



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-06434

**Appearances**

For Government: Pamela C. Benson, Esq., Department Counsel

For Applicant: *Pro se*

05/30/2017

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**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline J, criminal conduct. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On March 28, 2016, the Department of Defense (DOD) issued to Applicant a Statement of Reasons (SOR) 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; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines effective within the DOD for SORs issued after September 1, 2006.

Applicant answered the SOR on April 13, 2016, and elected to have his case decided on the written record. Department Counsel submitted the Government's file of relevant material (FORM), mailed it to Applicant, and it was received on May 27, 2016. Applicant was afforded an opportunity to file objections and submit material in refutation,

extenuation, or mitigation. Applicant did not object to the Government evidence. The Government's documents identified as Items 1 through 3. Applicant provided a statement in response to the FORM, and it is marked Applicant Exhibit (AE) A. The Government did not object and all exhibits are admitted. The case was assigned to me on April 6, 2017.

### **Findings of Fact**

Applicant did not admit or deny the sole SOR allegation, but provided a narrative explanation that is considered a denial. After a thorough and careful review of the pleadings and exhibits submitted, I make the following findings of fact.

Applicant is 56 years old. He has been employed by his present employer since 2001. He has been married since 1982 and has two grown children.

Applicant was arrested on October 31, 2014, and charged with assault-first degree, felony; assault-second degree, misdemeanor; and firearm use/felony/violent crime. He pled guilty to assault-second degree, misdemeanor, and was sentenced to a five-year suspended prison term, with three-years supervised probation. He was also ordered to attend anger management and substance abuse programs; forfeit all firearms; and have no unconsented contact with the victim. The other charges were nolle prossed. Applicant is on probation until May 2018. Applicant was represented by an attorney when he pled guilty to the lesser offense.<sup>1</sup>

Applicant provided a detailed chronology of a domestic disturbance he had with his son that involved several altercations between October 30, 2014 and October 31, 2014. He stated that his son was abusive, and threatened his and his wife's life with severe bodily harm and death. The police were called several times, but his son was not arrested. Applicant stated his son had several weapons and he was worried his son would dismember him. He stated that his son was attempting to gain entry into Applicant's house and his wife called the police. Applicant had a legally purchased and registered firearm. He stated he could see his son's shadow through an inside doorway, and his son had something about three feet long in his hand. Applicant believed it was a machete. He saw his son's shadow move closer. Applicant fired a single "warning shot" into the wall.<sup>2</sup>

Applicant provided documents to show he completed anger management and substance abuse ordered treatment. The only evidence provided by Applicant was his statement.<sup>3</sup>

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<sup>1</sup> Items 1, 3; AE A.

<sup>2</sup> Items 1, 3; AE A.

<sup>3</sup> Item 1.

## 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 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, 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 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, 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 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 that an applicant may deliberately or inadvertently fail to 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

### Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern for criminal conduct:

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.

I have considered the disqualifying conditions under criminal conduct AG ¶ 31 and the following three are potentially applicable:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted; and
- (d) individual is currently on parole or probation.

Applicant was arrested on October 31, 2014, and charged with assault-first degree, felony; assault-second degree, misdemeanor; and firearm use/felony/violent crime. He pled guilty to assault-second degree, misdemeanor, and was sentenced to a five-year suspended prison term, with three-years supervised probation; ordered to attend anger management and substance abuse programs; forfeit all firearms; and have no unconsented contact with the victim. He remains on supervised probation until May 2018. The above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32, and the following are potentially applicable:

- (a) so much time has elapsed since the criminal behavior happened, 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) 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 was represented by an attorney at his court proceeding. He pled guilty to a lesser offense. The judge ordered Applicant to be on supervised probation for three years and sentenced him to five years in prison, which was suspended. He also was ordered to attend anger management class and a substance abuse program. Applicant does not elaborate on the reasons he was ordered to attend these programs.

Presumably the court was made aware of all of the circumstances surrounding Applicant's offense. The only information provided in mitigation was Applicant's version of the altercation. The seriousness of the offense is reflected by the sentence and lengthy supervised probation which runs until May 2018. Although there is no evidence of additional criminal behavior, there is insufficient evidence to overcome the concerns raised by Applicant's criminal conduct. Therefore, not enough time has elapsed since the criminal behavior occurred. AG ¶ 32(a) and 32(d) do 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 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. I have incorporated my comments under Guideline J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant had a serious domestic altercation with his son. He provided an explanation for his conduct. However, he pled guilty to second-degree assault. Applicant received a five-year jail sentence that was suspended, and supervised probation until May 2018. Insufficient evidence was presented to conclude that Applicant's conduct is no longer a security concern. He is still on supervised probation. Applicant failed to meet his burden of persuasion. 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 failed to mitigate the security concerns arising under the criminal 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 J:                      AGAINST APPLICANT

Subparagraph 1.a:                      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's eligibility for a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge