



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



In the matter of: )  
)  
) ISCR Case No. 08-05205  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tovah Minster, Esquire, Department Counsel  
For Applicant: William F. Savarino, Esquire

June 4, 2010

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant’s questionable behavior is mitigated by the passage of time, his character reputation, remorse, and his many years of good work for defense contractors. Eligibility for access to classified information is granted.

**Statement of the Case**

On April 16, 2007, Applicant submitted a security clearance application. On December 7, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended, Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, and the Adjudicative Guidelines (AG), effective within DOD on September 1, 2006.

The SOR alleges security concerns under Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding

under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and it recommended referral to an administrative judge to determine whether a clearance should be granted or denied.

On December 23, 2009, Applicant responded to the SOR allegations, and requested a hearing before an administrative judge. The case was assigned to me on January 26, 2010. DOHA issued a notice of hearing on February 18, 2010, scheduling a hearing for February 24, 2010. The hearing was convened as scheduled. The Government offered Government Exhibits (GE) 1 through 5, which were admitted without objection. Applicant testified on his own behalf, presented one witnesses, and submitted Applicant Exhibits (AE) 1 through 5, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on March 4, 2010.

### **Procedural Issue**

In late January 2010, Department Counsel and Applicant's counsel agreed to schedule Applicant's hearing on February 24, 2010. The Notice of Hearing was issued four days before the hearing date. Applicant affirmatively waived his right to 15-day advance written notice. (Tr. 9, Appellate Ext. 1).

### **Findings of Fact**

Applicant made a partial, qualified admission of the factual allegations under SOR ¶ 1.a,<sup>1</sup> and admitted SOR ¶ 1.b. His admissions are incorporated here as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 36-year-old mission support lead manager for software development working for a defense contractor. He graduated from college in 1996, and received a Bachelor of Arts degree in management information systems. He is single and has no children. He has known his girlfriend for six years and they are engaged to be married.

Applicant has been working since January 1997, mostly for defense contractors providing support to government agencies, except for 1999 to 2003, when he worked for industry. He held access to classified information from 1997 until 1999, and from 2003 until sometime in 2007-2008 when his clearance was suspended. He has worked for his current employer providing support to a government agency since January 2007.

As a teenager (age 15-16), Applicant worked at a retail store. When the store manager was out, he would allow his friends to take merchandise without paying for it. When his friends were working at a different store, Applicant would do the same and

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<sup>1</sup> Applicant admitted he told a government investigator he smoked marijuana once in 2004. However, he testified he lied to the investigator to end the interview. The last time he illegally used marijuana was in 1992.

steal merchandise while the store manager was out. He estimated he stole around \$7,000-\$8,000.

Applicant illegally smoked marijuana while in high school and during college. He described his use of marijuana as infrequent, and claimed his last use of marijuana was in November 1992, at age 19. He testified that while attending college, he came to the realization that marijuana was not for him. He knew that at some point, he would work for the government and he did not want to adversely affect his eligibility for a government job.

In March 2002, Applicant was charged with possession of fake identification and alcohol. He underwent a diversion program, was placed on probation, his license was suspended for one year, participated in alcohol counseling, and performed community work. His record was expunged after he completed his probation.

From approximately 1996 to 1999 and in 2004, Applicant accessed inappropriate websites approximately 100 times from a government computer. He knew it was improper for him to access those websites from a government computer. He claimed his friends used to send him emails with links to pornographic sites or attachments that he opened and then deleted. He claimed he was naïve and immature and did not fully understand the ramifications of his actions. He has not accessed any inappropriate websites on a government computer since 2006, except during the performance of his duties as a network access manager.

Between an unspecified date and August 2005, Applicant rented and made illegal copies of approximately 150 DVD movies. He claimed he stopped making illegal copies of movies in August 2005.<sup>2</sup>

In September-October 2005, Applicant participated in a lifecycle polygraph assisted interview. Before the interview, he disclosed he shoplifted as a teenager, illegally smoked marijuana while in high school and college (the last time was in November 1992), that he illegally made copies of movies, and that he was suspended during his first year of college for academic reasons. He told the investigator that the last time he believed he was around marijuana was in May 2004. He explained that during a party, a girlfriend was smoking a European made cigarette and he took a drag of her cigarette. He believed he recognized the smell and taste of marijuana and asked her whether she was smoking a marijuana cigarette. She told him that the cigarette did not contain marijuana.

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<sup>2</sup> The SOR did not allege that Applicant made illegal copies of DVDs or that he lied to a government investigator during a polygraph assisted background interview. As such, this information cannot be used to deny Applicant's security clearance. Notwithstanding, I may consider any behavior not alleged in the SOR to: assess his credibility; evaluate his evidence of extenuation, mitigation, or changed circumstances; assess his possible rehabilitation; determine the applicability of the AGs; and conduct the whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

During the course of an approximately three-hour interview, the interviewer repeatedly confronted and questioned Applicant about his marijuana use until Applicant admitted he smoked marijuana in May 2004. At his hearing, Applicant repeatedly testified he has not used marijuana since November 1992. He claimed that after almost three hours of being badgered by the interviewer, he was tired and mentally exhausted and falsely admitted to using marijuana. Applicant admitted he lied to the interviewer about his use of marijuana in 2004, because he wanted to stop the interview and go home. As a result of his marijuana use admission, Applicant was denied access to classified information at the top secret level and his clearance was suspended. Applicant testified that he is against the use of illegal drugs, he does not associate with drug-users, and avoids visiting places where drugs may be used.

Applicant presented a sworn statement from his May 2004 girlfriend corroborating that he asked for a drag of her cigarette and that she was not smoking marijuana. She stated she has never seen or heard of Applicant using marijuana. To her knowledge Applicant is against the use of illegal drugs. Applicant's fiancé also provided a sworn statement indicating she has known him since 2004. She has never seen or heard of Applicant using marijuana during the last 10 years. Applicant is against the use of illegal drugs and avoids interacting with people who do.

Applicant's direct supervisor testified at his hearing. He has been employed by a government contractor for eight years. He is responsible for the industrial security and the network security of a government agency. He has known Applicant for seven years during which they have had close daily contact. During the last three years, Applicant has worked directly under his supervision. The supervisor confirmed Applicant worked as firewall administrator between 2003 and 2006. In that capacity, Applicant likely accessed inappropriate websites as part of his duties blocking access to those websites.

When Applicant informed him of the SOR allegations, he reviewed the last five years of firewall logs to determine whether Applicant had been accessing inappropriate websites. He determined that Applicant was not accessing inappropriate websites outside of his official duties to block such sites. Applicant is his go-to man. Applicant manages a 25 man team as a network security monitor and runs the program development organization. He considers Applicant to be honest, trustworthy, and of high moral character. Applicant is a bright and valuable employee that demonstrates good judgment. He has had a clearance for seven years and never has had any security issues. Applicant is knowledgeable of, and follows the rules and regulations for, handling secured information. He recommended Applicant's continued access to classified information. Applicant has a reputation for being opposed to drug use.

Applicant's company facility security officer provided a sworn statement. He has known Applicant since 1996. During this period, they have had daily to weekly contact. He considers Applicant extremely diligent in following security rules and procedures. He considers Applicant to be dependable, honest, and trustworthy. He believes Applicant has a reputation for being against drug use. He has never received a complaint about

Applicant accessing inappropriate websites. He recommended Applicant's continued access to classified information.

The government agency's industrial security manager also provided a sworn statement on behalf of Applicant. He has known and has interacted with Applicant on a daily basis since 2003. He believes Applicant has strong ethics and character. He considers Applicant to be dependable, honest, and trustworthy. Applicant has a reputation for following rules and procedures and has never been involved in any security violations. Applicant made him aware of the SOR allegations. Notwithstanding, Applicant has his complete confidence and he endorsed Applicant's continued access to classified information. He has never received any complaints about Applicant's performance. He believes Applicant is against the illegal use of drugs.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this Decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication that the Applicant has not met the strict

guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## Analysis

### Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern:

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.

Applicant shoplifted as a teenager. He used marijuana while in high school and during his first year of college. He last used marijuana in 1992. He deliberately provided a false statement to a government investigator when he falsely stated he had used marijuana in 2004. As a result of his false statement, his clearance was suspended.

Applicant’s behavior triggers the applicability of disqualifying conditions AG ¶ 16(b): “deliberately providing false or misleading information concerning relevant fact to an employer, investigator, security official, competent medical authority, or other official government representative;” AG ¶ 16(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;" and AG ¶ 16(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."

AG ¶ 17 lists seven conditions that could mitigate personal conduct 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.

After considering the above mitigating conditions, I find that AG ¶¶ 17(c), 17(d), 17(e), and 17(g) all apply, at least in part, to the facts of this case. Applicant's shoplifting occurred when he was a teenager in high school. There is no evidence that he has been involved in similar activity since, or that he has continued his association with his shoplifting friends.

Applicant illegally used marijuana while in high school and during his first year of college. He stopped using marijuana in 1992. He has closely worked with three different supervisors for approximately seven years. He disclosed and discussed the SOR allegations with his supervisors. All of his supervisors lauded Applicant's judgment, ability to follow rules and regulations, and his dependability, honesty, and trustworthiness. They consider Applicant to be opposed to the use of drugs and recommended Applicant's eligibility for access to classified information.

Applicant's behavior constituted serious offenses. Notwithstanding, the seriousness of his actions, I find his behavior to be remote and that it occurred under circumstances that are unlikely to recur. His shoplifting occurred when he was a teenager and his illegal marijuana use stopped in 1992. He has worked for a government contractor during the last seven years. His performance and character are considered beyond reproach. His three supervisors lauded his professionalism and his ability to follow rules and regulations.

Applicant established through his supervisor that his access to the inappropriate websites during the last five years was likely related to his duties as a firewall administrator. It appears the investigator did not consider necessary to follow up on Applicant's statement that it was part of his duties to access inappropriate websites to block them from access from others. Thus, it is plausible the investigator was overzealous on his investigation, refused to believe that Applicant stopped using marijuana in 1992, and pushed Applicant to his limit. It is possible Applicant lied to terminate his interview.

However, Applicant's false statement to a background investigator, regardless of the investigator's overzealousness is a serious concern. At the time of his background interview, he was a mature, well educated, capable worker. Lying to an investigator just to end the interview shows a clear lack of judgment. On the other hand, the statement was made five years ago. Applicant is now more mature person, he is engaged to be married, and holds substantial professional responsibility. Applicant has acknowledged his inappropriate behavior and expressed sincere remorse for his actions. He promised never to make any false statements in the future. Applicant's fiancé, supervisors, and employer know about his inappropriate behavior. As such, he is not vulnerable to exploitation or duress.

### **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 relevant 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) 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.

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. AG ¶ 2(c).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a mature and well-educated man. Except for the misconduct discussed in the decision, there is no evidence of any other blemishes on Applicant's behavior, or that he has otherwise failed to follow rules and regulations, or violated security procedures.

Applicant has acknowledged his inappropriate behavior and expressed sincere remorse for his actions. He promised never to make any false statements in the future. He has substantially reduced or eliminated his vulnerability to exploitation or duress. Since 1997, he has been successful working for defense contractors, and has established a reputation as a valuable, dedicated, and reliable employee. His references consider Applicant to be honest, trustworthy, and of high moral character. He was commended for his judgment, maturity, work ethic, and overall performance. His references recommended that he receive access to classified information.

On the other hand, Applicant deliberately made a false statement to an investigator despite his knowledge of the illegality of his action. His false statement is a serious offense. It squarely brings up the issue of whether Applicant is a security risk based on his past behavior.

On balance, and after considering all the evidence, I conclude that Applicant's favorable evidence is sufficient to mitigate the security concerns arising from his personal conduct. Applicant's favorable evidence of good performance for a government contractor outweighs his temporally remote questionable behavior. I believe he has learned from his mistakes and the security clearance process. He now understands what is required of him to maintain his eligibility for access to classified information. Overall, the record evidence convinces me of Applicant's eligibility and suitability for a security clearance.

### **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

Subparagraphs 1.a-1.b:

For Applicant

**Conclusion**

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

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JUAN J. RIVERA  
Administrative Judge