



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



In the matter of: )  
)  
) ISCR Case No. 06-25219  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Francisco Mendez, Esq., Department Counsel  
For Applicant: Sheldon I. Cohen, Esq.

May 12, 2008

**Decision**

LOUGHRAN, Edward W., Administrative Judge:

Applicant failed to mitigate the security concerns raised by his criminal conduct. Eligibility for access to classified information is denied.

On April 2, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J, Criminal Conduct. 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 answered the SOR on April 19, 2007, and requested a hearing before an Administrative Judge. The case was assigned to me on March 7, 2008. DOHA issued a notice of hearing on March 11, 2008, and the hearing was convened as scheduled on April 15, 2008. The Government offered Exhibits (GE) 1 through 29, which were received without objection. Applicant testified on his own behalf, called eight

witnesses, and submitted Exhibits (AE) A through L, which were received without objection. DOHA received the transcript of the hearing (Tr.) on April 23, 2008.

### **Procedural and Evidentiary Rulings**

Department Counsel submitted a notice on March 4, 2008, that SOR ¶ 1.00 was withdrawn. Applicant did not object to the notice and SOR ¶ 1.00 was withdrawn. The notice is marked Hearing Exhibit (HE) I. Applicant's attorney submitted a summary of specifications in the SOR. Department Counsel did not object and the summary was accepted as HE II.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted all the factual allegations in the SOR with the exception of ¶¶ 1.m, 1.r, 1.x, 1.gg, and 1.jj, which he denied.

Applicant is a 52-year-old employee of a defense contractor. He has never been married and has no children. Applicant is a recovering heroin addict. His father is a retired military officer and Applicant moved a number of times as a child. He was an honor student in high school, was involved in sports and extracurricular activities, and was a Boy Scout. He first started smoking marijuana in about the tenth grade. He was curious and his friends were using drugs. He experimented with other drugs including pills and hallucinogens. He worked several jobs while he was in high school and was able to pay for his marijuana. He started selling marijuana in his senior year in high school. The person that he bought his marijuana from told Applicant that if he sold marijuana that he could get his marijuana for free. His marijuana supplier later gave him heroin to sell, which he did. Applicant first used heroin around the end of his senior year or shortly thereafter. He decided to try the heroin that he was selling. He stated that the first time he used heroin, it made him sick, but he liked it. He stated "it just made me feel real good. The weight of the world was gone."<sup>1</sup>

Applicant lived at home and attended college after he graduated from high school. He continued to sell marijuana and heroin and his heroin use progressed to where he was addicted and using daily. He was snorting the heroin because he had an abundant supply of heroin from what he was selling. Applicant's college grades were affected by his drug use and he left college before he graduated. He moved out of his parents' home shortly thereafter. Eventually his supplier no longer trusted Applicant, and he was forced to buy his heroin. Because the purity of the heroin he purchased was not as good as what he was used to, he started injecting the heroin to maximize the effect.<sup>2</sup>

After Applicant was no longer selling heroin, he started committing burglaries to support his habit. He was arrested for burglary the first time in 1980, when he was 25

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<sup>1</sup> Tr. at 146-156, 194; GE 1, 2.

<sup>2</sup> Tr. at 155-157.

years old. In addition to his numerous burglaries, he regularly shoplifted and committed other crimes to support his addiction. He was arrested on more than 35 occasions between 1980 and 1994, for offenses including burglary, breaking and entering, grand larceny, probation violation, receiving stolen property, assault, shoplifting, theft, armed robbery, and numerous drug-related charges. He was convicted on 19 occasions for the various charges.<sup>3</sup> He was not convicted of armed robbery. He served about 35 months in the state penitentiary for his various felony convictions and additional time in the county jail, work camps, and work release. Applicant estimates that when he was not incarcerated, from the time he was 26 until he was 42, he was clean and off heroin a total of about two years.<sup>4</sup>

Applicant denied the allegation in SOR ¶ 1.gg, which alleges he was arrested and charged with Fugitive From Justice in 1991. Applicant credibly testified that was a mistake. His attorney told him he did not need to be present at a hearing. The charge was dismissed. He was arrested and charged with Fugitive From Justice again in 1992, as alleged in SOR ¶ 1.jj. Applicant was incarcerated in another jurisdiction and was unable to attend a court date, resulting in a warrant for his arrest. The charge was dismissed.<sup>5</sup>

Applicant was released from prison to work release in January 1995. He went to work in the construction industry for one of the witnesses who testified on his behalf. He was discharged from work release to probation in April 1995. He was drug free from January 1995 through September 1996. In September 1996, a female friend called him and asked him if he wanted to “go get high.” He used heroin with her. He did not use it again for another month. He used it again two weeks later and then he started using regularly until July 1997. Applicant had a warrant for his arrest for a probation violation for failing the probation office drug test. He knew he was going to be arrested and his life was in shambles. He called his mother and his probation officer and turned himself in on a significant date in his life in July 1997. He has not used illegal drugs or been involved in illegal activities since he turned himself in. He went back to jail for several months and then was released to work release, where he worked again for the same construction company.<sup>6</sup>

Applicant had attempted to quit heroin on numerous occasions prior to July 1997, and he was in various treatment programs. He still thought that he could do it on his own terms. In July 1997, he realized he could not and he accepted the principles of Narcotics Anonymous.<sup>7</sup>

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<sup>3</sup> HE II submitted by Applicant’s counsel lists 18 convictions. Applicant was also convicted of Petit Larceny as alleged in SOR ¶ 1.ee.

<sup>4</sup> Tr. at 158-165; Applicant’s Answer to SOR; GE 1-29.

<sup>5</sup> Tr. at 186-188.

<sup>6</sup> Tr. at 165-168.

<sup>7</sup> Tr. at 167-170.

Applicant returned to school. He graduated Cum Laude with an Associate's degree from a community college in 1998. He graduated on the Dean's List in January 2002, with a Bachelor of Science degree from the same university he attended in the 1970s. He was awarded a Master of Business Administration degree from another respected university in 2003, and a Master of Science degree from the same university in 2005. He has continued to pursue education and training and he has received certifications in the information technology (IT) field.<sup>8</sup>

Applicant continued to work for the construction company until 1999. He was very highly regarded and trusted by his employer, but it was time to move on. He obtained a job in the IT field in 1999. He worked for this company until December 2003. The former Chief Executive Officer of the company wrote a glowing letter of recommendation for him. Applicant has worked for the same defense contractor since January 2004.<sup>9</sup>

Applicant returned home to live with his parents after he was released from prison and he still lives there. His father essentially disowned his son while he was using drugs and living the criminal life. He testified about the positive changes in Applicant's life since he stopped using drugs and he is proud of what his son has accomplished. Applicant loves his job, where he is very well regarded and earns a high salary. He works 50 to 60 hours per week and has not missed a day of work in many years. He is also co-owner of an IT company, with the knowledge of his employer. His partner in the IT company also works at the same defense contractor where Applicant is employed. He testified that Applicant is trustworthy and completely honest. Applicant has developed a close personal relationship with one of his professional colleagues. She is a recovering alcoholic who has been sober for 20 years. She testified about his honesty, integrity, and commitment to remaining sober.

Applicant attended 280 meetings at NA or Alcoholics Anonymous (AA) in his first year of sobriety. It is not unusual for an alcoholic or an addict to attend either NA or AA or both, as they share the same 12-step program. He currently attends NA or AA meetings about once a week. He has a support system in place with friends and family. His sponsor is the founder and director of a drug and alcohol rehabilitation center. He and Applicant first met in about 1981, when they were in jail together. He is a recovering drug addict who has been sober for 20 years. Applicant was very instrumental in assisting him in opening the center in 1998. He spent countless hours using his construction background in renovating an old building that became the center. Applicant has remained very involved in the center. The sponsor was a witness on Applicant's behalf. He testified that Applicant is his best friend and they have supported each other. He described Applicant as upstanding, straightforward, trustworthy, and one of the finest men he has ever met.<sup>10</sup>

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<sup>8</sup> Tr. at 170-182; AE A-C, H, I.

<sup>9</sup> Tr. at 175, 182-185; GE 1; AE E.

<sup>10</sup> Tr. at 46-71; AE J.

Eight witnesses, including those discussed above, testified on Applicant's behalf. Character letters were also submitted. Applicant was universally praised by family, friends, co-workers, and supervisors as honest, hard working, trustworthy, and numerous other superlatives. All know about his drug and criminal background. He is strongly recommended for a security clearance.

### **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 to be used 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, Administrative Judges apply the guidelines 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 the 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 adverse 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 an Applicant’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 describes conditions that could raise a security concern and may be disqualifying. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested more than 35 times and convicted 19 times between 1980 and 1994. His criminal history raises both of the above disqualifying conditions.

Four Criminal Conduct Mitigating Conditions under AG ¶¶ 32(a)-(d) are potentially applicable:

- (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.

There is no evidence that Applicant was pressured or coerced into committing his criminal acts. AG ¶ 32(b) is not applicable. He did not totally deny any of his criminal

actions except for the Fugitive From Justice charges in 1991 and 1992, as alleged in SOR ¶¶ 1.gg and 1.jj. He credibly testified that he was innocent of those crimes and the charges were dismissed. AG ¶ 32(c) is applicable to SOR ¶¶ 1.gg and 1.jj.

Applicant has not used illegal drugs, been arrested, or charged since July 1997. Since then he returned to school and earned a Bachelor of Science degree and two Masters degrees. He returned home to live with his parents and regularly attends NA or AA meeting. He has a sponsor and a support network in place to help him maintain his sobriety. He has a great job that he loves and pays him a good salary. He is co-owner of an IT company. There is abundant evidence of successful rehabilitation. AG ¶ 32(d) is applicable. Because of the sheer volume of Applicant's drug and criminal history, even though he has been drug free for almost 11 years, I am unable to make an affirmative finding that his criminal past does not cast doubt on his reliability, trustworthiness, or good judgment. AG ¶ 32(a) is partially 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) 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 is 52 years old. Since he was in high school his life has been defined by when he was on drugs or living clean. He started smoking marijuana in high school. He decided to start selling marijuana to fund his marijuana use. He sampled the heroin that he started selling and then became addicted. He was a drug dealer and an addict until not even his supplier could trust him anymore. He then became a career criminal to fund his habit, specializing in burglaries and shoplifting. He spent extended periods in jail and prison, and he was in various treatment programs, but he always returned to heroin. He was released to a work release in January 1995, followed by probation. Applicant stayed clean until September 1996, when he fell victim to his old habits. Applicant picked an important personal day in

his life in July 1997 to begin his sobriety. He went back to jail and has not been involved in drugs or criminal activity since that date, giving him almost 11 years of sobriety.

Since July 1997, Applicant has been the model of rehabilitation. He finally accepted the 12-step program endorsed by NA and attended 280 meeting his first year and continues to regularly attend meetings. He moved back with his parents. His father's testimony was very moving. He and his wife now have their son back. Applicant pursued education with vigor. He thrived in his new profession. He has a support system in place to assist in his sobriety.

I am convinced that the man who appeared before me on April 15, 2008 is everything his witnesses said he is. In contrast, prior to 1997, he was a drug addict/drug dealer/convicted felon who broke the law almost every day he was not incarcerated for more than 20 years. His company and his business partner took a chance and trust him with their financial and proprietary interests. That is commendable and so far it has paid huge dividends for both. When it comes to our nation's secrets, I am not afforded the luxury of taking a chance on someone. Applicant's drug and criminal record is so extensive, that even almost 11 years later, I am unable to state that it is clearly consistent with the national interest to grant him a security clearance.

Overall, 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 criminal 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
Subparagraphs 1.a-1.ff:	Against Applicant
Subparagraph 1.gg:	For Applicant
Subparagraphs 1.hh-1.ii:	Against Applicant
Subparagraph 1.jj:	For Applicant
Subparagraphs 1.kk-1.nn:	Against Applicant



## **Conclusion**

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

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Edward W. Loughran  
Administrative Judge