



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 07-11006

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: *Pro Se*

April 17, 2008

**Decision**

WHITE, David M., Administrative Judge:

Applicant committed driving under the influence (DUI) offenses in 1984, 1990, 1996, and 2006. He was convicted of marijuana possession in 1986, and was discharged from the Navy for drug abuse in 1989. He has abstained from drug use since 1990, and from alcohol use since January 2006. He has changed his lifestyle and is committed to sobriety. Applicant is making significant progress but, given his long history of substance abuse, insufficient time has passed since his last relapse to demonstrate permanent behavioral change. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Applicant submitted his Electronic Questionnaires for Investigation Processing (e-QIP), on May 1, 2007. On November 26, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G, H, E, and J 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 December 12, 2007. He answered the SOR in writing, undated, and requested a hearing before an Administrative Judge. DOHA received that request on January 14, 2008. Department Counsel was prepared to proceed on January 25, 2008, and the case was assigned to me on January 28, 2008. DOHA issued a notice of hearing on February 4, 2008, and I convened the hearing as scheduled on February 22, 2008. The Government offered exhibits (GE) 1 through 3, which were admitted without objection. The Government also offered Administrative Notice (AN) exhibits 1 and 2, two sections of the Controlled Substances Act of 1970, to support a request that I take administrative notice of the fact that marijuana is a controlled substance. Applicant had no objection, and administrative notice of this fact was taken. Applicant testified on his own behalf, and submitted exhibits (AE) A through D, which were admitted without objection. Applicant's wife also testified for him. DOHA received the transcript of the hearing (Tr.) on March 3, 2008. While reviewing the evidence, I noticed that the first page of GE 1 was the signature page from another applicant's e-QIP, that was mistakenly substituted for Applicant's signature page. Department Counsel obtained and provided the correct page, which I appended to the record, together with accompanying email correspondence, as Hearing Exhibit (HE) I. Applicant offered no objection, and the record was reopened on Department Counsel's motion, to substitute the correct signature page into GE 1. The original remains attached to that exhibit to ensure that the record is complete, but is not otherwise material to this decision.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations concerning alcohol consumption, drug involvement, and criminal conduct, and denied deliberately failing to disclose some of his DUI and drug offenses on his e-QIP under personal conduct. Applicant's admissions, including those contained in his response to DOHA Interrogatories (GE 3), are incorporated in the following findings.

Applicant is a 40-year-old computer technician employed by a major defense contractor. Except for a year of unemployment and ten months with another company, he has worked for his present employer since 1996. He was recently promoted into his present position, and his recent performance evaluations are good. (AE B.) He has never held a security clearance.

In 1984, when he was 16 years old, Applicant was charged and convicted of Underage Drinking and Driving. He was fined, had his license suspended, and was required to attend an alcohol awareness class. In January 1986, while still in high school, he was arrested and charged with possession of marijuana. He paid a \$40 fine for this offense. After graduating, he joined the Navy in August 1986. He used marijuana

several times with other Sailors during his enlistment. After testing positive on a urinalysis test, he was awarded non-judicial punishment, and separated with an other-than-honorable discharge for misconduct-drug abuse in August 1989. (Tr. at 58-60.)

Applicant smoked marijuana a few more times after leaving the service, but has not done so since October 14, 1990. (Tr. at 66-67.) On that date, he was arrested for DUI. He pled guilty to that offense, served a week in jail, had his license suspended for a year, and was ordered to complete a two-year intensive outpatient treatment program. (Tr. at 48-50.) He was arrested for DUI again in 1996. He obtained a deferred prosecution on condition that he satisfactorily complete another two-year intensive outpatient treatment program, which he did.

Applicant resumed drinking in late 2005. He was arrested again for DUI on January 12, 2006, after wrecking his car in a single-car accident. He had been drinking whiskey at home, before driving to a fast-food restaurant. His blood-alcohol level was more than three times the legal limit. He was convicted of this offense in May 2006, and sentenced to five days in jail, a \$1,121 fine, 40 days of home monitoring, and suspension of his driver's license. He was also ordered to participate in another intensive outpatient treatment program. He completed this program, with a favorable prognosis from his program counselor, in December 2006. (AE A.) Since this last treatment, he has changed his lifestyle, and married his wife who is fully supporting his ongoing abstinence. He is also receiving ongoing follow-up counseling. (AE C; AE D; Tr. at 54-58, 69-72, 74-78.)

When Applicant completed his e-QIP security clearance application, he answered "Yes" to question 23.d, concerning whether he had ever been charged with or convicted of any offenses related to alcohol or drugs. In the section seeking details concerning affirmative answers about his police record, he listed his January 2006 DUI offense, but none of the earlier offenses noted above. During an interview with an OPM investigator on June 20, 2007, however, he volunteered what information he could recall about the three earlier DUI offenses. He testified very credibly that he had no intention of concealing the earlier convictions, which he was certain the Government would have access to. He misunderstood that this particular question was not limited to the past seven years, like many of the other questions.

### **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(a) and 2(c), the entire process is a conscientious scrutiny of applicable guidelines in the context 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 “Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the 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, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.” Section 7 of Executive Order 10865 provides that “Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”

A person applying for access to classified information seeks to enter 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.

## **Analysis**

### **Guideline G, Alcohol Consumption**

AG ¶ 21 expresses the security concern pertaining to 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.” AG ¶ 22 describes conditions that could raise a security concern and may be disqualifying. The disqualifying condition asserted by the Government in this case is: “(a) alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent.”

Applicant has four DUI convictions over the past 23 years, starting at age 16. His most recent conviction was just over two years ago, in January 2006, and involved blood-alcohol levels more than three times the legal limit. He attended an alcohol awareness class after his first conviction, and intensive outpatient treatment programs after each of the last three. There were six years between his first three DUIs, and ten years between the third and fourth. The Government has established security concerns under this guideline.

AG ¶ 23 provides conditions that could mitigate security concerns:

(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;

(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);

(c) the individual is a current employee who is participating in a counseling or treatment program, has no history of previous treatment and relapse, and is making satisfactory progress; and,

(d) the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meetings of Alcoholics Anonymous or a similar organization and has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

¶ 23(a) does not provide mitigation because Applicant's DUI offenses have been frequent and the latest one was fairly recent. Both the pattern and the recency of this last incident continue to cast doubt on his trustworthiness and good judgment. His history of relapses after court-ordered treatment programs also precludes mitigation under ¶ 23(c). He has acknowledged his alcoholism, changed his lifestyle, and began a period of abstinence following his January 2006 arrest. He also completed his most recent outpatient treatment program successfully, and received a favorable prognosis from the social worker who served as his program counselor. These efforts do generate some mitigation of security concerns under ¶¶ 23(b) and 23(d).

## **Guideline H, Drug Involvement**

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." AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying. Disqualifying conditions raised by the SOR allegations include: "(a) any drug abuse;" and "(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia."

Applicant was fined for marijuana possession when he was a high school senior in 1986. He also used marijuana several times from 1986 to 1990, during and shortly after his naval service. He was discharged under other-than-honorable conditions for drug use. The Government established facts necessary to raise security concerns under this guideline.

AG ¶ 26 provides conditions that could mitigate security concerns. Mitigating conditions supported on this record include: "(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 "(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." Applicant's drug possession and use occurred more than 18 years ago, and primarily with high school or service friends. He was an occasional user, and he no longer associates with drug users. Applicant established substantial mitigation of drug involvement security concerns.

## **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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. The disqualifying condition alleged in this case is:

(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.

Applicant credibly denied that he intentionally omitted information about his pre-1998 criminal charges related to alcohol and drugs on his e-QIP. His explanation of confusion based on the “last 7 years” limitation on other questions concerning these incidents was reasonable. Moreover, AG ¶ 17 provides conditions that could mitigate personal conduct security concerns, including “(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts.” Applicant volunteered the information about the earlier DUI offenses to the OPM investigator, further demonstrating the absence of any intent to conceal them and mitigating any security concerns raised by the initial omission.

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

AG ¶ 30 expresses the security concern pertaining 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.” AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying. Disqualifying conditions asserted by the Government were: “(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.” The crimes alleged in the SOR include Applicant’s four DUI convictions, his drug possession conviction, and falsification of his e-QIP in violation of 10 U.S.C. § 1001. Applicant admitted to commission of all but this latter offense. As discussed above, the evidence does not establish that he deliberately falsified his e-QIP. The other criminal offenses do raise security concerns, however.

AG ¶ 32 provides conditions that could mitigate security concerns. Applicant’s recent sobriety, completion of an outpatient treatment program, good work performance, and lifestyle changes create some mitigation under two of them: “(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, “(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.”

Some of Applicant’s criminal conduct occurred many years ago, but his criminal history must be evaluated as a whole, not piece by piece. All of his crimes have involved illegal substance abuse, and were indicative of poor judgment and a lack of self-control, as well as a willingness to flaunt rules and regulations. With another relapse and serious drunk driving conviction just over two years ago, Applicant did not establish strong mitigation of the concerns arising from his criminal history. He suffered relapses resulting in additional DUI convictions six and ten years after his first two intensive

outpatient treatment programs, leading to the conclusion that it is still too soon, since he completed his most recent treatment, to be confident that such behavior is unlikely to recur, and no longer casts doubt on his reliability, trustworthiness and judgment.

### **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 established by the record evidence. 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) 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.

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's conduct of potential concern involved a pattern of recurring substance-abuse related offenses including a fairly recent and serious DUI offense. He successfully completed post-conviction treatment programs after each offense, but suffered subsequent relapses. His earliest offenses occurred when he was young and immature, but his more recent convictions took place when he was mature and fully responsible for his choices. He mitigated security concerns arising solely from his drug abuse many years ago, but did not mitigate their impact as part of a larger pattern of criminal behavior.

There is no evidence that Applicant was pressured to commit any offense by anything beyond normal life pressures to which he remains subject. He has made positive lifestyle changes, and gained a very positive influence in his recent marriage to his very supportive wife. His behavior and good work performance since January 2006 create an excellent start on building a record of more responsible and trustworthy conduct, and provide a sound basis on which to build eligibility for a security clearance in the future. The number and recency of relapses, however, preclude a present judgment that Applicant has met his burden of mitigating the security concerns raised by the undisputed evidence in this record.



Overall, the record evidence leaves me with substantial 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 alcohol consumption and criminal conduct 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 G:	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 H:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Paragraph 4, Guideline J:	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant
Subparagraph 4.b:	Against Applicant
Subparagraph 4.c:	For Applicant

### **Conclusion**

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

DAVID M. WHITE  
Administrative Judge