



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 06-25860
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Nichole Noel, Esquire, Department Counsel  
For Applicant: James E. Watson, Personal Representative

February 15, 2008

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

ABLARD, Charles, Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on February 1, 2006. On June 27, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J and H 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 July 11, 2007. He answered the SOR in writing on July 24, 2007, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on August 13, 2007. I received the case assignment on October 4, 2007, after it was transferred from another judge who had received it on August 21, 2007. DOHA issued a notice of hearing on November 7, 2007, and I convened the hearing as scheduled on November 29, 2007. The

government offered three exhibits (Exh.) which were received without objection. Applicant and three witnesses testified on his behalf. He submitted 23 exhibits (Exh. A-MM) which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on December 7, 2007. Based upon a review of the case file, pleadings, exhibits, testimony, and the applicable statutory provision relating to an applicant eligibility for access to classified information is denied.

### **Procedural and Evidentiary Rulings**

#### **Motion to Amend Answer to SOR**

At the hearing it became apparent that Applicant's answer to the SOR was confusing and inconsistent with the pleadings. His answers lettered K-S were repetitive of answers B-J and two paragraphs were transposed in answers C and D. Applicant moved to amend the answer to which the government agreed. The amended answer is reflected in the file as an appendage to the answer.

#### **Evidence Rulings**

On motion of the government two sets of documents offered by Applicant were excluded. These were Exhibits AA and HH both of which related to criminal conduct of Applicant's former wife after their divorce and were not relevant to the allegations relating to Applicant. One other document, Exhibit G 2, relating to a police report in 2002 about Applicant's former wife in relation to the allegation against Applicant in SOR ¶ 1.g. was admitted over the objection of the government (Tr. 21, 22).

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in the SOR of criminal conduct and drug involvement, with explanations.

Applicant is a 30-year-old employee of a defense contractor who tests vehicles for the Army. During an eight year period between 1996 and 2004 he was the subject of eight criminal conduct arrests and investigations. Between 1994 and 2003 he used marijuana approximately 30 times and methamphetamine approximately 15 times during periods of probation for the criminal conduct. He has had no law enforcement problems since 2004 but was released from probation in June 2007.

Applicant was married in May 2002 and separated in February 2004. When they were married, his wife had one child from a previous relationship and was pregnant with Applicant's child. They were legally separated in May, 2002, and he was married again in 2006. He has one child less than a year old and a step child from the second marriage union.

Many of the incidents that are the subjects of the allegations of criminal conduct against Applicant occurred during the period immediately before and during his first marriage as a result of a difficult relationship and marriage.

A summary of the allegations of criminal conduct follows:

1. Applicant was arrested in 1996 and charged with burglary and larceny. He was found guilty of larceny and sentenced to three years probation. He was asleep in the back of vehicle traveling with three other men when they stopped to steal a stereo from a car. All were charged and convicted.
2. He was arrested in 1998 for speeding and stop sign violation. He was found guilty and fined \$238.
3. In February 2000, he was charged with criminal trespass and criminal damage (deface). The case arose from being stuck in the mud in a farm field. He paid for damages to the property and charges were dropped.
4. On June 26, 2002, he was arrested and charged with possession of drug paraphernalia and sentenced to six months in jail, suspended, and three years probation. The paraphernalia belonged to his wife but he said it was his to prevent her from having jail time since she was pregnant at the time.
5. He was arrested and charged with speeding one month later in 2002, found guilty and fined \$123.
6. He was arrested and charged with reckless driving in June, 2003. He was found guilty and sentenced to 30 days in jail, suspended, and fined \$185 with two years probation.
7. Two months later in 2003, he was arrested and charged with two counts of domestic violence. He was convicted and sentenced to fine of \$280 suspended with \$50 restitution, two years probation added to his prior probation and ordered to attend domestic violence counseling.
8. Three months later in 2003, he was arrested again on the same charges as the last case and sentenced to six months in jail, suspended, a fine of \$550, three years of probation ending on June 22, 2007 and again ordered into domestic violence counseling. This incident arose during a dispute with his wife and resulted in damage to their automobile.
9. In April 2004, he was charged with consuming liquor in public and paid a \$100 bond which was returned to him at the conclusion of the case.
10. Three months later in 2004, he was investigated by the police concerning an allegation of child abuse which was concluded in his favor.

A summary of the allegations of drug use follows:

1. Between 1994 and 2003, he used marijuana approximately 30 times.
2. During a period of 22 months in 2002 and 2003, he used methamphetamine approximately 15 times.
3. These uses of illegal drugs occurred while serving periods of probation as set forth in the criminal conduct summary.

Applicant is highly regarded by his supervisor who finds him to be dedicated and professional in his work and among the top 12 in a field of 110 employees (Tr. 46). He is admired by family friends and colleagues for his work ethic and his ability to turn his life around in the last three years (Tr. 25-50 and Exhs. KK, LL, and MM). A large part of this change is attributed to his second wife. He has received several awards from his employer for his work (Exh. NN).

Several of his family members and family friends who testified for him have served as mentors for him. He shows strong indication of an intent to maintain the good conduct that he had the past three years. His personal representative in this matter who is retired military also has provided counseling.

### **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. 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 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.

The guideline notes several conditions that could raise security concerns for an applicant. One of them that may be a disqualifying condition (DC) is a single serious crime or multiple lesser offenses (AG ¶ 31.a).

Possible mitigating factors under the guideline that could be applicable are that so much time has elapsed since the criminal behavior happened that it does not cast doubt on the individual’s reliability, trustworthiness, or good judgment (AG ¶ 32.a), or there is evidence of successful rehabilitation including but not limited to passage of time without recurrence of criminal activity, remorse, and a good employment record (AG ¶ 32.d).

I conclude that the first mitigating factor relating to the passage of time is applicable to the first three allegations in the above enumeration. The first allegation in 1996 was when he was 18 years old (SOR ¶ 1.j); the second in 1998 was for speeding and was relatively insignificant for which he paid a fine (SOR ¶ 1.i); and the third was dismissed after he made restitution to the aggrieved farmer (SOR ¶ 1.h).

The other allegations in the SOR are too recent and provide too much of a pattern of bad conduct to warrant a finding of mitigation. This is particularly so since several occurred while he was on probation for earlier offenses.

The second mitigating factor raises the issue of rehabilitation. While Applicant's conduct during the past three years has been without fault, this is a relatively brief period of time considering the stretch of time during which the alleged criminal conduct occurred so I conclude that it is premature to apply the mitigating factor at this time.

### **Guideline H Drug Involvement**

The security concern relating to guideline for Drug Involvement is set forth in AG ¶ 24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

(a) Drugs are defined as mood and behavior altering substances, and include:

(1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),

AG ¶ 26 provides several conditions that could mitigate security concerns:

(a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence;

While a period of over three years has elapsed since his use of illegal drugs and he has apparently removed himself from contact with drug users, in view of the extensive time of the use of drugs and the fact that they were used while he was on probation, it is premature to conclude that the security concern for drug use has been 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 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.

While Applicant has shown evidence of rehabilitation and changes in his life style through the effect of his second marriage, his help from friends and family, and his actions in removing himself from contact with drugs and users of drugs, the period of time has not been sufficient to warrant a whole person finding in his favor. The fact that he fell under the influence of others after he had reached maturity, and continued to use drugs even while on probation for two of the criminal matters raises questions about his judgment and rehabilitation that preclude the grant of a security clearance at this time.

After considering all the evidence in its totality, I conclude that Applicant has not mitigated the security concerns arising from his criminal conduct and drug use and it is premature to grant him a security clearance.

## **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 : Against Applicant  
Subparagraph 1.c.: Against Applicant  
Subparagraph 1.d.: Against Applicant  
Subparagraph 1.e.: Against Applicant  
Subparagraph 1.f.: Against Applicant  
Subparagraph 1.g.: Against Applicant  
Subparagraph 1.h.: Against Applicant  
Subparagraph 1.i.: For Applicant  
Subparagraph 1.j.: For Applicant  
Subparagraph 1.k.: For Applicant

Paragraph 2, Guideline H: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant

Subparagraph 2.b : Against Applicant

Subparagraph 2.c.: Against Applicant

**Conclusion**

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

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CHARLES D. ABLARD  
Administrative Judge