



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 07-04740  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Ray T. Blank, Jr., Esq., Department Counsel  
For Applicant: *Pro Se*

April 28, 2008

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant has not mitigated the security concerns arising from his criminal conduct. 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) detailing the security concerns under Guideline J, Criminal Conduct and Guideline M, Use of Information Technology Systems. 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 on February 1, 2008, and requested a hearing before an Administrative Judge. The case was assigned to me on February 27, 2008. DOHA issued a notice of hearing on March 14, 2008, and the hearing was convened as

scheduled on April 10, 2008. DOHA received the transcript of the hearing (Tr.) on April 22, 2008.

### **Procedural and Evidentiary Rulings**

The Government offered Exhibits (GE) 1 through 11. Applicant did not object to GE 1 through 6 and 8 through 11, and they were admitted. Applicant objected to GE 7, which is a police report of an alleged sexual assault by Applicant. He objected to the admission of the report because it contained a “malicious complaint” by the complainant and he is denied the right to confront her. I withheld ruling on the exhibit. The Appeal Board has addressed this issue and held that a police report was admissible over an applicant’s objection, stating “the DOHA process encourages Judges to err on the side of initially admitting evidence into the record and then to consider a party’s objections when deciding what, if any, weight to give to that evidence.”<sup>1</sup> Applicant’s objection is overruled and GE 7 is admitted. I will consider Applicant’s objection when determining the weight to give the document. Applicant testified on his own behalf and submitted Exhibits (AE) A through C, which were received without objection.

### **Findings of Fact**

Applicant is a 30-year-old employee of a defense contractor. He is a high school graduate. He has never been married and has no children.<sup>2</sup>

Applicant was arrested for possession of a controlled substance in 1995 and 1997. In 1998, he was arrested for unlawful delivery of a controlled substance. All of the charges were dismissed or otherwise disposed without going to trial. Applicant admitted to the arrests but denied all the charges. He stated he has never used illegal drugs but he had friends that did. Applicant described what led to the arrests in a statement provided for his background investigation on September 18, 2007. He stated the first arrest was for what the police believed were marijuana plants, except that the plants were not marijuana. The second case involved the police searching Applicant’s car. He stated a friend was with him and the friend dropped his cocaine on the floor of the car when the police arrived. The police arrested everybody in the car. Applicant denied knowing that his friend had drugs. He stated the charge was dismissed because it was an unlawful search. He stated the third arrest occurred because someone kept asking Applicant to sell him drugs. He wrote that after several months of asking, Applicant sold him tree sap for \$40, telling him it was opium. He was arrested for the sale, but the material tested negative for controlled substances, and the charge was dismissed.<sup>3</sup>

In July 2004, Applicant and a friend took two pieces of equipment from the rear of a business. He described the incident as “dumpster diving” and the items as two broken

---

<sup>1</sup> ISCR Case No. 04-12449 at 4 (App. Bd. May 14, 2007).

<sup>2</sup> Tr. at 23, 27; GE 1.

<sup>3</sup> Tr. at 22-23; Applicant’s Answer to SOR; GE 1, 3-5.

lasers which were in a scrap pile to be discarded. The police were called and stopped the car after it left the area. The owner of the business asked for the property to be returned. Applicant and his friend returned the items and the police let them go without an arrest or charges.<sup>4</sup>

Applicant was arrested in August 2004, and charged with (1) driving under the influence (DUI); (2) driving with a blood alcohol level of 0.08 or more; (3) hit and run driving causing property damage; and (4) unlawful left turn on divided highway. Applicant was driving after drinking and struck two parked cars. The accident had apparently caused his car to turn around. The car was damaged but operable. He then drove off southbound in the northbound traffic lanes. He drove to an intersection where he was able to turn into the correct lane. A police officer was driving by shortly after the accident occurred. He observed a cloud of dust, Applicant's car facing the wrong way, and Applicant's car driving away. The officer caught up to Applicant's car and paced it for less than a tenth of a mile, noting that Applicant was driving about 50 miles per hour in a 35 zone. He stopped the car, initiated a field sobriety test, and placed Applicant under arrest. Applicant requested a blood test, which indicated a blood alcohol level of .170%. In December 2004, Applicant pled guilty to counts (2), (3), and (4). Count (1) was dismissed. He was sentenced to serve ten days incarcerated to be served in the weekend work program; probation for three years; ordered to complete a first offender alcohol program; his license was restricted for 90 days; and he was ordered to pay approximately \$1,500 in fines and fees. Applicant admitted to the arrest and conviction. In his September 18, 2007 statement, he wrote that he "drove about 50 more feet after the accident." He testified that he did not really agree with the hit and run part of the charges, because his car was "just a few feet down the road," but "that's what they wanted to call it."<sup>5</sup>

A girlfriend of one of Applicant's friends filed a police report in August 2005, stating that Applicant had sexually assaulted her in May 2005. The following is a summary of her report. She met Applicant in about March 2005 at a hacking seminar and he introduced her to her boyfriend, who had been friends with Applicant since high school. After being out at a show together, the three went to Applicant's residence at about 2:00 in the morning. Applicant's roommate said they were making too much noise and asked them to move into Applicant's bedroom. At about 3:45 Applicant asked her if she wanted to take a powder he called "2CB." She stated that Applicant also had psilocybin mushrooms and cocaine in his possession. She took the powder and "passed out completely" shortly thereafter. Over the next six hours she regained consciousness intermittently only to lapse back into unconsciousness. During the times she regained consciousness, she remembered seeing Applicant with his mouth on her exposed neck and breasts and him rubbing his fully clothed body against her. She discussed the incident with her boyfriend the next day. He was also on the bed and saw what she described. He prevented Applicant from removing any more of her clothing and from touching her below the waist. He told her that he did not stop it because he thought that

---

<sup>4</sup> Tr. at 25; Applicant's Answer to SOR; GE 3, 6.

<sup>5</sup> Tr. at 25-26; Applicant's Answer to SOR; GE 1, 3, 4, 8-11.

she and Applicant may also have been dating. She decided to report the incident when all three of them were in a hotel room at a conference they were attending and Applicant again attempted to fondle her breasts through her clothing as she was lying on a bed. Her boyfriend walked into the room as this occurred. This incident was several weeks before she filed the police report. Several months later, she told the police that she did not want Applicant prosecuted and she refused to cooperate further in their investigation. The case was closed.<sup>6</sup>

Applicant admitted that he was in bed with the girl and his friend, and that he touched her breast, but he stated it was fully consensual. He stated that she placed his hand on her breast. He denied that he offered her a drug or that he had any drugs at his house. He stated that she became very mad at him about three months later when he complained about her driving and she thereafter filed the false report.<sup>7</sup>

A one-page report dated September 2006, from the Federal Bureau of Investigation was submitted as GE 2. It listed Applicant's full name, date of birth (DOB), and social security number. It stated:

FBI [city] files contain reference to [Applicant], aka "[nickname]," DOB: [Applicant's DOB], which contain allegations that he is a computer hacker who has gained unauthorized access to computer systems located in [-----] Library System (--LS) in [state], as well as to the computer system of a private company resulting in monetary damages. Additional allegations were that [Applicant] and others used computers at [--]LS to gain access to computers at the [state] Secretary of State's Office. These entities confirmed that computer intrusions had in fact occurred. The allegations were made by a subject of a computer intrusion case as well as a system administrator for one of the systems affected. The files do not reflect that [Applicant] was ever charged with a crime as a result of the allegations.<sup>8</sup>

The report notes at the bottom as standard language that "[t]his document contains neither recommendations nor conclusions of the FBI."<sup>9</sup>

Applicant denied ever illegally hacking into any system and specifically denied hacking into the Library System and Secretary of State's Office, as alleged in the FBI report and in the SOR. Applicant described himself as an "ethical hacker." He admitted that he has used the nickname listed as the aka in the FBI report. His job is to hack into the Government's computer systems with the Government's permission to test their

---

<sup>6</sup> GE 7.

<sup>7</sup> Tr. at 24, 26; GE 3.

<sup>8</sup> GE 2.

<sup>9</sup> *Id.*

security. He also does volunteer work and has hacked into friend's systems with their permission.<sup>10</sup>

Applicant's performance appraisals have been excellent. One appraisal commended him for keeping abreast of industry developments, new hacker techniques, and the latest tools to mitigate risks, and noted him as an expert in those areas. The Government has recognized him for his "outstanding contribution in Information Security" at the Government facility.<sup>11</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, these guidelines are applied 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.

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

---

<sup>10</sup> Tr. at 19, 27-30; Applicant's Answer to SOR; GE 3.

<sup>11</sup> AE A-C.

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**

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 on three occasions on drug-related charges. He was convicted of driving with his blood alcohol over the limit and hit and run. He was a suspect in a sexual assault case and was stopped by the police after taking equipment from the rear of a company. Applicant denied all the criminal conduct with the exception of driving over the limit. I find there is insufficient evidence for a finding that Applicant committed any of the specific criminal acts other than the conviction for driving over the limit and hit and run. The driving over the limit and hit and run conviction establishes AG ¶ 30(a) and (c) as security concerns.

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 acts. AG ¶ 32(b) is not applicable. He admitted committing the DUI and denied the remaining allegations. His denials are some evidence that he did not commit the offenses. AG ¶ 32(c) is applicable to all the allegations except SOR ¶ 1.e. The DUI and hit and run occurred in August 2004, more than three and a half years ago. He has not been arrested since then and he is well regarded by his employer and its Government client. AG ¶¶ 32(a) and 32(d) have been raised for consideration.

### **Guideline M, Use of Information Technology Systems**

The security concern relating to the guideline for Use of Information Technology Systems is set out in AG ¶ 39:

Noncompliance with rules, procedures, guidelines or regulations pertaining to information technology systems may raise security concerns about an individual's reliability and trustworthiness, calling into question the willingness or ability to protect sensitive systems, networks, and information. Information Technology Systems include all related computer hardware, software, firmware, and data used for the communication, transmission, processing, manipulation, storage, or protection of information.

Applicant denied committing the acts alleged in the SOR. The only evidence submitted was a one-paragraph report from the FBI which references allegations made by a subject of a computer intrusion case and a system administrator for one of the systems affected. I find that this report is insufficient evidence for the Government to satisfy their burden to present evidence to establish controverted facts alleged in the SOR. The allegations under Guideline M are concluded for Applicant.

### **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 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. In August 2004, Applicant was intoxicated, drove anyway, and hit two cars. He left the scene of the accident but he was quickly arrested by a police officer. I am concerned that he has not been totally candid about or truly accepted responsibility for the hit and run. He testified that he was "just a few feet down the road," when that is clearly counter to the eye witness police report and to the offense to which he pled guilty. I am also concerned about the prevalence of drug-related incidents in his life. He was arrested three times on drug charges. The alleged victim of the sexual assault also stated that Applicant had drugs. He admitted he had friends that used drugs and that he was driving the car when drugs were found by the police officer. He also admitted that he sold a substance that he told the buyer was an illegal drug. That is at the minimum extremely poor judgment. Applicant has the burden of proving that it is clearly consistent with the national interest to grant him a security clearance. He has consistently put himself in high risk situations where he was at the wrong place, at the wrong time, with the wrong people. Until he is totally candid and can disassociate himself from those situations and people, I cannot find that he has met his burden of persuasion.

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 J:	AGAINST APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	For Applicant

Paragraph 1, Guideline M:	FOR APPLICANT
---------------------------	---------------

Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	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.

---

Edward W. Loughran  
Administrative Judge