



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



In the matter of: )  
 )  
 ) ISCR Case No. 15-01837  
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Applicant for Security Clearance )

**Appearances**

For Government: Bryan J. Olmos, Esq., Department Counsel  
For Applicant: *Pro se*

05/08/2017  
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**Decision**  
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LOUGHRAN, Edward W., Administrative Judge:

Applicant did not mitigate the personal conduct security concerns. Eligibility for access to classified information is denied.

**Statement of the Case**

On June 2, 2016, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline E, personal conduct. The action was taken under Executive Order (EO) 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006.

Applicant responded to the SOR on June 16, 2016, and requested a hearing before an administrative judge. The case was assigned to me on December 1, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on December 19, 2016, scheduling the hearing for January 24, 2017. The hearing was convened as scheduled. Government Exhibits (GE) 1 through 4 were admitted in

evidence without objection. Applicant testified, but he did not submit any documentary evidence. The record was held open for Applicant to submit additional information. He did not submit any additional evidence. DOHA received the hearing transcript (Tr.) on February 2, 2017.

### **Findings of Fact**

Applicant is a 30-year-old prospective employee of a defense contractor. He will be hired if he obtains a security clearance. He served on active duty in the U.S. military from 2006 until he received a general under honorable conditions discharge in 2009. He has an associate's degree, which was awarded in 2008. He has never married, and he has no children. His fiancée has three children.<sup>1</sup>

Applicant was terminated from a job in 2005 after his cash drawer turned up short. Applicant admitted the termination, but he denied the implication that he took money.<sup>2</sup>

Applicant had disciplinary problems in the military. He was frequently late for work. He received nonjudicial punishment (NJP) for violating Article 86 of the Uniform Code of Military Justice (UCMJ) for failure to report to his appointed place of duty. In 2009, he pleaded guilty at a special court-martial to wrongful use of cocaine, a controlled substance. He was sentenced to a reduction to paygrade E-1, forfeiture of pay, and confinement for six months.<sup>3</sup>

Applicant's employment history after his military discharge includes multiple terminations and reprimands. In 2011, he fell asleep in a company vehicle at a fast food restaurant. He was arrested and charged with driving while intoxicated (DWI). Applicant stated that he was drinking the night before, but he slept for several hours, and he did not realize that he still had alcohol in his system. His blood alcohol concentration (BAC) was well below the legal limit. The charge was dismissed, but he was terminated for driving the vehicle with alcohol in his system.<sup>4</sup>

Applicant was "written up" (reprimanded) or terminated from six jobs between 2010 and March 2013 for being late or failing to report to work. He was terminated from three of the jobs. Applicant has a legitimate explanation for why the 2011 termination alleged in SOR ¶ 1.c was not his fault. He admitted being late on multiple occasions at the other jobs. Many of the jobs were temporary positions, and his attitude towards the jobs was not great. He reported all his adverse employment history on his April 2013 Questionnaire for National Security Positions (SF 86), and he was open and candid

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<sup>1</sup> Tr. at 26-27, 32, 50, 60; GE 1, 2.

<sup>2</sup> Tr. at 32; Applicant's response to SOR; GE 1, 2.

<sup>3</sup> Tr. at 20-21, 38-39; Applicant's response to SOR; GE 1-4.

<sup>4</sup> Tr. at 22-24; Applicant's response to SOR; GE 1, 2.

about his issues at his hearing. He stated that he has learned from the experience, and his employment record has been much better since 2013.<sup>5</sup>

In 2014, Applicant was driving home after a long day at work in which he essentially worked a double shift. He started to fall asleep and was weaving. He was stopped by the police and charged with DWI. Applicant stated that he did not have anything to drink, and he blew completely clean on the breathalyzer. The case is still pending, but he is convinced it will eventually be dismissed.<sup>6</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 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."

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 safeguard classified information. Such decisions entail a certain degree of legally permissible

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<sup>5</sup> Tr. at 18-20, 33-35, 40-48; Applicant's response to SOR; GE 1, 2.

<sup>6</sup> Tr. at 53-58. This incident was not alleged in the SOR and will not be used for disqualification purposes. It may be considered in the application of mitigating conditions and in the whole-person analysis.

extrapolation of 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 E, Personal Conduct**

The security concern for personal conduct is set out in AG ¶ 15, as follows:

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:

(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;

(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 indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources.

Applicant's behavior while in the military and his employment-related conduct reflect questionable judgment and an unwillingness to comply with rules and regulations. AG ¶¶ 16(c) and 16(d) are applicable.

Applicant was terminated from jobs in 2005 and 2011, but I am not convinced the terminations resulted from conduct that would raise a security concern. SOR ¶¶ 1.c and 1.j are concluded for Applicant.

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

(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; and

(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.

Applicant was open and candid about his issues at his hearing. I believe he is sincere that he wants to be a better employee. However, the sheer multitude of his issues indicate that he still has work to do. He may get there, but I am not convinced now that Applicant has the reliability, trustworthiness, and judgment required of a clearance holder. None of the mitigating conditions, individually or collectively, are sufficient to mitigate the personal conduct security concerns.

### **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 Guideline E in my whole-person analysis.

Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct 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 E:	Against Applicant
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d-1.i:	Against Applicant
Subparagraph 1.j:	For 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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Edward W. Loughran  
Administrative Judge