently null proessed the charges (Answer). Also, Applicant voluntarily completed anger management classes, which he successfully completed (Tr. 70; AE G).

Applicant now lives with his new girlfriend and her child (Tr. 87). According to his girlfriend, Applicant and his ex-wife do a great job coordinating visitation and ensuring their child has “what he needs” (Tr. 88). According to Applicant’s ex-wife, he is “a man of great integrity, and is extremely dedicated to his children, family, and work” (AE E).

In 2007, Applicant, then 34 years old, began dating his next door neighbor’s daughter (Tr. 31). She was 16 years old at the time. Applicant testified that he thought she was 18 years old because of her “physical attributes” (Tr. 50). He contends no sexual intercourse occurred, and that the relationship was limited to foreplay and the exchange of sexually suggestive text messages (Tr. 50).

Later, Applicant was arrested and charged with consensual sexual intercourse with a child, age 15 or older (GE 5; Tr. 31). He pleaded guilty and was sentenced to six months in jail with five months suspended (Answer).

One evening in February 2008, Applicant allowed his adult nephew who was living with him to borrow his car (Tr. 55). The next morning, Applicant drove it to work (Tr. 56). That afternoon, Applicant’s nephew called him and told him he left something in the trunk (Tr. 56). Applicant assumed it was marijuana (Tr. 58). He did not dispose of it or notify the police. Instead, Applicant left the marijuana in the trunk with the intention of returning it to his nephew (Tr. 58). Later, while driving home from work, a highway patrolman stopped Applicant for driving with tinted windows and smelled marijuana (Tr. 57). Applicant then told the officer about the marijuana in the trunk. The officer searched the trunk, discovered approximately one ounce of marijuana, and arrested Applicant, charging him with possession of marijuana. Applicant pleaded no contest, and was sentenced to 30 days (suspended), and fined \$141 (Answer at 2). Also, his driver’s license was restricted for six months (Tr. 58).

At or about the time Applicant was arrested, his adjustable rate mortgage loan increased, leading to a \$300 increase in the monthly payment (GE 3 at 11). After the marijuana-related arrest, Applicant evicted his nephew from the home. Applicant then discovered that his nephew had opened multiple credit accounts in his name and had charged approximately \$7,000 on them<sup>1</sup> (Tr. 35). These problems, combined with the legal fees associated with the 2007 and 2008 arrests, caused Applicant to fall behind on his mortgage. (Tr. 31, 35).

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<sup>1</sup>The SOR does not allege any delinquent credit card accounts.

Applicant then began making partial mortgage payments (GE 3 at 11). Also, he attempted to renegotiate the loan. In August 2008, the mortgagee rejected his renegotiation attempts and informed him that it would accept no further partial mortgage payments (*Id.*). In October 2008, Applicant contacted a loan modification company (*Id.*). Its efforts were unsuccessful. In January 2009, Applicant contacted another loan modification company. Its efforts were also unsuccessful (*Id.*).

In April 2009, the mortgagee foreclosed on Applicant's home (*Id.*). The balance of the mortgage was \$281,000 (SOR subparagraph 1.b). Since the issuance of the SOR, the mortgagee short sold the home (Tr. 33). Applicant now owes approximately \$27,000, the difference between the short-sale price and the amount he owed (AE B). Applicant wants to negotiate a payment plan, but the mortgagee wants the entire balance in a lump sum, which he is unable to pay. In January 2010, approximately three weeks after the hearing, Applicant wrote the mortgagee, again offering to begin satisfying the deficiency through a payment plan (*Id.*). He enclosed a \$200 check. It is unknown from the record whether the mortgagee cashed the check.

The SOR lists two other delinquencies collectively less than \$200. SOR subparagraph 1.a is a phone bill for \$58. Applicant contacted the phone company's billing department to dispute the bill (AE C). It had no record of the account, and forwarded Applicant's dispute to the credit reporting department to remove it from his record (*Id.*).

SOR subparagraph 1.c is an allegedly delinquent insurance payment for \$127. Applicant disputes this bill contending that he has been using this insurance provider for the past five years, and has never been informed of a delinquency (GE 3 at 10). Applicant contacted the insurance company. It conducted an extensive record search and confirmed that Applicant had no outstanding indebtedness (AE C).

Applicant maintains a budget (AE D). He has approximately \$250 of monthly after-expense income (AE D at 2).

### **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 together with the factors listed in the adjudicative process. 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.”

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.

## **Analysis**

### **Guideline J, Criminal Conduct**

Under this guideline, “criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness” (AG ¶ 30). Moreover, “by its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations” (*Id.*).

Applicant’s 18-year history of criminal conduct triggers the application of AG ¶ 31(a), “. . . multiple lesser offenses.” Applicant’s car theft charge occurred before he joined the Marines when he was a juvenile, and he successfully completed community service, as ordered. Applicant was not criminally charged with domestic disturbance/assault, as alleged in SOR subparagraph 1.b. I resolve SOR subparagraphs 1.a and 1.b for Applicant.

Applicant’s behavior that lead to his 2005 domestic-related arrest, as listed in SOR subparagraph 1.c, was precipitated by an unusual circumstance - receiving a sexually explicit text message from his wife intended for another man. However, this does not mitigate the behavior. Nevertheless, because Applicant is now divorced, maintains a healthy relationship with his ex-wife, and has another girlfriend, any domestic-related criminal conduct is unlikely to recur. I resolve SOR subparagraph 1.c in Applicant’s favor.

I remain concerned about the 2007 and 2008 criminal conduct. Applicant’s decision to become intimately involved with the teenage daughter of his next door neighbor represents an unacceptable lapse in judgment regardless of whether she was 16, or 18, as Applicant believed. Applicant demonstrated a similar judgment lapse when he decided to return the marijuana his nephew had left in the trunk of his car rather than notifying the police or throwing it away.

Applicant has a good employment record and deserves credit for repairing his relationship with his ex-wife, the physical custodian of one of his children. The mitigating condition set forth in AG ¶ 32(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,” applies partially. However, it is not sufficient to outweigh the recency of the two aforementioned episodes of criminal conduct. Applicant has not mitigated the Criminal Conduct security concern.

### **Guideline F, Financial Considerations**

Under this guideline, “failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information” (AG ¶ 18). In early 2008, Applicant fell behind on his mortgage payments, leading to the foreclosure of his home the following year. Although the mortgagee short sold the home, Applicant owes a deficiency of approximately \$27,000. In addition, the SOR alleges a delinquent phone bill and a delinquency owed to a car insurance company collectively less than \$200. AG ¶¶ 19(a), “inability or unwillingness to satisfy debts,” and 19(c), “a history of not meeting financial obligations,” apply.

Applicant successfully disputed the two minor bills and provided supporting documentation. AG ¶ 19(e), “the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue,” applies. I resolve SOR subparagraphs 2.a and 2.c in Applicant’s favor.

Applicant fell behind on his mortgage, in part, because the monthly payment spiked at or about the same time his nephew charged \$7,000 of purchases on credit cards opened in Applicant’s name without his knowledge. These factors potentially trigger the application of AG ¶ 20(b), “the conditions that resulted in the business downturn were largely beyond the person’s control (e.g., unexpected medical emergency, or a death, divorce, or separation), and the individual acted responsibly under the circumstances.” The legal fees Applicant incurred related to his criminal conduct also contributed to his financial difficulties. Under these circumstances, I decline to apply AG ¶ 20(b).

In the 14 months preceding the foreclosure of Applicant’s home, he made partial mortgage payments while unsuccessfully attempting to negotiate a loan modification. Since the mortgagee foreclosed on the home, Applicant has organized a budget, and sent a \$200 payment to the mortgagee along with a proposed payment plan. AG ¶ 20(d), “the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts,” applies.

It is unknown from the record whether the mortgagee will accept either the payment or Applicant’s payment plan proposal. As Applicant testified, the mortgagee wants him to pay the entire balance. Moreover, even if the mortgagee accepts Applicant’s payment plan, it would be too soon to conclude that the problem is under

control given the recency of the first payment and the amount owed. AG ¶ 20(d), “the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control,” is inapplicable. Applicant has not mitigated the Financial Considerations security concern.

### **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.

Applicant deserves credit for his exceptional service in the Marines and his strong employment record. Also, he demonstrated maturity by developing a cordial relationship with his ex-spouse for the benefit of their child’s well-being.

However, I cannot reconcile these positive attributes with the lapse of judgment and responsibility that he demonstrated with his recent criminal conduct. This conduct ultimately contributed to his financial problems that are currently unresolved. Upon considering this case in the context of the whole person concept, I conclude Applicant failed to mitigate the 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.c:	For Applicant
Subparagraphs 1.d-1.e:	Against Applicant
Paragraph 2, Guideline F:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant

