



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



In the matter of: )  
 )  
----- ) ISCR Case No. 08-09399  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Jeff A. Nagel, Esquire, Department Counsel  
For Applicant: *Pro se*

October 13, 2010

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**Decision**

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MOGUL, Martin H., Administrative Judge:

On January 12, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines G, H, and E for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the 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.

On February 12, 2010, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this Administrative Judge on March 8, 2010. DOHA issued a notice of hearing on March 9, 2010, and I convened the hearing as scheduled on April 5, 2010. The Government offered Exhibits 1 through 4, which were received without objection. Applicant testified on his own behalf and submitted Exhibit A at the time of hearing, which was also admitted without objection. I granted Applicant's request to keep the record open until April 19, 2010, to submit additional documents. He timely submitted a cover letter and

five character letters, which have been identified collectively and entered into evidence without objection as Exhibit B. DOHA received the transcript of the hearing (Tr) on April 13, 2010. Based upon a review of the case file, pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is denied.

### **Findings of Fact**

In his RSOR Applicant admitted SOR allegations 1.a. through 1.d., under Guideline G, 2.a. through 2.c., under Guideline H, and 3.a. under Guideline E. He indicated that he did not know if 1.e. was correct. The admitted allegations are incorporated herein as findings of fact.

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

Applicant is 54 years old. He is married, but legally separated from his wife since 2004. Applicant is employed by a defense contractor, and he seeks a DoD security clearance in connection with his employment in the defense sector.

#### **Paragraph 1 (Guideline G - Alcohol Consumption)**

The Government alleges that Applicant is ineligible for clearance because he has engaged in excessive alcohol consumption. The following are the five allegations as they are cited in the SOR, and as reviewed above, 1. a. through 1.d. have been admitted by Applicant in his RSOR :

1.a. In approximately 1977 or 1978, Applicant was arrested and charged with Driving Under the Influence of Alcohol (DUI). He pled guilty to the charge of Reckless Driving and was sentenced to pay a fine of \$500. In his RSOR, Applicant admitted this allegation.

At the hearing, Applicant testified that on the day of this event he had consumed approximately a case or three six packs of beer, and he drove home from a wedding anniversary party when this arrest occurred. (Tr at 31-33.)

1.b. In approximately July 1996, Applicant was arrested and charged with DUI. He was convicted and found guilty of DUI and was sentenced to pay a fine of \$1,000, and to attend an outpatient alcohol treatment program. In his RSOR, Applicant admitted this allegation. In his RSOR and during his testimony, Applicant admitted that he was guilty. He thereafter plead No Contest to the charge and paid a fine of approximately \$1,000. He testified that as part of the sentence, he attended two months of outpatient treatment, two times a week, and then attended two months of Alcoholics Anonymous (AA) meetings. During the outpatient treatment, he was advised to abstain completely from alcohol consumption, which he did for six or eight months, but then he resumed his alcohol consumption. (Tr at 33-35.)

1.c. The SOR alleges that despite receiving recommendations from three alcohol treatment programs that he attended to abstain from alcohol consumption, Applicant has continued to consume alcohol until at least January 18, 2009. Applicant testified that presently he continues to drink in an amount from three or four beers to two six-packs, on approximately five occasions during the last year before the date of the hearing. He continues to drink simply as a form of socializing. (Tr at 35-39.) When he was questioned later about an answer he gave on an interrogatory (Exhibit 4), Applicant conceded that on one occasion in January 2009, he consumed 10 beers during one day. (Tr at 69.) He also testified that a domestic disturbance that he had with his wife in 2004, was at least partially due to alcohol consumption. (Tr at 69-70.) Finally, in Exhibit 4, Applicant indicated that he did not intend to consume alcohol in the future. He clearly has not followed this plan.

1.d. In approximately April 2006, Applicant's employment was terminated for failing a urinalysis test, which detected excessive alcohol in his system.

Applicant testified that he had consumed too much alcohol on the previous night, and it resulted in a positive urinalysis the next day at work. He estimated that he had consumed three shots of vodka and a six pack of beer. He received the urinalysis test because that was his first day employed by that company. After his termination, he was informed that he should receive rehabilitation, if he had any hopes of being rehired at a later date by this company. (Tr at 39-41.)

1.e. On or about May 8, 2009, Applicant was diagnosed by a licensed independent substance abuse counselor as "Alcohol dependent with Psychological Dependence." Applicant testified that he had never received the report from the counselor, and the first time he viewed it was after it was sent to him from Department Counsel. Exhibit 3 contains the report from the counselor. Among the findings on the report is that Applicant is Alcohol Dependent, which is based on three factors: 1) A need for markedly increased amounts of the substance to achieve intoxication of desired effect, 2) the substance is often taken in larger amounts or over longer periods than was intended, and 3) there is a persistent desire of unsuccessful efforts to cut down or control substance abuse. Based on these findings he was found to have a "High Probability for Substance Abuse Disorder."

Under cross examination, Applicant justified his continuing to consume alcohol, despite all of the problems it has caused him by saying, "I really like the taste of beer." He conceded that he could be an alcoholic, and he continues to consume alcohol, in spite of the fact that all of the counselors he has seen have advised him to abstain completely from alcohol. (Tr at 55-59.)

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

The SOR lists three allegations regarding illegal drug involvement under Adjudicative Guideline H. As stated above, all of these allegations were admitted by Applicant in the RSOR., although his testimony, as will be reviewed below, differed from

the SOR in terms of dates of usage. They will be discussed in the same order as they were listed in the SOR:

2.a. The SOR alleges that Applicant used Crystal Methamphetamine approximately five times during the period from 2001 to 2008. At the hearing, Applicant testified that he was not certain what the period of usage was. He purchased the Crystal Methamphetamine that he used for approximately \$20 each time. (Tr at 45-46.)

2.b. The SOR alleges that Applicant used cocaine in approximately 2000. Applicant testified that he used cocaine on 20 occasions from 1976, when he was 20, until his last usage in 2000. He estimated that he purchased the cocaine about 10 times for \$80 to \$100 each time. The other times he used it, it was given to him. (Tr at 46-48.)

2.c. The SOR alleges that Applicant used prescription drugs that were not prescribed to him, on approximately four or five occasions during the period from 2001 to 2008. At the hearing, Applicant testified that he used the drugs of a friend for pain after he injured his back. (Tr at 49-50.)

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

The Government alleges in this paragraph that Applicant is ineligible for clearance because he exhibited conduct involving questionable judgement, lack of candor, dishonesty or unwillingness to comply with rules and regulations.

3.a. Applicant executed a Security Clearance Application (SCA), which was executed by him on February 28, 2008 (Exhibit 1.) Question #24 of the SCA asked since the age of 16 or in the previous seven years, whichever is shorter, had Applicant illegally used any controlled substance? Applicant answered "No" to this question, and he listed no illegal substances. The Government alleges, and the evidence is clear that Applicant should have included all of his illegal drug usage as included in subparagraphs 2.a. through 2.c., above. In his RSOR, Applicant wrote about this allegation, "In response to my dishonesty pertaining to section 24: The question was given orally I mistook the answer as 'no' instead of 'yes' that was my mistake and I admit to being wrong about my answer." (*Sic.*)

At the hearing Applicant continued to aver that he had misunderstood the question, and he was not attempting to give untruthful answers. (Tr at 50-51.) However, in Exhibit 2, which contains a Report of Investigation that was ratified by interrogatories, it states, "Subject failed to list the above information concerning his drug use on his SF 89, because he was embarrassed."

### **Mitigation**

Applicant submitted five character letters in Exhibit B from individuals who have known Applicant in his employment capacity and wrote in positive terms about him. He was described as "completely reliable and deserving of a position of trust."

## Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

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

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

## **Analysis**

### **Paragraph 1 (Guideline G - Alcohol Consumption)**

Applicant's alcohol consumption has resulted in two DUI arrests and convictions, a termination from employment, and a diagnosis as being Alcohol Dependent from a substance abuse counselor.

The Government established that Applicant was involved in "alcohol-related incidents away from work," and "binge consumption of alcohol to the point of impaired judgement." Disqualifying Conditions AG ¶ 22(a) and (c) apply to this case.

As stated above, Applicant admitted to currently drinking beer on a regular basis, and to consuming as many as 10 beers at one time. This is despite the fact that Applicant has been advised not to consume any alcohol in the future by three rehabilitation programs that he attended, and after he averred in a response to an interrogatory that he intended not to consume alcohol in the future. As a result of this, I do not find that any Mitigating Condition under ¶ 23 applies. Paragraph 1 Guideline G is found against Applicant.

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

With respect to Guideline H, the Government has established its case. Applicant's improper and illegal drug abuse, including the possession, and use for many years of marijuana, and other illegal substances is of great concern, especially in light of his desire to have access to the nation's secrets. Applicant's overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement Disqualifying Condition AG ¶ 25(a) "any drug abuse" and (c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution."

Based on the Applicant's recency of use of illegal substances, and his lack of candor in the information that he provided to the Government about his drug involvement, I cannot conclude at this time that Applicant's conduct comes within any Mitigating Condition under AG ¶ 26.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs for many years under Guideline H. Applicant, on the other hand, has failed to introduce persuasive evidence in rebuttal, explanation or mitigation which is sufficient to overcome the Government's case against him. Accordingly, Paragraph 2 Guideline H of the SOR is concluded against Applicant.

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

With respect to Guideline E, the evidence establishes that Applicant furnished to the Government incomplete, untruthful answers regarding his drug involvement on an SCA that he executed on February 28, 2008.

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. When such an individual intentionally falsifies material facts or fails to furnish relevant information to a Government investigator, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance. In this case, I conclude that Applicant knowingly and willingly failed to give complete, honest answers regarding his drug usage to the Government.

In reviewing the disqualifying conditions under Guideline E, I conclude that because of Applicant's "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" that ¶ 16(a) applies against Applicant. I find no mitigating conditions can be applied. I therefore, resolve Guideline E against Applicant.

### **Whole-Person Concept**

Under the whole-person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Based on all of the reasons cited above as to why the disqualifying conditions apply and the mitigating conditions do not apply, I find that the record evidence leaves me with significant questions and doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has not mitigated the security concerns.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline G:	AGAINST APPLICANT
Subparagraphs 1.a.- 1.e.:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a.-2.c.:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a.:	Against Applicant

### **Conclusion**

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

Martin H. Mogul  
Administrative Judge