



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



In the matter of:	)	
	)	
	)	ISCR Case No. 09-02419
SSN:	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gregg Cervi, Esquire, Department Counsel  
For Applicant: Anthony C. Williams, Esquire

February 26, 2010

**Decision**

---

HOGAN, Erin C., Administrative Judge:

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on June 2, 2008. On August 28, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concern under Guideline J, Criminal 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On September 14, 2009, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on October 15, 2009. The case was assigned to me on October 20, 2009. On October 26, 2009, a Notice of Hearing was issued, scheduling the hearing for December 9, 2009. The case was heard on that date. The government offered four exhibits which were admitted as Government Exhibits (Gov) 1 – 4. Applicant testified, called one witness and submitted four documents which were admitted as Applicant Exhibits (AE) A – D. The transcript

was received on December 16, 2010. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

### **Findings of Fact**

In his Answer to the SOR, Applicant admits to part of each allegation that sets forth the offenses he was charged with. He denies that he pleaded guilty. He pleaded no contest but was found guilty.

Applicant is a 50-year-old service instructor employed by a Department of Defense contractor who seeks to maintain a security clearance. He has been employed by his company for seven years. He has held a security clearance for 32 years. He served over 17 years on active duty in the United States Navy. He retired with an honorable discharge. He is a high school graduate and has attended technical training in the Navy. He is divorced and has two sons, ages 24 and 21. (Tr at 18, 46, 67-68, 110; Gov 1; see AE B and AE D)

Applicant has the following arrest history:

In October 1992, Applicant was charged with Display Artificial Deer Light Hunting. He pleaded guilty and was fined \$125 and court costs. (Gov 4 at 3)

In November 1996, Applicant was arrested and charged with (1) Spotlighting Deer During Prohibited Time Period; (2) Taking Deer With the Use of an Artificial Light; (3) Driving While Impaired. Applicant pleaded guilty to the first and second charge. The Driving While Impaired charge was dismissed. He was fined \$250 and his hunting privileges were revoked for two years. (Gov 4 at 3 – 4)

Although not alleged in the SOR, Applicant was also charged with Spotlighting in November 2002. He listed this offense in response to section 23 on his e-QIP application, dated June 6, 2008. He indicated that the charge was dismissed on the e-QIP application. Applicant testified that his hunting license was suspended for Spotlighting five years earlier which is likely related to the same offense. (Tr at 62, 100; Gov 1)

On October 27, 2007, Applicant was arrested and charged with Possession of Marijuana; Hunt with a Firearm While Intoxicated; Take Wildlife/Closed Season; Hunting with an Unauthorized Weapon; Unlawful Hunting of Wild Animal. On March 19, 2008, Applicant was found guilty of each offense. For the possession of marijuana charge, he was sentenced to 30 days in jail/20 days suspended, his license was restricted for six months, and he was fined \$500 and court costs. For the Hunting with a Firearm While Intoxicated, he was sentenced to nine months in jail (suspended); fined \$1,500 and ordered to pay \$10 court costs. For the Taking Wildlife/Closed Season, he was sentenced to 30 days in jail (suspended), fined \$1,000 and ordered to pay \$10 court costs; for the Hunting with an Unauthorized Weapon, he was ordered to pay a \$500 fine

and \$10 court costs; for the Unlawful Hunting of a Wild Animal, he was ordered to pay a \$500 fine and \$10 court costs. (Gov 3 at 1 – 5)

On November 4, 2007, Applicant was arrested and charged with Manufacture Marijuana for Others, a felony, and Hunting After License Revoked. On March 19, 2008, Applicant appeared in court on these charges in conjunction with the charges in the above paragraph. He was found guilty of Hunting After License Revoked. He was sentenced to 30 days in jail (suspended), fined \$1,000 and ordered to pay \$10 court costs. The Manufacture Marijuana for Others charge was nolle prossed. (Gov 3 at 6 -7)

The following is a summary of Applicant's description of the events leading to his arrests on October 27, 2007, and November 4, 2007:

On October 9, 2007, the local sheriff's department went to Applicant's home to serve Applicant's oldest son a civil summons regarding an accident his son had been involved in. Applicant travels overseas on a frequent basis for his job and was overseas at the time. When the sheriff's department approached the home, the door was open. They searched the home. During the search, they discovered six to eight marijuana plants in a bathroom located in the basement of the house. Grow lights were also discovered in the bathroom. Applicant was contacted at his overseas job location. He returned home shortly and contacted an attorney. Applicant claims the police believed that he was not involved with the marijuana but suspected one of his sons was involved. During the hearing, Applicant testified that he contacted his sons through his attorney, and told them whoever was involved with growing the marijuana plants needed to turn themselves in by calling his attorney. Applicant claims the oldest son called his attorney and admitted the marijuana plants were his. His son did not turn himself in to the police. Applicant did not talk directly with his sons about the marijuana plants found in his home because he did not want to have to testify against his sons in court. The summary of personal subject interview differs from Applicant's hearing testimony. In the summary, Applicant mentions that he called his sons directly and his oldest son told him the marijuana was his. (Tr at 48-50, 69, 75-78, 84-85; Gov 2)

On October 27, 2007, Applicant's sons came home. Applicant told his sons that if they had any more drugs in the house, they should remove them and told them to never bring drugs in the home again. He then left to attend a neighbor's birthday party. Applicant returned home several hours later. About four p.m., Applicant walked out to a deer stand which was approximately 300 feet from his house to relax. He brought a 22 caliber rifle with him. There was a fox in the area and if Applicant saw the fox, he intended to shoot it. He also brought the gun with him for safety because of other creatures in the area such as coyotes. He claims he had not been drinking and was not hunting. (Tr at 50-54, 63-64, 79-82; Gov 2)

Approximately five minutes after sitting in the deer stand, the deputy sheriff and the game warden approached the deer stand and told Applicant to come out with his hands up. They discovered the 22 caliber rifle and a baggie half-filled with marijuana in the deer stand. Applicant claims that the marijuana did not belong to him. He claims that

he did not see the marijuana when he entered the deer stand. He claims that his oldest son later told him that the baggie of marijuana belonged to him. Applicant was subsequently arrested and charged with Possession of Marijuana; Hunting with a Firearm While Intoxicated; Take Wildlife, Closed Season; Hunting with Unauthorized Weapon; and Unlawful Hunt Wild Animal. He was released after booking. His sons picked him up at the police station. (Tr at 52, 55, 90-95; Gov 2; Gov 3)

A few days later, on November 4, 2007, Applicant was arrested and charged with Manufacture Marijuana for Others. This charge was related to the marijuana plants that were discovered in the basement of his home on October 9, 2007. He was also charged with Hunting After License Revoked. His hunting license was revoked for Spotlighting Deer in November 2002. (Tr at 54, 62, 100; Gov 2; Gov 3)

Applicant claims that although he was aware that his oldest son was the one who was growing the marijuana plants, he decided to plead no contest in order to protect his son. He decided to do so after his lawyer told him that his son was facing five to 30 years for manufacturing marijuana. He did not want his son to serve jail time. On March 19, 2008, Applicant pleaded no contest to all of the charges. The court found him guilty of all the charges with the exception of the Manufacturing Marijuana charge which was nolle prossed pursuant to an agreement. (Tr at 57-58, 65-67, 98, 102-104, 109-110; Gov 2; Gov 3)

Applicant denies using marijuana. He was shocked when he learned that there were marijuana plants in his home. He admits that his hunting license was suspended when he was arrested in his deer stand. He claims that he was not hunting on the day of his arrest. He also believed it was legal for him to hunt on his own property. He initially told the police that the marijuana was not his but pleaded no contest in order to protect his son. When he pleaded no contest, he considered the possibility that he might lose his security clearance and his job. (Tr at 46, 55-56, 95, 100, 103-104)

Regarding the October 1992 conviction for Spotlighting Deer and the November 1996 conviction for Spotlighting Deer, Taking Deer With the Use of an Artificial Light, and Driving While Impaired, Applicant claims that on both occasions he was not hunting. He was just shining a spotlight to look at deer. In November 1996, he was with a friend. His gun was in the car. When they shined the spotlight, a game warden's headlights turned on in the distance. The game warden's car approached Applicant's car. Applicant's friend threw Applicant's gun out the window of the car. When the game warden approached the car, he Applicant asked if he had a gun in the truck. Applicant said, "No." Another game warden found the gun outside the truck. Applicant then admitted it was his gun. Applicant's blood alcohol content registered .08. He had drank three beers on that evening. The Driving While Impaired charge was dropped. (Gov 4)

## **References**

The Fleet Operations Manager of the location where Applicant works testified on his behalf. The Fleet Operations Manager is a civilian employee with the federal

government. Applicant is a contract employee who has worked for him since January 2007. He has known Applicant four years. He recommended that Applicant be hired in his current position because of his experience. Applicant is highly regarded by his organization. He is aware of Applicant's criminal history. He is aware that Applicant pleaded no contest to the marijuana and hunting charges because he wanted to protect his son. He states Applicant is fiercely protective of his sons. The Fleet Operations Manager would do the same thing to protect a family member if he encountered a similar situation. He does not question Applicant's trustworthiness. (Tr at 18 – 44; AE A at 9-10)

Applicant's direct supervisory manager states that he has known Applicant for two years. He works closely with Applicant. He finds Applicant to be honest, hard working, and dependable. He has observed Applicant safeguard confidential material of U.S. and foreign military interest without compromise. (AE A at 3)

Eight other individuals who work with Applicant wrote letters on his behalf attesting to his good character, trustworthiness, and reliability. (AE A)

Applicant's Navy performance evaluations have been favorable. (AE B) His awards and decorations include: the Navy Commendation Medal; the Navy Achievement Medal; Kuwaiti Liberation Medal; and the Southwest Asia Service Medal. (AE C; AE D)

## **Policies**

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are required 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, 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**

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

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

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.

There are two Criminal Conduct Disqualifying Conditions (CC DC) which apply to Applicant’s case. CC DC ¶ 31(a) (a single serious crime or multiple lesser offenses) and CC DC ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply. Applicant has a history of hunting violations beginning in 1992. He was charged with additional hunting violations in 1996 and 2007. Although not alleged in the SOR, his hunting license was suspended for five years because of another hunting violation in November 2002. The most recent charges in 2007 consisted of six different hunting violations. He was also arrested and charged with Possession of Marijuana, and Manufacture Marijuana for Others, a felony. The court found him guilty of possession of marijuana and all six hunting charges. The court nolle prossed the felony charge of Manufacture Marijuana for Others.

The government's substantial evidence and Applicant's own admissions raise security concerns under Guideline J. The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. (See ISCR Case No. 02-31154 at 5 (App. Bd. September 22, 2005))

The following Criminal Conduct Mitigating Conditions (CC MC) are potentially relevant to Applicant's case:

CC MC ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment);

CC MC ¶ 32(c) (evidence that the person did not commit the offense);

CC MC ¶ 32(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).

While Applicant has paid all of his fines and has a good employment record, I cannot conclude CC MC ¶¶ 32(a) and 32(d) apply because Applicant has a long history of hunting violations. His disregard of the hunting regulations indicate a lack of regard for rules and regulations. Although he was found guilty of the each hunting violation, he claimed that he was not hunting at the time of each of these offenses. He has not taken responsibility for his actions.

Applicant claims that he did not actually possess marijuana. His claim that he pleaded no contest to the charges in order to protect his son raises the potential applicability of CC MC ¶ 32(c) (evidence that the person did not commit the offense). However, the court found him guilty. Aside from his own assertions, no reliable evidence was presented to corroborate his story. Even if he had presented evidence that the marijuana was his son's, concerns would remain about his trustworthiness and reliability for accepting culpability for something he allegedly did not do in order to protect his son. Hiding the truth from authorities, regardless of the motive for doing so, raises further questions about Applicant's integrity.

Considering Applicant's history of hunting violations and his 2007 arrests for possession of marijuana and manufacture of marijuana, Applicant has not met his burden to mitigate the security concerns raised under criminal conduct.

### **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. I considered Applicant's active duty service in the U.S. Navy. I considered that he held a security clearance for over 32 years. I considered the favorable comments of his superiors and co-workers. I also considered Applicant's criminal history. While the majority of the violations were misdemeanors, Applicant has a long history of disregarding hunting regulations. The court found him guilty of the six hunting violations he was charged with in 2007. One of charges included Hunting After License Revoked. He was found guilty of the possession of marijuana charge and the Manufacture of Marijuana charge was dismissed. While Applicant claims that he pleaded no contest to the possession of marijuana charge in order to protect his son, he provided no corroborating evidence that the marijuana belonged to his son. Even if I concluded that Applicant pleaded no contest to the charges in order to protect his son, concerns about Applicant's trustworthiness and integrity would remain. Applicant's history of misdemeanor hunting violations reveals a disregard for rules and regulations. His drug involvement furnishes additional reasons to believe he has problems complying with rules and laws enacted to protect the public. If he defies laws that he does not like, there is a possibility he may disregard security rules that he does not like. Applicant has not mitigated the security concerns raised under the Criminal 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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant



Subparagraph 1.d:

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 interests to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

---

ERIN C. HOGAN  
Administrative Judge