



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-05065
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Francisco Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

May 7, 2010

**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, Criminal Conduct, Guideline E, Personal Conduct, and Guideline F, Financial Considerations. Applicant’s eligibility for a security clearance is denied.

On January 25, 2010, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guideline J, Criminal Conduct, Guideline E, Personal Conduct, and Guideline 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 adjudicative guidelines (AG).

Applicant answered the SOR in writing on February 1, 2010, and requested a hearing before an administrative judge. The case was assigned to me on March 12, 2010. DOHA issued a Notice of Hearing on March 17, 2010. I convened the hearing as

scheduled on April 12, 2010. The Government offered Exhibits (GE) 1 through 13. Applicant did not object and they were admitted. Applicant and one witness testified on his behalf. He offered Exhibits (AE) A through J, and they were admitted without objection. DOHA received the hearing transcript (Tr.) on April 21, 2010.

### **Findings of Fact**

Applicant admitted all of the allegations in the SOR except ¶ 2.a. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 24 years old. He has a son who is almost two years old. He and his fiancée, the mother of his son, have lived together for approximately six years. He has financially supported his fiancé during this period. She has been employed since October 2009. Prior to then she did not work. Applicant's aunt took care of him when he was growing up. He graduated from high school in 2003. He anticipates being awarded his associate's degree in June 2010. He previously held a security clearance in 2005, while working for a former employer. He has been working for his present employer since June 2009.<sup>1</sup>

Applicant was arrested on May 25, 2006, and charged with Deliver Drugs to Prisoner, a felony. Applicant stated, "I knew that if I get the felony, that I can kiss my clearance good-bye."<sup>2</sup> On December 12, 2006, he pleaded guilty to an amended charge of Obstruction of Justice, a misdemeanor, and was sentenced to 12 months in jail, a \$1,000 fine, \$380 in court costs, and one year of supervised probation. He served 72 days in jail and performed 100 hours of community service. He stated he was released from probation early due to his community service.<sup>3</sup>

Applicant admitted to arranging three-way telephone calls for his cousin who was serving four years in prison for drug offenses. He was aware this was a prohibited practice by the prison. At his hearing, he confirmed that through the calls his cousin was making arrangements to get drugs in the prison. Applicant stated he suspected that his cousin was arranging drug transactions. He admitted to arranging "about five calls." Applicant held a security clearance when he was arranging these calls for his imprisoned cousin. He knew he could not be involved in drugs with a security clearance.<sup>4</sup>

In approximately September 2007, Applicant was released from supervised probation. On April 15, 2008, while working for a federal contractor, Applicant was

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<sup>1</sup> Tr. 20, 31-34, 107-108.

<sup>2</sup> Tr. 49.

<sup>3</sup> Tr. 46.

<sup>4</sup> Tr. 63-71.

arrested and charged with two counts of Indecent Exposure. On June 16, 2008, at a contested bench trial, Applicant was found guilty of both counts. He appealed the conviction, and it was overturned on a procedural error. On March 3, 2009, he accepted a plea agreement to plead guilty to Obscene Display, a misdemeanor. He was sentenced to serve 90 days in jail, all of which was suspended. He was required to pay \$141 in court costs, and was on unsupervised probation for one year.<sup>5</sup>

Applicant maintains his innocence of exposing himself on April 15, 2008, despite his guilty plea. He stated he was making deliveries at a federal building. Two female custodians identified Applicant and testified at his trial that he exposed himself. He had never met these women and did not know them. He had no idea why they would accuse him of the offense. He stated "I did have something wrong with my buckle [on] my pants that day. . . ."<sup>6</sup> Applicant hired an attorney and was represented by counsel throughout the trial, appellate proceedings, plea negotiations, and guilty plea. His lawyer had an opportunity to cross examine the witnesses and presented a defense. Applicant admitted that after his appeal, he accepted a plea agreement and he pleaded guilty to the misdemeanor Obscene Display. In his response to interrogatories, dated August 31, 2009, he stated: "In the second case I was able to get a nice plea and I took it because I was afraid I would lose again."<sup>7</sup> Applicant's unsupervised probation ended in March 2010.<sup>8</sup>

Applicant's employer, at the time of his April 2008 arrest, initially waited for the disposition of Applicant's case before addressing his employment status. Applicant stated the reason his employment was terminated was because his employer did not want to wait four months after his plea, to learn what Applicant's sentence would be. Applicant then admitted he was fired from the job because he pleaded guilty to the Obscene Display charge.<sup>9</sup>

Applicant admitted he was terminated from a job in October 2008, after he had an argument with a supervisor and used profanity.<sup>10</sup>

Applicant was proud of the fact he held a security clearance and would tell people that he had one. He believed it would "help him out" and was a reflection of his good character. He stated:

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<sup>5</sup> Tr. 34-46, 70.

<sup>6</sup> Tr. 40.

<sup>7</sup> GE 8.

<sup>8</sup> Tr. 40-46, 70-83.

<sup>9</sup> Tr. 44-46, 84-86.

<sup>10</sup> Tr. 85-87.

I work with all types of outstanding people. So it happened, even when I got in trouble on these two particular incidents, you know, when I tell people I have a clearance they think it's outstanding. I know a lot of people judge me by it. I really think that it has helped me out in my court situations. It's brought me a long way to take care of myself.<sup>11</sup>

Applicant further stated the following:

A lot of people don't know what a security clearance is. It's quite natural. I mean I don't have any skills. Quite naturally it has brought me my living, and I just like to share that with people, let [them] know about a clearance situation, because you know, it's a nice thing to have. I'd like to let people know that, you know, I'm a good person and I'm affiliated with the government, and I do a good job. I like representing the government.<sup>12</sup>

Applicant has numerous delinquent debts alleged in the SOR. Applicant paid the medical debts listed in SOR ¶¶ 3.c, 3.d, and 3.e. He paid them in January 2010 with his tax refund.<sup>13</sup>

The debt in SOR ¶ 3.a is for a broken lease for an apartment. Applicant lost his job and could not pay the rent. He stated the total amount of the debt is approximately \$4,100. He stated he has been paying \$125 towards the debt since May 2009.<sup>14</sup>

The debt in SOR ¶ 3.b (\$424) is a medical debt that is approximately three years old. It is not paid.<sup>15</sup>

The debt in SOR ¶ 3.f (\$904) is for telephone services. The debt is approximately two and a half years old. It is unpaid.<sup>16</sup>

The debt in SOR ¶ 3.g (\$285) is a medical account that is approximately two and a half years old and it is unpaid.<sup>17</sup>

The debt in SOR ¶ 3.h (\$5,108) is a credit card debt. Applicant obtained the credit card in approximately 2006, and it became delinquent sometime in 2007. He used

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<sup>11</sup> Tr. 56.

<sup>12</sup> Tr. 83.

<sup>13</sup> Tr. 62, 90-91; AE A.

<sup>14</sup> Tr. 59, 87-89.

<sup>15</sup> Tr. 89-90.

<sup>16</sup> Tr. 91-93.

<sup>17</sup> Tr. 94-96.

the credit card to fix his car and obtain an apartment. He has contacted the creditor and advised them they will have to wait for his payments. The debt is unpaid.<sup>18</sup>

The debt in SOR ¶ 3.i (\$274) is for telephone services. The account was approximately two years old. Applicant settled the account in March 2010 for \$119.<sup>19</sup>

The debt in SOR ¶ 3.j (\$1,105) is for telephone services. Applicant stated these charges were for collect calls he incurred while he was incarcerated for 72 days, serving the sentence for Obstruction of Justice. The debt has been owed since 2007 and is unpaid.<sup>20</sup>

The debt in SOR ¶ 3.k (\$2,819) is for a car loan through a credit union. Applicant stopped paying the monthly amount due in approximately June 2008, when he lost his job. He did not pay the loan for three to four months. He stated the loan has since been charged-off by the creditor. He stated he is making monthly payments of \$50 on the loan.<sup>21</sup>

The debt in SOR ¶ 3.l (\$1,319) was for a personal loan from a credit union. He stopped paying the loan in June 2008, when he lost his job. He stated he is making monthly payments of \$50 on the loan.<sup>22</sup>

Applicant stated he plans on paying his delinquent debts in "due time before this year is out."<sup>23</sup> He has a \$1,200 judgment awarded to him in April 2009, but has been unable to collect it. He also anticipates suing an apartment complex on a civil matter and hopes to obtain a judgment. He plans on using the money from the first judgment, when he collects it, to help pay his delinquent debts. He also intends on using the money from a potential second judgment to pay his debts.<sup>24</sup>

Applicant's fiancée testified on his behalf. She believes Applicant has overcome his mistakes. He has always been a good provider to both her and their son. No one in his family provides him financial support. Regarding his conviction for Obstruction of Justice, she stated he did the wrong thing at the wrong time, and he was just helping his cousin out. She said Applicant told her he was not in his right state of mind when the offenses occurred and he was not thinking straight. He learned his lesson from that

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<sup>18</sup> Tr. 96-98.

<sup>19</sup> Tr. 60-61; AE B.

<sup>20</sup> Tr. 98-100.

<sup>21</sup> Tr. 100-102.

<sup>22</sup> Tr. 102-105.

<sup>23</sup> Tr. 109.

<sup>24</sup> Tr. 28-30, 125-137.

experience. Regarding the Obscene Display offense, she was shocked to learn of it, and does not believe he committed the offense. She feels they are both on track with their lives.<sup>25</sup>

Applicant provided a character letter from his aunt. She wrote that he has matured and she has noticed a positive change in his life. He has become very responsible since the birth of his son. She wrote about the hardships Applicant faced as a child, yet he stayed in school and received his high school diploma. He is a hard worker. She explained he did not always make the right choices and decisions, but he is resilient and has a positive attitude in becoming a law-abiding and honest young man.<sup>26</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 disqualifying conditions and mitigating conditions, which are considered 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

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<sup>25</sup> Tr. 110.

<sup>26</sup> AE D.

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 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**

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 especially considered the following:

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

Applicant was arrested on May 25, 2006 and charged with Deliver Drugs to Prisoner, a felony. He pled guilty to an amended charge of Obstruction of Justice. He was sentenced to 12 months in jail and served 72 days. He was on supervised probation. On April 15, 2008, he was arrested and charged with two counts of Indecent Exposure. He was found guilty of the offenses and appealed the conviction. Following the appeal, he pled guilty to Obscene Display, a misdemeanor. He was sentenced to 90 days in jail, all of it was suspended, and one year of unsupervised probation. I find both of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and especially considered the following:

- (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 committed a serious offense by helping his cousin coordinate drug sales from prison. He was aware of what was happening and assisted his cousin on five separate occasions. He held a security clearance at the time he committed these offenses. A few months after his probation expired he was arrested for Indecent Exposure. He contested the charge at a bench trial. His lawyer had an opportunity to cross examine witnesses and conduct a defense. Applicant was convicted, appealed, and the conviction was overturned on a procedural error. The State chose to retry him and he accepted a plea agreement. He pled guilty to Obscene Display. Applicant professed his innocence at the hearing. There is no evidence Applicant was not afforded proper due process during the proceedings and at his trial. He hired an attorney who contested the first set of charges. Later, his attorney represented him when he chose to plead guilty. Applicant was released from probation in March 2010. I find not enough time has elapsed since Applicant's last criminal offense to conclude further misconduct is unlikely to recur. I also find Applicant's criminal conduct in helping his cousin facilitate drug deals while a prisoner and while Applicant held a security clearance raises serious questions about his reliability, trustworthiness, and good judgment. I find there is sufficient evidence to conclude Applicant committed all of the offenses alleged. Applicant has continued to pursue his education and is taking care of his family. However, because of the seriousness of Applicant's criminal conduct and the fact his latest offenses occurred shortly after being released from his first probation, I find there is not enough evidence to conclude he is successfully rehabilitated. I find none of the mitigating conditions apply.

### **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.

I have considered all of the personal conduct disqualifying conditions under AG ¶ 16 and especially considering the following:

(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.



Applicant was terminated from two jobs. One was due to his criminal conviction and the other was due to arguing with his supervisor and using profanity. I find the above disqualifying condition applies.

I have considered all of the personal conduct mitigating conditions under AG ¶ 17 and especially considered:

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

Applicant was proud of the fact he held a security clearance and wanted people to know it because he believed it showed he was trusted. He committed a serious offense while holding a security clearance. He was terminated from his job after his conviction. I have more thoroughly addressed and analyzed this issue under the criminal conduct guideline, which deals with the underlying reason for his termination. I also conclude that the incident raises questions about his personal conduct.

Applicant was also terminated from another job in October 2008 because of his conduct. I find this type of conduct reflects on his personal, professional, and community standing, and could create a vulnerability to exploitation and manipulation. Applicant did not provide sufficient evidence to convince me that the circumstances were unique or unlikely to recur. His actions cast doubt on his good judgment. There is no evidence he acknowledged the behavior and sought counseling. I am not convinced that the inappropriate behavior is unlikely to recur. Applicant did not provide information of the positive steps he has taken to reduce or eliminate vulnerability to exploitation, manipulation or duress. Applicant did show that he is caring for his son and his fiancée. He continues to go to school and expects to earn his associate's degree in a couple of months. These are positive factors, but based on all of the information, there is not enough evidence to overcome the disqualifying information. I find none of the above mitigating conditions apply.

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

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several conditions that could raise security concerns. I have considered all of them under AG ¶ 19 and especially considered the following:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Appellant has unpaid and unresolved delinquent debts. I find the above disqualifying conditions have been raised.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating conditions under AG ¶ 20 and especially considered the following:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) the conditions that resulted in the financial problem were largely beyond the person's control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances;
- (c) 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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (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.

Appellant has nine delinquent debts totaling approximately \$12,000. He stated he is making small payments on a couple of debts, but no documentary proof was

provided. He paid three medical debts and one phone bill. He does not have a realistic plan for resolving his delinquent debts. He hopes to file a civil lawsuit and obtain a judgment on a claim he has and then use that money to help pay his delinquent debts. He has a valid judgment on another claim, but has not received the money. He is hoping to get the money from that judgment to pay his debts. Applicant has not formulated a realistic, viable, practical plan for paying his creditors. His debts are current and unpaid. I find mitigating condition AG ¶ 17(a) does not apply. Some of his debts became delinquent because he was in jail or paying for a lawyer due to his criminal conduct. These matters were not beyond his control. I find AG ¶ 17(b) does not apply. There is no evidence he has received financial counseling or there is a clear indication the problem is being resolved. Hence, AG ¶ 17(c) does not apply. He has paid four delinquent debts, so AG ¶ 17(d) is partially applicable. There is no evidence he disputes any of the debts. I find mitigating condition AG ¶ 17(e) does not 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. Applicant graduated high school and anticipates earning his associate's degree in a couple of months. He is taking care of his fiancée and his son. Applicant committed a serious criminal offense when he helped his incarcerated cousin facilitate drug transactions, from prison. Applicant held a security clearance when he committed this criminal conduct. Shortly after he was released from probation, he again committed a criminal offense. Applicant's criminal activity impacted his financial situation. He hired an attorney which impacted his finances and he could not pay his bills when he was in jail. Applicant appears to be trying to move beyond his past and put his life in the right direction to take care of his family. However, his criminal conduct occurred while he was entrusted with a security clearance and he abused that privilege. His finances remain an issue because he has

not yet addressed all of his delinquent debts. The record evidence leaves me with serious questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for Criminal Conduct, Personal Conduct, and Financial Considerations.

### **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 1a-1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Paragraph 3, Guideline F:	AGAINST APPLICANT
Subparagraphs 3.a:	For Applicant
Subparagraph 3.b:	Against Applicant
Subparagraphs 3.c-3.e:	For Applicant
Subparagraph 3.f-3.h:	Against Applicant
Subparagraph 3.i:	For Applicant
Subparagraphs 3.j-3.l:	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. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge