



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



In the matter of: )  
)  
) ISCR Case No. 08-09965  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Caroline H. Jeffreys, Department Counsel  
For Applicant: *Pro se*

August 10, 2010

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guideline J, Criminal Conduct, Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

On December 7, 2009, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, Criminal Conduct, Guideline H, Drug Involvement, and Guideline E, Personal Conduct. 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) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on January 19, 2010, and elected to have his case decided on the written record. Department Counsel submitted the Government’s File of Relevant Material (FORM) on April 20, 2010. The FORM was

mailed to Applicant and it was received on April 27, 2010. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM and did not submit additional material. The case was assigned to me on July 20, 2010.

### **Findings of Fact**

Applicant admitted SOR ¶¶ 1.a, 1.b, 1.c, 2.a, 2.b, 2.c, 2.d, 3.a, and 3.b. He denied SOR ¶ 1.d. After a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is 30 years old and has worked for a federal contractor since April 2008. He is married and has a three-year old stepdaughter and an infant son.

Applicant admitted that he used marijuana at least five times in 2005 and purchased it multiple times the same year.

Applicant was arrested in February 2005 and charged with (1) No Proof Liability Insurance, (2) Driving Under the Influence (DUI)-Liquor, and (3) Operating a Vehicle Under Combined Influence Alcohol/Controlled Substance. The police officer noted in his report that he could smell alcohol on Applicant. Applicant denied to the police officer that he had used alcohol. He was given a field sobriety test. Applicant explained he was on prescription drugs. In his interview on June 19, 2008, with an Office of Personnel Management (OPM) investigator he stated that on the day he was arrested he had stopped at a bar after work and consumed one to two beers before driving home. He confirmed he was also taking prescription medications. In his answer to the SOR, he stated, "I had nothing in my possession, no drugs, nor prescription medications, no alcohol." The DUI and Operating a Vehicle Under Combined Influence Alcohol/Controlled Substance were dismissed. He paid a fine for No Proof of Liability Insurance.<sup>1</sup>

In December 2005, Applicant was arrested and charged with Public Intoxication. After drinking alcohol at a bar, Applicant got into an altercation with another person. He pled guilty to Public Intoxication, and paid a fine and court costs.

In August 2007, Applicant was stopped by police for failing to wear his seat belt. The police officer smelled marijuana. Applicant consented to a search of his vehicle. The police officer noticed that Applicant had a pack of cigarettes in the door handle of the driver's side of the vehicle. After conducting a pat-down search of Applicant, the police officer found in Applicant's right shirt pocket rolling papers. In the vehicle, he also found a small brown box with a smoking pipe with residue and a small amount of a green leafy substance. A loaded 357 Smith & Wesson pistol was found under the seat.<sup>2</sup> In Applicant's statement to the OPM investigator, he explained that he forgot about the

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<sup>1</sup> Items 5, 7, 10.

<sup>2</sup> Item 8.

pipe in the vehicle and believed he left it there some time in 2005. He was arrested for (1) Carrying a Pistol Without a Permit, (2) Possession of Drug Paraphernalia (3) Under the Influence of any Substance which impairs the Mental or Physical Faculties, and (4) Seatbelt Violation. He pled guilty to Count (2). He was fined \$500, court costs, and sentenced to 30 days in the city jail, which was suspended for 24 months. Applicant previously had a permit to carry a concealed weapon, but that permit had recently expired. He subsequently renewed the permit and Count (1) was dismissed, along with Count (4). It appears that Applicant was ordered to complete a Level I Substance Abuse Program and upon completion Count (3) was dismissed.<sup>3</sup> In his answer to the SOR, Applicant stated that he had no alcohol in his system when he was arrested. In his statement to the OPM investigator, he said he was given a breathalyzer after his arrest and it recorded a .02 %. He stated that he had consumed a beer at lunch approximately two hours before the traffic stop.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on about May 13, 2008. In response to Question 23.c, which asked: In the last 7 years have you had a firearms or explosive charge," Applicant answered "no." This response was false because Applicant had been arrested for carrying a pistol without a permit in August 2007. When interviewed on June 19, 2008, by an OPM investigator, Applicant failed to disclose material facts about his 2007 arrest. He stated that he was arrested for DUI and Possession of Drug Paraphernalia, but failed to disclose he was charged with Carrying a Pistol Without a Permit. At the interview, he was asked if there were any additional charges during that arrest or any additional details that were not covered. He explained to the investigator that he was forthcoming with all the information and he could not recall any other details about the arrest. On September 11, 2008, Applicant was interviewed again by an OPM investigator and was confronted with the information about the arrest for Carrying a Pistol Without a Permit. In this interview, he acknowledged that he purposely omitted this charge during the initial interview because in his opinion it was not a viable charge and he decided not to mention it. He also added that he considered talking about this charge, but decided against it because it would make him look bad. He initially claimed ignorance over its existence because he decided that there was no need to bring it up.<sup>4</sup>

In his answer to the SOR, Applicant's explanation for failing to disclose the required information was that he believed the charge was suppose to be removed from his record. He stated he was told by his lawyer it would not be on his record, and he believed he did not have to report it. Applicant's two explanations for not disclosing the charges are inconsistent. Intentional failure to disclose the required information is a violation of Title 18 of the United States Code § 1001, a felony. I find Applicant intentionally and deliberately failed to disclose on his e-QIP and to the government investigator that he had been arrested for Carrying a Pistol Without a Permit.

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<sup>3</sup> Item 8.

<sup>4</sup> Item 7.

In his answer to the SOR Applicant stated he has been drug free for four years and does not drink. He admitted that he made mistakes in his past. He is a member of the Freemasons and works to help underprivileged citizens and handicapped children.

### **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. 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 to obtain a favorable clearance 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 H, Drug Involvement**

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considerer the following:

(a) any drug abuse, and

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Applicant used marijuana at least five times in 2005. He purchased marijuana on multiple occasions in 2005. He was arrested and convicted in 2007 for possession of drug paraphernalia. I find the above disqualifying conditions apply.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26, and especially considered the following:

(a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment, and

(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 are used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.

I was unable to question Applicant about his prior use of illegal drugs, what type of drugs he used, how often he used them, when was the last time he used them, and other pertinent questions, which would allow me to make an informed decision about the security concerns regarding his drug involvement. I was not able to inquire about the police officer's report that indicated when he was searched during his 2007 arrest rolling papers were found in his shirt pocket. I was unable to make a credibility determination or judge his demeanor and candor. Therefore, I find Applicant has not met his burden of persuasion. I find none of the above mitigating conditions apply.

### **Guideline J, Criminal Conduct**

AG ¶ 30 sets out the security concern relating 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.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered the following:

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

Applicant was convicted of Possession of Drug Paraphernalia in 2007, and Public Intoxication and No Proof of Insurance in 2005. He was also arrested for Carrying a Pistol Without a Permit, DUI, and Operating a Vehicle Under Combined Influence Alcohol/Controlled Substance. Those charges were dismissed. Applicant did not disclose the firearm arrest on his e-QIP or during his OPM interview. He was aware of the charge and intentionally withheld the information. His actions constitute a violation of federal law. I find the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 23 and especially considered 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;
- (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.

Applicant's last arrest was in 2007. The record does not contain evidence of any other involvement with law enforcement since then. However, Applicant deliberately failed to disclose his firearm arrest because he did not want to "look bad" and he decided there was no reason to bring it up. His omissions are a cause of concern. Government investigators rely on applicants' honest answers so they can conduct an informative background check. Intentionally failing to provide the required information is a violation of federal law and a security concern. Because he waived his right to a hearing, I did not have an opportunity to question Applicant about his conduct, determine his credibility, or access his candor. Applicant failed to meet his burden of persuasion.

### **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.

Applicant intentionally failed to disclose his firearm arrest on his e-QIP and during his interview with an OPM investigator. I find the above disqualifying condition applies.

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

- (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; and

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

Applicant decided that his arrest for a firearms offense was not a viable charge and he did not want to look bad by disclosing it. He failed to disclose it on his e-QIP, during his initial OPM interview, and when he was interviewed a second time. There is sufficient evidence that Applicant's actions were intentional and deliberate. He did not make a good-faith effort to correct the omission. I find AG ¶ 17(a) does not apply. Applicant also stated that he did not think he was required to disclose it because his lawyer told him it would be removed from his record. This contradicts his original reason for not disclosing it. In addition, no evidence was presented to show that Applicant's lawyer was specifically advising him concerning the security clearance process. Without further inquiry, I cannot find AG ¶ 17(b) applies. I find the offense is not minor, and thus AG ¶ 17 (c) does not apply. There is insufficient evidence to support the application of any of the remaining mitigating conditions.

### **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.



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 facts and circumstances surrounding this case. Applicant is 30 years old. He was last arrested in 2007 and he was previously arrested twice in 2005. He used illegal drugs in the past. I did not have the opportunity to question Applicant, determine his credibility, and appraise his candor. I was not provided any supporting evidence as to Applicant's use of drugs after 2005 or his explanation for why he had drug paraphernalia in his possession in 2007. I was not able to question the purpose for carrying cigarette rolling papers in his pocket when he was arrested. In addition, Applicant made a conscious choice not to disclose the arrest for a firearms violation. He decided it was not a viable charge and did not want to "look bad." His intentional omission is a violation of federal law and a felony. 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 meet his burden of persuasion and mitigate the security concerns arising under the guidelines for Criminal Conduct, Drug Involvement, and 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 J:	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a-2.b:	Against Applicant
Subparagraph 2.c:	For Applicant
Subparagraph 2.d:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	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.

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Carol G. Ricciardello  
Administrative Judge