



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-05588
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Eric Borgstrom, Esq., Department Counsel  
For Applicant: *Pro Se*

April 7, 2009

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**Decision**

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RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On January 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E. 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 answered the SOR in writing on January 29, 2009, and requested a hearing before an administrative judge. The case was assigned to me on February 17, 2009, and DOHA issued a Notice of Hearing on the same day. I convened the hearing as scheduled on March 11, 2009. The Government offered Exhibits (GE) 1 through 31.

Applicant did not object and they were admitted. Applicant testified and offered Exhibits (AE) A through D. Department Counsel did not object and they were admitted. DOHA received the transcript of the hearing (Tr.) on March 20, 2009.

### **Findings of Fact**

Applicant admitted all of the allegations in the SOR. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 28 years old and has worked for a federal contractor since 2007. He graduated from high school in 1999 and attended college, but did not earn a degree. He is married and has two children.<sup>1</sup>

Applicant admitted the following:

On February 2, 2005, he was charged with Driving Vehicle on Highway at Speed Exceeding the Limit. He was fined \$140.

On October 11, 2004, he was charged with Simple Assault. He pled no contest and was fined \$50.

Applicant held a DoD secret security clearance from July 1998 to October 22, 2002. On October 22, 2002, he was separated from the Army National Guard for misconduct due to abuse of illegal drugs, after he tested positive for marijuana. Applicant used illegal drugs while holding a security clearance.<sup>2</sup>

In July 2002, Applicant was charged with (1) Driving, Attempting to Drive a Vehicle While Under the Influence (DWI); (2) Driving, Attempt to Drive Vehicle While Impaired by Alcohol; (3) Driving Vehicle on Highway at Speed Exceeding Limit; (4) Attempting to Drive to Elude Uniformed Police by Failing to Stop Vehicle; (5) Turning Off Vehicle Lights to Avoid Identification; (6) Failure to Pass Around Rotary Traffic Island to Right of Island; and (7) Person Driving Motor Vehicle on a Suspended Out of State License. He was found guilty of (2), (3), (4) and (7) and sentenced to 10 days in jail, of which six were suspended.<sup>3</sup>

On July 3, 2001, he was charged with (1) Purchase etc. of Alcoholic Beverages by a Minor; (2) Driving Without a License; and (3) Driving While Operator's Privileges Suspended or Revoked. He was found guilty of all three offenses and ordered to pay fines and costs totaling approximately \$577.

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<sup>1</sup> Tr. 93-95.

<sup>2</sup> Tr. 96-97.

<sup>3</sup> Tr. 86-93; SOR 1. d lists the date of offense as July 18, 2002. He went to court in February 2003.

On May 18, 2001, he was charged with Bad Checks. He was ordered to pay restitution and was fined \$50.

On April 21, 2001, he was charged with Bad Checks. He pled guilty and was fined \$50.

On December 20, 2000, he was charged with Bad Checks and was ordered to pay restitution and costs.

On August 7, 2000, he was charged with Driving While Operator's Privileges Suspended or Revoked. He was found guilty and fined \$200.

On July 24, 2000, he was charged with Driving While Operating Privileges Suspended or Revoked. He was found guilty and fined \$200.

On February 15, 2000, he was charged with Speed Exceeding Limit. He was fine \$80.50.

On December 29, 1998, he was charged with Purchase Etc. Alcohol by Minor. He pled guilty and was fined \$175.

Applicant completed his security clearance application (SCA) on November 7, 2007. In response to question 23 inquiring about his police record, Applicant admitted he was charged in July 2002 and went to court in February 2003 for Driving While Impaired and with a suspended license. He did not list all of the other offenses he was charged with or convicted as of that day. He did not divulge the additional charges when he was interviewed by an Office of Personnel Management Investigator (OPM) on December 18, 2007. He was interviewed again on March 6, 2008, and questioned why he failed to list his other alcohol-related offenses. He stated he should have revealed them, but thought the time frame was five years. He stated that if he wanted to conceal the information he would not have disclosed the Driving While Impaired charge. He also stated that he completely forgot about the other charges and that all of the other charges except the Driving While Impaired charge were dismissed.<sup>4</sup> This is contrary to the court records that document he was convicted of Driving While Impaired, eluding a uniformed police officer, turning off his lights to avoid identification, and driving on a suspended license. He stated in his interview that he did not disclose the other charges because he thought they were trivial compared to the Driving While Impaired and they were all dismissed. He acknowledged he was aware of his past offenses and did not forget them.<sup>5</sup>

Applicant also failed to list in response to question 23 the charges from December 29, 1998, for purchasing alcohol as a minor and the July 3, 2001, charges for purchasing alcohol as a minor and driving with a suspended license. He explained that

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<sup>4</sup> GE 4 at page 2.

<sup>5</sup> Tr. 74-83; GE 4.

he did not know why he failed to list these offenses. He explained that he had not purchased alcohol, but rather had consumed it as a minor, but the charges list the term “etcetera” which includes consumption. He admitted he was driving on a suspended license and had done so on other occasions with the suspension. He understood he was not supposed to drive. He drove to and from work for approximately a year while his license was suspended. He also drove other times. Applicant’s driver’s license was suspended from June 2000 to January 2005, except for the time between November 2003 and January 2004, when it was reinstated. His suspensions were imposed due to the various offenses he committed and because he continued to violate his suspension.<sup>6</sup>

Applicant did not disclose that the reason he was discharged from the National Guard was due to his illegal drug abuse. Question 23(e) asks if he was subject to disciplinary action under the Uniform Code of Military Justice. Apparently, Applicant did not receive disciplinary action for his drug use while in the military, but rather was discharged for misconduct and received a General Discharge. There is no evidence to support he received disciplinary action. Therefore, he was not required to list any action in this section of his SCA. He did, however, fail to disclose on his SCA that he used drugs while he held a security clearance. He stated he was unaware that he had a clearance at the time. He thought he only had the clearance when he was actually serving on active duty with his reserve unit.<sup>7</sup> I do not find his explanation regarding this failure to be credible.

In response to Question 23(f) inquiring if in the last seven year Applicant had been arrested for, charged with, or convicted of any offense(s) not listed in the other sections of the question, he answered “no”. He failed to list he had been charged with simple assault on October 11, 2004, and received a fine. He admitted he was arrested, fingerprinted, photographed and spent the night in jail. He hired an attorney and worked out a plea deal. The case was dismissed. He stated he later disclosed the information during his background interview.<sup>8</sup>

In response to Question 24(a) inquiring if Applicant had used illegal drugs in the last seven years or since he was 16, whichever was shorter he failed to disclose he had used illegal drugs in November 2001. Applicant stated he miscalculated the years and said he had previously listed it on an earlier SCA.<sup>9</sup> Applicant completed a Questionnaire for Public Trust Position (SF 85P) dated February 6, 2003. Question 21 of the SF 85P asked if in the last year he had illegally used a controlled substance. He answered “no.” He was discharged from the National Guard for drug abuse on October 22, 2002. It is possible that it was more than a year since he had used illegal drugs and his answer

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<sup>6</sup> Tr. 32-43; GE 3, 12, 13, and 14.

<sup>7</sup> Tr. 23, 96-99.

<sup>8</sup> Tr. 65-71; AE 5, 10 and 11.

<sup>9</sup> Tr. 22-23, 62-65; GE 1.

was truthful. However, it is inconsistent with his explanation regarding the omissions on his 2007 SCA that he previously provided the information on the earlier SF 85P questionnaire, which did not have this information. He then stated that he completed a totally different SCA at an earlier date that included the omitted information. He did not retain a copy of this application and the government did not have it in its possession. I did not find Applicant's testimony credible.<sup>10</sup>

Applicant also failed to disclose on the 2003 SF 85P the Driving While Impaired charges from July 2002, and other offenses from July 3, 2001, August 7, 2000, July 24, 2000, and December 29, 1998. (See above paragraphs for the specific charges)<sup>11</sup> His explanation for why he did not divulge on his SF 85P that he had been arrested for various charges in July 2002 was because he believed he was not charged yet and he had not been to court at that point. However, he admitted he knew he had been arrested, had been handcuffed, placed in a police cruiser, photographed and fingerprinted, and had received a notice in the mail about the charges. He also explained the reason he did not disclose the Driving While Impaired incident was because he was distraught over the death of his brother, six months earlier, in a single car accident. He explained the reason he did not disclose the other offenses from July 2002 were because they were traffic violations and he did not pay a fine. He learned from the investigator that fines had been imposed, but suspended, and he should have listed them. Applicant stated he did not know why he did not list the July 3, 2001 offense.<sup>12</sup> I do not find any of his explanations credible.

Applicant did not list the three bad check offenses on his 2003 SF 85P because he stated he did not realize he had been charged criminally. Applicant did not have an explanation for why he did not think he was charged criminally when he received court documents in the mail. Although Applicant never appeared in court, he admitted that he pled guilty and was fined three times between 2000 and 2001 for bad check charges. He provided conflicting testimony about whether he made restitution before he received the summons. He verified he was notified by mail of the court's finding. He also provided confusing testimony about whether he paid the fines.<sup>13</sup>

Applicant was arrested four times for driving with a suspended or revoked license from 2000 to 2002. He does not remember many of the incidents. He does recall being pulled over by the police, but does not think he was arrested. His explanation for driving on a suspended license was, "I still have bills to pay." He did not know why he did not list these offenses on his 2003 SF 85P. He then testified he did not list them because he was a minor.<sup>14</sup> Applicant was over 18 in 2000.

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<sup>10</sup> Tr. 22-23, 57-62; GE 1, 2 and 4.

<sup>11</sup> SOR 1.d, 1.f, 1.j, 1.k. and 1.m.

<sup>12</sup> Tr. 23-32, 56.

<sup>13</sup> Tr. 44-47.

<sup>14</sup> Tr. 46-54.

Applicant stated he did not deliberately or intentionally fail to divulge the information required on his SCA and SF 85F. He does not know why he did not list certain offenses. Regarding some omissions, he believed he did not have to list them because of a five-year period. He is not sure why he thought there was a five-year period. Regarding other omissions, he explained he misread the questions, forgot about the offenses, or thought he did not have to disclose them because the charges were dismissed or he only paid fines.<sup>15</sup>

Applicant testified he made mistakes and used poor judgment. He has since matured. He is a family man now and is devoted to providing the best life he can for his family. He does not drink to intoxication. Applicant volunteers his time at a mental health center and has taken a mission trip with his church to build homes.<sup>16</sup>

Applicant provided character statements from coworkers, a supervisor, a friend, and a family member. He is considered an exceptionally competent employee, a quick learner, and very dependable. He has a strong work ethic and is a devoted family man. He is also considered trustworthy, honest, and a man of integrity.<sup>17</sup> Applicant provided photographs of awards he received from his employer.<sup>18</sup>

I find Applicant intentionally and deliberately failed to divulge important information on both his SCA and SF 85P. His testimony was not credible for why on two difference documents he failed to provide complete disclosure of important information about his past. His explanations for his repeated omissions were not credible.

### **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,

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<sup>15</sup> Tr. 26-28.

<sup>16</sup> Tr. 100-103.

<sup>17</sup> Tr. 21-22; AE D.

<sup>18</sup> Tr. 20-22; AE A.

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 and 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 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. I have specifically considered the following:

(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; 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.

I have considered all of the facts and find Applicant deliberately omitted concealed, misled, and falsified information on his SCA and his SF 85P. Applicant used illegal drugs while holding a security clearance. He committed alcohol-related offenses. He had his driver's license suspended several times and ignored the suspensions and drove his vehicle. Although Applicant's drug offense and some of his alcohol offenses were several years ago, I find, combined with all of his other offenses, his behavior and conduct demonstrate questionable judgment, untrustworthiness, unreliability, lack of candor, and an unwillingness to comply with rules and regulations. I find all of the above disqualifying conditions apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

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

(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; and

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

Applicant did not make an effort to correct the omissions and falsifications on his SCA or his SF 85P before being confronted. He was not entirely truthful during his first interview, thereby continuing to mislead the investigator. Applicant's explanations for his omissions were inconsistent and not believable.

Applicant has a long history of violating the law. He was discharged from the military due to illegal drug use. He used the drugs while he held a security clearance. He has several alcohol-related offenses. He repeatedly had his driver's license suspended, yet continued to drive. He did not grasp the importance of obeying the law, but rather rationalized his actions. Some of Applicant's criminal offenses occurred several years ago. He believes he has matured and is now a responsible family man devoted to his family. Although that may be true, I have serious concerns about his failure to honestly and truthfully divulge all of his background information, which had he done so would have reflected a changed man. His numerous explanations and excuses for failing to provide complete and honest answers on both his SCA and SF 85P are a cause of concern. His inconsistent answers and omissions, along with his history of violating the law are not minor issues nor were his actions infrequent. I find they cast doubt on his reliability, trustworthiness and good judgment. Applicant has not provided sufficient evidence to convince me he has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress. Applicant failed to mitigate the personal conduct security concerns. I find none of the mitigating conditions apply.

### **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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense 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 is a young man devoted to his family. He has a good work record. Applicant has a significant history of rules violations, including use of marijuana while in the National Guard and holding a security clearance, repeated alcohol-related offenses, driving while impaired, and repeatedly driving on a suspended license. Although many of these violations could be attributed to his age and maturity at the time of the offenses, he did not truthfully divulge all of his past indiscretions and offenses on his 2007 SCA and 2003 SF 85P. His lack of candor and inconsistent answers raise security concerns. Overall, the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his personal conduct.

### **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.o:	Against Applicant
Subparagraph 1.p:	For Applicant
Subparagraphs 1.q-1.t:	Against 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.

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Carol G. Ricciardello  
Administrative Judge