



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



In the matter of:	)	
	)	
	)	ISCR Case No. 12-11821
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Jeff Nagel, Esquire, Department Counsel  
For Applicant: Ryan C. Nerney, Esquire

April 19, 2016

---

**Decision**

---

CEFOLA, Richard A., Administrative Judge:

Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP) on June 28, 2012. On October 1, 2015, the Department of Defense (DOD) 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 adjudicative guidelines (AG), effective within the Department of Defense after September 1, 2006.

Applicant acknowledged receipt of the SOR on October 14, 2015. He answered the SOR in writing through counsel on October 30, 2015, and requested a hearing before an Administrative Judge. The Defense Office of Hearings and Appeals (DOHA) received the request soon thereafter, and I received the case assignment on January 5, 2016. DOHA issued a notice of hearing on January 20, 2016, and I convened the hearing as scheduled on February 9, 2016. The Government offered Exhibits (GXs) 1

through 8, which were received without objection. Applicant testified on his own behalf, as did three character witnesses, and submitted Exhibits (AppXs) A through M, which were received without objection. DOHA received the transcript of the hearing (TR) on February 17, 2016. The record closed on February 9, 2016. Based upon a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

In his Answer to the SOR, Applicant denied the factual allegations in of the SOR with explanations.

#### **Guideline J - Criminal Conduct & Guideline H - Drug Involvement**

Applicant is 54 years old, has a high school education, and has been working for a government contractor for about a year. (TR at page 67 line 11 to page 69 line 4.)

2.a. and 2.c.<sup>1</sup> Applicant used illegal stimulants: methamphetamine, speed, crystal meth and ecstasy, over a period of about 24 years, from 1980~1996 and again from 2000~2008, to the point of addiction. (TR at page 72 lines 15~25, at page 91 line 23 to page 92 line 13, at page 94 line 2 to page 96 line 4, and GX 7.) He participated in a drug rehabilitation program in 2008 (TR at page 79 line 2 to page 80 line 16), has not used any illegal substance for the last eight years (TR at page 74 line 17 to page 75 line 21, at page 80 line 17 to page 84 line 12, and AppXs A~C), and has submitted a signed statement of intent with automatic revocation of clearance for any “illegal drug use” (AppX B).

2.b. and 2.c. Applicant sold illegal stimulants, including methamphetamine, speed, crystal meth and ecstasy, over a period of about 15 years, from 1988~1996 and again from 2000~2007, to support his addiction. (TR at page 73 lines 1~17, at page 96 lines 5~16, and GX 7.) In 1988, he estimated he sold illegal substances about 115 times. (GX 7 at page 7.)

1.o. In June of 1992, Applicant was arrested and charged with “DUI alcohol.” (TR at page 97 lines 2~23, at page 99 line 18 to page 100 line 2, and GX 3 at page 1.) For “time served [he was] released by law enforcement.” (GX 3 at page 1.)

1.n. In February of 1995, Applicant was arrested and charged with “Possession of a controlled substance,” “Driving while license suspended/revoked” and for “Fail to appear: written promise.” (GX 3 at page 1.) He was “released on own recognizance . . . for time served.” (*Id.*)

---

<sup>1</sup>The alleged acts of Criminal Conduct and Drug Involvement will be discussed chronologically, and not in the order they appear on the SOR.

1.m. In August of 1997, Applicant was arrested for and pled guilty to “Offensive words in public place.” (Tr at page 97 line 24 to page 98 line 11, and GX 3 at page 1.) He was “sentenced to 2 years probation and \$199 in fines.” (GX 3 at page 1.)

1.l. In August of 1999, Applicant was arrested for and found guilty of “DUI Alcohol.” (Tr at page 98 line 11 to page 99 line 18, and GX 3 at page 1.) He was “sentenced [to] 2 days in jail, 5 years court probation and \$1,547.00 fine.” (GX 3 at page 1.)

1.k. In January of 2002, Applicant was arrested for and pled guilty to “Exhibit deadly weapon other than firearm,” “Driving while license suspended or revoked” and “No insurance.” (Tr at page 100 line 3 to page 101 line 21, and GX 3 at page 2.) He was “sentence[d] to 3 days in jail and 3 years court probation” for the weapon charge, and “sentence[d] to 30 days in jail” for the driving related charges. (GX 3 at page 2.)

1.j. This appears to be the same offense as subparagraph 1.k., directly above. (Tr at page 100 line 3 to page 101 line 21, and GX 3 at page 2.)

1.i. This also appears to be the same offense as subparagraph 1.k., above. (Tr at page 101 line 22 to page 102 line 1, and GX 3 at page 3.)

1.h. In December of 2003, Applicant was arrested for and pled guilty to “Obstruct[ing] officer,” “Prowling/loitering” and “Use/under the influence of controlled substance.” (GX 3 at page 3.) He was “sentenced to 3 years probation, \$1,415 fines, [and] to serve 90 days in jail.” (*Id.*)

1.g. This appears to be the same offense as subparagraph 1.h., directly above. (Tr at page 102 lines 11~18, and GX 3 at page 3.)

1.f. In January of 2005, Applicant was arrested for and pled nolo contendere to “Driv[ing] while license suspended/revoked.” (Tr at page 103 line 1 to page 104 line 17, and GX 3 at page 4.) He was “sentenced to 180 days in jail.” (GX 3 at page 4.)

1.e. This appears to be the same offense as subparagraph 1.f., directly above. (GX 3 at page 3.)

1.d. In January of 2006, Applicant was arrested for and pled nolo contendere to “Burglary: 2<sup>nd</sup> Degree,” “Possession of controlled substance” and “Use/under the influence of controlled substance.” (Tr at page 104 line 19 to page 105 line 12, and GX 3 at page 4.) He was “sentence[d] to 15 days in jail, 3 years court probation and \$135.00 in fines” for the burglary charge, and “sentence[d] to 3 years court probation and \$420.00 in fines” for the controlled substance related charges. (GX 3 at page 4.)

1.c. This appears to be the same offense as subparagraph 1.d., directly above. (GX 3 at page 4.)

1.b. In November of 2006, Applicant was arrested for “Possession of controlled substance” and “Use/under the influence of controlled substance.” (Tr at page 105 line 14 to page 106 line 19, and GX 3 at page 5.) As a result of this arrest, his previous probation (from 1.d., above) was “reinstated and modifie[d]”; and as a result, he was “senten[ed] to serve 68 days in jail and \$200.00 in fines.” (GX 3 at page 5.)

1.a. In February of 2008, Applicant was arrested for “Possession of controlled substance,” “Use/under the influence of controlled substance” and “Drive while license suspended/ revoked.” (Tr at page 106 line 20 to page 109 line 25, and GX 3 at pages 5~6.) He pled nolo contendere to the driving charge, and was “sentenc[ed] to serve 270 days in jail.” (GX 3 at page 6.) As a result of this arrest, his previous probation (from 1.b., above) was “reinstated and modifie[d]”; and as a result, he was “senten[ed] to serve 365 days in jail.” (GX 3 at page 5.) It is unclear how much time in jail Applicant served, but he testified credibly that he “never did more than four months in jail at a time.” (TR at page 106 lines 9~23.)

### **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 commonsense decision. According to AG Paragraph 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 Paragraph 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 Paragraph E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive Paragraph E3.1.15, the Applicant is responsible “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**

Paragraph 30 of the adjudicative guidelines sets out the security concern relating 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.

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(a) provides that “*a single serious crime or multiple lesser offenses,*” may raise security concerns. By his own admission, Applicant was addicted to illegal substances, and was a drug dealer for about 15 years. Paragraph 31(c) provides that an “*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted,*” may also raise security concerns. He has ten arrests over a period of about 16 years. These arrest resulted in at least six convictions. I find no countervailing mitigating condition that is applicable here. Under Subparagraph 32(a), it may be mitigating when “*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.*” Despite Applicant’s eight years of good behavior for which he is to be commended; in light of his extensive, very serious, past criminal conduct, it is too soon to say with confidence such conduct is unlikely to recur.

## **Guideline H - Drug Involvement**

The security concern relating to the guideline for Drug Involvement is set out in Paragraph 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.

The guideline also notes several conditions that could raise security concerns. Under Subparagraph 25(a), "*any drug abuse*," may be disqualifying. In addition, "*illegal drug sale*" under Subparagraph 25(c) may be disqualifying. Here, the Applicant used drugs for 24 years to the point of addiction. He also sold them on countless occasions over a period of 15 years. Again, I find no countervailing mitigating condition that is applicable here. Under Subparagraph 26(a) it may be mitigating where "*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.*" It is too soon to say that Applicant past extensive drug involvement is not a security concern. Perhaps, more than a decade of no such involvement would result in a decision more favorable to the Applicant's cause. However, at present, drug involvement is found against 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. Under AG Subparagraph 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.

The Administrative Judge should also consider the nine adjudicative process factors listed at AG Subparagraph 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. Those who know the Applicant in the

workplace speak most highly of him. (TR at page 24 line 17 to page 66 line 1, and AppXs K and L.) However, 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 admitted Criminal Conduct and Drug Involvement.

### **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
Subparagraphs 1.a.~1.o.:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a.~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 the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Richard A. Cefola  
Administrative Judge