



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



In the matter of:

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Applicant for Security Clearance

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ISCR Case No. 09-02890

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel

For Applicant: *Pro se*

June 15, 2011

**Decision**

GALES, Robert Robinson, Administrative Judge:

Applicant failed to mitigate the security concerns regarding criminal conduct, personal conduct, and drug involvement. Eligibility for a security clearance and access to classified information is denied.

**Statement of the Case**

On March 15, 2004, Applicant applied for a security clearance and submitted a Security Clearance Application (SF 86).<sup>1</sup> On an unspecified date, the Defense Office of Hearings and Appeals (DOHA) issued him a set of interrogatories. He responded to the interrogatories on August 7, 2009.<sup>2</sup> On another unspecified date, DOHA issued him another set of interrogatories. He responded to the interrogatories on October 12, 2009.<sup>3</sup> On May 7, 2010, DOHA issued a Statement of Reasons (SOR) to him, pursuant

<sup>1</sup> Government Exhibit 2 (SF 86), dated March 15, 2004.

<sup>2</sup> Government Exhibit 5 (Applicant's Answers to Interrogatories, dated August 7, 2009).

<sup>3</sup> Government Exhibit 6 (Applicant's Answers to Interrogatories, dated October 12, 2009).

to Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended and modified (Directive); and the *Adjudicative Guidelines for Determining Eligibility For Access to Classified Information* (December 29, 2005) (AG) applicable to all adjudications and other determinations made under the Directive, effective September 1, 2006. The SOR alleged security concerns under Guideline J (Criminal Conduct), Guideline E (Personal Conduct), and Guideline H Drug Involvement), and detailed reasons why DOHA could not make a preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant acknowledged receipt of the SOR on May 11, 2010. In a sworn statement, dated June 26, 2010, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. Department Counsel indicated the Government was prepared to proceed on August 3, 2010, and the case was assigned to Administrative Judge Sharon A. Dam on August 10, 2010. A Notice of Hearing was issued on September 7, 2010, but the matter was continued upon Applicant's request. The case was reassigned to me on October 4, 2010. A Notice of Hearing was issued on November 13, 2010, and I convened the hearing, as scheduled, on November 30, 2010.

During the hearing, 7 Government exhibits (GE 1-7) and 16 Applicant exhibits (AE A-P) were admitted into evidence without objection. Applicant and two witnesses testified on his behalf. The hearing transcript (Tr.) was received on December 7, 2010.

### **Findings of Fact**

In his Answer to the SOR, Applicant admitted two of the factual allegations pertaining to criminal conduct (§§ 1.a. and 1.b.), and two of the factual allegations pertaining to personal conduct (§§ 2.a. and 2.b.), of the SOR. Those admissions are incorporated herein as findings of fact. He denied the remaining factual allegations (§§ 1.c. and 3.a.). During the hearing, Department Counsel moved to amend the SOR by adding two additional factual allegations pertaining to criminal conduct. In the absence of any objection, the motion was granted and §§ 1.d. and 1.e. were added to the SOR.<sup>4</sup> Applicant admitted both of the allegations.<sup>5</sup> After a complete and thorough review of the evidence in the record, and upon due consideration of same, I make the following additional findings of fact:

Applicant is a 35-year-old employee of a defense contractor, currently serving as a senior electrical engineer and hull manager.<sup>6</sup> He is seeking to retain the secret

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<sup>4</sup> Tr. at 41-43.

<sup>5</sup> *Id.* at 43

<sup>6</sup> *Id.* at 47-48.

clearance he was previously granted in October 2000.<sup>7</sup> Applicant has held a secret clearance since 1994.<sup>8</sup> He is a 1994 high school graduate, with a 2000 bachelor of science in electrical engineering, and a 2010 master's degree in business administration.<sup>9</sup> While in high school, Applicant held a number of different part-time jobs. His last position was as a laboratory technician at the local power plant.<sup>10</sup>

Upon his high school graduation in June 1994, Applicant enlisted in the U.S. Marine Corps (USMC) Reserve.<sup>11</sup> He remained on active duty until August 1995, when he reverted to a reserve status while in school. Applicant joined his current employer as an intern in March 2000,<sup>12</sup> and upon his graduation in December 2000, was hired as a full-time engineer.<sup>13</sup> In June 2004, Applicant was recalled to active duty to train Marines getting ready to deploy to Iraq and Afghanistan.<sup>14</sup> He was appointed a warrant officer in December 2004.<sup>15</sup> In March 2005, he was deployed to Iraq where he served as an avionics officer aboard helicopters.<sup>16</sup> He returned to the United States in October 2005, but remained on active duty until February 2006 when he rejoined his current employer.<sup>17</sup> Applicant was recalled to active duty in February 2007, and was promoted to squadron maintenance and material control officer.<sup>18</sup> He was released from active duty in September 2008 when he rejoined his current employer.<sup>19</sup> In June 2009, Applicant resigned his warrant (he was a Chief Warrant Officer-2) and was administratively discharged under other than honorable conditions for drug involvement, based solely upon his conviction.<sup>20</sup>

Applicant was married in 2001 and divorced in 2005.<sup>21</sup> He is engaged to be married in September 2011.<sup>22</sup> He has one daughter, born in 1997, from a prior relationship.<sup>23</sup> He has always been his daughter's custodial parent.<sup>24</sup>

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<sup>7</sup> Government Exhibit 7 (Joint Adjudication Management System Person Summary, dated August 3, 2010).

<sup>8</sup> Government Exhibit 2, *supra* note 1, at 6.

<sup>9</sup> Tr. at 46; Applicant Exhibit N (Diploma, dated May 31, 2010).

<sup>10</sup> Tr. at 45.

<sup>11</sup> Government Exhibit 2, *supra* note 1, at 2.

<sup>12</sup> Tr. at 47.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 48.

<sup>15</sup> *Id.* 29.

<sup>16</sup> *Id.* at 49.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 50.

<sup>19</sup> *Id.* at 51.

<sup>20</sup> *Id.* at 52.

## Criminal Conduct and Drug Involvement

**(SOR ¶ 1.c.):** In August 1996, when he was 20 years old, Applicant was working “graveyard shift” as a package handler for a delivery company while attending school. A box of T-shirts addressed to a sporting goods store was damaged, and Applicant took a T-shirt from a pile outside the box and intended to take it without permission.<sup>25</sup> At the end of his shift, Applicant placed the shirt in his truck and departed.<sup>26</sup> Applicant was questioned by a police officer who was called to the scene by Applicant’s employer.<sup>27</sup> According to the officer, Applicant said he would return the shirt, but by January 1997, he had not done so.<sup>28</sup> A criminal complaint for petty theft was filed and a letter was mailed to Applicant at his last known local address, notifying him of the charges filed against him and the arraignment date which was scheduled for December 5, 1996.<sup>29</sup> The letter was returned with a notation that the address given “does not exist.”<sup>30</sup> Applicant contended he had resided in ten different addresses during college, and had never received the complaint or the letter.<sup>31</sup> An arrest warrant was issued on January 16, 1997. On January 21, 2002, it was purged, and the charge was dismissed in furtherance of justice for lack of prosecution.<sup>32</sup>

**(SOR ¶ 1.b.):** An investigation regarding alleged fraudulent travel claims submitted by five USMC Reservists, including Applicant, was conducted because of suspicions that the Marines actually resided within the 50-mile travel radius to the military facility and therefore were not entitled to a maximum lodging rate.<sup>33</sup> Preliminary inquiries determined Applicant’s permanent residence was in the local area.<sup>34</sup> An Article 32, Uniform Code of Military Justice (UCMJ), Investigation was initiated due to

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<sup>21</sup> *Id.* at 66.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 64.

<sup>24</sup> *Id.* at 65.

<sup>25</sup> *Id.* at 30.

<sup>26</sup> Government Exhibit 1 (Complaint, dated November 12, 1996), at 1-2; *Id.* at 61.

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Tr. at 62.

<sup>32</sup> Government Exhibit 1 (Supplemental Docket, dated January 23, 2002).

<sup>33</sup> Government Exhibit 3 (Naval Criminal Investigative Service (NCIS) Report of Investigation, dated June 4, 2008), at 1-2.

<sup>34</sup> *Id.* at 2.

suspected violations of Article 107, UCMJ (false official statements), Article 121, UCMJ (larceny and wrongful appropriation), Article 132, UCMJ (frauds against the United States), and Article 81, UCMJ (conspiracy).<sup>35</sup> Applicant contends the allegations were false and baseless.<sup>36</sup> All charges against Applicant and two other Marines were dismissed at the Article 32.<sup>37</sup>

**(SOR ¶ 1.d.):** In October 2006, Applicant was visiting his parents during Halloween weekend. He consumed a few beers with his father, ate dinner, and then met his brother and some friends at a local pub where they played pool and consumed more beer and hard liquor.<sup>38</sup> Applicant was driving from the pub to his brother's residence when he was pulled over by the police.<sup>39</sup> Applicant registered 0.08 on a blood alcohol test that was administered.<sup>40</sup> He was arrested and charged with driving while intoxicated (DWI).<sup>41</sup> He was convicted of the charge,<sup>42</sup> and sentenced to three years of probation, \$2,500 fine, five days of community service, and one night in jail.<sup>43</sup> Although Applicant attended Alcohol Anonymous (AA) meetings and alcohol education for three months, he did not have any individual therapy, and did not undergo any urinalysis.<sup>44</sup> He continued his heavy consumption of alcohol.<sup>45</sup>

**(SOR ¶ 1.e.):** In November 2007, while visiting his parents during the Thanksgiving weekend, a similar scenario played out. This time, however, he was stopped while driving a woman home.<sup>46</sup> Applicant registered 0.14 on a blood alcohol test that was administered.<sup>47</sup> Applicant was arrested and charged with DWI.<sup>48</sup> He was convicted of the charge,<sup>49</sup> and sentenced to 50 days in jail, reduced to 50 days

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<sup>35</sup> *Id.*

<sup>36</sup> Tr. at 31-32.

<sup>37</sup> Government Exhibit 3, *supra* note 33, at 2.

<sup>38</sup> Tr. at 68-69.

<sup>39</sup> *Id.* at 69.

<sup>40</sup> *Id.* at 67.

<sup>41</sup> *Id.* at 43. Although Applicant admitted the charge was DWI, he subsequently characterized it as driving under the influence (DUI). See *Id.* at 67.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 69-70.

<sup>44</sup> *Id.* at 70-71.

<sup>45</sup> *Id.* at 71.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 72.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

restriction administered by the USMC, one night in jail, and five years of probation.<sup>50</sup> It is unclear if there was a fine administered. Applicant was required to attend AA weekly for 18 months, alcohol education, and group therapy.<sup>51</sup> Three years later, as of the hearing, Applicant still attends monthly AA meetings.<sup>52</sup> He recognizes that he is an alcoholic and aspires to become abstinent.<sup>53</sup> He does not have a sponsor. Applicant can recite the Serenity Prayer.<sup>54</sup>

**(SOR ¶¶ 1.a. and 3.a.):** Applicant owns several investment properties. He would periodically go to one particular property to collect the rent, and on one particular occasion, while repairing the washer and dryer, he detected the strong aroma of marijuana.<sup>55</sup> Thinking it was the result of his tenant merely smoking a “joint,” Applicant did not give the incident any further interest.<sup>56</sup> Applicant suspected his tenant might be growing marijuana but did nothing because he did not wish to violate his tenant’s privacy.<sup>57</sup> Furthermore, the tenant was a “paying renter,”<sup>58</sup> and with the state of the real estate market, he chose to ignore the tenant’s actions.<sup>59</sup> In October 2008, the police came to his place of employment and took Applicant into custody before driving to the rental property. A number of agents “swarmed” into the building and raided it.<sup>60</sup> It appeared that Applicant’s tenant was cultivating marijuana in the building.<sup>61</sup> In addition, it was discovered that the tenant had tapped into the electrical box of surrounding neighbors.<sup>62</sup> Applicant is inconsistent in recalling his knowledge of the tenant’s actions pertaining to both the marijuana and the electrical box, claiming he was both unaware of the activity, and that he knew, but failed to report it.<sup>63</sup>

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<sup>50</sup> *Id.* at 72-75.

<sup>51</sup> *Id.* at 75-76.

<sup>52</sup> *Id.* at 76.

<sup>53</sup> *Id.* at 78.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 33.

<sup>56</sup> Government Exhibit 5 (Personal Subject Interview, dated February 26, 2009), at 1.

<sup>57</sup> *Id.*; Applicant Exhibit O (Applicant’s Letter of Explanation to Secretary of the Navy, dated April 1, 2009), at 1.

<sup>58</sup> Tr. at 33.

<sup>59</sup> Government Exhibit 5 (Applicant’s Answers to Interrogatories), *supra* note 2, at 6.

<sup>60</sup> Tr. at 33.

<sup>61</sup> Government Exhibit 5 (Personal Subject Interview), *supra* note 56, at 1.

<sup>62</sup> *Id.*

<sup>63</sup> Tr. at 63 (unaware). However, see Government Exhibit 5 (Applicant’s Answers to Interrogatories), *supra* note 2, at 6 (knew).

Applicant and his tenant were arrested and charged with: 1) possession of marijuana for sale, a felony; 2) cultivating marijuana, a felony; 3) tampering with electric, telephone, and cable television, a felony; and 4) injuring or interfering with electric lines, a felony.<sup>64</sup> He remained in the county jail overnight to be processed. Although Applicant denied any culpability, as a single father he could not afford any jail time, so upon the advice of his attorney, Applicant agreed to a plea deal.<sup>65</sup> He agreed to plead guilty to counts 1 and 2, with count 2 reduced to a misdemeanor and the remaining counts dismissed.<sup>66</sup> He was sentenced to three years supervised probation, to expire on February 8, 2012; 45 days of public service; a restitution fine of \$680, plus \$200 to be suspended; and restitution of \$10,000, at the rate of \$50 per month. The restitution was to be a joint responsibility with Applicant's co-defendant.<sup>67</sup>

Although Applicant had experimented with marijuana while in college,<sup>68</sup> he has never used it in the ensuing years.<sup>69</sup> Nevertheless, in October 2008, Applicant sought medical treatment for a knee injury, insomnia, and post-traumatic stress disorder (PTSD) from combat in Iraq.<sup>70</sup> On October 21, 2008, the physician prescribed medical marijuana for the period of one year.<sup>71</sup> Despite obtaining the prescription, Applicant never processed it and never used the marijuana.<sup>72</sup>

In December 2008, Applicant started seeing a psychologist to "get back on the straight and narrow" because of three incidents since his return from Iraq.<sup>73</sup> The psychologist's preliminary DSM diagnostic impression was that Applicant had an adjustment disorder with disturbance of conduct, 309.3.<sup>74</sup> After conducting psychological treatment on eight occasions, and being administered the Hamilton Anxiety Inventory<sup>75</sup> and subliminal therapy – a relatively unknown therapeutic modality

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<sup>64</sup> Government Exhibit 4 (Complaint-Charge Summary, dated October 29, 2008), at 1-3.

<sup>65</sup> Tr. at 63.

<sup>66</sup> Government Exhibit 4 (Pre-Disposition Minutes, dated January 8, 2009), attached to Complaint-Charge Summary.

<sup>67</sup> Government Exhibit 4 (Sentencing Order, dated February 9, 2009), attached to Complaint-Charge Summary.

<sup>68</sup> Tr. at 37.

<sup>69</sup> *Id.* at 37-38.

<sup>70</sup> *Id.* at 36; Government Exhibit 6 (Medical Report, dated October 21, 2008), attached to Applicant's Answers to Interrogatories.

<sup>71</sup> Government Exhibit 6 (Physician's Statement and Recommendation, dated October 21, 2008), attached to Applicant's Answers to Interrogatories.

<sup>72</sup> Tr. at 36.

<sup>73</sup> Applicant Exhibit A (Psychologist Report, dated January 6, 2009).

<sup>74</sup> *Id.* at 2.

<sup>75</sup> Tr. at 94.

that is hypnotic in nature<sup>76</sup> - he opined that Applicant's diagnosis was PTSD, although that diagnosis is not supported by the more restrictive DSM.<sup>77</sup>

## Personal Conduct

**(SOR ¶ 2.a.):** On February 26, 2009, Applicant was interviewed by an investigator from the Office of Personnel Management (OPM).<sup>78</sup> During that interview, Applicant said he knew there was marijuana in the rental property because he had smelled it, but he was unaware that the tenant had been cultivating marijuana in the house. He also stated that he had failed to notice that the tenant had tapped into the electric box of surrounding neighbors.<sup>79</sup> That information was not entirely accurate, for in his subsequent answers to interrogatories in August 2009, Applicant acknowledged knowing that the tenant was growing marijuana and that the electrical box had been tampered with, but he failed to report those facts because of the current real estate market situation.<sup>80</sup> During the hearing, he reverted back to his original position about not actually knowing what his tenant had done.<sup>81</sup> Applicant's inconsistent explanations raise the specter that during his February 2009 interview, he may have deliberately failed to disclose what he knew and when he knew it.

**(SOR ¶ 2.b.):** The SOR alleges that during the same OPM interview, Applicant deliberately failed to disclose that he had been prescribed medical marijuana in October 2008, even though he possessed a security clearance. Applicant admitted the allegation in his Answer to the SOR, but during the hearing denied deliberately failing to disclose the fact because he had never used the prescription and did not think the information was relevant.<sup>82</sup> The topic never was raised in the interview and Applicant never even thought to mention it.<sup>83</sup>

## Character References and Work Performance

During his abbreviated military career, Applicant was awarded the Navy and Marine Corps Achievement Medal, Outstanding Volunteer Service Medal (two awards), Global War on Terrorism Expeditionary Medal, Global War on Terrorism Service Medal, Armed Forces Reserve Medal (with two M(obilization) devices), Sea Service

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<sup>76</sup> *Id.* at 90.

<sup>77</sup> *Id.* at 85-86.

<sup>78</sup> Government Exhibit 5 (Personal Subject Interview), *supra* note 56.

<sup>79</sup> *Id.* at 1.

<sup>80</sup> Government Exhibit 5 (Applicant's Answers to Interrogatories), *supra* note 2, at 6.

<sup>81</sup> Tr. at 35.

<sup>82</sup> *Id.* at 36.

<sup>83</sup> *Id.* at 64.



Deployment Ribbon, Expert Rifle Badge, Expert Pistol Badge, and the National Defense Service Medal.<sup>84</sup> During his civilian career, he was awarded a number of certificates of appreciation, performer recognition awards, and team achievement awards.<sup>85</sup> Applicant's supervisors and coworkers, all of whom are retired Marine or Naval officers, are very supportive of Applicant's application for a security clearance. They have characterized Applicant as a hard worker with initiative, strong moral fabric, selfless commitment, loyalty, honesty, dedication, maturity, high integrity, trustworthiness, and reliability.<sup>86</sup>

## Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance."<sup>87</sup> As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information. The President has authorized the Secretary of Defense or his designee to grant an applicant eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so."<sup>88</sup>

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

An administrative judge need not view the guidelines as inflexible, ironclad rules of law. Instead, acknowledging 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. The entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider

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<sup>84</sup> Government Exhibit 6 (Certificate of Release or Discharge from Active Duty (DD Form 214), dated February 5, 2006); Government Exhibit 6 (DD Form 214, dated September 30, 2008); Applicant Exhibit H (Citation – Navy and Marine Corps Achievement Medal, dated September 30, 2008); Applicant Exhibit J (Citation – Military Outstanding Volunteer Service Medal, dated May 4, 2005); Applicant Exhibit K (Citation – Outstanding Volunteer Service Medal, dated June 24, 2008).

<sup>85</sup> Applicant Exhibit L (Certificate, dated October 19, 2009); Applicant Exhibit M (Various Certificates, various dates).

<sup>86</sup> Applicant Exhibit C (Character Reference, dated March 17, 2009); Applicant Exhibit D (Character Reference, dated March 20, 2009); Applicant Exhibit E (Character Reference, dated December 10, 2008); Applicant Exhibit F (Character Reference, dated April 29, 2009); Applicant Exhibit G (Character Reference, dated April 17, 2009); Tr. at 114-116.

<sup>87</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

<sup>88</sup> Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

all available, reliable information about the person, past and present, favorable and unfavorable, in making a meaningful decision.

In the decision-making process, facts must be established by “substantial evidence.”<sup>89</sup> The Government initially has the burden of producing evidence to establish a potentially disqualifying condition under the Directive, and has the burden of establishing controverted facts alleged in the SOR. Once the Government has produced substantial evidence of a disqualifying condition, under Directive ¶ E3.1.15, the applicant has the burden of persuasion to present evidence in refutation, explanation, extenuation or mitigation, sufficient to overcome the doubts raised by the Government’s case. The burden of disproving a mitigating condition never shifts to the Government.<sup>90</sup>

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 as well. It is because of this special relationship that the Government must be able to repose a high degree of trust and confidence in those 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 as to potential, rather than actual, risk of compromise of classified information. Furthermore, “security clearance determinations should err, if they must, on the side of denials.”<sup>91</sup>

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.”<sup>92</sup> Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. It is merely an indication the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance. 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.

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<sup>89</sup> “Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all contrary evidence in the record.” ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994).

<sup>90</sup> See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

<sup>91</sup> *Egan*, 484 U.S. at 531

<sup>92</sup> See Exec. Or. 10865 § 7.

## Analysis

### Guideline J, Criminal Conduct

The security concern relating to the guideline for Criminal Conduct is set out in AG ¶ 30:

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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 31(a), "a single serious crime or multiple lesser offenses" is potentially disqualifying. Similarly, under AG ¶ 31(c), an "allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted," may raise security concerns. Also, if the "individual is currently on parole or probation," AG ¶ 31(d) may apply. As noted above, Applicant was charged with petty theft in 1996, DWI in 2006, a variety of allegations under the UCMJ in 2006, DWI in 2007, and a variety of allegations in 2008. While the 1996 charge was dismissed, the 2006 UCMJ charges were dismissed, and two of the 2008 charges were dismissed, Applicant was convicted of the 2006 and 2007 DWIs and two of the 2008 charges. He remains on probation until February 2012. Accordingly, AG ¶¶ 31(a), 31(c), and 31(d) have been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from criminal conduct. Under AG ¶ 32(a), the disqualifying condition may be mitigated where "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." Also, where there is "evidence that the person did not commit the offense," AG ¶ 32(c) may apply. Similarly, AG ¶ 32(d) may apply where "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."

As to the 2006 criminal allegations under the UCMJ, Applicant was exonerated following an Article 32 Investigation and the charges were dropped. I am satisfied that Applicant did not commit the offenses for which he was charged, or possibly satisfied the convening authority that the charges could not be proven. AG ¶ 32(c) applies.

Applicant's two DWI convictions occurred in 2006 and 2007. He completed alcohol education and treatment programs, and regularly attends AA meetings. While he continues to consume moderate amounts of alcohol, with the ultimate goal of abstinence, since the 2007 incident – approximately three and one-half years ago – there has been no recurrence of such alcohol-related incidents. In December 2008, Applicant started seeing a psychologist to "get back on the straight and narrow" because of the three incidents since his return from Iraq. The psychologist's preliminary

diagnostic impression was that Applicant had an adjustment disorder with disturbance of conduct, and following psychological treatment and testing, the psychologist opined that Applicant's diagnosis was a form of PTSD. As to those two alcohol-related incidents, the passage of time, outstanding performance as a government contractor, and the completion of the court-imposed sentences, all point to evidence of successful rehabilitation. AG ¶¶ 32(a) and 32(d) apply.

As to the 2008 charges related to the possession and cultivation of marijuana and the theft of electrical service, it is clear that Applicant was convicted of possession of marijuana for sale, a felony, and cultivating marijuana, a misdemeanor. The electrical theft charges were dismissed as part of his plea agreement. While Applicant denies having been involved in the enterprise, his inconsistent statements regarding his knowledge of the tenant's activities is troublesome and leads me to conclude that Applicant has something to hide. Furthermore, Applicant is still on probation. Under these circumstances, while there is some evidence of rehabilitation, it is simply too soon to conclude that Applicant's 2008 criminal conduct is unlikely to recur. AG ¶¶ 32(a) and 32(d) partially apply.

### **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.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 16(b), "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative," may raise security concerns. Similarly, under AG ¶ 16(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. . ." may raise security concerns.

Applicant's omissions in his responses to inquiries in the OPM interview, of information pertaining to his tenant's criminal conduct and involvement with marijuana and the theft of electrical services, provide sufficient evidence to examine if Applicant's comments were deliberate falsifications pertaining to critical information, as alleged in the SOR, or were the result of confusion or misunderstanding on his part. I had ample opportunity to evaluate the demeanor of Applicant, observe his manner and deportment, appraise the way in which he responded to questions, assess his candor or evasiveness, read his statements, and listen to his testimony. Applicant's positions

regarding his knowledge of the tenant's actions pertaining to both the marijuana and the electrical box are inconsistent. He claimed he was both unaware of the activity, and that he knew, but failed to report it.

During that interview, Applicant said he knew there was marijuana in the rental property because he had smelled it, but he was unaware that the tenant had been cultivating marijuana in the house. He also stated that he had failed to notice that the tenant had tapped into the electric box of surrounding neighbors. That information was not entirely accurate, for in his subsequent answers to interrogatories in August 2009, Applicant acknowledged knowing that the tenant was growing marijuana and that the electrical box had been tampered with, but he failed to report those facts because of the current real estate market situation. He admitted he was not truthful when he answered the SOR. During the hearing, he reverted back to his original position about not actually knowing what his tenant had done. AG ¶¶ 16(b) and 16(e) have been established.<sup>93</sup>

As to the allegation that during the same OPM interview, Applicant deliberately failed to disclose that he had been prescribed medical marijuana in October 2008, even though he possessed a security clearance, Applicant admitted the allegation in his Answer to the SOR, but during the hearing denied deliberately failing to disclose the fact because he had never used the prescription and did not think the information was relevant. He explained that the topic was not raised in the interview and Applicant never even thought to mention it. AG ¶¶ 16(b) and 16(e) have been established.

The guidelines also include examples of conditions that could mitigate security concerns arising from personal conduct. If “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,” AG ¶ 17(c) may apply. Also, AG ¶ 17(d) may apply if “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.”

Applicant’s inconsistencies with regard to his tenant’s activities continue, but his explanation as to the issue of the prescription for medical marijuana is consistent and compelling. The interview in question occurred in February 2009, nearly two and one-half years ago. Applicant obtained counseling in an effort to alleviate the stressors,

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<sup>93</sup> The Appeal Board has explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant’s intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant’s intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

circumstances, or factors that caused his untrustworthy, unreliable, or otherwise inappropriate behavior, and such behavior is unlikely to recur. There is substantial evidence of Applicant's outstanding reputation and previous gallant service to our Nation. Several character references concur in an assessment that Applicant is trustworthy and exhibits the highest standards of ethical conduct and moral character. Nevertheless, despite the length of the period since his interview, in light of some continuing inconsistencies, there is some doubt as to Applicant's current reliability, trustworthiness, or good judgment. AG ¶¶ 17(c) and 17(d) partially apply.

## **Guideline H, Drug Involvement**

The security concern relating to the guideline for Drug Involvement is set out in AG ¶ 24:

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.

(a) 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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

The guideline notes several conditions that could raise security concerns. Under AG ¶ 25(a), "any drug abuse (see above definition)," is potentially disqualifying. Similarly, under AG ¶ 25(c), "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," may raise security concerns. In addition, AG ¶ 25(g) may apply if there was "any illegal drug use after being granted a security clearance." In October 2008, while Applicant possessed a security clearance, Applicant was convicted of possession of marijuana and cultivating marijuana. There is no evidence that he used marijuana. AG ¶¶ 25(a), and 25(g) have not been established. Because of the conviction pertaining to the possession and cultivation of marijuana, AG ¶ 25(c) has been established.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Under AG ¶ 26(a), the disqualifying condition may be mitigated where "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on

the individual's current reliability, trustworthiness, or good judgment.” Under AG ¶ 26(b), drug involvement concerns may also be mitigated where there is 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 were used;
- (3) an appropriate period of abstinence;
- (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant was the landlord of a tenant who cultivated marijuana. Although Applicant was convicted of possession of marijuana and cultivating marijuana, other than the relationship between landlord and tenant and the conviction, there is nothing to connect Applicant to the marijuana. Applicant is still on probation. The activity happened under such circumstances that it is unlikely to recur. However, Applicant’s inconsistent statements about the enterprise cast some doubt on his current reliability, trustworthiness, or good judgment. Applicant’s association with his psychologist, physician, and AA, all support his efforts to turn his life around and clearly demonstrate an intent not to abuse any drugs in the future. He has paid dearly for his relationship with his tenant, both in terms of reputation, criminal record, military career, and finances. He has devoted his life to his daughter and his country. AG ¶¶ 26(a) and 26(b) partially 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 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.

There is substantial evidence in favor of mitigating Applicant's conduct. Applicant is a good parent. Additionally, he was a good Marine who had deployed to the combat zone and returned with an alcohol problem and a version of PTSD. Applicant started seeing a psychologist to "get back on the straight and narrow" because of the three incidents since his return from Iraq. The passage of time, Applicant's adapting to therapy, participating in AA, his outstanding performance as a government contractor, and his completing the court-imposed sentences, except for the continuing period of probation, all point to evidence of successful rehabilitation.

The disqualifying evidence under the whole-person concept is more substantial. In 1996, Applicant was charged with petty theft, but managed to escape the consequences when the charge was subsequently dismissed. He was arrested and convicted of DWI in 2006 and 2007. In 2008, he was arrested and convicted for possession and cultivation of marijuana. Applicant is still on probation. During a February 2009 OPM interview, he lied. His subsequent explanations are inconsistent.

I have evaluated the various aspects of this case in light of the totality of the record evidence and have not merely performed a piecemeal analysis.<sup>94</sup> Applicant's alcohol abuse ceased in 2007, and has not recurred. While he aspires to abstinence, he possesses a new appreciation of the negative aspects of excessive alcohol consumption, and has a support group. His unfortunate relationship with his tenant exposed him to some sharp realities of life and he has focused on his daughter and his civilian job. He forfeited an outstanding military career. It is difficult to determine which version of the facts regarding his 2008 charges and convictions are the truth in light of his constant inconsistencies. See AG ¶¶ 2(a)(1) through 2(a)(9).

Overall, the record evidence leaves me with substantial questions and doubts as to Applicant's eligibility and suitability for a security clearance. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has failed to mitigate the criminal conduct, personal conduct, and drug involvement 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 J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Subparagraph 1.e:	For Applicant

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<sup>94</sup> See *U.S. v. Bottone*, 365 F.2d 389, 392 (2d Cir. 1966); See also ISCR Case No. 03-22861 at 2-3 (App. Bd. Jun. 2, 2006).



Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	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.

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ROBERT ROBINSON GALES  
Administrative Judge