



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



In the matter of:	)	
	)	
SSN:	)	ISCR Case No. 07-09632
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Daniel Crowley, Esquire, Department Counsel  
For Applicant: Pro Se

February 14, 2008

\_\_\_\_\_  
**Decision**  
\_\_\_\_\_

HENRY, Mary E., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on March 8, 2006. On November 21, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and E for Applicant. 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 acknowledged receipt of the SOR on November 28, 2007. He answered the SOR in writing on November 28, 2007, and requested a decision on the record in lieu of a hearing. Department Counsel was prepared to proceed on February 7, 2007, and I received the case assignment on February 7, 2007. Based on the evidence of record, Applicant has not mitigated the security concerns under Guideline J and his clearance is denied. Concerns under Guideline E are not raised.

## Findings of Fact

In his Answer to the SOR, dated November 28, 2007, Applicant admitted all the factual allegations of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.<sup>1</sup>

Applicant is a 36-year-old software engineer employed by a defense contractor. He graduated from college in 1996 with a Bachelor of Science degree in computer science. He married his first wife in 1998 and they divorced in 2000. He does not know her current address. He remarried in 2002. He and his second wife separated in 2006 and are divorced. He has no children.<sup>2</sup>

In 1989 when a high school student, the police arrested Applicant and charged him with grand larceny for stealing and forging government payroll checks and using a VISA credit card. The State dropped the charges. Because his criminal conduct occurred shortly after his sister committed suicide, he sought and received counseling.<sup>3</sup>

At Christmas time in 2002, Applicant stole sports cards at a local store during difficult times. The police arrested and charged him with petit larceny. The court found him guilty, sentenced him to 10 days in jail, suspended the sentence and fined him. Applicant acknowledges that his conduct was wrong. Shortly after this incident, medical professionals diagnosed him with depression. He currently takes medication for his depression and leads a normal life.<sup>4</sup>

Following the break-up of his second marriage, Applicant, in June 2006, drank four beers in an hour while at a local bar with friends. He left the bar and started driving his car home. The police stopped him. They performed a field sobriety test, which he failed. The police arrested him and then searched his car, where they found two ecstasy pills. The police charged him with Driving Under the Influence (DUI), a misdemeanor, and possession of a controlled substance, a class 5 felony. His blood alcohol level measured .14. He entered into a plea agreement with the State. At his hearing in March 2007, he pled guilty to possession of a controlled substance and withdrew his appeal of the DUI. The court sentenced him to 90 days on the DUI, suspended the sentence, fined him \$250, assessed him costs of \$238, ordered him to attend an alcohol and substance abuse program (ASAP), and restricted his driving privileges for one year, until March 8, 2008. On the possession of the controlled substance charge, the court assessed him costs of \$506, placed him on one year of supervised probation which will end on March 8, 2008, suspended and restricted his driving privileges for six months, ending on September 9, 2007, and deferred disposition of his case until March 10,

---

<sup>1</sup>Item 2 (Response to SOR) at 1-2.

<sup>2</sup>Item 4 (Security Clearance Application (SF-86)) at 2-5; Response to FORM.

<sup>3</sup>Item 1 (SOR) at 1-2; Item 2, *supra* note 1, at 3.

<sup>4</sup>*Id.*

2008. Applicant paid the fines and costs. At the end of his probation, the drug possession charge should be removed from his record.<sup>5</sup>

Applicant adamantly denies any drug use and any knowledge that the ecstasy pills were in his car. He attributes the two ecstasy pills found in his car to his second wife. He no longer drinks alcohol and does not intend to do so in the future. He has become active in his church and provides services to the community through his church. He acknowledges that his decision to drive after drinking was misguided. He completed the ASAP program, stating that he passed the random drug tests. He has not provided evidence to support this statement or that he completed the ASAP program.<sup>6</sup>

### **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 useful 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, an administrative judge must 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 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 applicant or proven by Department Counsel. . . ." The applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

---

<sup>5</sup>Item 5 (Court records) 2-8; Item 6 (Answers to Interrogatories) at 4-5.

<sup>6</sup>Response to FORM at 1; Item 2, *supra* note 1, at 3; Item 6, *supra* note 5, at 5-6.

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 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 expresses the security concern pertaining to 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.”

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. The following disqualifying conditions may be applicable in this case:

- (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;
- (d) individual is currently on parole or probation;

Applicant has been arrested three times in the last 18 years, twice for stealing and once for DUI and possession of a controlled substance. He is currently on probation for the drug possession charge. Thus, these disqualifying conditions apply.

AG ¶ 32 provides conditions that could mitigate security concerns. The following mitigating conditions may apply in this case:

- (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) 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.

Applicant's arrest for forgery and stealing occurred more than 18 years ago. His sister had committed suicide not long before he committed these crimes. He wisely sought counseling to deal with the issues of his sister's death and his resulting criminal conduct. Since this date, he has never forged any documents. AG ¶ 32 (a) has partial applicability.

Applicant, however, stole again five years ago. While both actions are remote in time, the fact that he again resorted to stealing 13 years after his arrest in high school raises questions about his trustworthiness and judgment.

Applicant denies any drug use, despite his arrest for possession of a controlled substance. The court deferred disposition on the controlled substance charge, but sentenced him on the DUI charge. Because he remains on probation for the drug possession charge, has not provided any evidence that he has passed his drugs tests, and not enough time has passed, he has not mitigated the government's security concerns under Guideline J.

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

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

The government alleges that AG ¶ 16 (c) disqualifying condition applies in this case:

(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.

For this disqualifying condition to apply, the record must contain credible adverse information which is insufficient for adverse determination under any other single guideline, a condition precedent. The record contains credible adverse information which could support an adverse determination under another adjudicative guideline. Since I reached an adverse determination under Guideline J, there is no need to reach a second determination on the same allegations under AG ¶ 16 (c) of Guideline E. Even if the record contains evidence sufficient to raise this disqualifying condition, my reasoning for the adverse decision under Guideline J on the same issues 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 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) 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. Applicant's behavior as a high school student following his sister's suicide occurred many years ago. His decision to seek counseling after his arrest in 1989 showed mature judgment and a willingness to address his conduct.

In recent years, he has shown some serious lapses in judgment. His decision to steal sports cards in 2002 when he was in difficult times raises questions about his ability to handle adverse situations. He was 31 years old, not a high school student. He knew stealing was wrong, but he chose to steal. He showed a second lapse of judgment when he drove his car after drinking heavily. While he attributes the presence of ecstasy in his car to his second wife, he agreed to plead guilty to the drug possession charge. He has not completed his probationary period. In viewing his conduct in the last five years, Applicant has not demonstrated good decision making, which raises questions about his judgment.

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.

## 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 G:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

## Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

---

MARY E. HENRY  
Administrative Judge