



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



In the matter of: )  
)  
) ISCR Case No. 06-20385  
SSN: )  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Daniel F. Crowley, Esquire, Department Counsel  
For Applicant: *Pro se*

October 31, 2008

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**Decision**

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O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised by his drug involvement, criminal conduct, sexual conduct, and personal conduct. Accordingly, his request for a security clearance is denied.

On July 13, 2005, Applicant submitted a Questionnaire for Sensitive Positions (SF-86) to request a security clearance required as part of his employment with a defense contractor (FORM, Item 4). After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant's request.

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<sup>1</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

On May 8, 2008, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision – security concerns addressed in the Directive under Guideline H (Drug Involvement), Guideline J (Criminal Conduct), Guideline D (Sexual Conduct), and Guideline E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).<sup>2</sup>

Applicant received the SOR (FORM, Item 3) on May 13, 2008. He signed his Answer on May 19, 2008, in which he admitted to the following allegations in the SOR: ¶¶ 1.a, 1.b. and 1d under Guideline H; ¶¶ 2.a, and 2.b under Guideline J; ¶¶ 3.a, 3.b. and 3c under Guideline D; and ¶¶ 4.a, and 4.b. under Guideline E. He denied SOR ¶¶ 1.c, which concerns the timing of his non-judicial punishments when he was serving in the U.S. Navy; and 2.c, which is a cross-reference to 1.c. In his Answer, Applicant also requested a decision without a hearing.

On August 4, 2008, DOHA Department Counsel submitted a file of relevant materials (FORM)<sup>3</sup> in support of the government's preliminary decision. Applicant received the FORM on August 12, 2008, and was given 30 days to file a response. He did not submit a response to the FORM by the September 12, 2008 deadline. I received the case on October 14, 2008.

### **Findings of Fact**

Applicant's admissions in response to the SOR are admitted as fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the FORM, I make the following additional findings of fact.

Applicant is a 54-year-old data communications technician employed by a defense contractor. Applicant has one daughter, born in 1977 (FORM, Item 4). The record is unclear as to his current marital status.

Applicant started smoking marijuana in 1969, at the age of 15. Several years later, in 1974, he joined the U.S. Navy. His DD-214s (FORM, Item 6) indicate that his rate was Electrician's Mate/Fireman (E-3) and Missile/Missile Checkout Technician 2 (E-5). He was granted his first security clearance in December 1974 (FORM, Item 4). Three times during his naval service, Applicant tested positive for TCH (marijuana). Although the SOR states that these tests occurred in 1983, I find that they occurred in 1976, 1983 or 1984, and in 1986 (FORM, Item 10). He does not recall the details of the

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<sup>2</sup> Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

<sup>3</sup> See Directive, Enclosure 3, Section E3.1.7. The FORM included 13 documents (Items 1 - 13) proffered in support of the government's case.

first failed random drug test in 1976, but in 1983 or 1984, he tested positive while serving at sea and was sent to Captain's Mast. He was removed from submarine duty and re-assigned to a surface ship. In 1986, while stationed on that ship, he smoked hash while on liberty. Subsequently, he tested positive for TCH and was discharged Under Other Than Honorable Conditions (FORM, Item 10).

At the time of his discharge in 1986, Applicant decided to accept drug treatment offered by the Navy. He participated in both group and individual counseling, but does not recall receiving a diagnosis or prognosis during his 30-day inpatient treatment program. Although he did abstain from marijuana following treatment, he later relapsed, "I complied with the treatment for 2-3 years, exact date not recalled. I started smoking marijuana again for no reason." (FORM, Item 10).

Applicant smoked marijuana sporadically between 1989 and 2005, and three to four times per year between 2005 and 2007 (FORM, Item 10, page 6). When he completed his security clearance application in July 2005, he denied any use of illegal drugs during the seven years prior to completing the application (FORM Item 4). The last date of use indicated in the record is approximately mid-October 2007, when Applicant smoked marijuana two weeks before his security clearance interview (FORM, Item 10). He states that he is not dependent on the drug, and it does not affect his judgment or his ability to hold a confidence. Applicant stated that he has no intent to use marijuana in the future, but also that he "would possibly use marijuana if it were presented." (FORM, Item 10).

In June 1993, Applicant was arrested and charged with Aggravated Sexual Battery and Taking Indecent Liberties with Children stemming from incidents that occurred on December 1, 1992, March 1, 1993, and May 1, 1993 (FORM, Items 7 - 10). Applicant states his spouse, stepdaughter, and two neighbor children were in his home. While Applicant tickled one of the children, his hand touched the child's breast. He does not recall the incidents that generated the other counts of indecent liberties, and the "details are fuzzy." (FORM, Item 10). He states that violence was not involved in any of the incidents, and that his classification as a "violent sex offender" (FORM, Item 9) resulted from his conviction on three counts of Taking Indecent Liberties with Children.

Applicant pled guilty to three counts of the Indecent Liberties and was sentenced to five years on each count, suspended. He served 30 days in prison and was placed on supervised probation, which ended in mid-2000. Applicant is a registered violent sex offender and is required to renew his registration on the state Sex Offender Registry every 90 days (FORM, Item 9). He notes that his family, friends, and employer are aware of his status (FORM, Item 10).

As part of his sentence, Applicant was required to participate in counseling. He attended sessions with two different counseling centers in late 1994, but did not believe that either was helpful. In Fall 1995, he attended weekly one-hour counseling sessions for two to three months at a third counseling center. He discontinued the therapy, but does not remember the reason. In approximately late 1996, Applicant began counseling

that continued for three years, until December 1999. He does not remember receiving a diagnosis or prognosis at any of the counseling he attended (FORM, Item 10).

### **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG).<sup>4</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines. Commonly referred to as the “whole person” concept, these factors are:

(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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline G (alcohol consumption) at AG ¶ 21.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest<sup>5</sup> for an Applicant to either receive or continue to have access to classified information. The government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an Applicant. Additionally, the government must be able to prove controverted facts alleged in the SOR. If the government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the government's case. Because no one has a “right” to a security clearance, an Applicant bears a heavy burden of persuasion.<sup>6</sup> A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the

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<sup>4</sup> Directive. 6.3.

<sup>5</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>6</sup> See *Egan*, 484 U.S. at 528, 531.

requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an Applicant’s suitability for access in favor of the government.<sup>7</sup>

## Analysis

### Guideline H, Drug Involvement

Under Guideline H, AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

Applicant’s admits to SOR ¶¶ 1.a, 1.b. and 1.d. He denies allegation 1.c., but only as to the dates on which his non-judicial punishments occurred. He admits to the substance of the allegation, that he was punished three times for illegal drug use while serving in the Navy (FORM, Item 10).

Available information requires application of the disqualifying conditions listed at AG ¶ 24(a) (*any drug abuse*); AG ¶ 24(b) (*testing positive for illegal drug use*); AG ¶ 24(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); AG ¶ 24(g) (*any illegal drug use after being granted a security clearance*); and AG ¶ 22(h) (*expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use*).

In his signed affidavit (FORM Item 10), Applicant admits to using marijuana, and to testing positive on three random drug tests administered to him during his service in the Navy. The evidence shows that he began using marijuana in 1969, was granted his first security clearance in 1974, and failed his first random drug test in 1976. In addition, Applicant indicated in his response to Question 26(b) of his application that his security clearance was revoked in 1983 because of his use of marijuana (FORM, Item 4). These facts indicate that he was using marijuana while he held a security clearance, and support application of AG 24(g). Applicant possessed an illegal drug on the numerous occasions over the almost 40 years that he used marijuana. Finally, Applicant failed to express a convincing intent to end his marijuana use, when he stated that he “...would possibly use marijuana if it were presented.” (FORM Item 10).

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<sup>7</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Two mitigating conditions are relevant: AG ¶ 24(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*) and AG ¶ 24(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; and,*
- (4) *a signed statement of intent with automatic revocation of clearance for any violation).*

Neither mitigating condition applies. Applicant's illegal drug use is not in the distant past, since his last known use occurred only one year ago. Moreover, Applicant shows little interest in discontinuing his drug involvement – he used marijuana in October 2007, in the midst of his security clearance investigation. Applicant's actions, and his statement that he might use it again if the opportunity arose, demonstrate that he has no commitment to avoiding marijuana in the future.

#### **Guideline J, Criminal Conduct**

The security concern pertaining to criminal conduct is that

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 ¶ 30).

Here, Applicant's admission that he was convicted of three counts of Taking Indecent Liberties with a Minor, a felony, (FORM, Item 10), requires application of both AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*). Applicant denies allegation 2.c., stating that it was "Not clear" (FORM, Item 2). It appears that he did not understand it referred to the non-judicial punishment alleged in ¶ 1.c. Applicant's admission to the substance of allegation 1.c. – that he received three non-judicial punishments for drug use while serving in the Navy – carries over to allegation 2.c., which has independent security significance under Guideline J.

Two mitigating conditions under Guideline J have potential application: AG ¶ 32(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*) and AG ¶ 32 (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).*

A substantial amount of time has passed since Applicant's sex-crime conviction and his non-judicial punishments. However, given the gravity of the sexual crime, and the lack of a sincere intent to discontinue drug use, Applicant's judgment and reliability remain in doubt. In addition, Applicant has provided no evidence of remorse, rehabilitation, or a mature understanding of the effect his conduct has had on his own life or the lives of others. Neither AG ¶ 32(a) nor AG ¶ 32(b) can be applied.

## **Guideline D, Sexual Conduct**

AG ¶ 12 expresses the security concern under Guideline D:

Sexual behavior that involves a criminal offense, indicates a personality or emotional disorder, reflects lack of judgment or discretion, or which may subject the individual to undue influence or coercion, exploitation, or duress can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. No adverse inference concerning the standards in this Guideline may be raised solely on the basis of the sexual orientation of the individual.

Applicant's admissions to all allegations under guideline D raise serious security concerns. The following disqualifying conditions are relevant: AG ¶ 13(a) (*sexual behavior of a criminal nature, whether or not the individual has been prosecuted*) and AG ¶ 13(d) (*sexual behavior of a public nature and/or that reflects lack of discretion or judgment*). Although Applicant claims not to remember all the details of the three incidents in 1993, he pled guilty and was convicted of felonious sexual conduct. As a result, he is listed on his state's registry of sex offenders and is required to periodically update his registration (FORM, Items 7, 8 and 9). AG ¶ 13(a) applies. Applicant's lack of judgment implicates AG ¶ 13(d). In fact, Applicant's conduct goes beyond poor judgment; his mistreatment of children, the most vulnerable members of society, demonstrates a willingness to breach the trust relationship that should exist between adults and children.

Two mitigating conditions are relevant: (AG ¶ 14(a) (*the behavior occurred prior to or during adolescence and there is no evidence of subsequent conduct of a similar nature*) and AG ¶ 14(b) (*the sexual behavior happened so long ago, so infrequently, or under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's current reliability, trustworthiness, or good judgment*). Although there is no evidence of recent similar conduct, Applicant's behavior did not occur when he was an adolescent (AG ¶ 14(a), On the contrary, he was a mature adult of 39 years, married, with a daughter and step-daughter (FORM, Items 4 and 10). AG ¶ 14(b) is potentially applicable because the criminal conduct occurred 15 years ago. However, because the record contains no diagnosis on which to gauge the severity of Applicant's condition, and no prognosis as to the possibility of recurrence, I cannot predict

confidentially that Applicant will not engage in such conduct in the future. AG ¶ 14 (b) cannot be applied.

### **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.

Applicant admits to both allegations under Guideline E. Applicant's conduct, including his discharge from the Navy because of long-standing drug use, his repeated positive drug tests, his criminal sexual conduct, and his unwillingness to commit to abstaining from the use of an illegal drug, all indicate not only a failure of good judgment, but a persistent unwillingness to conform to the rule of law.

In addition, AG ¶ 16(a) applies (*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*). When he completed his security clearance application in July 2005, Applicant disclosed that he used an illegal drug from 1983 to 1986, approximately 20 years in the past, but failed to disclose his recent use. Later, in his 2007 affidavit (FORM, Item 10), he admitted that he used marijuana sporadically from 1989 to 2005, including three to four times during 2005. His statement indicated that he had been using marijuana for years, including during the seven years before he completed his application. Applicant admits in his Answer that he falsified the information he provided to the government (FORM, Item 2).

The potentially applicable mitigators are AG ¶ 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) and AG ¶ 17(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). However, these conditions do not apply. The record contains no evidence that Applicant attempted to inform the government of the true extent of his drug use, and AG ¶ 17(a) cannot be applied. In addition, Applicant's falsification cannot be considered insignificant under AG ¶ 17(c). The government relies on information provided by Applicants, and deliberate falsification both undermines the security clearance process, and casts serious doubts on an Applicant's trustworthiness.



## Whole Person Concept

I have evaluated the facts presented and have applied the appropriate adjudicative factors under the four cited Guidelines. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a).

Applicant is 54 years old and presumed to be a mature, responsible adult. Over almost four decades, he continued to use marijuana, with no true intent to stop, despite the negative consequences it has had on his life. He has failed to demonstrate rehabilitation or to express remorse for his sexual misconduct. In response to the government's concerns about his drug use and arrest for sexual misconduct, he offered no explanation or mitigation, or even acknowledgment of the gravity of his conduct. Absent such information, the record presents no evidence sufficient to overcome the government's security concerns. A fair and commonsense assessment<sup>8</sup> of the available information bearing on Applicant's suitability for a security clearance shows he has not satisfied the doubts about his ability or willingness to protect the government's interests. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.<sup>9</sup>

## Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Paragraph 3, Guideline D:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	Against Applicant

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<sup>8</sup> See footnote 4, *supra*.

<sup>9</sup> See footnote 7, *supra*.

Paragraph 4, Guideline E:

AGAINST APPLICANT

Subparagraph 4.a:

Against Applicant

Subparagraph 4.b:

Against Applicant

**Conclusion**

In light of all of the foregoing, it is not clearly consistent with the national interest to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

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RITA C. O'BRIEN  
Administrative Judge