



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-04946
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Marc Laverdiere, Esq.  
Richard Stevens, Esq. Department Counsel  
For Applicant: *Pro se*

November 5, 2010

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline J, Criminal Conduct. Applicant's eligibility for a security clearance is granted.

On June 24, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on July 13, 2010, and requested a hearing before an administrative judge. The case was assigned to me on August 17, 2010. DOHA issued a Notice of Hearing on August 23, 2010. I convened the hearing as scheduled on September 13, 2010. The Government offered Exhibits (GE) 1 through 7.

Applicant did not object and they were admitted. Applicant and three witnesses testified. Applicant offered Exhibits (AE) A through F, which were admitted without objections. DOHA received the hearing transcript (Tr.) on September 20, 2010.

### **Findings of Fact**

Applicant admitted all the allegations in SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 30 years old. He has worked for a federal contractor since 2009. He married in 2006, and has two children with his wife. His children are ages eight and three. He also has two children from a previous relationship, who are ages 14 and 12. He pays child support for his two older children. Applicant earned an associate's degree and a bachelor's degree, and is presently working on a master's degree. He excelled academically while in college and earned scholarships. He worked while going to college and raising his family.<sup>1</sup>

In 1999, Applicant lived in an inner city neighborhood that was in transition, meaning crime in the neighborhood was increasing. He was waiting for a bus and he was harassed by two police officers. He credibly testified that he was not doing anything wrong. He was searched and put in a police car. He was charged with failing to obey a reasonable and lawful order and loitering in a public place. He was released on his own recognizance. Applicant missed a day of school. He was on the baseball team at the time and missed practice. The next day Applicant was again harassed by the police. His father spoke to the police officers and informed them that Applicant was not part of the problems that were occurring in the neighborhood. He was told by the police officer that things would get worse for Applicant if he tried to do anything. Applicant's father contacted the police officers' supervisor and the harassment stopped. The charges were nolle prosequi. Applicant credibly testified that he did not commit any criminal acts.<sup>2</sup>

In 2000, Applicant's older half-brother wrote a bad check. The police came to Applicant's residence. His half-brother did not live there, but would stop by on occasion. His half-brother was not there so the police returned later to arrest him. Applicant stated the police broke the front door. He apparently became agitated and he was arrested for disorderly conduct, and obstructing and hindering. He was a college student at the time. The disorderly conduct charge was nolle prosequi and he was given Probation Before Judgment for the obstructing and hindering charge. Applicant was on probation for a year. He completed community service and the charge was dismissed.<sup>3</sup>

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<sup>1</sup> Tr. 85-86, 88; GE 7.

<sup>2</sup> Tr. 30-38.

<sup>3</sup> Tr. 38-50,160-163.

Applicant and his girlfriend<sup>4</sup> had a relationship from 1999 to 2004. They decided to terminate the relationship in 2004. At that time his girlfriend became friends with Person X. The girlfriend and Person X did not have an intimate relationship. Applicant could not recall how long he and his girlfriend were broken up, but he believed it was a few weeks or a month, before they decided to reconcile. Person X began harassing Applicant's girlfriend. He would repeatedly contact her on her cell phone during the day and nighttime. She told him to stop. He would contact her at her workplace. He would wait outside her workplace. He would contact her coworkers and talk about her. The girlfriend's employer contacted the police. Applicant's girlfriend became afraid and would have someone escort her to her car. She would hide at her workplace so Person X would not see her. The police were contacted several times and they told the Applicant's girlfriend she should have someone talk to Person X about the harassment, and if that did not work she should file a police report. The police were called to the girlfriend's residence and workplace. They did not contact Person X or take any action to protect Applicant's girlfriend and child. Person X told Applicant's girlfriend that he did not want to have to hurt her. She took this as a threat and feared for her safety and her child's safety. She was scared and thought he might harm her. She told Applicant about the harassment.<sup>5</sup>

Applicant contacted Person X by telephone and told him to refrain from calling and harassing his girlfriend. Applicant advised him he did not want any problems and he wanted to resolve the problem amicably. His girlfriend's parents contacted Person X and told him to stop. Applicant stated Person X agreed to stop calling. Applicant believed the problem was resolved. A week later Person X started contacting Applicant's girlfriend again. Applicant explained he feared for the safety of his girlfriend and his child. Person X threatened Applicant, his girlfriend, and their child. He stated it was clear that Person X was continuing the harassment. He stated he believed Person X would carry out the threat of hurting his girlfriend and child.<sup>6</sup>

On January 17, 2005, Person X again called Applicant's girlfriend and harassed her. Applicant knew Person X lived in one of the more dangerous neighborhoods in the city. It was well known that one did not go into the neighborhood unless you knew someone and you brought people with you. Applicant went to the neighborhood during the day and brought four men with him. Person X lived with his mother and brother. Applicant expected one of two things to happen. He expected Person X's mother, after being made aware of the problem, would tell Person X to stop, or Person X would see Applicant and the four men, and decide it was not worth the trouble. Person X was not at home. Applicant spoke with the brother and mother and told them the problem. He said it was a civil conversation and they told him they would talk to Person X. As they were leaving Applicant received a phone call from Person X who had seen him at his

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<sup>4</sup> Applicant's girlfriend later became his wife.

<sup>5</sup> Tr. 50-59, 90-99, 163-182; AE A is a multiple page document of phone records provided by Applicant to support that his girlfriend was receiving numerous phone calls from Person X.

<sup>6</sup> Tr. 50-59.

house. They then saw each other on the street. There was a confrontation and Applicant stated Person X “took a swing” at him. Applicant stated he acted in self-defense. All of the men began to fight. One of the men, a cousin of Applicant’s, had a knife and stabbed Person X multiple times. Applicant stated he was unaware until later that Person X had been stabbed. It was not until they were all in the car and he noticed blood on his clothes. His cousin showed him the knife. Applicant stated he had no idea his cousin brought a knife.<sup>7</sup>

The police contacted Applicant two days later. He contacted an attorney and explained his story. He turned himself in to the police and was charged. He stated he was willing to testify against his cousin. To this day he is estranged from his cousin and has a distant relationship with his aunt because of his willingness to testify. He was later released on bail. He was charged with attempted first degree murder, attempted second degree murder, assault-first degree, assault-second degree, deadly weapon intent to injure, deadly weapon-conceal, reckless endangerment, and conspiracy to commit assault-second degree.<sup>8</sup>

Applicant admitted that he burned his clothes after the incident because they had blood on them and he did not want them to be used as evidence against him. He and his girlfriend went to the police station after the incident to file a restraining order. His girlfriend was questioned, but Applicant was not. He did not volunteer information about the altercation.<sup>9</sup>

After a two-year delay in the court proceedings, Applicant wanted to resolve the case. He learned Person X wanted \$10,000 to resolve the case and not pursue the charges. Applicant accepted a plea agreement. He pleaded guilty to assault-first degree, was given Probation Before Judgment, and was required to pay \$10,000 in restitution. He paid the restitution and was released early from probation, when he graduated from college in December 2008. The charge was dropped and he is no longer on probation. Applicant stated that the judge in his case hoped that the incident would not hinder his future employment and ability to obtain a security clearance.<sup>10</sup>

Applicant’s father testified on his behalf. He described his son as a productive member of society with a strong work ethic. He confirmed that his son has been working, going to school, and raising a family. He confirmed that his son was being harassed by the police in 1999, and after discussing it with the officers’ supervisor it stopped. He considers his son a responsible adult who pays his bills and takes care of his family.<sup>11</sup>

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<sup>7</sup> Tr. 56-79, 92-121.

<sup>8</sup> Tr. 68-79, 81.

<sup>9</sup> Tr. 116-121, 124-126.

<sup>10</sup> Tr. 70-79,122-124.

<sup>11</sup> Tr. 129-146.

A former coworker of Applicant's testified on his behalf. He has known Applicant for 12 years. He described him as an ambitious man who has goals to better himself and his quality of life. He was a trusted employee at his job. He has never seen him be violent or aggressive. He described Applicant as a family man with strong family bonds.<sup>12</sup>

I have considered all of the documents provided by Applicant. Applicant's supervisor from 2004 to 2008 provided a character letter. He was aware of the criminal incident that occurred in 2005. Based on Applicant's past work history and his candor, no action was taken. He described Applicant as an honest and trustworthy employee. He has never experienced any problems with him.<sup>13</sup>

Applicant's wife considers him to be a reliable and trustworthy person. He provides for his family and his children.<sup>14</sup>

Applicant worked from the time he graduated high school. He earned enough money to buy a house in 2001. His grades in college were high enough that he earned scholarships and financial assistance. He was on the Dean's List. He took a line of credit loan on his house to pay the restitution.<sup>15</sup>

Applicant described himself as a law-abiding citizen who was put in a difficult position. He felt his girlfriend and child's safety were threatened and he believed Person X was going to act on the threat. He was frustrated that the police would not intervene. He admitted he was in a difficult situation and since the incident has spent many nights worrying about it. He admitted he made a bad choice and did not handle the harassment in the best way. He is truly sorry for his actions and wants to put the incident behind him and move on so he can provide for his family. He has had no further contact with Person X. He promised to always do what is right in the future.

Applicant sought counseling from a licensed clinical social worker. He attended two sessions and was assessed as having no indications that he is unstable.<sup>16</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially

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<sup>12</sup> Tr. 149-155.

<sup>13</sup> AE E.

<sup>14</sup> Tr. 155,163.

<sup>15</sup> Tr. 72-74, 86-87.

<sup>16</sup> AE C.

disqualifying conditions and mitigating conditions, which are 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, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense 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, 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 and has the ultimate burden of persuasion to obtain 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 safeguard 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." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## Analysis

### Guideline J, Criminal Conduct

AG ¶30 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offense; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Appellant was arrested in 1999 for failure to obey reasonable and lawful order, and loitering in public place. The charges were nolle prosequi. He was arrested in 2000, for disorderly conduct, and obstructing and hindering. He was awarded Probation Before Judgment on the charge of obstructing and hindering, and ordered to pay court costs. The disorderly conduct charge was nolle prosequi. He was arrested in 2005, and pleaded guilty to assault-first degree. He was given Probation Before Judgment, and paid restitution to the victim. I find both disqualifying conditions apply.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 23 and the following 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;
- (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 was arrested in 1999. His father testified on his behalf and confirmed that Applicant was being harassed by the police. He was in high school at the time. The charges were nolle prosequi. I find AG ¶ 32(c) applies to this allegation. In 2000, his half-brother was involved in criminal activity. The arrest took place at Applicant's home and Applicant became agitated. He was arrested for disorderly conduct and obstructing

and hindering. The disorderly conduct charge was nolle prosequi. He was given Probation Before Judgment, and completed the terms of the probation. In 2005, Applicant's girlfriend was being harassed. She felt threatened and was concerned for their child. I found Applicant's testimony credible. He was frustrated that the police would not act on the harassment. He was concerned for the safety of his girlfriend and his child. Applicant used poor judgment when he went to Person X's neighborhood with four men. I believe that he was unaware at the time that his cousin brought a knife and later used it on Person X. Applicant's actions after the incident also showed poor judgment. Applicant accepted a plea agreement and pleaded guilty to assault first degree. He was given Probation Before Judgment and paid \$10,000 restitution.

It has been five years since the last incident occurred. Applicant presented himself as a mature person. He continued to stay focused on completing college and pursuing a career. He completed his associate's and bachelor's degree, and he is now pursuing a master's degree. He has been steadily employed while attending college. He pays his child support and takes care of his children and wife. Although Applicant used poor judgment in addressing his concerns about the safety of his girlfriend and child, I find that the behavior happened under unusual circumstances and they are unlikely to recur. His previous incident with law enforcement in 2000 also occurred under unusual circumstances. Applicant had a history of being harassed by police. He has matured and understands the importance in properly handling issues. He has a very good work record and is a trusted and valued employee. He recognized he made bad choices and he is remorseful. He is committed to acting appropriately in the future. I find there is an abundance of evidence that Applicant is successfully rehabilitated. Therefore, AG ¶¶ 32(a) and (d) apply.

### **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 commonsense 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. I have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment. Applicant had two minor incidents with law enforcement in 1999 and 2000. The 1999 incident, he was being harassed by police and the charge was nolle prosequi. The incident in 2000, Applicant should have used better judgment. He was given Probation Before Judgment and he paid court costs. He completed the terms of the probation. In 2005, he acted to protect his girlfriend and child. He admitted he used poor judgment in how he conducted himself. He pleaded guilty to assault first degree and completed the terms of the Probation Before Judgment. This incident was serious and Applicant acknowledges his conduct. I considered Applicant's demeanor, candor, and credibility during his hearing. He understands the seriousness of his conduct. He is sincerely remorseful. Applicant has remained focused on completing his college education and taking care of his family. He has worked hard as a student and employee to increase his chances for success and achieve his goals. He understands the importance of conducting himself professionally and abiding by the law. I am confident Applicant will not be involved in criminal activity in the future. There is substantial evidence that he is successfully rehabilitated. Overall, the record evidence leaves me with no questions or doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising under the guideline for Criminal 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
Subparagraphs 1.a-1.c:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is granted.

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Carol G. Ricciardello  
Administrative Judge