



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



In the matter of:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 08-05586

**Appearances**

For Government: Candace Le'i, Esquire, Department Counsel  
For Applicant: *Pro se*

September 30, 2009

**Decision**

CURRY, Marc E., Administrative Judge:

Applicant's multiple criminal charges over the past 20 years, his failure to list the alcohol-related ones, as required, on a 2007 security clearance application, and his history of illegal drug use generate security concerns that he failed to mitigate. Clearance is denied.

On April 28, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, Personal Conduct and H, Drug Involvement. 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) as promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR on May 26, 2009, admitting all of the allegations except subparagraph 1.j. He requested a hearing, and the case was assigned to me on June 11, 2009. On June 24, 2009, a notice of hearing was issued scheduling the case for July 28, 2009. On July 27, 2009, I continued the case on my own motion, and rescheduled it with the agreement of the parties for August 3, 2009. The hearing was conducted as rescheduled. I received 11 government exhibits, four Applicant exhibits, and Applicant's testimony. The transcript was received on August 7, 2009.

### **Findings of Fact**

Applicant is a 44-year-old single man. A prior marriage ended in divorce in 1989. Applicant has no children. He has a high school education, and has taken some technical courses over the years (Tr. 24).

For the past two years, Applicant has worked as an electrician for a defense contractor. Specifically, Applicant focuses on quality control and safety issues (Exhibit A). According to his supervisor, he has strong work habits, and his performance level is high (Exhibit C). According to the company's manager for safety and quality assurance, Applicant is highly observant of potential quality control problems, and has a dynamic personality that prompts others to "pick up their standards a notch higher" (Exhibit A).

Applicant served in the U.S. Navy from 1983 to 1987. In November 1986, Applicant's roommate, a fellow sailor, borrowed his car without permission (Answer at 1). Applicant then left his duty station without authority, located his roommate, and attacked him, "grabbing him around the throat and hitting his head against the bulkhead several times" (Exhibit 4). Subsequently, Applicant was charged under Article 15 of the United States Code of Military Justice (UCMJ) for assaulting and threatening a fellow sailor. He received 45 days restriction, 45 days extra duty, and two weeks forfeiture of pay (Exhibit 4; Tr. 26).

In April 1987, a disagreement among fellow sailors, including Applicant, which occurred during an off-duty softball game, degenerated into a brawl (Tr. 27). During the melee, Applicant struck a seaman several times "about the face and body with his hands and feet" (Exhibit 5). Subsequently, Applicant received a general discharge under other than honorable conditions (Exhibit 6).

On or about June 1994, Applicant went to a gas station. After pumping gas into his car, he realized that he did not have any cash (Tr. 28). Applicant offered to pay with a check, but the clerk refused to accept a check without any identification (*Id.*). Because Applicant needed his identification to cash the check at a bank, he left his license tag with the clerk, and drove away, headed to the bank. The clerk called the police, who arrested and charged Applicant with theft under \$300. Applicant spent the night in jail. The following morning, he was released, and issued a ticket (Tr. 30). At a court hearing the following month, he pleaded guilty and paid the fine (*Id.*). The amount of the fine is unknown from the record.

In August 2000, during a concert at the beach, Applicant “got into some verbal confrontations” with some people who were “raising a ruckus” (Tr. 32). The police arrived and arrested everyone, including Applicant, charging them with being drunk in public (*Id.*). Applicant and the others were then taken to an overnight holding cell (Tr. 33). Applicant was released the next day, and issued a \$25 ticket, which he paid (Tr. 33, 36).

A few months after the arrest, Applicant was stopped by the police at a sobriety checkpoint.<sup>1</sup> Although he was sober, he did not have his operator’s license in his possession. He was then issued a traffic ticket for driving without an operator’s license (Tr. 32-33). Applicant paid the ticket.

Late one evening in March 2004, Applicant was charged with public intoxication after police observed him staggering down the street (Tr. 38, 87). Applicant was arrested and charged with being drunk in public (Tr. 37). After spending the night in jail, he was issued a \$25 ticket, which he paid in lieu of appearing in court (Tr. 37, 87).

In approximately June 1997, when Applicant was 32 years old, he began experimenting with marijuana (Answer at 2). Over the course of the following year, he smoked it approximately once per week (Tr. 53). During this period, he purchased it approximately four times, spending \$200 per purchase (Exhibit 3 at 7). He never smoked the drug with other people. Instead, he would smoke it alone while working on his vehicle (*Id.* at 18). During an interview with an investigative agent, Applicant stated that the marijuana made him feel relaxed and focused (*Id.*). At the hearing, Applicant testified that he did not enjoy smoking marijuana because it made him feel paranoid (Tr. 52-53).

Applicant contends he has not smoked marijuana since 1998 (Tr. 87). In 2007, he tested positive for marijuana in a pre-employment urinalysis screening for the job he held immediately before he began working at his current job (Answer at 3). He contends that he had not been smoking marijuana before he took the urinalysis, and questioned the accuracy of the urinalysis (Tr. 54). He informed his then-employer who told him to undergo another urinalysis (Tr. 56). The following week, Applicant underwent another urinalysis and passed (Tr. 56). He worked for this employer for one month before leaving to work for his current employer (*Id.*). His decision to leave was unrelated to his initial failure of the urinalysis (Tr. 59). Applicant voluntarily disclosed this information to an investigative agent (Exhibit 3 at 13).

On July 20, 2009, Applicant executed a statement of intent not to use any illegal drugs in the future (Exhibit D). He has relocated to a new town and does not socialize at places where there is heavy drinking or illegal activity (Tr. 96).

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<sup>1</sup>Applicant’s recollection of this incident constitutes the only record evidence. He did not specifically recall the date of the incident.

Applicant completed a security clearance application in December 2007. He did not disclose his alcohol-related charges or arrests in response to Section 23d. (*Have you ever been charged with or convicted of any offenses related to alcohol or drugs?*). He testified that he had “forgotten all about them” (Tr. 40).

## **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 required to be considered 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. 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.”

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.

## **Analysis**

### **Guideline E, Personal Conduct**

The security concern under this guideline is as follows:

[c]onduct 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 ¶ 15).

SOR subparagraph 1.g, “[o]n or about November 10, 2001, you failed to appear in [municipality X] on a misdemeanor charge” does not identify the specific charge, and is therefore overbroad. Nevertheless, Applicant admitted this allegation, and identified the charge as a traffic infraction which he paid, obviating the need to appear in court. I resolve SOR subparagraph 1.g in Applicant’s favor.

Applicant’s omission of his alcohol-related arrests from his 2007 security clearance application, as alleged in SOR subparagraph 1.j, raises the issue of whether AG ¶ 16(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,” applies. Applicant contends that he did not include his alcohol-related arrests on his security clearance application because he forgot about them. On both occasions, however, the police jailed him overnight. Under these circumstances, it is not credible that Applicant would forget these arrests. His credibility is further undermined by the contradictory statements he provided throughout the investigatory process regarding whether he enjoyed smoking marijuana. AG ¶ 16(a) applies without mitigation.

Applicant’s 2009 falsification of his security clearance, together with the episodes of misconduct while in the military, his multiple arrests, and his abuse of marijuana trigger the application of 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, or other characteristics indicating that the person may not properly safeguard protected information.”

The relevant, potentially mitigating condition is AG ¶ 17(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.” Much of Applicant’s misconduct was either minor, or remote in time. However, the security significance of Applicant’s misconduct is elevated by its varied, repetitive nature, and its frequency. Moreover, Applicant’s falsification of his security clearance application occurred less than six months ago. Upon viewing Applicant’s personal conduct in its totality, I conclude that AG ¶ 17(c) does not apply.

### **Guideline H, Drug Involvement**

Under this guideline, “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 ¶ 24). Applicant’s abuse of marijuana from 1997 through 1998, and his 2007 failure of a urinalysis, testing positive for

marijuana, trigger the application of AG ¶ 25(a), “any drug abuse,” and AG ¶ 25(b), “testing positive for illegal drug use.”

The relevant mitigating conditions are as follows:

AG ¶ 26(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,

AG ¶ 26(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 recent positive urinalysis undercuts his contention that he has not used marijuana since 1998. His contention that the urinalysis was inaccurate is not credible given the falsification of his security clearance application, as described earlier. I conclude AG ¶ 26(a) does not apply.

AG ¶¶ 26(b)(1) and 26(b)(2) are not relevant because Applicant always used marijuana while home alone. The failed 2007 urinalysis casts doubt on Applicant’s contention that he has not used marijuana since 1998. Consequently, he has failed to establish that AG ¶ 26(b)(3) applies. He did, however, submit a signed statement of intent not to use any marijuana in the future. AG ¶ 26(b)(4) applies.

### **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) 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.

Between 1997 and 2004, Applicant engaged in a variety of misconduct including fighting with fellow sailors while in the Navy, drinking in public, and smoking marijuana. The minor nature of most of these offenses is offset by their repetitive nature. Moreover, immaturity does not mitigate the behavior because Applicant was 32 years old when he chose to smoke marijuana, and 39 when he committed his most recent alcohol-related offense. Most importantly, he failed to be fully forthcoming about his alcohol-related offenses when he completed his security clearance application in 2009. Applicant deserves credit for his solid work performance. However, this is insufficient to outweigh the security concerns generated by his history of adverse personal conduct and drug involvement.

### **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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.f:	Against Applicant
Subparagraph 1.g:	For Applicant
Subparagraphs 1.h - 1.j:	Against Applicant
Paragraph 2, Guideline H:	AGAINST Applicant
Subparagraph 2.a:	Against Applicant

### **Conclusion**

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

MARC E. CURRY  
Administrative Judge