



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



In the matter of: )  
)  
) ISCR Case No. 10-02716  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Melvin A. Howry, Esq., Department Counsel  
For Applicant: *Pro se*

May 30, 2012

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**Decision**

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GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has mitigated the Criminal Conduct security concerns that arose out of his criminal conduct during the period of 1998 through 2007. He has not consumed alcohol or committed any criminal offenses since 2007. However, he failed to mitigate the Personal Conduct concern that arose out of his false answers on his Electronic Questionnaires for Investigations Processing (e-QIP) or in his adopted summary of his interview with an investigator for the Department of Defense. Eligibility for access to classified information is denied.

**Statement of the Case**

On October 21, 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 and Guideline E, Personal 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 after September 1, 2006.

Applicant answered the SOR on February 16, 2012, and requested a hearing before an administrative judge. The case was assigned to me on March 22, 2012. DOHA issued a notice of hearing on March 28, 2012, and the hearing was convened as scheduled on April 25, 2012. The Government offered Exhibits (GE) 1 through 3, which were admitted without objection. The Applicant offered Exhibits (AE) A through C, which were admitted without objection. Applicant testified on his own behalf and called one witness. DOHA received the transcript of the hearing (Tr.) on May 8, 2012.

### **Findings of Fact**

Applicant is a 32-year-old high school graduate who lives with his girlfriend and her son. Applicant's girlfriend is pregnant with their first child together. He can read and write the English language. Since 2009, Applicant has worked for a defense contractor. (Tr. 36, 52.)

In the SOR, the Government alleged that Applicant has been arrested seven times between 1998 and 2007. His arrests are as follows.

In March 1998, Applicant was arrested and charged with Possession of Marijuana and Disturbing the Peace. Applicant testified that was not using marijuana at the time, but was observed by officers to be with his friend who was holding marijuana in his hand. Applicant was convicted of Disturbing the Peace and was ordered to pay a fine or perform community service. He was a senior in high school at the time of this arrest. Applicant performed community service and the drug possession charge was dismissed. (Tr. 37-39.)

In March 2000, Applicant was arrested and charged with Disorderly Conduct, Solicit, Lewd Act, and Indecent Exposure. At the time, he worked at the airport and was arrested after he was observed "stroking [him]self" in the employee parking lot. He was convicted of Disorderly Conduct and placed on probation for one year and fined. He testified that he successfully completed the terms of his probation and the other charges were dismissed. (GE 2; Tr. 39-40.)

In December 2003, Applicant was arrested and charged with Driving Under the Influence (DUI) Alcohol/Drugs and DUI Alcohol .08%. Applicant was arrested after accelerating too quickly at a traffic signal. He pled "No Contest" to DUI Alcohol/Drugs and was placed on one year probation. Also, his driver's license was suspended for three months, and he was ordered to attend a first offender DUI class. (GE 2; Tr. 40.)

Applicant was arrested in June 2005 and charged with DUI Alcohol/Drugs. He was convicted, placed on 36 months of probation, and was ordered to attend an 18-month DUI program. Applicant testified that he has no recollection of this arrest. He denied this allegation in his Answer to the SOR. However, this arrest appears on

Applicant's Federal Bureau of Investigation record. Applicant failed to produce documentation that would challenge the accuracy of this record. (GE 2; GE 3; Tr. 41.)

In January 2006, Applicant was arrested and charged with DUI Alcohol/Drugs and Obstruct Public Officer. He pled No Contest to DUI. He was sentenced to one year probation and ordered to attend a second-offender DUI program for 18 months. (GE 2; Tr. 42-43.)

Applicant was again arrested for DUI in July 2006. He pled "No Contest" to DUI Alcohol .08%. He was sentenced to 30 days in jail, placed on two years of probation, his driver's license was suspended for one year, and he was ordered to attend a second-offender 18-month DUI program. (GE 2; Tr. 43-44.)

Applicant's most recent arrest occurred in October 2007. He was charged with Driving with a Suspended License. Applicant was convicted of this charge, placed on 36 months of probation, fined, and ordered to serve 16 days in jail or perform community service. Applicant testified that an emergency caused him to drive that day, but he was unable to recall the nature of the emergency. (Tr. 45-50.)

Applicant testified that he had a lot of stress related to his adoption as a child. He began consuming alcohol after he graduated high school. He would typically consume three beers, once a week, on weekends. He indicated that he has now learned from his mistakes and believes he has turned his life around. His statements regarding his last alcohol consumption, however, are conflicting. In his adopted summary of his interview with an investigator for the Department of Defense, he indicated that he last consumed alcohol prior to his 2007 arrest. At hearing, he testified that he last consumed alcohol prior to his 2006 arrest. Regardless of the date of his last consumption, it has been a number of years since Applicant has used alcohol. He successfully completed all court-ordered alcohol programs and related Alcoholics Anonymous (AA) participation. He did not continue in AA or other alcohol related treatment once his court ordered requirements were fulfilled. (GE 3; Tr. 44-45, 87-90.)

On December 7, 2009, Applicant completed an e-QIP. Under Section 22 of this form he was asked, in part:

**Section 22: Police Record**

For this item, report information regardless of whether the record in your case has been sealed, expunged, or otherwise stricken from the record, or the charge was dismissed. You need not report convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. Be sure to include all incidents whether occurring in the U.S. or abroad.

For Questions a. and b., respond for the timeframe of the last 7 years (if an SSBI go back 10 years). Exclude any fines of less than \$300 for traffic offenses that do not involve alcohol or drugs.

b. Have you been arrested by any police officer, sheriff, marshal, or any other type of law enforcement officer?

e. Have you EVER been charged with any offense(s) related to alcohol or drugs?

Applicant answered, “No” to both sections 22.b and 22.e. In his adopted summary of his January 2010 interview with an investigator for the Department of Defense, he indicated that he thought he disclosed his three DUI arrests to his security office and in his “SF-86.” He stated that “he [wa]s certain he was only arrested three times for DUI.” Further, after discussing his 2003 through 2007 arrests with the investigator, he “stated that he ha[d] no other arrests . . .” At his hearing, Applicant testified that he misunderstood the questions about his arrests. (GE 1; GE 3; Tr. 50-66.)

Applicant is well respected by the members of his church and his girlfriend who wrote letters of support on his behalf. Their letters indicate he is a responsible man who is doing his best to be a productive member of society. His girlfriend indicated that Applicant “has been doing an outstanding job with his probation without violation for his past arrests.” Applicant’s step-father, who testified on his behalf, indicated that Applicant no longer associates with friends who were a bad influence on Applicant and that he has not seen Applicant consume alcohol since his last arrest. (AE A; AE B; AE C; Tr. 97-97.)

### **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 an Applicant’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 history of criminal offenses that occurred between 1998 and 2007 including: Disturbing the Peace, Disorderly Conduct, four DUIs, and Driving with a Suspended License. These offenses give rise to concerns about Applicant’s judgment

and reliability both because of the nature of the offenses and the quantity of criminal offenses. 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 has a history of criminal behavior. However, his offenses occurred when he was young and less mature. More than four years have passed since his last offense. During that time, he has become "a responsible man who is doing his best to be a productive member of society," as seen by members of his church. His step-father, girlfriend, and church family support Applicant's application and speak highly of him. Due to the recent, positive changes in Applicant's life, further criminal conduct is unlikely to occur. He demonstrated that he has successfully rehabilitated himself. He no longer consumes alcohol and is focused on his family. His past criminal behavior does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶¶ 32(a) and 32(d) apply.

### **Guideline E, Personal Conduct**

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

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

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(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; and

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

The evidence shows that Applicant has a history of criminal conduct that he sought to conceal. He denied relevant facts, with respect to his arrests during the preceding seven years and his drug and alcohol related arrests, in his answers to Section 22 on his December 2009 e-QIP. He also failed to disclose his March 2000 arrest during his interview with an investigator for the Department of Defense. Applicant has shown himself to be untrustworthy, and could be vulnerable to exploitation, manipulation, or duress. The Government has established sufficient concerns under AG ¶¶ 16(a), 16(b), 16(c), and 16(e) to disqualify Applicant from possessing a clearance.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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.

After considering the mitigating conditions outlined above in AG ¶ 17, it is apparent that none of them apply. Applicant did not make prompt or good-faith efforts to correct his falsifications or concealments. Although he testified that he must not have understood the questions, he could not point to any ambiguity in the questions. He provided no evidence that indicates he was ill-advised in completing his e-QIP. While his lack of judgment displayed in his criminal conduct last occurred over four years ago, Applicant continues to exercise questionable judgment by concealing his criminal history. He failed to take responsibility for his actions and has not demonstrated concrete steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. Applicant has not provided information in this record to meet his burden of proof for mitigation of his personal conduct.

### **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 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 Guidelines J and E in my whole-person analysis.



Applicant is trusted by his church friends and family. However, his deliberately dishonest conduct indicates a lack of judgment and trustworthiness, and raises doubts as to whether he understands what is required of those who hold security clearances. He is a mature individual who is accountable for his voluntary choices, and failed to demonstrate either rehabilitation or reduced potential for pressure, coercion, exploitation, or duress.

Overall, the record evidence fails to overcome the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his personal 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.g:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a~2.d:	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