



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



In the matter of: )  
)  
) ISCR Case No. 07-05853  
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Applicant for Security Clearance )

**Appearances**

For Government: Emilio Jaksetic, Esq., Department Counsel  
For Applicant: *Pro Se*

May 21, 2008

**Decision**

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LOUGHRAN, Edward W., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his criminal conduct, personal conduct, and financial issues. Eligibility for access to classified information is denied.

On January 10, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant, detailing the security concerns under Guideline J, Criminal Conduct; Guideline E, Personal Conduct; and Guideline F, Financial Considerations. 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on February 4, 2008, and elected to have the case decided on the written record in lieu of a hearing. On February 7, 2008, Department Counsel requested a hearing before an Administrative Judge pursuant to ¶

E3.1.7 of the Directive. The request is marked Hearing Exhibit (HE) I. The case was assigned to me on March 31, 2008. DOHA issued a notice of hearing on April 1, 2008. I convened the hearing as scheduled on April 28, 2008. The Government offered Exhibits (GE) 1 through 6, which were received without objection. Applicant testified on his own behalf and submitted Exhibits (AE) A and B, which were received without objection. DOHA received the transcript of the hearing (Tr.) on May 7, 2008.

## **Procedural and Evidentiary Rulings**

### **Notice**

I advised Applicant of his right under ¶ E3.1.8 of the Directive to 15 days notice before the hearing. Applicant affirmatively waived his right to 15 days notice.

### **Motion to Amend SOR**

The SOR references “ADP” positions. Department Counsel made an oral motion to amend the SOR by deleting any reference to ADP positions and substituting appropriate “security clearance” language. Applicant did not object to the motion and it was granted.

## **Findings of Fact**

Applicant is a 68-year-old employee of a defense contractor. He has a Bachelor of Science degree. He served in the U.S. Navy on active duty from 1959 to 1963 and then in the Naval Reserve until 1989. He retired as a chief petty officer. He has worked for his current employer since 2001. He was married and divorced three times and is currently married. He has three adult children.<sup>1</sup>

Applicant was driving a motorcycle in August 2000. A truck sounded its horn behind him. He became distracted and bumped the car in front of him with his motorcycle. Applicant and the driver of the car he struck both pulled their vehicles to the side of the road and saw there was no damage to the car. He then returned to the road and saw the truck that beeped the horn. He chased after the truck and followed it to a parking lot. He went up to the woman driving the truck, got in an argument and physically assaulted her by slapping her. Applicant does not dispute the above events. He and the victim provided different specifics of the events. Applicant’s versions are also inconsistent. He told an investigator in 2006, that he returned to the road after the minor accident and he happened to see the truck stopped in a parking lot. This is inconsistent with his testimony that he chased the truck. He testified that when he went up to her truck, “she was just a very aggravating kind of person.” He stated he reached in the window and slapped her, but did not otherwise strike her and did no damage to her truck.<sup>2</sup> He testified:

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<sup>1</sup> Tr. at 41-46; GE 1.

<sup>2</sup> Tr. at 49, 59, 78-79; Applicant’s Answer to the SOR; GE 2-4; AE A.

She was a very large person to start with. And the way she was talking to me was very agitating. I mean she was just, very brazen and I just lost my temper.<sup>3</sup>

The victim's description as taken from the criminal and civil complaints was different. She stated that after Applicant and the other car pulled to the side of the road, she continued driving. Applicant caught up to her and started sounding his horn at her. When she pulled off on a ramp, he passed her and stopped his motorcycle at the top of the ramp, blocking her way. He got off his motorcycle and approached her, but she drove around him. He followed her as she pulled into a parking lot. He went up to her truck, screamed and used profanity toward her, opened the door, and struck her in the face with his hand. As she was attempting to get out of the truck, he slammed the door on her leg. Four witnesses observed the assault. She asked for help and said to call 911. She pulled a pad from her purse to write his license number but he grabbed the pad from her hand. She grabbed it back and wrote down the plate number. He covered his license plate with a glove and left the scene. She provided the police with the license plate number and identified the Applicant in a photo line-up.<sup>4</sup>

Applicant was arrested and charged with battery and damage to personal property. He pled guilty to battery and the damage to personal property charge was dismissed. He was sentenced to 10 days in jail, suspended, one year of unsupervised probation, 30 hours of community service, and fined \$76. He served his probation without incident.<sup>5</sup>

The victim of Applicant's assault sued him for damages. There was a jury trial in February 2004, in which Applicant appeared and was represented by counsel. She was awarded compensatory damages of \$25,000 and punitive damages of \$125,000. Interest was also ordered on the judgment to accrue at the rate of 10% per annum from the date of the verdict until paid.<sup>6</sup>

Applicant has not paid any part of the judgment against him. He has stated that he does not plan on paying anything on the judgment. He told an investigator in September 2006, that he did not feel that it was a fair judgment, that he had a "lousy" lawyer, and that the court was stacked against him because he was not born in the state where the trial was held. He reiterated in a statement provided in a response to Interrogatories, dated November 28, 2007, "I have not made any payment toward the civil action judgment against me and I don't intend to." In his Answer to the SOR he stated, "[d]ue to no action taken I don't believe that I will ever be presented with any determination of a payment plan or method of payment; therefore, until such a plan is

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<sup>3</sup> Tr. at 60.

<sup>4</sup> GE 2-4.

<sup>5</sup> Tr. at 46-47; Applicant's Answer to the SOR; GE 2-3.

<sup>6</sup> Tr. at 47-49, 52; Applicant's Answer to the SOR; GE. 2, 4-6.

established I don't plan to do anything about making payment."<sup>7</sup> He was asked about paying the judgment at his hearing:

ADMIN. JUDGE: How about the judgment? Do you think it's fair that you would have to --

APPLICANT: No, I don't think that's fair at all, Your Honor. I don't think what I did deserves any of that at all, I really don't.

ADMIN. JUDGE: Are you not paying it because you don't have the money or because you don't think it's fair or both?

APPLICANT: Well, I don't think it's fair at all. And, of course, I don't have \$150,000.00. I'm just barely trying to get all my debts paid off and like that. I just don't think it's fair at all.

ADMIN. JUDGE: I understand.

APPLICANT: I really think I got railroaded out. I'm not a [citizen of state where judgment issued]. And [state where judgment issued], I think that has a lot to do with it.

ADMIN. JUDGE: So I take it, even if you had the money, you would not pay it, voluntarily?

APPLICANT: I would have to think about that one, Judge. If I had the money, it might be a different story, but I don't have the money.<sup>8</sup>

Applicant married his current wife in 2005. She is from another country. He has not told her about his conviction or about the judgment against him. He stated that he just did not see a reason to tell her about it. His co-workers are also unaware of the conviction and judgment. Applicant testified that while he was not proud of his conviction, he would reveal it if necessary, and it could not be used as a basis for blackmail or coercion.<sup>9</sup>

Applicant responded to a DOHA Interrogatory on May 28, 2004, asking him to provide the result of the lawsuit held in February 2004. He responded:

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<sup>7</sup> Tr. at 52-54; GE 2; Applicant's Answer to the SOR; AE A.

<sup>8</sup> Tr. at 61-62.

<sup>9</sup> Tr. at 76-78.

The outcome of the civil lawsuit against me was that I pay one hundred fifty thousand dollars (\$150,000.00) to the plaintiff plus 10% interest per annum until paid. No payment of settlement has been determined.<sup>10</sup>

Applicant submitted a Questionnaire for National Security Positions (SF 86), certified as true on June 16, 2006. Applicant listed his conviction for battery under the question that asked about his police record. Question 28a asked, "In the last 7 years, have you been over 180 days delinquent on any debt(s)?" He answered "No." Question 29, asked, "In the last 7 years, have you been a party to any public court actions not listed elsewhere on this form?" He answered "No," but he listed a "[c]ivil suit resulting from traffic accident" and "[s]uit went to court and plaintiff won but no further action occurred."<sup>11</sup>

Applicant denied the two falsification allegations in the SOR. He stated he already provided the requested information via the Interrogatory.<sup>12</sup> I considered all the evidence, including the Interrogatory and the derogatory information that Applicant included in the Questionnaire. I find there is insufficient evidence for a finding that Applicant intentionally falsified his Questionnaire for National Security Positions as alleged in the SOR.

### **Policies**

When evaluating an applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). 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 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

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<sup>10</sup> AE A.

<sup>11</sup> GE 2.

<sup>12</sup> Tr. at 28-33.

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 the 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 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 relating to the guideline 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 ¶ 30 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

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

Applicant was arrested and convicted of battery against a woman after a traffic incident. This raises both of the above disqualifying conditions.

Four Criminal Conduct Mitigating Conditions under AG ¶¶ 32(a)-(d) 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;

(b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;

(c) evidence that the person did not commit the offense; 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.

There is no evidence that Applicant was pressured or coerced into committing his criminal act. AG ¶¶ 32(b) and 32(c) are not applicable. The incident happened almost eight years ago and there is no other criminal record or history of similar incidents. Applicant says he is sorry about the incident, but does not appear particularly remorseful. He continues to blame the victim of the assault for causing him to lose his temper. He has also refused to pay any of the judgment which a civil court ordered him to pay to the victim of his assault. Applicant was 60 years old when he committed this assault, an age where he should have known better. While there is some evidence of successful rehabilitation, I am unable to find that it is unlikely to recur and does not cast doubt on his current reliability, trustworthiness, and good judgment. AG ¶ 32(a) is not applicable. AG ¶ 32(d) has been raised as a factor for consideration.

### **Guideline E, Personal Conduct**

The security concern relating to the guideline 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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The following 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; and

(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.

Applicant omitted some information from his Questionnaire for National Security Positions; however, he had already provided the information to DOHA through an Interrogatory. There is insufficient evidence to find that it was a deliberate omission. AG ¶ 16(a) is not applicable. SOR ¶¶ 2.b and 2.c are concluded for Applicant.

SOR ¶¶ 2.a alleges the \$150,000 judgment addressed above. The judgment is not personal conduct on Applicant's part. It is a court order for him to pay substantial money based upon his personal conduct, i.e., the battery of the woman in the truck. That behavior was shocking and reprehensible. It also resulted in a \$150,000 judgment that is accruing interest at 10% per year. His actions made him vulnerable to exploitation, manipulation, and duress. AG ¶ 16(e) is applicable.

Conditions that could mitigate Personal Conduct security concerns are provided under AG ¶ 17. 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;

(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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

There was no evidence that Applicant obtained counseling for the anger that led to the assault. He admitted he slapped the woman and pled guilty to the battery in his criminal trial. I am unable to state the behavior is unlikely to recur for the same rationale provided under the discussion for criminal conduct. AG ¶¶ 17(c) and 17(d) are not applicable. His wife and co-workers are unaware of the conviction and judgment. He has refused to pay the \$150,000 judgment which is growing by 10% every year. He has not sufficiently lessened his vulnerability to exploitation, manipulation, and duress to raise AG ¶ 17(e) as a mitigating condition.

## **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 under AG ¶ 19. Two are potentially applicable in this case:

- (a) inability or unwillingness to satisfy debts; and
- (c) a history of not meeting financial obligations.

Applicant has a judgment against him for \$150,000 that is accumulating interest at the rate of 10% per annum. Both of the above potentially disqualifying conditions have been raised.

Five Financial Considerations Mitigating Conditions under AG ¶¶ 20(a)-(e) are potentially applicable:

- (a) the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;
- (b) 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;
- (c) the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides

documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

The judgment against Applicant was the result of his criminal assault. He has refused to pay any part of the judgment. No mitigating condition is applicable.

### **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 common sense 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. Applicant is 68 years old. When he was 60, he chased a woman on his motorcycle, caught her, and physically assaulted her. He pled guilty to battery. She sued him and won a judgment against him for \$150,000, which is accruing 10% interest per year. He refuses to pay the judgment because he does not think it is fair and he does not have the money to pay it. He continues to blame the woman he assaulted for aggravating him to the point where he lost his temper. I also considered that this was a one-time incident in an otherwise clean record. He has a stable work record and served honorably for an extended period in our armed forces. Despite the positive evidence, Applicant's actions raise serious concerns about his judgment, reliability, and trustworthiness.

Overall, 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 has not mitigated the security concerns arising from his criminal conduct, personal conduct, and financial issues.

### **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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Paragraph 1, Guideline F:	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 interests of national security 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