



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



In the matter of:	)	
	)	
	)	ISCR Case No. 07-05804
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gina L. Marine, Esquire, Department Counsel  
For Applicant: Pro Se

July 11, 2008

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**Decision**

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HENRY, Mary E., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant's eligibility for access to classified information must be denied.

Applicant submitted his Security Clearance Application (SF 86), on September 20, 2006. On March 12, 2006, 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 March 20, 2008. He answered the SOR in writing on April 2, 2008, and requested a hearing before an administrative

judge. DOHA received the request in April 2008. Department Counsel was prepared to proceed on April 29, 2008, and I received the case assignment on May 2, 2008. DOHA issued a notice of hearing on May 9, 2008, which Applicant received on May 15, 2008. I convened the hearing as scheduled on June 4, 2008. The government offered three exhibits (GE) 1 through 3. All were received and admitted into evidence, except GE 3, which the government withdrew. Applicant testified on his own behalf. He did not submit any exhibits. DOHA received the transcript of the hearing (Tr.) on June 16, 2008 and the record closed on June 4, 2008.

## **Procedural and Evidentiary Rulings**

### **Evidentiary Ruling**

Applicant objected to the admission of GE 4, arguing incorrect dates of birth and addresses in the report. After discussion with Applicant and Department Counsel, I overruled his objection and admitted GE 4 into evidence. (Tr. 17-24)

### **Findings of Fact**

In his Answer to the SOR, dated June 25, 2007, Applicant admitted the factual allegations in ¶¶ 1.a, and 2.a of the SOR, with explanations. He denied the factual allegations in ¶ 2.b of the SOR.<sup>1</sup>

Applicant, who is 25 years old, works in data acquisition for a Department of Defense contractor. He began his current employment in September 2006 and completed his security clearance application (SF-86) immediately.<sup>2</sup>

He graduated from high school in 2000, and currently attends college part-time. He is working on his bachelor's degree. He holds a second degree black belt in Tae Kwon Do. He previously taught Two Kwon Do at a local facility to students between the ages of 10 and 35. He currently lives with his parents.<sup>3</sup>

On June 20, 2001, the police began investigating a complaint against Applicant for furnishing obscene material to a minor. During the investigation, the police arrested Applicant and charged him with eight criminal counts. Applicant hired an attorney to represent him, and denied the allegations which served as the basis for his arrest. In December 2005, the prosecutor dismissed the charges against him without prejudice

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<sup>1</sup>Applicant's response to the SOR at 1.

<sup>2</sup>GE 1 (Security clearance application) at 1, 8.

<sup>3</sup>*Id.* at 5-7; Tr. 26-30.

due to witness lack of co-operation. The prosecutor has not re-filed the charges and the time to file has expired.<sup>4</sup>

Statements by the Applicant as written by the police in the investigative report reflect that before he was read his rights, Applicant told the police that he accidentally sent the obscene material in question to the alleged victim. The investigative report also indicates that the police did not find any illegal material on his computers. In his house, the police found a penthouse and playboy magazine. At the hearing, Applicant denied any wrongdoing.<sup>5</sup>

When he completed his security clearance application, Applicant answered “no” to the following question:

Section 23: Your Police Record

f. In the last 7 years, have you been arrested for, charged with or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150.00 unless the violation was alcohol or drug related.)

Applicant admitted he answered “no” to this question in his response to the SOR. At the hearing, he acknowledged his “no” answer was intentional. He explained that he answered “no” after talking with a Naval recruiter. Prior to accepting his current job, he contacted a Naval recruiter because he was considering enlisting. He specially asked the recruiter if he needed to list his arrest since his case had been dismissed without prejudice and was told no, the same answer he got when he first called a Navy 1-800 number for general information about enlisting. He asked this question because he knew he would probably need a secret security clearance if he was in the Navy. He focused his question on the fact that his dismissal was without prejudice and the need for a secret clearance.<sup>6</sup>

The government mailed Applicant interrogatories, which Applicant answered on January 31, 2008. Question 3 asks:

Available information revealed a search warrant was executed at your residence on June 27, 2001, after allegations were made that you furnished obscene material to minors. You were charged with four counts of Furnishing Harmful Items to Minors, Attempting to Destroy Evidence, Aggravated Assault, and two counts of Tampering with Evidence. All

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<sup>4</sup>GE 4 (Police report); Tr. 35-38, 47-51. I carefully listened to Applicant’s testimony at the hearing and have read the police report and transcript of his testimony. It is not necessary to review all the details of the circumstances surrounding his arrest as it is not necessary for my decision.

<sup>5</sup>GE 4, *supra* note 4, at 29-31, 35, 37, 70.

<sup>6</sup>GE 1, *supra* note 2, at 20-21; Tr. 70-80.

charges were dismissed on December 16, 2005, due to lack of victim cooperation.

Please provide an explanation of the incident(s) associated with these charges. If you have any documents related to this matter, you may submit a copy(ies) with your response.

He responded that a ludicrous allegation had been made against him by a particular individual suffering from mental problems. He explained briefly the events of the evening without going into any details about his arrest or the nature of the charges against him and the subsequent legal process.<sup>7</sup>

Question 4 asked Applicant to explain why he did not list the arrest in June 2001 on his Electronic Questionnaires for Investigations Processing (E-QIP). He stated that he did not answer “yes” to Question f. in Section 23 because he relied upon information given to him by the person who answered the telephone when he called the 1-800 number for Navy recruiting and the Naval recruiter with whom he spoke.<sup>8</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.

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<sup>7</sup>GE 2 (Interrogatories and answers dated January 31, 2008) at 4, 8.

<sup>8</sup>*Id.* at 5, 8.

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 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:

- (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; and
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program.<sup>9</sup>

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<sup>9</sup>AG ¶ 30(b) and (f) are not applicable in this case.

In the instant case, the police arrested and charged Applicant with eight criminal counts for furnishing obscene materials to minors, obstructing a criminal investigation, aggravated assault, and tampering with evidence. Because the police arrested and charged him, AG ¶¶ 31 (a) and (c) apply.<sup>10</sup> The government has established its prima facie case.

Since the government has established its case, Applicant must present evidence of mitigation. Under AG ¶ 32, the Applicant could mitigate the government's security concerns through any of the following conditions:

- (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.<sup>11</sup>

Applicant argues that since the prosecutor dismissed his case without prejudice, he has established mitigation. The dismissal of his case is not the same as proving that he did not commit the crime alleged. It has been seven years since the police arrested him and there is little likelihood that the State will re-file his case. He has not been arrested for any other criminal conduct since this time. Thus, AG ¶ 32(a) has some applicability because the arrest occurred over seven years ago. However, in light of my findings under Guideline E, Applicant is not entitled to full credit under this mitigating condition.

I have considered the remaining mitigating conditions and conclude that none apply.

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<sup>10</sup>The government is not required to establish that an applicant has been convicted of a crime for the disqualifying conditions to apply under AG 31.

<sup>11</sup>Because AG ¶ 30(b) and (f) do not apply, the mitigating condition in AG ¶ 32(e) is not raised.

## 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.

Although the following conduct will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility, this conduct is not at issue in this case:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; and

(b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and the following condition may be disqualifying in this case:<sup>12</sup>

(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.

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

The government established that Applicant omitted material facts from his SF-86 (E-QIP) when he answered “no” to Question f in Section 23 about any criminal arrests in the last seven years. This information is material to the evaluation of Applicant’s trustworthiness to hold a security clearance and to his honesty. For this guideline to apply, Applicant’s omission must be deliberate. He acknowledged in his response to the SOR and at the hearing that he intended to answer “no” to this allegation. I, however, find his rationale for answering “no” not credible and conclude that he intentionally

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<sup>12</sup>The remaining disqualifying conditions, AG ¶¶ 16(c)-16(g) are not raised in this case.

falsified his answer to this question. The government has established its prima facie case under DC AG ¶ 16(a) as to allegation 2.a in the SOR.

For DC AG ¶ 16 (b) to apply to SOR allegation 2.b, the government must establish that Applicant's deliberately falsified material facts when he answered interrogatory questions 3 and 4. Applicant provided a brief response to question 3 which did not provide any details about the circumstances surrounding his arrest. His answer to this question evades the specific request to provide full and complete information about the incidents surrounding his arrest. His answer to question 4, however, complies with the interrogatory information requested. I find that he did not falsify his answer to Question 4, but deliberately avoided providing details about his arrest as requested in Question 3. DC AG 16 (b) applies.<sup>13</sup>

In light of my finding of deliberate falsification, none of the mitigating conditions set forth in AG ¶¶ are 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 was 19 years old when the police arrested and charged with him serious criminal conduct involving young people. Since this time, he has not been arrested for any criminal conduct. Over the last seven years, he has continued studying for his bachelor's degree and worked steadily. He has not been involved with drugs nor does he have any alcohol problems. (See AG ¶ 2(a)(4).)

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<sup>13</sup>See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004)(explaining holding in ISCR Case No. 02-23133 at 5 (App. Bd. Jun. 9, 2004)).

Applicant has not been truthful about his arrest and the facts surrounding his arrest. He denies he did anything wrong in June 2001 and he has this right until the State proves otherwise. However, by failing to acknowledge his arrest as well as the circumstances surrounding it in a forthright manner, he has shown that he cannot be trusted and that he lacks integrity and the capacity to be honest. He is embarrassed and ashamed of his arrest. He is not required to announce his misconduct to the world. He, however, must be totally forthright about it. Because he cannot be completely truthful about his conduct to himself and minimizes it, he places himself in a position to be coerced, pressured, or exploited because of his arrest for providing obscene materials to minors.

Overall, the record evidence leaves me with questions or 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 criminal conduct and personal 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:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is 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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MARY E. HENRY  
Administrative Judge