



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 07-16050  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jennifer Goldstein, Esquire, Department Counsel  
For Applicant: *Pro Se*

December 10, 2008

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**Decision**

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MOGUL, Martin H., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on April 3, 2007. On June 26, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines J, H, and 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 replied to the SOR (RSOR) in writing on July 29, 2008, with additional documents and requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on September 4, 2008. DOHA issued a notice of hearing on September 16, 2008, and the hearing was convened as scheduled on October 28, 2008, in Santa Barbara, California.

The Government offered Exhibits 1 through 12, which were received without objection. Applicant testified on his own behalf, and the documents submitted as part of

Applicant's RSOR were admitted without objection. DOHA received the transcript of the hearing (Tr) on November 6, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

In his RSOR, Applicant admitted the SOR allegations 1.a., through 1.f., under Guideline J, 2.a. through 2.d., and 2.f., under Guideline H, and 3.b through 3.d. under Guideline E. He denied allegations 2.e. and 3.a. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the additional findings of fact:

Applicant is 33 years old. He is unmarried and has no children. He served in the Navy from 2000 to 2005, and received an Honorable Discharge. He is currently employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

### **Paragraph 1 (Guideline J - Criminal Conduct)**

The Government alleges that Applicant has engaged in following criminal acts:

1.a. On July 4, 2007, Applicant was arrested and charged with Misdemeanor Drunk Driving with Injury Enhancement, Felony DUI with .08% Alcohol Causing bodily Injury with Enhancement, and Failure to Provide Proof of Insurance. He pled no contest to the charge of Driving Under the Influence of Alcohol, a misdemeanor. Applicant was sentenced to serve 20 days in jail, which he did serve, perform community service, attend a DUI First Offender program, and he was placed on three years probation.

Applicant testified that he believed he had about five drinks in the course of an hour, after which he drove his vehicle and became involved in a vehicular accident. He remains on probation for approximately two more years during which he must report to a probation officer. He received a fine of \$3,000, and he still owes \$2,000 on this fine.

1.b. On March 3, 2003, Applicant was arrested and charged with Disorderly Conduct. He was sentenced to serve six months in jail; which was suspended, and fined \$217.

Applicant and an acquaintance in the Navy had a physical altercation as to who would drive a vehicle. This was after they had both been out for the evening, during which time they were both consuming alcohol.

1.c. On July 29, 1998, Applicant was arrested and charged with Distribution of a Look-A-Like Substance, a class three felony. Applicant was found Guilty, and he was sentenced to two years probation, and ordered to pay fines and costs of \$813.

Applicant testified that he attempted to sell baking soda to a drug user and charge him as if it were cocaine. The individual whom he believed to be a drug user was an undercover police officer, which resulted in Applicant's arrest. He testified that he served two weeks in jail for this offense.

1.d. On May 17, 1997, Applicant was arrested and charged with Unlawful Use of a Weapon, a felony. He was found guilty and sentenced to serve 12 months probation, and pay fines and costs of \$255. On September 16, 1998, his probation was extended for two additional years and he was sentenced to serve 14 days in jail.

Applicant testified that a friend of his had accidentally shot himself with a gun. Applicant claimed that while the friend was in the hospital, Applicant took the gun from his friend's vehicle in order to keep the police from locating it, but the police had the vehicle under surveillance, and Applicant was arrested and charged. As alleged in 3.d. below, Applicant had a different explanations as to what actually occurred in this event.

1.e. On March 24, 1997, Applicant was arrested and charged with Possession of Cannabis (30 grams) and Possession of a Firearm without a Valid license, a misdemeanor. He was found guilty sentenced to serve 16 days in jail; and he was given credit for 16 days time served.

Applicant testified that he was driving when he was stopped by a police officer, who found both marijuana and a shell casing in his vehicle. Applicant claimed that the amount of marijuana was less than the 30 grams for which he was charged, but he had been using it. He also testified that in a sworn statement that he provided to a Government investigator, he claimed that the shell casing was from when he went hunting with his uncle, although at the hearing he conceded that the casing was not from hunting with his uncle.

1.f. On January 23, 1993, Applicant was arrested and charged with Disorderly Conduct.

This incident is the result of a physical altercation between Applicant and another individual at a shopping mall.

## **Paragraph 2 (Guideline H - Drug Involvement)**

The SOR lists 6 allegations regarding illegal drug involvement under Adjudicative Guideline H. All of the allegations will be discussed in the same order as they were listed in the SOR:

2.a. In September 2006, Applicant tested positive for marijuana as a result of a drug test conducted by his employer. This resulted in his being terminated from this employer. Applicant claimed that he tested positive for marijuana because of his one time marijuana usage on July 4, 2006.

2.b. In August 2006, Applicant failed a drug test given by a prospective employer. As a result of the failed drug test, he was not hired by this employer. Applicant also claimed that he failed this drug test because of his one time usage on July 4, 2006.

2.c. Applicant used marijuana on at least July 4, 2006, when he was with friends at a barbecue. Applicant contends that was the only time since he left the Navy that he used an illegal substance.

2.d. In a signed, sworn statement, dated October 23, 2001, Applicant stated that he had no intension of using marijuana in the future (Exhibit 10). Clearly he used it at least one time after stating that he would not use it again.

2.e. Applicant used marijuana on a daily basis for a period of time prior to his entering the Navy in September 2000. In his RSOR, Applicant denied this allegation. However, at the hearing, he testified that for approximately three years before he entered the Navy, 1997 to 2000, he was using marijuana on a daily basis.

Applicant testified that he had not been truthful in his RSOR because he was ashamed that he had ever used marijuana and also to keep himself from looking even worse than he already did (Tr at 54-55).

2.f. On March 24, 1997, Applicant was arrested and charged with Possession of Cannabis (30 grams), as alleged in 1.e., above. As discussed above, Applicant claimed that the amount of Cannabis in his possession was less than the 30 grams that had been alleged, but he did concede that he had been using the marijuana that he possessed.

### **Paragraph 3 (Guideline E - Personal Conduct)**

3.a. Applicant executed a signed, sworn statement to a DoD investigator, dated October 23, 2001, in which he admitted that he deliberately falsified material facts before he entered the Navy when he claimed that he had only used cannabis on one occasion, whereas he had been using it on a daily basis prior to his entering the Navy (Exhibit 10).

At the hearing, Applicant admitted that he believed that if he had been truthful about his marijuana usage before he entered the Navy, he might not be allowed to enlist in the Navy (Tr at 60).

3.b. During a personal subject interview with a DoD investigator on May 17, 2007, Applicant stated that he had only used marijuana on two occasions on July 2006 and February 2000, whereas he had been using it on a daily basis prior to his entering the Navy.

At the hearing, Applicant conceded that he lied about his marijuana usage in 2007, because he had forgotten that on Exhibit 10 made in 2001, he had told the truth about his marijuana usage. He also admitted that he had lied to help him get a clearance.

3.c. In March 28, 2008 Answers to Interrogatories (Exhibit 4), Applicant claimed that he had only used cannabis on one occasion, whereas he had been using it on a daily basis prior to his entering the Navy.

3.d. Applicant gave two different versions of the circumstances concerning the criminal activity that has been alleged on paragraph 1.d., above, one version on his SCA dated April 3, 2007, in which he got the gun out of the car of his friend and a different version in a signed, sworn statement made to a DoD investigator on October 23, 2001, in which he found the gun in an alley.

### **Mitigation**

In his RSOR, Applicant submitted a letter of recommendation from his current supervisor, who spoke in very positive terms about Applicant. He also submitted a Letter of Commendation from his Commanding Officer and a Citation, both of which he received while in the Navy.

### **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(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 applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information)

## **Analysis**

### **Guideline J - Criminal Conduct**

The Government has established that Applicant engaged in criminal conduct, as he was arrested and convicted of six different criminal violations that spanned a period from 1993 to the most recent DUI in 2007. Applicant has two more years remaining on this latest criminal violation as well as \$2,000 of his fine that has not yet been paid.

In reviewing the Disqualifying Conditions (DC) under Guideline J, DC 31. (a), a single serious crime or multiple lesser offenses, and (d), individual is currently on probation, apply in this case. Under Mitigation Conditions, I find that no MC applies to this Applicant, because of the seriousness and recency of the latest criminal conduct. Applicant has not mitigated this allegation. Paragraph 1 is found against Applicant.

### **Guideline H - Drug Involvement**

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession, and use of marijuana, after stating that he would not use marijuana in the future is of concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition (DC) 25. (a) (any drug abuse), and (c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution).

It appears that Applicant has had extremely limited use of any illegal substance in the last few years, However, because the evidence shows multiple examples of Applicant not being truthful about his previous drug usage, I can not conclude that his current statements concerning his drug usage are credible or come within any of the Mitigating Conditions.

Accordingly, Paragraph 2 Guideline H of the SOR is concluded against Applicant.

### **Guideline E - Personal Conduct**

With respect to Guideline E, the evidence establishes that Applicant has been less than candid and truthful with information that he has provided to the Government in many forms and as recently as when he denied his previous drug usage on his Reply to the SOR.

In reviewing the DCs under Guideline E, I conclude that DC (a), deliberate omission, concealment or falsification of relevant facts from any personnel security questionnaire, and (b), deliberately providing false or misleading information concerning relevant facts to an employer or investigator, apply. No Mitigating Condition is applicable.

I resolve Paragraph 3, Guideline E, against Applicant.

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. 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. Based on all of the factors discussed above, including the multiple false information provided by Applicant, and multiple examples of criminal conduct, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

### **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
Subparagraph 1.a. through 1.f.:	Against Applicant
Paragraph 2, Guideline H	AGAINST APPLICANT
Subparagraph 2.a. through 2.f.:	Against Applicant
Paragraph 3, Guideline E	AGAINST APPLICANT
Subparagraph 2.a. through 2.d.:	Against Applicant

### **Conclusion**

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

Martin H. Mogul  
Administrative Judge