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

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| In the matter of: | ) | |
| | ) | |
| | ) | ISCR Case No. 09-01488 |
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| | ) | |
| Applicant for Security Clearance | ) | |

## Appearances

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

September 20, 2011

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## Decision

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GOLDSTEIN, Jennifer I., Administrative Judge:

Applicant has not mitigated the Personal Conduct security concerns related to his criminal history, employment history, and falsification surrounding his police record, alcohol arrests, and use of illegal substances. Eligibility for access to classified information is denied.

## Statement of the Case

On February 18, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines E, Personal Conduct, and J, Criminal Conduct. The action was taken under Executive Order (EO) 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 after September 1, 2006.

Applicant answered the SOR on March 18, 2011, and requested a hearing before an administrative judge. The case was assigned to me on April 21, 2011. DOHA issued

a notice of hearing on May 3, 2011, and the hearing was convened as scheduled on May 23, 2011. The Government offered Exhibits (GEs) 1 through 11, which were admitted without objection. The Applicant offered no exhibits. He testified on his own behalf and called one witness. The record was left open until May 31, 2011, for the Applicant to submit additional documentation. On May 31, 2011, Applicant submitted a one-page letter, marked Exhibit (AE) A and Department Counsel indicated he had no objections. AE A was admitted. DOHA received the transcript of the hearing (Tr.) on June 1, 2011.

## Amendment to the SOR

Pursuant to Additional Procedural Guidance ¶¶ E3.1.2, E3.1.3, E3.1.7, and E3.1.13 of the Directive, Department Counsel moved to amend the SOR ¶ 1.a through 1.m to correct a typographical error in the lettering of the SOR, which alleged two different allegations as ¶ 1.i. The SOR was amended to include allegations 1.a through 1.n (instead of 1.a through 1.m, with two 1.i's) in their correct alphabetical order without duplication. Further, Department Counsel moved to strike ¶2 of the SOR in its entirety, which alleged Criminal Conduct. Applicant had no objection to the amendments and I granted the motions. (Tr.8-17.)

## Findings of Fact

Applicant admitted SOR allegations 1.b, 1.c, 1.h, 1.j, and 1.l. (Tr. 8-17.) He denies allegations 1.a, 1.d, 1.e, 1.f, 1.g, 1.i, 1.k, 1.m, and 1.n. (Tr. 8-17.) After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 46-year-old employee of a defense contractor since approximately 2001. He is married and has two children and one step-son. He served in the Navy as an electronics technician from 1985 to 1989. (GE 1; GE 2; AE A; Tr. 51-55; 56-60.)

SOR ¶ 1.a alleges that Applicant was arrested in about April 1994 and charged with Driving Under the Influence of Alcohol and Drugs and Driving While having Measurable Blood Alcohol in System. The Applicant admits that in 1994 he was arrested. He claims that the arrest was for "wet reckless" and not Driving Under the Influence of Alcohol. Applicant explained that the incident occurred after he was struck by a hit-and-run driver. He admitted to drinking one beer prior to the incident. He claimed his blood alcohol content was only .03%. As a result of this charge, he was required to complete a first offender program. (GE 4; GE 5; GE 6; GE 10; Tr. 32-34.)

The SOR ¶ 1.b alleges that Applicant was cited in June 1996 and charged with Alcohol on Beach. Applicant admits this allegation. At hearing, he claimed he had "one foot on the beach" and didn't know the law. He received a $60 ticket for this offense. He paid the fine in full. (GE 5; Tr. 34.)

The SOR ¶ 1.c alleges that Applicant was arrested in July 2005 and charged with Driving Under the Influence. Applicant denied this allegation because he claims he was

only charged with Malicious Driving. He asserted he had only consumed one beer and was at the legal limit on this occasion. He stated he had been given a breathalyzer test and his blood alcohol content was .05% or .06%. The breath test in evidence shows that Applicant actually had a blood alcohol content of .92%. Applicant pled guilty to the lesser charge of Negligent Driving. As a result of this charge, Applicant was required to complete a "witness panel." He was also fined $600. He had difficulties completing the court required witness panel because he was working in Japan at the time and could not locate a comparable class. As of December 2008, Applicant had not completed the "requirements for this ticket."(GE 1; GE 7; GE 8; GE 9; Tr. 34.)

The SOR ¶ 1.d alleges that Applicant falsified material facts on his Security Clearance Application electronically transmitted on January 20, 2000, in response to question "24. Your Police Record – Alcohol/Drug Offenses Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607." He answered "No", whereas in truth, he failed to list that he had been arrested for the alcohol offenses as set forth in subparagraphs 1.a, and 1.b, above. Applicant explained that he did not know why he answered this question "No," but denied that the falsification was intentional. He testified that he has worked for the Government "long enough to know there is no sense in hiding it." He testified he disclosed everything in his security clearance interview. However, Applicant admitted in his April 15, 2003 statement to Special Agents of the Defense Security Service that with respect to the charge of Alcohol on Beach (SOR ¶ 1.b), "the reason I did not list this on my security questionnaire or discuss it during my prior interview with DSS was because it was just a non-traffic ticket and I don't believe it was required." (GE 2; GE 5; Tr. 35-36.)

The SOR ¶ 1.e alleges that Applicant falsified material facts on his Security Clearance Application electronically transmitted on January 20, 2000, in response to question "27. Your Use of Illegal Drugs and Drug Activity – Illegal Drug Use The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful response nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding." He answered "No," whereas in truth, he deliberately failed to list that he had used marijuana in at least 1994. Applicant explained that as a result of his "Wet Reckless" conviction in 1994, he was required to take an alcohol class. The teacher of the class thought he came to class stoned and asked him about it. Applicant didn't think she was serious and answered "sure." He was dismissed for that class. At hearing, Applicant denied using marijuana in 1994. However, he testified used marijuana while in college from 1984 to 1985. (GE 2; Tr. 36.)

The SOR ¶ 1.f alleges that in a signed, sworn statement dated November 28, 2001, Applicant falsified material facts in that he stated he first used marijuana from age 14 or 15 to September 1984 and from April 1989 to 1990. Applicant's statements with

respect to his drug use are confusing and contradictory. He testified he last used marijuana in college but explained in his November 28, 2001 statement that he "did not use it" at college because he did not have close friends in college. His November 2001 statement regarding his drug use did disclose he used cocaine and psilocybin mushrooms while in college. He used marijuana again from 1989 to 1990 when his friends would pass around a joint. Court records indicate that in 1994, Applicant was reported to the Court for failure to comply with the requirements of the DUI program by reporting to the program under the influence of drugs. Applicant testified he did not use marijuana in 1994. (GE 6; GE 10; Tr. 36-40.)

The SOR ¶ 1.g alleges that Applicant was terminated from employment with a government contractor in violation of its corporate policy, which included a violation of the tobacco and smoke free environment, absence from work services policy, and for recording more hours on his time card than worked. Applicant claimed that his supervisor did not like him. He testified that his supervisor had no proof Applicant smoked in the company vehicle, as the write-up alleged. He indicated he did not know what the time card allegations were about. He just signed the write-up as was required. He claimed that his supervisors were later fired for misconduct and that prior to leaving his employer he filed a complaint against his supervisor. He failed to present documentation to support his claims. (GE 3; GE 8; GE 11; Tr. 40-42.)

The SOR ¶ 1.h alleges that Applicant failed to return his government issued CAC card to his employer after his termination in May 2007. Applicant testified that no one asked him for his CAC card at the time he was terminated. Eventually, when he was asked to return it, he could not locate it. However, in his Answers to Interrogatories dated December 22, 2010, Applicant stated, "My CAC card was turned in to the security office . . ." He indicated he "had no further communication with [new employer] about [his] CAC card or anything else to [his] knowledge." (GE 11; Tr. 42.)

The SOR ¶ 1.i alleges that Applicant falsified material facts on his Security Clearance Application electronically transmitted on November 26, 2007, in response to "section 23: Your Police Record For this item, report information regardless of whether the record in your case has been 'sealed' or otherwise stricken from the court record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued an expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607. d. Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?" Applicant did list an August 2006 (estimated) arrest for "malicious driving" and indicated he had "to go to meetings and pay fine," but omitted his other alcohol arrests set forth in ¶¶ 1.a and 1.b, above. Applicant explained that his omission was not intentional. He testified that he did answer, "Yes," to this question, but only listed the most recent arrest. He did not recall why he only listed one arrest. (GE 1; Tr. 42-43.)

The SOR ¶ 1.j alleges that Applicant was arrested in October 2008 and charged for Driving While License Suspended-3rd Degree. At that time, he also had an outstanding warrant for Driving Under the Influence (SOR ¶ 1.c). (GE 9.)

The SOR ¶ 1.k alleges that Applicant falsified material facts during his October 29, 2008 interview with an investigator for the Department of Defense when he indicated he had not received any alcohol counseling or treatment. Contrary to his statement, records reflect that Applicant received alcohol treatment while in the Navy in approximately 1986 and 1987. Applicant testified that in 1986 he "self referred" for alcohol treatment after he showed up late for work while serving in the Navy. He attended a 40 hour alcohol course. In 1988, Applicant was late for work and sent to a counselor. He was referred to two weeks inpatient treatment. He testified he participated in Alcoholics Anonymous and was sober for a total of six years. Applicant had no explanation for denying his alcohol treatment when he was interviewed in October 2008. He indicated he "forgot" about the treatment. (GE 4; GE 8; Tr. 43-45.)

The SOR ¶ 1.l alleges that Applicant was cited in September 2009 for Proof of Registration. Applicant explained that he had mailed in his registration documentation to the state, but had not received the registration sticker for his license plate back. He was parked in a parking lot and found the citation on his windshield when he returned to his vehicle. (Tr. 45-46.)

The SOR ¶ 1.m alleges that Applicant falsified a signed, certified statement dated April 28, 2010, when he indicated that he had not been involved in any alcohol incidents except for the July 2005 incident. He omitted the alcohol offenses set out in ¶¶1.a and 1.b, above. Applicant testified that he did bring up the 1995[1] incident (¶ 1.a) and that he forgot about the alcohol on the beach charge (¶ 1.b). Applicant's April 28, 2010 statement supports his testimony that he did bring up what he described as the "wet reckless" charge in 1994. (GE 4; Tr. 46-47.)

The SOR ¶ 1.n alleges that Applicant signed a notarized interrogatory dated December 22, 2010, which contained a falsified statement with respect to Applicant's past drug use. In the interrogatory, Applicant was asked, "Have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.) or prescription drugs." Applicant answered "No." In truth, he used marijuana in at least October 2005 and from approximately 1979-1994. He also used cocaine and psilocybin mushrooms while attending college in 1984-1985. Applicant claims that in 2005, when he was pulled over for Malicious Driving (as alleged in ¶ 1.c.), the officer claimed to have found "green particles" in Applicant's sunglasses case. The green particles were alleged to be marijuana. Applicant testified that the police statement was "not correct." He denied intentionally falsifying this statement. (GE 3; GE 10; Tr. 47-49.)

Applicant's wife testified that she finds her husband to be a truthful person. He has been supporting her through school. They have been married for 15 years. (Tr. 56-60.)

[1] Applicant appears to have confused the date of his 1994 arrest and indicates in his testimony and his statement that it occurred in 1995.

## 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 to be 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, administrative judges apply the guidelines 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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain 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 EO 10865 provides that adverse 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

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

> 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. The following disqualifying conditions are potentially applicable:

> (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; 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, 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.

Applicant admits to being charged with consuming alcohol on the beach; his 2005 arrest for Driving Under the Influence; failing to return his CAC card; his October 2008 arrest for Driving While License Suspended; and that he was cited in September 2009 for Proof of Registration. The Government also presented sufficient information to establish that Applicant was arrested in 1994 for Driving Under the Influence; he was terminated from an employer due to violations of corporate policy; he failed to return his CAC card as required; he falsified material facts on his January 2000 and November 2007 Security Clearance Applications; he falsified his November 2001 and April 2010 statements; he provided the investigator with false facts in his October 2008 interview; and he falsified material facts in his answers to interrogatories dated December 2010. Applicant's testimony and explanations regarding these incidents and false statements

are not credible. His statements are confusing and contradictory. He has not adequately explained his omissions. I find they were deliberate. His inability to tell the truth about his criminal incidents and drug use, along with his termination and failure to return his CAC card, casts doubts on his candor and creates a vulnerability to exploitation. The Government has established sufficient concern under AG ¶¶ 16(a), 16(b), and 16(e) to disqualify Applicant from possessing a clearance.

AG ¶ 17 provides conditions that could mitigate security concerns. The following are potentially applicable:

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

Applicant's falsification and poor personal conduct is unmitigated. Falsification of information provided to the Government cannot be considered minor. He has not been forthcoming with the truth and has made little attempt to correct his omissions. His statements contain numerous inconsistencies and cast doubt on his reliability, trustworthiness, and good judgment. Further, the arrests, drug use, employee misconduct, and failure to return his CAC card demonstrate a long pattern of misconduct. He has not shown sufficient steps to reduce or eliminate vulnerability to exploitation. AG ¶¶ 17(a), 17(c), and 17(e) do not 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 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 the facts and circumstances surrounding this case. I have incorporated my comments under Guideline E in my whole-person analysis.

Applicant has served the Navy for six years and has worked in his current position for ten years. His wife finds him to be an honest person. However, his conduct indicates a lack of judgment and trustworthiness, and raises doubts as to whether he understands what is required of those who hold security clearances.

Overall, the record evidence fails to satisfy the doubts raised about Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

## 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

Subparagraph 1.a through 1.n: Against Applicant

## Conclusion

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

_____
Jennifer I. Goldstein
Administrative Judge