



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 08-09004  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Richard A. Stevens, Esquire, Department Counsel  
For Applicant: *Pro se*

March 18, 2011

**Decision**

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HENRY, Mary E., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I grant Applicant's eligibility for access to classified information.

Applicant signed an Electronic Questionnaire for Investigations Processing (e-QIP) version of a security clearance application (SF-86) on May 1, 2006. The Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) on November 20, 2009, detailing security concerns under Guideline J, Criminal Conduct, and Guideline E, Personal Conduct, that provided the basis for its preliminary decision to deny him a security clearance. 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 Adjudicative Guidelines For Determining Eligibility for Access to Classified Information (AG) implemented on September 1, 2006.

Applicant acknowledged receipt of the SOR on December 5, 2009. He answered the SOR in writing on December 10, 2009, and requested a hearing before an administrative judge. DOHA received the request on December 23, 2009, and Department Counsel was prepared to proceed on October 14, 2010. DOHA assigned the case to another administrative judge on October 19, 2010. Due to Applicant's overseas assignment, I received the case assignment on November 3, 2010. DOHA issued a notice of hearing on November 12, 2010, and I convened the hearing as scheduled on December 17, 2010. The Government offered eight exhibits (GE) 1 through 8, which were received and admitted into evidence without objection. Applicant testified, and submitted four exhibits (AE) A through D, which were received and admitted into evidence without objection. The record closed on December 17, 2010. DOHA received the transcript of the hearing (Tr.) on December 29, 2010.

### **Procedural Ruling**

Applicant agreed to the hearing date about one month before the hearing and received the written hearing notice on December 5, 2010, less than 15 days before the hearing. (Tr. 8.) I advised Applicant of his right under ¶ E3.1.8 of the Directive to receive the notice 15 days before the hearing. Applicant agreed to proceed with his hearing. (*Id.*)

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted the factual allegations in ¶¶ 1.a through 1.f of the SOR, concerning criminal conduct. His admissions are incorporated herein as findings of fact. He denied the factual allegations in ¶¶ 2.a and 2.b of the SOR, concerning personal conduct.<sup>1</sup> After a complete and thorough review of the evidence of record, I make the following additional findings of fact.

Applicant, who is 34 years old, works as a team leader in cellar communications for a Department of Defense contractor. He began his position in October 2003 and works overseas. Since his arrival at his job, he has demonstrated "incredible initiative and a strong dedication" to his work. As a result of his hard work, his employer promoted him, and he now works as a shift supervisor. His managers describe him as enthusiastic, reliable, dependable, responsible, and an asset to their mission. They trust him and consider him a professional. His approach to his work is professional and well-

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<sup>1</sup>When SOR allegations are controverted, the government bears the burden of producing evidence sufficient to prove controverted allegations. Directive, ¶ E3.1.14. "That burden has two components. First, the government must establish by substantial evidence that the facts and events alleged in the SOR indeed took place. Second, the government must establish a nexus between the existence of the established facts and events and a legitimate security concern." See ISCR Case No. 07-18525 at 4 (App. Bd. Feb. 18, 2009), (concurring and dissenting, in part) (citations omitted). 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. 08-06605 at 3 (App. Bd. Feb. 4, 2010); ISCR Case No. 08-07290 at 2 (App. Bd. Nov. 17, 2009).

reasoned. His professional conduct has never been called into question. They consider him well-qualified to hold a clearance.<sup>2</sup>

Because of his father's military career, Applicant moved many times in childhood. He graduated from high school in 1994. He enlisted in the United States Army in September 1995 and received an honorable discharge in September 1999. During his first his year of college, a cellular phone company offered him employment, which he accepted. From 2000 until October 2003, he worked at various communications companies. He is single and the father of a five-year-old son.<sup>3</sup>

While serving in the Army, Applicant received a non-judicial punishment (NJP) in 1996 for disobeying an order. After failing a physical training test, one supervising sergeant told him that he could not play on a local basketball team. Another supervisor ordered him to play on the team, so he did. He accepted the NJP. His punishment was one week of extra duty.<sup>4</sup>

In March 2000, while driving with two college friends, the police stopped Applicant for failure to yield at a right of way yield sign. During the stop, the police officer alleged that he smelled marijuana and directed Applicant and his friends to exit the car. The police officer searched all three men on the side of the road and found no weapons or contraband. The police officer called for drug sniffing dogs, who also found no drugs in the car. The police officer searched the car and found a leafy green substance inside the remains of a cigar in an ashtray in the car. He also found three other cigars in the car. The police charged all three with possession of marijuana, less than 2 ounces, a Class B misdemeanor. The police laboratory tested the leafy green substances and determined that it was not marijuana. Upon the recommendation of the prosecutor, the court dismissed the charges against Applicant on July 11, 2000.<sup>5</sup>

In November 2001, Applicant drove a company van from the job site. Four co-workers rode with him as he drove along a highway, drinking beer. He drank enough beer to become intoxicated. The police stopped him for speeding. He admitted to the police he had been drinking. The police conducted a field sobriety test and a breathalyzer test. As a result, the police arrested and charged him with driving under the influence (DUI), speeding, open container, reckless driving, disorderly conduct, leaving the scene of an accident with property damage, and seatbelt violation. Applicant did not receive a notice advising him of a court date and did not appear for his first court date. The court issued a failure to appear warrant, which resulted in his arrest on the warrant in 2002. He pled guilty to DUI, and the court dismissed the other charges. The court fined him \$1,500, placed him on probation, suspended his driver's license for six

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<sup>2</sup>GE 1; AE A - AE D.

<sup>3</sup>GE 1; GE 3; Tr. 27-29.

<sup>4</sup>GE 2.

<sup>5</sup>GE 2; GE 7; Tr. 41-42.

months, and required him to attend a weekend alcohol education and awareness class. He eventually paid the fines, and he completed his probation.<sup>6</sup>

In May 2002, the police stopped Applicant and charged him with driving on a suspended license and failure to yield right of way following his involvement in a car accident. He pled *nolo contendere* to failure to yield right of way and does not remember how he pled to driving on a suspended license. The court fined him \$500 and placed him on probation for 12 months. He paid his fine over time and completed his probation. At some later point in time, a failure to appear warrant was issued on this matter, but the case was fully resolved in June 2003.<sup>7</sup>

In August 2003, Applicant rode with a friend for a haircut at the neighborhood barber shop. On the way, his friend decided to stop to buy a personal bag of heroin. They stopped in a bad section of town. His friend exited the car, and he remained in the car. A police officer from the city drug task force appeared from a place of hiding and told him to get out of the car. The police found a bag of heroin left on the floor of the car by his friend and unknown to Applicant. The police charged Applicant with possession of heroin. In the rearview mirror of the car, Applicant observed his friend run away when the friend saw the police with Applicant. The police report contains a different version of the events surrounding the arrest, which Applicant strongly disputes. The police report indicated that the police officer approached in a marked cruiser and observed Applicant open a suspected bag of heroin. When the police officer got within 10 feet of Applicant, Applicant dropped a small straw on the ground and placed a small bag of heroin in his pants pocket. At a pretrial hearing the following day, Applicant told his story to the court, explaining that the car and heroin were not his. He denied that he was a drug user and agreed to an immediate urinalysis drug test. The court directed that Applicant attend one session of a prevention awareness program, which he did. On September 25, 2003, the court placed Applicant's case on the dead docket after receiving a favorable pretrial report.<sup>8</sup>

Applicant's version of the events surrounding his arrest in August 2003 differs from the police report. At his hearing the day after his arrest, Applicant willingly agreed to an immediate drug test. The court sentenced him to one preventive awareness class and then placed his case on the dead docket.<sup>9</sup> Given the actions of the trial court, I assign greater weight to Applicant's credible testimony about the totality of the proceedings and arrest in August 2003.

In September 2003, the police arrested and charged him with possession of marijuana, less than two ounces. The court set a hearing date for October 21, 2003. Applicant did not appear at the hearing because he had accepted his current job and

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<sup>6</sup>GE 2; GE 4.

<sup>7</sup>GE 2; Tr. 39-40.

<sup>8</sup>GE 5; Tr. 36-37.

<sup>9</sup>Neither party explained the meaning of dead docket.

moved overseas. Since he did not appear for his hearing, the court issued a failure to appear warrant. Applicant acknowledged that he did not quickly resolve this matter. He hired an attorney in 2008 to represent him. The court dismissed the case on December 16, 2008, as there was insufficient evidence.<sup>10</sup>

Since his arrest in September 2003, Applicant has not been involved in any matters which could lead to his arrest. He no longer associates with these friends and has not associated with them since September 2003. Applicant describes the period of 2001 through September 2003 as his “gray cloud period”. He knows his behavior was inappropriate and his associates suspect. During this time, he did not consider that associating with individuals who used drugs a problem for him because he did not use drugs. He now realizes that he is judged by the friends he keeps and that friends who use drugs are not friends he should have.<sup>11</sup>

When he completed his SF-86 (e-QIP) on May 1, 2006, Applicant answered “no” to the following question:

Section 23: Police Record<sup>12</sup>

(c) Are there currently any charges pending against you for any criminal offense?

Applicant did not list his drug arrest in August 2003. He, however, answered “yes” to question (d) under Section 23 and listed his DUI arrest. In response to questions from the Office of Personnel Management (OPM) investigator about his failure to provide this information, Applicant told the investigator that he did not list the August 2003 arrest because the case had been dismissed. He declined to discuss the September 2003 arrest with the OPM investigator as the case was still active.

At the hearing, Applicant denied intentionally falsifying his answers to these questions. He explained that he sought guidance from his security officer about completing the SF-86 (e-QIP). He was told to fill out the application to the best of his knowledge and not lie. He was advised that if he left anything out, he should not worry as he could provide the information in his interview. He understood that the clearance process involved two parts: the “paperwork” and the interview. He believed the two parts worked together, meaning that if he left information off in the paperwork, he could explain the information in the interview. He acknowledged that he may have misunderstood this information.

In answering the questions, Applicant only listed his DUI conviction, not the dismissed arrest. He thought he only needed to list his conviction. He did not seek

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<sup>10</sup>GE 2; GE 6.

<sup>11</sup>Tr. 30, 34.

<sup>12</sup>The instruction directed an Applicant to report information regardless of whether the record in your case has been “sealed” or otherwise stricken from the record, except for certain convictions under the Federal Controlled Substances Act. GE 1.

specific guidance on how to answer these questions. Applicant was open and candid at the hearing.<sup>13</sup>

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used 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 overarching adjudicative goal is a fair, impartial, and commonsense 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.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." An applicant has the ultimate burden of persuasion for 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 an 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

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<sup>13</sup>GE 1; GE 2; Tr. 31-35, 44-47.

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**

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 the disqualifying conditions that could raise security concerns. I have considered all the conditions, and especially the following:

- (a) a single serious crime or multiple lesser offenses;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

Between March 2000 and September 2003, the police arrested Applicant for drugs on three occasions, once for a DUI, and once for driving on a suspended license. He received a NJP in 1996 for disobeying an order. The Government has established its case under the above disqualifying conditions.

AG ¶ 32 provides conditions that could mitigate security concerns. I have considered all the mitigating conditions, and especially the following:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) evidence that the person did not commit the offense; 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.

In 2000, the prosecutor dismissed the marijuana charges against Applicant after the laboratory tests failed to show that the police had found marijuana in his car. Based on the prosecutor's decision and the test results, Applicant did not commit the offense

for which he was charged in 2000. Applicant has mitigated the Government's security concerns expressed in SOR ¶ 1.c under AG ¶ 32(c).

Applicant was arrested once for DUI, nearly ten years ago. His drug arrests in 2003 occurred more than seven years ago. The NJP occurred 14 years ago and the remaining arrest occurred almost nine years ago. Applicant accepted a job overseas, where he has worked for more than seven years. He has not been involved in any criminal activity for over seven years. Given the long length of time since his arrests, his change of friends, his demonstrated maturation, and his employer's favorable recommendations, AG ¶ 32(a) applies, as his past conduct does not reflect on his current reliability, trustworthiness, and good judgment. Since he has not been involved in criminal activity for more than seven years, he has recognized that his conduct was inappropriate, he has new friends, and he has performed exceptionally well at his job, he has successfully rehabilitated himself. AG ¶ 32(d) applies.

### **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:

(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;

(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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group;

For AG ¶ 16(a) to apply, Applicant's omission, concealment or falsification of relevant facts on his e-QIP must be deliberate. The Government established that Applicant omitted a material fact from his SF-86 when he answered "no" to Question 23a, about current pending criminal charges against him. This information is material to



the evaluation of Applicant's trustworthiness to hold a security clearance and to his honesty. In his response, he denies, however, that he had an intent to hide this information from the Government. When a falsification allegation is controverted, the Government has the burden of proving it. Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. See ISCR Case No. 07-00196 (App. Bd. Feb. 20, 2009); ISCR Case No. 09-07551 (App. Bd. Mar. 1, 2011) In evaluating whether the Government has presented substantial evidence regarding the deliberate nature of a false statement or an omission, the Judge must examine the statement or omission in light of the record as a whole. *Id.* In making this determination, the administrative judge must determine whether there is direct or circumstantial evidence concerning an applicant's intent or state of mind at the time the omission occurred.

The relevant issue for determination is Applicant's state of mind when he completed his SF-86 (e-QIP). He knew not to lie as his facility security officer (FSO) specifically told him not to lie. He also understood that if he left any information out of his paperwork, he could provide it to the OPM investigator. Applicant was fully aware of his past arrests when he completed his SF-86 (e-QIP). He listed his DUI arrest, as he had been convicted of this charge by the court. He did not list his August 2003 and September 2003 arrests because he had not been convicted. Despite the instruction in the SF-86 (e-QIP) to list all arrests, he thought that he needed only to list his conviction. Applicant clearly did not read the instructions carefully and received some poor guidance from his facility security officer. Applicant's carelessness and inattentiveness to the instructions for answering the questions regarding his past criminal conduct does not make his decision to answer "no" to Question 23d or his failure to list his August 2003 arrest an intentional falsity. The Government has not established a *prima facie* case under Guideline E, which is found in favor of 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 an 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.

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. The decision to grant or

deny a security clearance requires a careful weighing of all relevant factors, both favorable and unfavorable. In so doing, an administrative judge must review all the evidence of record, not a single item in isolation, to determine if a security concern is established and then whether it is mitigated. A determination of an applicant's eligibility for a security clearance should not be made as punishment for specific past conduct, but on a reasonable and careful evaluation of all the evidence of record to decide if a nexus exists between established facts and a legitimate security concern.

In reaching a conclusion, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I also considered Applicant's highly credible testimony and demeanor. Ten years ago, while in his early twenties, Applicant began associating with individuals of questionable character. As a result of these associations, the police arrested Applicant on drug charges twice in 2003 and once in 2000. His own conduct led to his arrest for DUI in 2001. After accepting an overseas job, in 2003, Applicant moved many miles from his these friends. Over the last seven years, Applicant has thought about his conduct and associations in his "gray cloud period" and realized that society forms a view of an individual based on their associations. He understands that even though he did not use drugs, he would be perceived as drug user if he associated with drug users. He decided to change his associations and did. He does not intend to use drugs in the future or associate with individuals who use drugs. He is highly respected at work and supports his son. Since his last arrest in 2003, he has significantly changed his thinking and his behavior. He is a responsible individual with good judgment.

Overall, the record evidence leaves me without questions or doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant mitigated the security concerns arising from his past criminal conduct and his personal conduct under Guidelines J and E.

### **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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant
Subparagraph 1.f:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant

## **Conclusion**

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

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MARY E. HENRY  
Administrative Judge