

DATE: March 19, 2007

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In re:

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SSN: -----

Applicant for Security Clearance

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CR Case No. 05-08540

## **DECISION OF ADMINISTRATIVE JUDGE**

**JUAN J. RIVERA**

### **APPEARANCES**

#### **FOR GOVERNMENT**

Stephanie C. Hess, Esquire

#### **FOR APPLICANT**

*Pro Se*

### **SYNOPSIS**

Applicant is a 51-year-old technical illustrator employed by a defense contractor. Between 1983 and 2004, he was arrested five times, charged once with possession of marijuana, four times with DUI, and convicted three times for DUI. In 2003, he deliberately failed to disclose in his security clearance application his 2002 DUI charge, two 1983 DUI convictions, and his use of marijuana while having access to classified information. Applicant failed to present sufficient evidence to mitigate security concerns raised by his criminal conduct, alcohol consumption, drug involvement, and personal conduct. Clearance is denied.

### **STATEMENT OF THE CASE**

On October 9, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns under Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), and Guideline E (Personal Conduct). The SOR informed Applicant that, based on information available to the government, DOHA adjudicators could not make a preliminary affirmative finding that it is clearly consistent with the national interest to grant him access to classified information. <sup>(1)</sup> On November 12, 2006, Applicant answered the SOR (Answer), <sup>(2)</sup> and requested a clearance decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) which was mailed to Applicant on December 13, 2006. He acknowledged receipt of the FORM on December 18, 2006, and did not object to anything contained in the FORM or submit additional information for consideration within the 30-day time period provided to him. The case was assigned to me on February 23, 2007.

### **FINDINGS OF FACT**

Applicant admitted the SOR allegations in ¶¶1.a - 1.e, 2.a, 3.a, and 4.a - 4.c with explanations. He denied the SOR allegations in ¶¶2b and 2.c. His admissions to the SOR allegations are incorporated herein as findings of fact. After a

thorough review of the FORM evidence, I make the following additional findings of fact:

Applicant is a 51-year-old technical illustrator. (3) He has worked for a defense contractor since 1983. (4) From June 1975 to June 1978, he served in the U.S. Army and achieved the rank of Private First Class (E-3). He was discharged after completion of his time in service. He married his first wife in September 1984, and they were divorced in October 2003. He has two daughters, ages 13 and 14, out of this marriage. In his response to the DOHA interrogatories, (5) Applicant indicated he has remarried. He provided no additional information concerning the particulars of his marriage, or as to whether he has any additional children. He disclosed no education beyond junior high school. DOD granted him access to classified information at the secret level on February 4, 2002. (6)

The allegations against Applicant are described in the same order as in the SOR:

a. In December 2004, he was charged with possession of marijuana and driving with a suspended license. (7) He entered into a pre trial agreement, pled to disorderly conduct, and was fined \$2,500. Applicant explained he went to visit his sister with his girlfriend. She was driving and got sick. He took the wheel and shortly thereafter he was stopped by police officers. He had a full pipe containing marijuana in his shirt pocket when he was arrested.

Applicant explained the marijuana was a present for his sister. He and his sister used marijuana together during high school. After high school, Applicant stopped using marijuana. Approximately in 1994, he got reacquainted with his sister, and since then, they have been infrequently smoking marijuana when they get together. He has used marijuana at least four times during the last 10 years. Applicant stated he has not used marijuana since 2004 and does not intend to do so ever again. Applicant averred he has learned his lesson.

b. In January 2004, he was charged with DUI and leaving the scene of an accident. Applicant explained that the police officers were upset because he left the scene of an accident and treated him poorly. He refused to take a blood or breath alcohol test because of the way the police officers treated him. He stated the charges were dismissed as a result of errors made during his arrest. (8)

c. In March 2004, he was convicted of DUI for an incident that occurred in October 2002. He was sentenced to to pay a fine, to serve 24 hours in jail, to be placed on 12 months' probation, to attend DUI school, and to complete 40 hours of community service.

d. On January 29, 1983, he was charged with DUI, driving without a license, and leaving the roadway. On July 1983, he was convicted of DUI and sentenced to 12 months jail (suspended), and to be fined \$750.

e. On or about January 5, 1983, he was charged with driving under the influence (DUI) and driving on the wrong side of the road. He pled *nolo contendere* to the DUI. He was convicted of DUI and required to pay a fine.

Concerning his alcohol consumption, Applicant explained he developed a drinking problem while serving in the Army. (9) He believes he tends to drink and drive when he suffers from severe depression and stress. He identified two periods in his life that caused his alcohol consumption problems. In 1983, when he failed school and was pushed out of his home, and in 2002 when he separated from his wife of 20 years. He claimed not having any alcohol or drug related problems while married to his first wife (1984-2002). After his divorce he dated a woman who was an alcoholic and used drugs. After she died, he met his current wife and she does not drink alcohol or use drugs. He is happily married and lives in a healthy environment. Applicant "decided to stop drinking as much as possible" after January 2004. (10) Since then, he only consumes a couple of beers in special occasions. He has never participated in any alcohol or drug rehabilitation treatment. (11)

In his October 2003 security clearance application, (12) Applicant answered "Yes" to question 24, which asked whether he had ever been charged with or convicted of any offenses related to alcohol or drugs. Applicant disclosed a December 1980 DUI conviction. (13) He failed to disclose his alcohol and/or drug related charges/convictions of October 2002 (SOR ¶1.c), January 29, 1983 (SOR ¶1.d), and January 5, 2003 (SOR ¶1.e).

Applicant also answered "No" to question 27, which asked whether in the last seven years he had illegally used any controlled substance (i.e., marijuana). Applicant failed to disclose he had used marijuana on at least four occasions between 1996 and 2003. [\(14\)](#)

Applicant further answered "No" to question 28, which asked whether he had ever illegally used a controlled substance while possessing a security clearance. He failed to disclose he had used marijuana after being granted a security clearance in 1993. [\(15\)](#) Applicant admitted that he deliberately falsified his answers to SF 86. He explained he was embarrassed to tell the truth. [\(16\)](#)

## **POLICIES**

The Directive sets forth adjudicative guidelines which must be considered in evaluating an Applicant's eligibility for access to classified information. Foremost are the Disqualifying and Mitigating conditions under each adjudicative guideline applicable to the facts and circumstances of the case. However, the guidelines are not viewed as inflexible ironclad rules of law. The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an Applicant. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3 of the Directive, [\(17\)](#) and the whole person concept. [\(18\)](#) Having considered the record evidence as a whole, I conclude Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), Guideline H (Drug Involvement), and Guideline E (Personal Conduct) are the applicable relevant adjudicative guidelines.

## **BURDEN OF PROOF**

The purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interest to grant or continue an applicant's eligibility for access to classified information. [\(19\)](#) The government has the initial burden of proving controverted facts alleged in the SOR. To meet its burden, the government must establish a prima facie case by substantial evidence. [\(20\)](#) The responsibility then shifts to the applicant to refute, extenuate or mitigate the government's case. Because no one has a right to a security clearance, the applicant carries the burden of persuasion. [\(21\)](#)

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest to ensure each applicant possesses the 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 to classified information in favor of protecting national security. [\(22\)](#)

## **CONCLUSIONS**

Since this case is being decided without a hearing, my evaluation is necessarily limited to the contents of the various documents in the case file.

Under Guideline J (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. [\(23\)](#) The government established its case under Guideline J by showing that Applicant committed in five offenses between 1983 and 2004. He was convicted of three DUIs and one disorderly conduct offense. I also find, as discussed below under Guideline E, that Applicant deliberately falsified his 2003 security clearance application. His falsification of the SF 86 is a violation of 18 U.S.C. §1001, a felony. [\(24\)](#) Disqualifying Condition (DC) 31(a): *a single serious crime or multiple lesser offenses* and DC 31(c): *allegation or admission of criminal conduct regardless of whether the person was formally charged, formally prosecuted or convicted*, apply.

Applicant's past behavior, from 1983 to 2004, forms a pattern of criminal activity. His falsification brings to the forefront the criminal conduct, drug involvement, and alcohol consumption concerns raised by his past behavior. I am required to consider Applicant's overall questionable behavior when evaluating the seriousness of the conduct alleged in the SOR to determine factors such as the extent to which his behavior is recent; the likelihood of recurrence; Applicant's [\(25\)](#)

explanations concerning the circumstances of the incidents alleged; and his rehabilitation.

Under the totality of the circumstances, I find Applicant's criminal behavior is recent and not isolated. Applicant engaged in criminal misconduct over a period of at least 21 years, from the time he was 28 until he was 49. The available evidence indicates he has not been involved in criminal misconduct since 2004. However, considering his 21 year history of criminal behavior, the nature and seriousness of his misconduct, his falsification of the SF 86, and his prolonged, disregard for the law, I find his favorable information (i.e., good employee record, change in lifestyle, and remorse) is not sufficient to mitigate the Guideline J security concerns. His behavior raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. His falsification weighs against a finding of rehabilitation and positive behavioral changes. I find that none of the mitigating conditions apply. <sup>(26)</sup> **Guideline J is decided against Applicant.**

Under Guideline G (Alcohol Consumption), excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness. <sup>(27)</sup> **The government established its case under Guideline G by showing that from 1983 to 2004, he was involved in four alcohol-related incidents, including three DUI convictions. Applicant abused alcohol, resulting in his exercising questionable judgment and being convicted for three DUIs. Guideline G Disqualifying Condition (DC) 22(a): *alcohol-related incidents away from work, such as driving while under the influence . . .* applies.**

There is no evidence that Applicant has been involved in any alcohol-related misconduct since January 2004. As such, Alcohol Consumption Mitigating Condition (AC MC) 23(a): *so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment;* or AC MC 23(b): *the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an alcohol abuser),* may apply.

The record fails to establish Applicant is alcohol dependent. However, considering Applicant lengthy abuse of alcohol and the seriousness of his alcohol-related misconduct, he has failed to provide sufficient information as to his current level of alcohol use to show he is now a responsible user. Nor does the available evidence establish a favorable diagnosis or prognosis for the Applicant, or that he has no alcohol related problems. In light of the extent of Applicant's alcohol related behavior, not enough time has transpired since his last alcohol-related incident to show that his past behavior is not likely to recur, or to show reliability, trustworthiness, and good judgment.

Applicant knew or should have known about the government's alcohol consumption security concerns based on his years of experience working for a defense contractor and the SF 86 questions. Notwithstanding, in 2004 Applicant engaged again in further alcohol-related misconduct. Under the totality of the circumstances, I conclude that Applicant's favorable information is not sufficient to mitigate the alcohol consumption security concerns. I find that none of the mitigating conditions apply.

Under Guideline H (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. <sup>(28)</sup> Applicant's admissions to the SOR allegations and his 2005 statement establish he used marijuana, although infrequently, from around 1994 until at least December 2004. Guideline H Disqualifying Condition (DC) 25(a): *any drug abuse*, DC 25(c): *illegal drug possession . . .*, and DC 25(g): *any illegal drug use after being granted a security clearance*, apply.

I considered all Guideline H Mitigating Conditions (MC) and I conclude none apply. He used drugs while in high school with his sister. He stopped using marijuana for some time while married to his first wife. Applicant then resumed his marijuana use from 1994, at age 39, to at least 2004, when he was 49 years old. During that time frame, he was employed by a federal contractor and held a security clearance. He knew or should have known about the criminal consequences of his behavior and the seriousness of his actions. I specifically considered MC 26(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 MC 26(b): *a demonstrated intent no to abuse any drugs in the future*. For the reasons outlined above, and under the discussion of Guideline J,

incorporated herein, I conclude they do not apply.

Considering the totality of the circumstances of his case, including his falsification of the SF 86, I find Applicant's drug involvement to be recent and not isolated. Additionally, Applicant presented no evidence of drug treatment or rehabilitation. Applicant's illegal involvement with drugs raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. I find Guideline H against the Applicant.

Under Guideline E (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. <sup>(29)</sup>

Applicant admitted he failed to disclose relevant information in his answers to SF 86 questions 24, 27, and 28. In light of Applicant's admissions, age, length of employment, the number of incidents that he failed to disclose, the seriousness of those incidents, and the circumstances surrounding those incidents, I find Applicant's omissions were deliberate and made with the intent to mislead the government. Disqualifying Conditions (DC) 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . .*, and DC 16(e): *personal conduct or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress . . .*, apply.

I specifically considered all Guideline E Mitigating Conditions (MC) and conclude that none apply. Although the falsification occurred in 2003, considering the totality of the circumstances in Applicant's case, the passage of time alone is not sufficient to mitigate the security concerns raised by his behavior. Furthermore, he presented no evidence that he has reduced his vulnerability to exploitation, manipulation, or duress. Additionally, for the same reasons outlined above under the discussions of Guidelines J, H, and G incorporated herein, I conclude none of the MCs apply. Guideline E is decided against Applicant.

I have carefully weighed all evidence, and I applied the disqualifying and mitigating conditions as listed under the applicable adjudicative guidelines. I specifically considered Applicant's age, the lack of any misconduct or questionable behavior since 2004, his 24 years working for a defense contractor, and his positive changes in behavior as a result of his recent marriage. As previously discussed, Applicant's overall past behavior forms a pattern of disturbing criminal activity, drug use, and alcohol abuse with significant adverse security implications. His falsifications bring to the forefront the criminal conduct, drug use, and alcohol abuse concerns raised by his past behavior. Applicant failed to present sufficient evidence to mitigate the overall judgment and trustworthiness security concerns raised by his behavior, and the likelihood of recurrence remains a concern.

### **FORMAL FINDINGS**

Formal findings regarding each SOR allegation as required by Directive Section E3.1.25 are as follows:

Paragraph 1, Criminal Conduct (Guideline J) AGAINST APPLICANT

Subparagraphs 1.a - 1.e Against Applicant

Paragraph 2, Alcohol Consumption (Guideline G) AGAINST APPLICANT

Subparagraph 2.a Against Applicant

Paragraph 3, Drug Involvement (Guideline H) AGAINST APPLICANT

Subparagraphs 3.a - 3.c Against Applicant

Paragraph 4, Personal Conduct (Guideline E) AGAINST APPLICANT

Subparagraphs 4.a - 4.d Against Applicant

**DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Juan J. Rivera

Administrative Judge

1. See Executive Order 10865, *Safeguarding Classified Information Within Industry* (Feb. 20, 1960, as amended, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992) (Directive), as amended. On August 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised adjudicative guidelines (Guidelines) to all adjudications and other determinations made under the Directive in which the SOR was issued on or after September 1, 2006.

2. Government Exhibit (GE) 3 (Applicant's answer to the SOR).

3. GE 4 (Office of Personnel Management Security Clearance Application (SF86), dated October 21, 2003), unless indicated otherwise, is the source for the facts in this paragraph.

4. Applicant's security clearance application shows he was hired by his current employer in 1990. However, in his answer to the SOR and in his response to DOHA interrogatories (GE 6) he stated he was hired in 1983.

5. GE 6 (Applicant's response to DOHA interrogatories, dated December 5, 2005).

6. GE 4, question 31.

7. GE 5 (Applicant's sworn statement, dated March 30, 2005) is the source of Applicant's explanations.

8. GE 5.

9. The source for the facts in this paragraph is Applicant's response to the SOR (GE 3), unless stated otherwise.

10. GE 5.

11. *Id.*

12. GE 4

13. *Id.* The 1980 DUI conviction was not alleged in the SOR.

14. GE 6 (Applicant's affidavit, dated March 30, 2005).

15. GE 4, question 31.

16. GE 3.

17. Directive, Section 6.3. Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria and adjudication policy in enclosure 2, including as appropriate:

18. Directive, E2.2.1. ". . . The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. . . ." **The whole person concept includes the consideration of** the nature and seriousness of the conduct and surrounding circumstances; the frequency and recency of the conduct; the age of the applicant; the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or

undertaken with knowledge of the consequences involved; the absence or presence of rehabilitation; and the probability that the circumstances or conduct will continue or recur in the future.

19. *See Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

20. ISCR Case No. 98-0761 at 2 (App. Bd. Dec. 27, 1999) (Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.); ISCR Case No. 02-12199 at 3 (App. Bd. Apr. 3, 2006) (Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record.); Directive, ¶ E3.1.32.1.

21. *Egan*, *supra* n.10, at 528, 531.

22. *See Id*; Directive E2.2.2.

23. Guidelines, ¶ 30. [Hereinafter, the particular paragraph of the Guidelines will be cited as part of the relevant disqualifying and mitigating condition. See n.1 supra.](#)

24. It is a criminal offense to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation, or knowingly make or use a false writing in any matter within the jurisdiction of the executive branch of the Government of the United States. Security clearances are within the jurisdiction of the executive branch of the Government of the United States. *Egan*, 484 U.S. at 527 (discussing 18 U.S.C. § 1001).

25. ISCR Case No. 04-09959 at.3 ( App. Bd. May 19, 2006).

26. I specifically considered Criminal Conduct Mitigating Condition (MC) 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 MC 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.*

27. Guidelines, ¶ 21.

28. Guidelines, ¶ 24.

29. Guidelines, ¶ 15.