



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-07991
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Francisco Mendez, Esquire, Department Counsel  
For Applicant: David P. Price, Esquire

February 28, 2008

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**Decision**  
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LYNCH, Noreen A., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on June 12, 2006. On September 24, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline E 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 October 7, 2007. He answered the SOR in writing through counsel on November 13, 2007, and requested a hearing before an Administrative Judge. DOHA received the request on December 16, 2007, and I received the case assignment on the same day. I granted Applicant's request for a delay until late January 2008, in order for his counsel to be available. DOHA issued a notice of hearing on December 26, 2007, and I convened the hearing as scheduled on

January 31, 2008. The government offered Exhibits (Ex.) 1 through 5 which were received without objection. Applicant testified on his own behalf and submitted Exhibits A through E, without objection. Applicant also presented the testimony of six witnesses. DOHA received the transcript of the hearing (Tr.) on February 7, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

In his Answer to the SOR, dated October 7, 2007, Applicant admitted the factual allegations in ¶¶ 1.a- 1.e, and 1.g of the SOR, with explanations. He denied the factual allegations in ¶¶ 1.f and 1.h of the SOR. He also provided additional information to support his request for eligibility for a security clearance.

Applicant is a 46-year-old employee of a defense contractor. After graduating from high school in 1979, he started working at a marina. Shortly after that, he joined the U.S. Navy. While in the military, his career progressed from his position as a diesel mechanic to Chief Engineer. However, after ten years, he was discharged with another than honorable (OTH) in May 1989. Applicant used marijuana and tested positive for marijuana in 1983 and in March 1989. The discharge was based on Applicant's use of marijuana and the positive urinalysis tests while in the U.S. Navy.<sup>1</sup>

While in the Navy, he received numerous awards, recognition and certificates. He was an outstanding operator and mechanic. He earned the respect of junior and senior leadership. He was highly recommended for any position of leadership. His officer-in-charge noted in 1989 that Applicant has diverse skills and a disciplined work ethic. He was reliable and professional.<sup>2</sup>

Applicant married in 1985. He and his wife have one son. His wife has problems with alcohol and depression. His son has been arrested and charged with possession of marijuana. He is currently attending a drug rehabilitative program. His son is now 21 years old.<sup>3</sup>

In 1994, Applicant started his employment with a contractor. He has maintained a security clearance since 1996. His employment record is outstanding. In 1995, he received the employee of the year award. Applicant has received cash awards. Again in 2007, Applicant received the employee of the year award. His record is replete with praise and comments on his extraordinary performance. He is in charge of a mobile launch platform. He also has his Coast Guard Masters' License.<sup>4</sup>

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<sup>1</sup>GE 3 (Applicant's Security Application Form, dated June 12, 2006).

<sup>2</sup>AE A (Attachments 1-28).

<sup>3</sup>Tr. 85; 88.

<sup>4</sup>AE B (Letters of Reference).

On February 14, 1996, Applicant completed a security clearance application form. In response to Question 24, Applicant listed his marijuana use as April 1989. He reported his OTH discharge for the marijuana use on the form under Question 23 (Police Record).<sup>5</sup> He did not disclose marijuana use subsequent to 1989.

In May 2004, Applicant and his son drove to Florida for a vacation. Applicant was speeding and was stopped by the police. When his son saw the police vehicle, he immediately told Applicant that he had some marijuana in his possession. Applicant told his son to give him the baggie of marijuana. He wanted to protect his son and did not want to get his son in any trouble. The police smelled the marijuana in the car. Applicant told the police officer that he had the marijuana. As a result, Applicant received a citation and was charged with a misdemeanor, and possession of marijuana. After the incident, Applicant called an attorney because of potential difficulties with his security clearance. Applicant was told to make a \$500 contribution to charity and after that the charge was dismissed. The attorney advised Applicant it was taken care of and that he had nothing to worry about.<sup>6</sup> Applicant understood that everything was dismissed and that there was nothing on his record, showing a conviction.

On June 12, 2006, Applicant completed his security clearance application form for a top secret clearance. In response to Section 23 - Your Police Record, he answered "no", that he had never been charged with or convicted of any offenses related to alcohol or drugs. He did not disclose the charge for the misdemeanor (marijuana possession) incident of May 2004. He believed there was no obligation to disclose it because his attorney told him the charge was dismissed. His attorney did not advise him about disclosure on his security clearance application. In fact, Applicant never appeared in court. On that same application form, Applicant made other errors unrelated to drug use. These errors were identified and corrected during the interview in 2006.<sup>7</sup>

During November and December 2006, Applicant spoke to investigators as part of his security investigation. He told the investigators that he did not have any alcohol/drug charges. He also expanded upon his admitted drug use, and told investigators in April 2007 that he smoked marijuana and last used it approximately 1992.

In April 2007, Applicant again spoke with investigators about his admitted use of marijuana in the past. Applicant disclosed that he recalls smoking randomly from 1979 to 1992 but the exact date was not recalled as discussed above. On August 22, 2007, Applicant completed interrogatories concerning his previous drug use. He reported his last use of marijuana was weekly in 1992. He stopped using marijuana due to his job

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<sup>5</sup>GE 1 (Security Application dated 1996).

<sup>6</sup>Tr. 106.

<sup>7</sup>Tr. 136.

responsibility. He does not associate with anyone who uses drugs. He has no intention of using marijuana . Applicant marked a “?” Mark on the interrogatory, question 6, concerning an arrest or charge and then explained the 2004 incident in Florida with his son.<sup>8</sup>

Applicant’s current position is a challenging and demanding one. His colleagues and supervisors applaud him for his leadership and his integrity. He is open, honest, and loves his job. Applicant is subject to random drug tests from his employer and the Coast Guard.<sup>9</sup>

### **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©, 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.

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<sup>8</sup>GE 4 (Applicant’s Response to Interrogatory, dated August 22, 2007).

<sup>9</sup>Testimony of Witnesses at Tr. 24; 40; 56; 65; 78; and 86.

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 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.

The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

- (a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, and cooperation with medical or psychological evaluation; **and**
- (b) refusal to provide full, frank and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying:

- (a) 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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations; and

(e) personal conduct, or concealment of information about one's conduct that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The Government established security concerns over Applicant's use of marijuana from 1979 to 1992. He admitted using marijuana from 1979 to 1989, while in the U.S. Navy. He tested positive for marijuana in 1983 and again in 1989. He received an OTH characterization of his service in 1989 due to his marijuana use. In 1996, he falsely failed to disclose his marijuana use on his SF 86, which was as recent as four years earlier. On November 1, 2004, he possessed marijuana that he received from his son, and provided to the police. There is substantial evidence that he failed to disclose the 2004 marijuana possession on his 2006 SF 86. Such conduct, if known, adversely affects one's personal, professional and community standing. There is substantial evidence, establishing all the SOR allegations.

AG ¶ 17 provides conditions that could mitigate security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully.

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and,

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant provided sufficient evidence to rebut the allegation that he deliberately falsified his 2006 security clearance application.<sup>10</sup> When he responded to question 23 of his SF 86, concerning his police record, he believed that he was not required to report the 2004 marijuana possession. His attorney advised him that the case was dismissed, and he was told that everything was resolved. He concluded erroneously that he did not have to disclose the marijuana possession charge. I found him credible in his testimony about his honest, but mistaken belief. He was open and candid during

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<sup>10</sup>The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

his 2006 interview. In response to questions about drugs, Applicant was forthright and mentioned the 2004 incident with his son. He also was candid that he does not remember the specific date he last smoked marijuana, but believed it was in the 1990 to 1992 time frame. His 2007 interrogatories report using marijuana weekly in 1992. Applicant has not used marijuana after 1992. I do not believe that he deliberately falsified his 2006 SF 86. Thus, the 2006 allegation of falsification of his SF 86 in SOR paragraph 1.g. is unsubstantiated under AG ¶ 17(f).

He answered the 1996 SF 86 question about drug use in the last seven years by listing the 1989 incident that caused his discharge from the Navy. He falsely failed to disclose more recent marijuana use (up to around 1992). When he spoke to investigators in 2006, he was honest that he may have used after that time once or twice. I found his testimony at the hearing credible.

AG ¶ 17(a) partially applies to mitigation the allegations of falsification of his SF 86 concerning marijuana use. He disclosed marijuana use that was much more extensive than could be proven. He showed his good-faith in his disclosures of marijuana use.

AG ¶ 17(b) partially applies to the omission of his 2004 marijuana possession charge from his 2006 SF 86. The omission or concealment was caused or significantly contributed to by advice of his legal counsel, who advised or instructed Applicant about his offense. His lawyer did not advise him specifically concerning the security clearance process, but he did tell him the charge was dismissed, and Applicant incorrectly assumed thereafter that he did not have to disclose it on his SF 86. Upon being made aware of the requirement to cooperate or provide the information, Applicant cooperated fully and truthfully and disclosed the 2004 marijuana possession charge.

AG ¶ 17(c) applies to his marijuana use because his use of marijuana is a misdemeanor, but more importantly the 1996 falsification of his SF 86, and his marijuana use in 1992 and previously, is not recent. So much time has passed that it has little relevance to his current suitability for a security clearance.<sup>11</sup> Moreover, his circumstances have changed since his last marijuana use in 1992. I conclude marijuana use and falsification of his SF 86 is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.

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<sup>11</sup>In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the Administrative Judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse. In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board explained:

[W]here an applicant had extensive marijuana use and renewed marijuana use after periods of abstinence, a Judge may articulate a rational basis for doubts about whether the most recent period of abstinence was sufficient to conclude the applicant had put marijuana use behind them. See e.g. ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004).



AG ¶ 17(e) applies because he has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress through disclosure of his marijuana use to security officials and to the Government. Accordingly, he is no longer vulnerable to coercion, exploitation or manipulation.

### **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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant served in the military for ten years. During that time he received a commendation for outstanding service. He was commended for his leadership, technical expertise and "can do" spirit. His officer-in-charge in April 1989 recommended him for any position in operation, maintenance or management of an engineering system. He received commendations for his leadership and outstanding efforts as an exceptional performer. However he used marijuana and tested positive in 1983 and 1989. He was separated from the Navy for using marijuana with an OTH characterization of his service.

Applicant stopped using marijuana around 1992. He does not have any association with persons who use drugs. He is a hardworking individual who is married with one son. His wife has problems with depression and alcohol. His son uses marijuana and is now receiving court-ordered treatment in a rehabilitative unit. Applicant is very protective of his wife and son. He is often away for work, but he takes his family responsibilities very seriously.

Applicant's use of marijuana ended in 1992. He falsified his 1996 security clearance application. He briefly possessed marijuana in 2004, when he accepted marijuana from his son and passed it to the police, who has pulled them over for speeding. He acknowledges and recognizes the security and employment impact of

such conduct. They do not cast doubt on his reliability, trustworthiness, or good judgment because his marijuana use and possession, and the falsification of his 1996 SF 86 are unlikely to recur. Applicant has “acknowledged” his misbehavior and recognizes the negative consequences of such conduct. Based primarily on the lack of misconduct after 1996 (the 2004 marijuana possession was not to use the marijuana or distribute it to others), he has reduced “vulnerability to exploitation, manipulation, or duress” through disclosure of his misconduct to security officials.

In 2004, Applicant took his son on a driving vacation to Florida. Applicant was stopped for speeding. His son, 18 years old, suddenly informed him that he had “weed” on him. The Applicant did not want his son to get into any other trouble. So he told his son to give him the marijuana to protect his son. He provided the marijuana to the police. Applicant was charged with marijuana possession. The charge was never prosecuted, and was dismissed without a court appearance. Based on the advice of an attorney, he believed the charge was non-existent and erroneously failed to disclose it on his 2006 SF 86.

Applicant’s current employment has provided him with many opportunities for advancement. He is well regarded by his supervisor and his colleagues. He has received numerous awards for his achievements.

Overall, the record evidence leaves me without questions or doubts as to Applicant’s eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his financial considerations.

### **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 E:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Subparagraph 1.g:	For Applicant
Subparagraph 1.h:	For Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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NOREEN A. LYNCH  
Administrative Judge