



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 11-07188
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Kathryn MacKinnon, Esq., Department Counsel  
For Applicant: *Pro se*

08/01/2013

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**Decision**

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MARSHALL, Jr., Arthur E., Administrative Judge:

Applicant mitigated the Government's security concerns under Guideline E, personal conduct. Applicant's eligibility for a security clearance is granted.

**Statement of the Case**

On November 5, 2012, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E (Personal Conduct). 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 DOD on September 1, 2006.

In an undated response to the SOR, Applicant admitted the eight allegations raised and requested a hearing before an administrative judge. The case was assigned to me on April 2, 2013. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 17, 2013, setting the hearing for May 7, 2013. The hearing was convened as scheduled. The Government offered Exhibits (GX) 1-3. They were

accepted without objection. Applicant offered testimony and the hearing was adjourned. On May 20, 2013, the Government forwarded additional materials from Applicant without objection. They were accepted into the record as Applicant's Exhibit (AE) 1. The transcript (Tr.) was delayed until July 12, 2013.

### **Findings of Fact**

Applicant is a 39-year-old senior software systems engineer who has worked for his present employer for about seven years. He has maintained a security clearance without incident for over eight years. He attended college for about a year-and-a-half. He then earned certification in programming before he chose his present field of work. Applicant is married. He and his wife have four children, ranging in age from 10 to 15.

In about September 2003, Applicant was charged with second degree assault against his wife after an argument over how to best discipline their eldest child. His wife tried to bar Applicant from leaving the house; Applicant pushed her out of the way so he could exit and have a private talk with their child. Applicant's wife fell over a chair. Applicant and the child left for a talk. They were met by the police on their return. The argument was discussed and Applicant was charged. Applicant's wife declined to testify and Applicant was found not guilty. The couple received counseling. Applicant learned how to "diffuse emotional anger." (Tr. 17) There have not been any repeats of this sort of behavior. (Tr. 17)

At some point in 2007, Applicant was issued a ticket, which he gave to his wife to pay. His wife managed the family accounts. (Tr. 20) She failed to pay the ticket. In about March 2008, Applicant was charged with exceeding the speed limit and, as a result of the unpaid ticket, driving on a suspended license. (Tr. 18) Applicant had the court date incorrect and did not go at the appointed time. He was later charged with failure to appear and was arrested in about November 2008 on a bench warrant. He pled guilty to driving on a suspended license and was granted probation before judgment plus fines and costs. The unpaid ticket causing the suspension to be invoked was paid and his driver's license reinstated. Applicant completed five years of probation early, in July 2013.

In 2009, Applicant had a tedious commute to work. It included a long stretch of roadway with no lights. At some point, traffic begins to move faster as the long open stretch drags on. Applicant would often find himself driving above the legal limit, at speeds between 60 and 65 miles per hour or over, as if he had been on a highway. (Tr. 28-29, 58-59) As a result, in about September 2009, Applicant was charged with exceeding the maximum speed limit. He was similarly charged again in December 2009. He was found guilty both times and fined. He now appreciates the importance of maintaining and using a working speed control function on his car.

After his 2009 speeding tickets, Applicant was found guilty in June 2011 of driving on a suspended registration. It had been suspended for failure to timely

complete a supplemental emissions test. He paid the fine and immediately had the emissions test conducted once he discovered his registration had been suspended.

In 2010, Applicant used his corporate credit card to try to purchase about \$300 of merchandise at a sporting goods store. He thought the purchase would be approved because he had previously charged gasoline on the card and promptly paid for the charge without objection. He did not see a problem with this practice since he took responsibility for the charge, and he did not think to directly ask his employer if he could make such charges. In this case, the purchase was declined and the incident was reported to his employer. Applicant was counseled and his corporate card was closed.

In December 2010, Applicant walked into his bank branch and saw a teller he knew from numerous past transactions. (Tr. 34-35) The teller looked bored and Applicant was in a playful mood. Thinking they would both get “a giggle out of it” (Tr. 34), he wrote a note saying she should give him all her money. He then stepped out of line to give her the message. (Tr. 35) The woman said, “yeah, right.” (Tr. 35) They shared a laugh together, then he returned to the line. Once he was at the front of the line, he gave her his deposit and they chatted. He extended a holiday greeting. She made a comment advising him that he probably should not have passed her the note. He apologized, noting he was just trying to cheer her.

Later at home, Applicant got a call from the sheriff, who asked if Applicant could be interviewed about something. Applicant met with a detective, who eventually asked him about the bank incident. Applicant insisted he had only meant to humor the teller. The detective concluded that it was a simple lapse of judgment. A few weeks later, the detective called him to advise that the bank wished to have him charged with robbery. He was not detained or jailed, but was required to appear in court when charged. Ultimately, Applicant was found not guilty of attempted theft and a robbery charge was not prosecuted. (Tr. 41)

In October 2011, because Applicant’s wife had not given him the appropriate sticker to update his vehicle’s license plate, Applicant was cited and charged for displaying an expired registration plate. Applicant immediately rectified the situation by paying the fine. Applicant has since begun to review the mail himself. (Tr. 45-47) Moreover, in order to make sure he does not miss important dates in the future, he uses a cellular telephone with a calendar function to help keep him organized. (Tr. 24)

Nearing 40 years of age, the incidents described above are the only negative instances of employee rules, personal or criminal misconduct, or questionable judgment. (Tr. 56-57) He takes full responsibility for his actions. Having taken control of the mail and by using his phone as a reminder tool, Applicant has made changes to avoid repeating traffic and vehicular violations as the ones noted above. With regard to his misuse of a corporate credit card and the bank incident, he has learned to contain his natural effusiveness and give more thought to comporting his behavior to each situation. Applicant is “keenly aware” of the importance of better controlling his conduct, especially since his work depends on his maintaining a security clearance. (Tr. 52, 55)

He is committed to his job, where he genuinely enjoys both the work and his peers. He does not want to risk losing that job. Similarly, he will do nothing to jeopardize his family's financial well-being. (Tr. 52-53) He now has a better understanding of the trust expected of one who possesses a security clearance and appreciates that degree of trust. (Tr. 54) He is committed to doing whatever it takes to ensure that the government can trust him. (Tr. 54) He has had no behavioral lapses since 2011.

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

These guidelines are not inflexible rules of law. Instead, 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 not drawn 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.

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 E, Personal Conduct**

The security concern 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.

Applicant has raised issues related to personal conduct in several different contexts. While traffic tickets and registration issues generally do not play heavily into this process, here, they represent a 2009 to 2011 period of disregard for the rules of the road. He was found not guilty of assault and the resultant marital counseling proved to be productive. The misuse of a corporate credit card did not indicate a criminal intent, but did show poor judgment. His “joke” with a bank teller similarly showed poor judgment given the context. Taken together, there is a pattern of small failures to follow through with rules and regulations that has created concern. Under these circumstances, the following disqualifying conditions under AG ¶ 16 are relevant:

AG ¶ 16(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);

AG ¶ 16(d) (credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicting that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (3) a pattern of dishonesty or rule violations); and

AG ¶ 16(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).

At first blush, the collection of admitted allegations in this case represents a whole consisting of a hodgepodge of examples of unreliable conduct or an unwillingness to comply with rules and regulations. At heart, however, they remain, for the most part, fundamentally minor or isolated and singular incidents for which Applicant has already made restitution, timely rectified the situation, or taken corrective action. He received productive counseling regarding his early domestic incident and his unintentional misuse of his corporate credit card. He has seized personal control of all aspects related to his driving and vehicle registration with the help of cell phone reminders and personal monitoring of correspondence. He intends to use speed control to help him monitor his pace during his commute. He has clearly learned to better comport his behavior after his inappropriate joke with his bank teller; indeed, the bank situation has given him genuine pause to consider his behavior in context.

Each of these incidents proved to be a teachable moment from which Applicant has learned and used as the basis for taking corrective action in his life. His most recent infraction, failing to timely apply a sticker to his license plate to update its expiration, occurred nearly two years ago. He has had no additional infractions or personal conduct issues since. He is genuinely contrite and embarrassed about these incidents. I have no concerns that Applicant will fail to continue self-monitoring his behavior and comporting his behavior as appropriate. Taken as a whole, I find that AG ¶ 17(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 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) applies.

### **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). 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 E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 39-year-old senior software systems engineer who has worked without adverse incident for his present employer for seven years. He was a credible and outgoing witness. He has attended some college courses and completed certification in programming before he chose his present field of work. Applicant is married and has four children.

Over the past decade, Applicant was charged with domestic assault, but found not guilty. He and his wife received counseling. No subsequent domestic or anger-related incidents have arisen. Today, they are still together working to raise their family. Applicant received more than one speeding ticket and administrative charges related to his driving privilege, such as a suspended or revoked license based on an oversight. All such charges were timely rectified. Counseling advised him how to use a corporate credit card in a manner not previously discussed. Finally, there is the most egregious violation – the bank incident. Applicant was highly credible in his depiction of it as a joke. Apparently, others concurred as he was found not guilty of the attempted theft charge and the robbery charge was *nolled*.

Overall, Applicant's 30s served as a learning process for a case of delayed maturation. Most importantly, Applicant demonstrated through his testimony, demeanor, and acts that he has learned from each of these admitted instances of poor personal conduct. He is clearly committed to comporting his behavior appropriately in the future. There is no evidence he has ever compromised security at work. He has been incident free in his personal life for two years. I am convinced that Applicant will henceforth monitor his behavior and conduct himself appropriately. For all these reasons, I conclude Applicant mitigated the security concerns arising under the personal conduct guideline.

### **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 E:	FOR APPLICANT
Subparagraphs 1.a-1.h:	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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Arthur E. Marshall, Jr.  
Administrative Judge