



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



In the matter of: )  
)  
) ISCR Case No. 09-07714  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Esq., Department Counsel  
For Applicant: Bradley R. Corbett, Esq.

May 25, 2011

**Decision**

GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant failed to mitigate the Criminal Conduct security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On January 19, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline J, Criminal Conduct. The action was taken under Executive Order (EO) 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 for cases dated after September 1, 2006.

Applicant answered the SOR on February 7, 2011, and requested a hearing before an administrative judge. The case was assigned to me on March 2, 2011. DOHA issued a notice of hearing on March 15, 2011. The hearing was scheduled and convened on April 4, 2011. The Government offered Exhibits (GE) 1 through 6, which

were admitted without objection. The Government also presented two documents for Administrative Notice, marked and admitted at I and II. Applicant, through his attorney, offered Exhibits (AE) A through D, called two witnesses, and testified on his own behalf. All Applicant's exhibits were admitted without objection. DOHA received the transcript of the hearing (Tr.) on April 12, 2011.

### **Findings of Fact**

Applicant admitted the SOR allegations ¶¶ 1.a, 1.b, 1.c. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 40 years old. He served in the U.S. Navy for six months in 1993, but after he was diagnosed with ulcers, he was medically barred from service. He possesses an associate's degree and a degree in mechanics. He has been employed as a government contractor since June 1997. He is married, but separated from his spouse. He has a nine-year-old daughter from his marriage. His daughter lives with Applicant's spouse. (Tr. 65-74, 115-119; 134; GE 2.)

Applicant admits that in January 2002, he was charged with Possession of Less Than 1 Ounce Marijuana and Fighting in Public. He testified that on the evening in question, he was waiting in line to see a movie at a theater with his girlfriend. She asked him to hold her clutch and he put it in the pocket of his cargo shorts. While in line, another movie patron was allegedly making perverse comments to Applicant's girlfriend. When the comments continued, despite Applicant's request that the aggressor "throttle back," Applicant complained to an usher, but the usher told him to get back in line. Applicant continued to insist the usher take action and the usher asked Applicant to leave. He felt he had not done anything wrong and refused to vacate the premises. The usher called the mall cops and Applicant was escorted to the mall's detention facility. Eventually, the San Diego Police Department arrived at the mall and arrested Applicant for Fighting in Public. Inside his girlfriend's clutch, the police found a small amount of marijuana, which Applicant claims he had no knowledge of. Applicant pled guilty to Fighting in Public, and the Possession of Less Than 1 Ounce Marijuana charge was dismissed. Applicant was fined approximately \$100 as a result of this incident. (Tr. 75-78; 125-126, 129, 134-138; GE 6.)

Applicant was arrested in September 2005 and charged with Driving Under the Influence Alcohol/Drugs and Driving Under the Influence with 0.08% or Higher Blood Alcohol. Applicant contended that he did not drive after consuming alcohol on this occasion, although he was found guilty of both charges by a jury. Applicant claimed that on the evening in question, he came home from work to find a tow truck with an open door that was blocking the driveway to his apartment complex parking lot. Applicant waited for the truck to close his door and move. Eventually, he honked his horn. When the truck still did not move, he put his vehicle into park, got out of his vehicle, and closed the tow truck door to allow his vehicle room to enter into the parking lot. According to Applicant, the tow truck driver was belligerent and yelled at him. Applicant had not consumed any alcohol prior to this altercation. However, when Applicant got

into his apartment, he proceeded to consume approximately four 16 ounce cans of beer over the next hour and a half. During that time, Applicant decided to call the police to complain about the tow truck driver. When the police arrived, the tow truck driver reported to the police that Applicant had been driving while intoxicated. The Police knocked on Applicant's door and requested he come outside and speak with them. He was promptly arrested and charged with Driving Under the Influence Alcohol/Drugs and Driving Under the Influence with 0.08% or Higher Blood Alcohol. Applicant was found guilty by a jury and sentenced to pay a fine, attend alcohol classes, participate in three months of a first offender program, and attend a Mothers Against Drunk Driving (MADD) victim impact panel. (Tr. 79-87, 126-127, 138-139, 145; GE 1; GE 6.)

Applicant's most recent criminal incident took place in March 2009. On or about March 24, 2009, Applicant was charged with one count of Carrying a Loaded Firearm on One's Person; two counts of Drawing or Exhibiting Firearm; one count of Disturbing the Peace by Fighting; and one count of Resisting an Officer, as a result of an incident that occurred on or about March 19, 2009. Applicant testified that prior to the day in question, he had discovered his vehicle had been vandalized with gold spray paint, along with about 12 other vehicles in the parking lot. He suspected that his neighbor's eight-year-old child had sprayed his car with gold spray paint because the child's go-cart had recently been spray-painted gold. Applicant knocked on the child's door and complained to the father, who punished the child and discarded the child's go-cart. Applicant then called the police and reported the incident. Applicant felt that the deputy he reported the incident to was biased against Applicant. The boy was arrested, but the city decided not to prosecute the child because he was so young. Applicant was told that if he wanted compensation, he would need to talk to the child's parents. (Tr. 91-112, 127-128, 140-145; GE 3; GE 4.)

On the night in question, witnesses and the victim retold partial versions of events, compiled in the police reports. Applicant apparently decided to address the child's parents to request compensation. Police records reflect that on March 19, 2009, at approximately 10:30 pm, Applicant pounded on the front door of his neighbor's apartment. Applicant lives in a second story apartment and the victims live on the ground floor. The mother of the child in question looked out her window and observed Applicant standing in front of her apartment door with what she believed was a hand gun in his right hand. She reported that Applicant berated her with foul and offensive language. The woman yelled back at Applicant and then phoned her estranged husband for assistance. Applicant was reported to have returned to his apartment. Neighbors reported seeing Applicant aiming a rifle at the woman's front door while yelling at her from his apartment. Eventually, the woman's husband arrived. He confronted Applicant about what had happened that evening. He asked Applicant why he was threatening his family. Applicant was at the top of the stairs near his front door. The husband told Applicant that he would break his neck if he threatened his family again. Witnesses saw Applicant walking down the stairs with a rifle pointed toward the husband. At this point, someone called the police. Applicant had returned to his apartment. When the police arrived, Applicant was asked to come out of his apartment, but he refused. Police decided to treat Applicant as armed and barricaded. Neighbors were evacuated. (GE 3; GE 4; GE 5.)

Applicant's version of the events differs from that of the victim and witnesses. Applicant reported that he believed his neighbor's husband was a drug dealer and had recently gotten out of prison. During the hearing, he made no mention of confronting the child's mother and claims the information that he knocked on her door while holding a hand gun is a flat-out lie. Instead, he explained that he had been waiting to speak to the father of the children to request compensation for the damage to his car, but had not seen him for about a month. It was approximately 10:30 pm and he had just arrived home. Applicant was on the ground floor of the apartment building and was walking up to his own apartment when he saw the husband. Applicant asked him for compensation and the man became belligerent and used racial terms toward Applicant. Applicant claims he walked up toward his own apartment and then called the man a profanity for not teaching his child right from wrong. The victim began to follow the Applicant and the Applicant retreated into his apartment and slammed the door, but failed to lock it. The man entered Applicant's apartment through the unlocked door. Fearing for his life, Applicant grabbed an airsoft rifle, a type of pellet gun that is not lethal but looks like a real weapon, and pointed it at the man. Applicant kept the gun pointed at the man and walked the man backwards out of his apartment and down the stairs to his apartment, keeping the weapon pointed at the man the entire time. Applicant indicated he returned to his apartment and called the police. The police came to Applicant's door and he talked to the police through a window. Applicant felt he had more civil rights on his own property. Applicant believes the police stereo-typed him in a negative manner. After a three-hour stand-off, the swat team used a "flash bang grenade" and persuaded Applicant to exit his apartment. He was arrested and remained in jail for five days before he was released on bail. (Tr. 91-112, 131-132; GE 3.)

Applicant pled guilty to Carrying a Loaded Firearm on One's Person and Resisting an Officer. The remaining counts were dismissed. Imposition of sentence was suspended for three years and Applicant was placed on summary probation for three years, required to pay a fine and costs totaling \$1,021, was sentenced to five days in the public service program, with credit for five days served, and ordered not to possess any weapons or firearms. On March 9, 2011, Applicant motioned for his probation to terminate early and the motion was granted. (AE A; Tr. 107-109; GE 3.)

Applicant believes that he has rehabilitated himself since his arrests. Applicant claimed at hearing that he recognizes that he needs to take a step back before he acts and think about how to react before he acts to events in his life. (Tr. 110-112, 127-128.)

Applicant is well respected by his friends, co-workers and supervisor. Applicant's work performance evaluation reflects he performs satisfactorily at his job. His Supervisor, who testified on his behalf and wrote letters of recommendation, indicated that Applicant is an asset to his shift and finds Applicant responsible and reliable. (AE B; AE C; AE D; Tr. 28-61.)

## Policies

When evaluating an applicant's suitability for a security clearance, the 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, which are to be 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, administrative judges apply the guidelines 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.

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 the applicant or proven by Department Counsel." The applicant 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 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 EO 10865 provides that adverse 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

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (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 has a long criminal history from January 2002, through his most recent conviction in 2009. Over this seven-year time span, he had three criminal incidents, all involving poor judgment. The above disqualifying conditions have been established.

Two Criminal Conduct mitigating conditions under AG ¶ 32 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; 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's criminal conduct involves extremely poor judgment, no matter which version of the facts one believes. While two years have passed since his last criminal act and subsequent conviction, the passing of time does not mitigate his lack of judgment. He was a mature adult at the time of his last criminal act. His seven-year history of criminal conduct reflects a disregard for following rules and regulations and not only cast doubt on his judgment, but also his reliability and trustworthiness. Based on his history of criminal conduct I cannot find that future criminal conduct is unlikely to recur. AG ¶ 32(a) does not apply.

Applicant presented numerous letters of recommendation, work performance appraisals, and other character evidence. However, these alone are not enough to

mitigate his recent criminal activity. Only two years have passed since Applicant's last arrest and he has been under court ordered probation until recently. I find at this juncture there is insufficient evidence to show successful rehabilitation. AG ¶ 32(d) 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 relevant 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 guideline 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.

I have considered Applicant's character, as attested to by his two witnesses and through the letters from professional colleagues, as well as his evaluation reports. However, the serious nature of his criminal conduct, especially his recent 2009 conviction, lead me to conclude he does not demonstrate the good judgment, reliability, and trustworthiness required of one who has access to classified information. He was a mature adult when he committed these offenses. Not enough time has passed to demonstrate rehabilitation.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the Criminal Conduct security concern.

## 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:	AGAINSTAPPLICANT
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	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. Eligibility for access to classified information is denied.

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Jennifer I. Goldstein  
Administrative Judge