



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 10-09109
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: *Alfredo Guevara III, Esquire*

May 29, 2012

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**Decision**

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MOGUL, Martin H., Administrative Judge:

On October 19, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and F for Applicant. 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.

On November 16, 2011, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. I received the case assignment on January 17, 2012. DOHA issued a notice of hearing on January 30, 2012, and I convened the hearing as scheduled on February 21, 2012. The Government offered Exhibits 1 through 15, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through F, at the time of hearing, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on March 5, 2012. I granted Applicant's request to keep the record open until March 9, 2012, to

submit additional documents, and additional documents that were received have been identified and entered into evidence without objection as Exhibits G through M. Based upon a review of the pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

### **Findings of Fact**

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following findings of fact:

Applicant is 54 years old and a high school graduate. He is married, and he and his wife have three sons. Applicant has been employed for 22 years by his current employer, a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

#### **Paragraph 1 (Guideline J - Criminal Conduct)**

The SOR alleges that Applicant has engaged in criminal acts.

1.a. The SOR alleges that on April 12, 1986, Applicant was charged with Inflicting Corporal Injury on a Spouse/Cohabitant. The charge was rejected by the prosecutor. In his RSOR, Applicant denied this allegation.

Applicant testified that this incident occurred with his wife. At the time they had been married for approximately 12 years, and they have continued to married for an additional 22 years for a total of 36 years. Applicant averred that with the exception of this incident, he and his wife have had no other incidents involving domestic violence. He also stated that no criminal charges were ever filed as a result of this incident, and his wife did not want to pursue any criminal action against her husband. Finally, he testified that this incident involved an argument between his wife and him, but no physical blows were ever struck. (Tr at 36-39.) Exhibit M consists of a letter written by Applicant's wife, in which she confirms the testimony of Applicant that no violence was involved in this incident, nor has there been any subsequent violence during their additional years of marriage.

1.b. The SOR alleges that on August 27, 1993, Applicant was and charged with (1) Hit and Run property damage and (2) Failure to report an accident. Applicant plead Nolo Contendere to Count (2) and was ordered to pay \$136 for fines and fees or serve one day in jail. Count 1 was dismissed. In his RSOR, Applicant admitted this allegation.

Applicant testified that after the traffic accident that is the subject of this allegation, Applicant stopped and exited his vehicle. He spoke to the passenger of the other vehicle, who was the wife of the driver. He exchanged information with the woman, including giving her his insurance information. He also got three estimates to have her vehicle repaired. A week later he was informed by mail that he was considered to have been involved in a hit and run accident. He ultimately went to court and was told

that he was pleading guilty to the infraction of failure to report an accident. He never was ordered to pay restitution to the driver of the other vehicle. (Tr at 39-41, 69-71.)

1.c. The SOR alleges that on March 12, 2010, Applicant was arrested and charged with Loitering with intent to Commit Prostitution. Applicant plead Nolo Contendere to the charge and was sentenced to 36 months summary probation, and to perform 5 days community labor, enroll in and complete an AIDS education class, and to pay fines and restitution in the amount of \$170. In his RSOR, Applicant admitted this allegation.

Applicant testified that while he was waiting in line at a restaurant, a woman propositioned him to have sex for money and he rejected her proposition. He averred that he was aware that she was an undercover police officer. He was then approached by another officer and he rejected her as well. He stated that as he was about to receive his food and leave the restaurant, he was arrested for loitering. Applicant reiterated that he had no intention of engaging the services of a prostitute, and he was aware that the two women were undercover police officers. (Tr at 36-43)

Applicant stated that he plead Nolo Contendere because he could not afford to hire an attorney and take time off from work to fight the charge. Applicant testified that he completed the requirements under a plea bargain agreement, and he thereafter went to court to have the guilty plea set aside and have the case expunged. (Tr at 43-46.) Exhibit C is a minute order from the court which confirms that on November 15, 2011, the Guilty plea in this action was set aside, a plea of Not Guilty was entered, and the complaint was dismissed. It further granted that the case would be expunged and the probation was terminated.

## **Paragraph 2 (Guideline F, Financial Considerations)**

The SOR lists two allegations (2.a. and 2.b.) regarding financial difficulties under Adjudicative Guideline F. The two allegations will be discussed below as they were listed on the SOR:

1.a. The SOR alleges that on September 15, 1997, Applicant petitioned for Chapter 7 bankruptcy in United States Bankruptcy Court. On January 7, 1998, the discharge order was issued. In his RSOR, Applicant admitted this allegation. During his testimony, Applicant confirmed that this bankruptcy occurred. (Tr at 47.) He testified that he got into financial difficulties because he was unemployed or underemployed for a period of 10 years. (Tr at 89-90.)

1.b. The SOR alleges that Applicant is indebted to Bank of America (B of A) on an overdue mortgage account in the amount of at least \$48,373, with a balance of in the approximate amount of at least \$401,000. In his RSOR, Applicant denied this allegation. Applicant testified that he had financial difficulties in 2009, and he engaged the services of a credit counseling service (CCS) to help him renegotiate his home loan. The CCS advised him to stop paying his mortgage so the bank would be more likely to renegotiate a loan modification. Applicant testified that in September 2011, he contacted

B of A, and arranged a trial period where he would pay \$2,830 for three months. At the time of the hearing, Applicant had been making the payments as agreed to for six months. Applicant averred that his wife has spoke to a representative of the bank, and he is expecting a loan modification to be agreed to shortly. Exhibit G consists of six copies of checks to B of A in the amount of \$2,830.69 through February 2012.

Applicant testified that his financial problems in part because his father died in 2009, and he had to pay the funeral expenses. Exhibit J shows a bill of \$8,656.79 from the mortuary where Applicant's father was buried. Applicant indicted that he gave his mother \$4,329 to help defray the costs of his father's funeral. He also provided care for his children and two grandsons from 2006 to 2011, and this resulted in additional costs.

Applicant testified that his current financial situation is up to date with no overdue debts. He subscribes to a credit reporting agency, which gives him access to his credit reports on a daily basis. He reviews his reports every other day, and his credit score has gone from 492 to 635, a significant increase. He's lived with his family in his current home for approximately one year, and he has never been late with his monthly rental payment. (Tr at 55-68.)

## **Mitigation**

Applicant submitted a previous Personal Financial Statement that showed when he had his children and grandchildren living with him and his wife, the net monthly remainder was \$153.30, but now that his children and grandchildren have moved out, and considering his current B of A payments, his net remainder is \$1,818.48 a month. (Exhibit I.)

While there were no allegation in the SOR regarding credit cards, Applicant testified that he has six credit cards, and he has paid approximately half of what is owed on each of them. Applicant also testified that he expected to pay all of the credit cards in full as soon as he received his refund for tax year 2011. (Tr at 55-58.) Exhibits D and H show that Applicant has been managing his credit cards and been making payments in a responsible manner.

Finally, Applicant submitted a letter from a financial aid counselor for the college that his son is attending. It showed the extensive costs to attend the university, and Applicant has indicated that he contributes what he can to help his son with the costs. (Exhibit L.)

## **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 useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense 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, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

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 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**

### **Paragraph 1 (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 judgement, reliability and trustworthiness. By its very nature, it calls into question a person's ability, or willingness to comply with rules, laws and regulations.

The Government established that Applicant was charged, and pled nolo contendere to Failure to Report an Accident in 1993 and Loitering with Intent to Commit Prostitution in 2010, as alleged in subparagraph 1.b. and 1.c.. I find that disqualifying condition under ¶ 31(a), "a single serious crime or multiple lesser offenses," applies in this case. ¶ 31(c), "allegations or admissions of criminal conduct, regardless or whether the person was formally charged," is also applicable to this case. I do not find that there was any criminal conduct under allegation 1.a.

I find that mitigating condition ¶ 32(a) is applicable to the allegation in subparagraph 1.b., because "so much time has elapsed since the criminal conduct happened that it is unlikely to recur . . ." Also regarding allegation 1.c., I considered that the court dismissed the complaint, entered a plea of not guilty, and expunged the record, together with Applicant's credible testimony that he was not seeking prostitution. I find that ¶ 32(c), "evidence that the person did not commit the offense" is applicable to allegation 1.c. therefore, Paragraph 1, Guideline J is found for Applicant.

## **Paragraph 2 (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 and could potentially apply in this case. Under AG ¶ 19 (a), "an inability or unwillingness to satisfy debts" is potentially disqualifying. Similarly under AG ¶ 19 (c), "a history of not meeting financial obligations" may raise security concerns. I find that both of these disqualifying conditions apply to Applicant in this case. The evidence has established that Applicant has accumulated significant delinquent debt.

AG ¶ 20 provides conditions that could mitigate security concerns from financial difficulties: Under AG ¶ 20 (b), it may be mitigating where "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." As noted above, Applicant testified that his financial problems occurred at the time of his bankruptcy filing in 1997 because of many years of unemployment or

underemployment. I find that he acted responsibly at that time by using the legal means of bankruptcy to resolve his overdue debts.

Applicant's recent financial problems also occurred because of the debts from the death of his father and the significant bills of taking care of his grandchildren. I find that Applicant has acted responsibly by continuing to make his mortgage payments while working to establish a mortgage modification, as well as paying off his credit cards. Based on his current Personal Financial Statement, Applicant's current financial situation should continue to be positive. Therefore, I find that this mitigating condition is a factor for consideration in this case.

Finally, AG ¶ 20(d) is applicable since Applicant, by paying his credit cards and continuing to make his mortgage payments, has "initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." I find that this mitigating condition is also a factor for consideration in this case.

I conclude that Applicant is resolving his overdue debt, and he has shown that he can maintain financial stability. Therefore, Applicant has mitigated the financial concerns of the Government.

### **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. Based on all of the reasons cited above as to why the mitigating conditions apply under Guidelines J and F, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility

and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraph 1.a.-1.c.:	For Applicant

Paragraph 2, Guideline F:	FOR APPLICANT
Subparagraphs 2.a. and 2.b.:	For Applicant

### **Conclusion**

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

Martin H. Mogul  
Administrative Judge