



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



In the matter of: )  
 )  
 ) ISCR Case No. 17-03092  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Ross Hyams, Esq., Department Counsel  
For Applicant: *Pro se*

10/02/2018  
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**Decision**  
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LOUGHRAN, Edward W., Administrative Judge:

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

**Statement of the Case**

On October 13, 2017, the Department of Defense (DOD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E (personal conduct) and J (criminal conduct). Applicant responded to the SOR on December 8, 2017. It was unclear from his response whether he wanted a hearing or have his case decided on the written record in lieu of a hearing. On September 26, 2018, he clarified that he wanted the case decided on the written record in lieu of a hearing.

The Government's written case was submitted on April 12, 2018. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on April 19, 2018. He responded to the FORM with documents that I have marked Applicant's Exhibits (AE) A

and B. The case was assigned to me on September 26, 2018. The Government exhibits included in the FORM and AE A and B are admitted in evidence without objection.

### **Findings of Fact**

Applicant is a 31-year-old employee of a defense contractor. He has worked for his current employer since 2013. He completed a trade school in 2009. He has never married, and he has one child.<sup>1</sup>

Applicant has a history of criminal arrests. He was arrested in May 2007 and charged with assault on a family member. The charge was dismissed. Applicant stated that he had a fight with his brother. He was arrested in September 2007 and charged with unlawful purchase or possession of an alcoholic beverage. The charge was dismissed in November 2008. Applicant admitted that he possessed alcohol while underage.<sup>2</sup>

Applicant was arrested in August 2009 and charged with disturbing the peace and what amounted to a trespassing charge. He stated that there was a minor disturbance outside a bar. He placed his hand on the shoulder of a police officer who was arresting his friend and asked the officer where he was taking his friend. Applicant was also arrested. He paid a small fine.<sup>3</sup>

Applicant was arrested for assault in December 2010. He was later charged with violating the conditions of his release. Applicant asserted that he was the victim of an assault by the ex-boyfriend of the woman he was with. He missed a court date, which resulted in the second charge. He paid restitution, and there was a guilty finding on the charge of violating the conditions of his release. The assault charge was dismissed.<sup>4</sup>

Applicant was arrested in February 2011 and charged with driving under the influence of alcohol (DUI). In April 2011, he pleaded guilty to the lesser charge of reckless driving. He was sentenced to a \$750 fine with \$500 suspended; 30 days in jail, with 30 days suspended; probation for two years; attendance at an alcohol-safety program and a victim-impact panel; and his driver's license was suspended for six months. A show-cause summons was issued in April 2012 to revoke the suspended fine and jail time because he had not completed the victim impact panel. Applicant appeared in court in June 2012 and established to the court's satisfaction that he had completed the court's requirements.<sup>5</sup>

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<sup>1</sup> Items 4, 5.

<sup>2</sup> Items 3, 5, 6.

<sup>3</sup> Items 3, 5, 6.

<sup>4</sup> Items 3, 5, 6.

<sup>5</sup> Items 3, 5, 6; AE B.

Applicant stated that he was stopped on the freeway for speeding the morning after the Super Bowl. He woke up and was driving to work, but he still had some alcohol in his system from the night before. Applicant's statement is partially corroborated by police and court records. He was arrested on the morning after the Super Bowl, but the arresting officer's affidavit indicates Applicant was arrested after an accident. His blood alcohol content (BAC) was .09, which is above the legal limit.<sup>6</sup>

Applicant was arrested in November 2014 for assault on a family member. The charge was dismissed in June 2015. Applicant asserted that a female friend had been drinking and she bit and scratched him. They were both arrested. The charge was dismissed after he produced photographs of the scratches and bite marks.<sup>7</sup>

Applicant submitted a Questionnaire for National Security Positions (SF 86) in December 2015. He reported the November 2014 arrest for assault, but he mistakenly listed it as occurring in January 2015. He answered "No" to questions that required him to report all additional arrests, charges, convictions, sentences, and probation within the previous seven years, and if he had "**EVER** been charged with an offense involving alcohol or drugs." He also answered "No" to the alcohol questions under Section 24, which included the question:

**In the last seven (7) years** has your use of alcohol had a negative impact on your work performance, your professional or personal relations, your finances, or resulted in intervention by law enforcement personnel.

Applicant was interviewed for his background investigation in November 2016. He discussed his arrests with the investigator. He stated that he did not know that he had to report charges that had been dismissed. He stated that he did not report the DUI arrest and subsequent conviction for reckless driving because he forgot about the incident when he submitted the SF 86. In his response to the SOR, he denied intentionally providing false information on the SF 86.

## **Policies**

This case is adjudicated 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), which became effective on June 8, 2017.

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.

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<sup>6</sup> Items 3, 5, 6; AE B.

<sup>7</sup> Items 3, 5, 6; AE A.

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(a), 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 national security eligibility will be resolved in favor of the 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 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 J, Criminal Conduct**

The security concern 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 pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and

(b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant was arrested on multiple occasions between 2007 and November 2014. The above disqualifying conditions are applicable.

Conditions that could mitigate criminal conduct security concerns are provided under AG ¶ 32. The following 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;

(c) no reliable evidence to support that the individual committed the offense; and

(d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant denied committing several of the offenses, and many of the charges were dismissed. Those allegations are mitigated. The arrests alleged in SOR ¶¶ 1.c, 1.e, and 1.f resulted in convictions. The last conviction was for reckless driving after a February 2011 arrest for DUI. That conduct was more than seven and a half years ago. I nonetheless have concerns about Applicant's candor and truthfulness. He stated that his DUI arrest occurred after he was stopped on the freeway for speeding the morning after the Super Bowl. The arresting officer's affidavit indicates Applicant was arrested after an accident. Additional candor issues are discussed below under personal conduct. If I cannot believe Applicant's statements, I cannot find successful rehabilitation or that the conduct is unlikely to recur. Applicant's criminal conduct is not mitigated.

## **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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security clearance investigative or adjudicative processes.

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;

(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 individual may not properly safeguard classified or sensitive information; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes:

(1) engaging in activities which, if known, could affect the person's personal, professional, or community standing.

Applicant reported the November 2014 arrest for assault on his SF 86, but he mistakenly listed it as occurring in January 2015. He answered "No" to questions that required him to report all additional arrests, charges, convictions, sentences, and probation within the previous seven years, and if he had "**EVER** been charged with an offense involving alcohol or drugs." He also answered "No" to the alcohol questions under Section 24, which included if his alcohol use resulted in intervention by law enforcement personnel.

Applicant denied intentionally providing false information on the SF 86. He told the background investigator that he did not know that he had to report charges that had been dismissed and that he forgot about the DUI arrest. It is not credible that Applicant forgot being arrested for DUI with all the court appearances and requirements to complete his sentence. I find that Applicant's answers to the police record and alcohol questions on the SF 86 were intentionally false. AG ¶ 16(a) is applicable.

Applicant's criminal conduct is cross-alleged under Guideline E. That conduct reflects questionable judgment and an unwillingness to comply with rules and regulations. It also created vulnerability to exploitation, manipulation, and duress. AG ¶¶ 16(c) and 16(e) are applicable.

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 advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. 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 contributed to untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

Applicant discussed his criminal conduct when he was interviewed for his background investigation in November 2016. However, I do not believe he was forthcoming to the investigator. His conduct continues to cast doubt on his current reliability, trustworthiness, and good judgment. Personal conduct security concerns are not mitigated.

### **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(d):

(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 E and J in my whole-person analysis. Applicant has a history of relatively minor criminal offenses. More importantly, he cannot be trusted to tell the truth.

Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. I conclude Applicant did not mitigate the personal conduct and criminal 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 J:	Against Applicant
Subparagraphs 1.a-1.b	For Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Subparagraphs 1.e-1.f:	Against Applicant
Subparagraphs 1.g-1.h:	For Applicant
Paragraph 2, Guideline E:	Against Applicant
Subparagraphs 2.a-2.d:	Against Applicant

### **Conclusion**

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