



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



In the matter of:	)	
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SSN: -----	)	ISCR Case No. 09-03000
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Gregg A. Cervi, Esquire, Department Counsel  
For Applicant: *Pro se*

September 8, 2010

**Decision**

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings and exhibits, Applicant’s request for eligibility for a security clearance is denied.

On May 15, 2008, Applicant submitted a Questionnaire for National Security Positions (SF-86) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of Applicant’s background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) sent interrogatories to Applicant to clarify or augment information in his background.<sup>1</sup> After reviewing the results of the background investigation and Applicant’s responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative

<sup>1</sup> Authorized by DoD Directive 5220.6, Section E3.1.2.2.

finding<sup>2</sup> that it is clearly consistent with the national interest to continue Applicant's access to classified information. On February 23, 2010, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which, if established, would raise security concerns addressed in the adjudicative guidelines (AG)<sup>3</sup> under Guideline E (personal conduct), Guideline G (alcohol consumption), Guideline H (drug involvement), and Guideline J (criminal conduct).

On March 2, 2010, Applicant responded to the SOR through a notarized statement and requested a decision without a hearing. On May 12, 2010, Department Counsel prepared a File of Relevant Material (FORM)<sup>4</sup> in support of the Government's preliminary decision. Applicant received the FORM on May 18, 2010, and was given 30 days to file a response to the FORM. He did not respond to the FORM. The case was assigned to me on August 4, 2010.

### **Findings of Fact**

Under Guideline H, the Government alleged that Applicant used marijuana between 1999 and about September 2007, and from August 2008 until at least February 2009 (SOR 1.a), and that he has purchased marijuana (SOR 1.b). Applicant admitted these allegations.

Under Guideline G, the Government alleged that Applicant drank alcohol, at times to excess, between 1998 and at least February 2009 (SOR 2.a); that in 2004, he had consumed alcohol before he was arrested and charged with retail theft, for which he was convicted (SOR 2.b); that in 2005, he was arrested and charged with operating (a vehicle) with a prohibited alcohol concentration, operating (a vehicle) while under the influence, and having an open container in a motor vehicle, and that he pleaded no contest to operating while under the influence (SOR 2.c); that in 2006, he was found guilty of a charge of open container, for which he was fined (SOR 2.d); and that in 2007, he was convicted of a charge of damage to property, which occurred after he had been drinking (SOR 2.e). Applicant admitted these allegations.

Under Guideline J, the Government cross-alleged the alcohol-related criminal conduct detailed in SOR 2.b - 2.d (SOR 3.a). Applicant admitted this allegation. Under Guideline E, the Government alleged that Applicant used marijuana after submitting a his SF-86 in May, 2008 (SOR 4.a). Applicant admitted this allegation. In addition to the facts established by Applicant's admissions, I make the following findings of relevant fact.

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<sup>2</sup> Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

<sup>3</sup> The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006). Pending official revision of the Directive, they take precedence over the guidelines listed in Enclosure 2 to the Directive.

<sup>4</sup> See Directive, Enclosure 3, Section E3.1.7. The FORM included 12 documents (Items 1 - 12) proffered in support of the Government's case.

Applicant is 31 years old and has been employed as a technician for a defense contractor since June 2008. He requires a security clearance for his work. Applicant attended college from 2001 until 2005, when he received a bachelor's degree. When he submitted his SF-86, he disclosed significant adverse information about alcohol-related criminal conduct and extensive marijuana use. (FORM, Item 5)

Applicant first consumed alcohol at about age 15. By the time he was in college, he was drinking several times each week and becoming intoxicated at least three times weekly. Since 2005, when he graduated, his alcohol consumption has lessened, but still consists of two or more instances of intoxication each month. He drinks between six and eight beers in a sitting twice a month and estimates he drinks about 18 beers per occasion when he goes out to bars with friends. He does not believe he has an alcohol problem, and the only counseling he has ever received was a court-ordered alcohol awareness course after an arrest for drunk driving. (FORM, Item 6)

Applicant also started smoking marijuana when he was in high school. Applicant estimates that between 1997 and 2007, he used this drug about 1,000 times. (FORM, Items 5 and 6) He stopped using marijuana for a time in 2007 when he was applying for a job that required a pre-hiring drug test. After he submitted his e-QIP, Applicant resumed smoking marijuana about once a month. His last known use of marijuana was on February 15, 2009, four days before he was interviewed for his clearance by a Government investigator. As to future use, Applicant told the investigator he will try not to use marijuana in the future, and that he will not use drugs if he gets a security clearance. Applicant still associates with the friends with whom he has become intoxicated and used illegal drugs the past two years. (FORM, Item 6)

On November 6, 2004, Applicant and a friend switched the original price tags with lower price tags on steaks and other meats, a lobster, a goose, and several pork products at a local grocery store. Store workers called police who arrested Applicant. During the arrest, police smelled alcohol on Applicant's breath and administered a breathalyser test that showed he had a blood alcohol content (BAC) of .13%. Applicant ultimately pleaded guilty to stealing a total of \$132 worth of goods by paying only \$18. (FORM, Items 6 and 7)

On September 10, 2005, Applicant and some friends were drinking at a bar when they decided to drive to a friend's party. Applicant was driving erratically when he was stopped by police. A breathalyser test showed he had a .16% BAC, which reflects the 16 beers he had before getting into his car. In December 2005, Applicant pleaded guilty to operating a motor vehicle under the influence (OWI), 1<sup>st</sup> offense. His driver's license was revoked for seven months, he was assessed a \$200 fine plus court costs, and ordered to attend an alcohol awareness and evaluation course. No clinical assessment of his alcohol use was made. (FORM, Items 6, 8 - 10)

On July 1, 2006, Applicant was cited for having an open container of alcohol in a motor vehicle. He had consumed at least 20 beers in a bar, but carried one out to his friend's car when it was time to go. Applicant did not contest the charge and paid a fine. (FORM, Items 6 and 11)

On April 18, 2007, Applicant was at a party at a friend's apartment. After drinking between 30 and 40 beers over a 12-hour period, he began to feel sick and went outside for some air. When he returned, he went to the wrong apartment. Thinking his friends were playing a joke on him by locking the door and turning out the lights, he forced his way into a woman's apartment downstairs from the party. Applicant's friends retrieved him and brought him to the right apartment, where he soon passed out. The woman downstairs called the police, who later charged Applicant with damage to property because it appeared he had kicked in the woman's door. Applicant paid a fine and court costs. He also paid for the damage and apologized to the woman whose door he damaged. (FORM, Items 6 and 12)

## **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines.<sup>5</sup> Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole-person" concept, those factors are:

- (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.

The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>6</sup> for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the Government's case. Because no one has a "right" to a security clearance, an applicant bears a heavy

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<sup>5</sup> Directive. 6.3.

<sup>6</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

burden of persuasion.<sup>7</sup> A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as his or her own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the national interest.<sup>8</sup>

## Analysis

### Drug Involvement

The Government presented sufficient information to support the factual allegations under Guideline H (SOR 1.a and 1.b). Applicant began using marijuana about 11 years ago. His use has been extensive, because his estimate of 1,000 uses equates to a frequency of more than ten times a month over the 96 months between 1999 and 2007. Additionally, Applicant used on a monthly basis while his background investigation was in progress, and he last smoked the drug less than a week before his subject interview in February 2009. When he discussed future use during his subject interview, Applicant was, at best, equivocal about whether he would use marijuana again. Based on his extensive history of substance abuse over the past 12 years, and in light of his continued association with friends who also use marijuana, I conclude it is a virtual certainty that he will use marijuana again.

The facts established through the Government’s information and through Applicant’s admissions raise a security concern addressed in AG ¶ 24 as follows:

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.

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<sup>7</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>8</sup> See *Egan*; Adjudicative Guidelines, ¶ 2(b).

More specifically, available information requires application of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse (see definition (at AG ¶ 25(a))*) and AG ¶ 25(h) (*expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use*). By contrast, available information does not support application of any of the mitigating conditions at AG ¶ 26. His use of illegal drugs is recent, extensive over the course of almost half of his lifetime, and he still associates with friends with whom he has used marijuana over at least the past two years. On balance, available information is not sufficient to mitigate the security concerns about Applicant's drug use.

### **Alcohol Consumption**

The Government's information is also sufficient to support the factual allegations under Guideline G (SOR 2.a - 2.e). Applicant has abused alcohol since he was 15 years old, and he shows no signs of changing his use of alcohol. He has been arrested for or charged with alcohol-related offenses in 2005 and 2006. He was legally intoxicated when he arrested for retail theft in 2004, and he had consumed at least 30 beers when he kicked in a woman's door in 2007, for which he was charged with a criminal offense. These facts raise a security concern about Applicant's use of alcohol, which, as stated in AG 21, is that:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

More specifically, Applicant's use of alcohol requires application of the disqualifying conditions at AG 22(a) (*alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, disturbing the peace, or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent*) and AG ¶ 22(c) (*habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent*). By contrast, Applicant did not present any information that supports application of the mitigating conditions listed at AG ¶ 23. In response to the FORM, Applicant did not show how, if at all, his excessive use of alcohol has changed. Nor has he shown that he has sought or received any professional help with his abusive relationship with alcohol. He has failed to mitigate the security concerns about his alcohol consumption.

### **Criminal Conduct**

The Government submitted sufficient reliable information to support the factual allegations under Guideline J (SOR 3.a). Applicant has been arrested for or charged with numerous criminal offenses since 2004. The only charges for which he was not convicted were not prosecuted after he entered into a plea agreement (SOR 2.c). Available information raises a security concern about his criminal conduct, which, as stated in AG ¶ 30, is that:

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 facts established herein further require application of the disqualifying conditions at AG ¶ 31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶ 31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

By contrast, all of Applicant's criminal conduct has been alcohol-related. As discussed under Guideline G, above, he still drinks to excess. Thus, it is probable that he will engage in criminal conduct in the future unless his drinking abates. His last arrest was in April 2007, more than three years ago. However, given the scope of his drinking problem, the passage of time since his last offense does not indicate that his criminal conduct is no longer a concern. In summary, available information militates against the application of any of the AG ¶ 32 mitigating conditions. Applicant has failed to mitigate, refute, or extenuate the security concerns raised by the Government's information.

## **Personal Conduct**

The Government alleged (SOR 4.a) as adverse personal conduct that Applicant smoked marijuana between May 2008, when he submitted his e-QIP, and February 2009, when he was interviewed by a Government investigator during his background investigation. Applicant admitted this allegation. The security concern raised by this information, as stated at AG ¶ 15, is that:

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.

However, Applicant's conduct does not fall within any specific AG ¶ 16 disqualifying condition. Instead, as discussed above, his drug use is addressed by the Guideline H (drug involvement) disqualifying conditions at AG ¶ 25(a) (*any drug abuse (see definition [at AG ¶ 25(a)]) and AG ¶ 25(h) (expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use)*). As such, the Guideline E disqualifying condition at AG ¶ 16(d) (*credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: (1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information; (2) disruptive, violent, or other inappropriate behavior in the workplace; (3)*

*a pattern of dishonesty or rule violations; (4) evidence of significant misuse of Government or other employer's time or resources) does not apply. Additionally, because I concluded that the conduct in question was sufficient to disqualify the Applicant under Guideline H, discussed above, I have not applied the disqualifying condition at AG ¶ 16(c) (credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information).*

Nonetheless, Department Counsel correctly argued that Applicant's continued drug use after submitting his e-QIP and his equivocal statements regarding possible future use indicate a "cavalier attitude" (FORM, p. 8) that undermines general confidence in Applicant's judgment. This is sufficient to invoke the general security concern under AG ¶ 15. In response, he has not presented information that would support application of any mitigating conditions at AG ¶ 17. Accordingly, he has not mitigated the security concerns about his personal conduct.

### **Whole-Person**

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guidelines E, G, H, and J. I have also reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(a). Applicant, a 31-year-old employee of a defense contractor, was forthright and candid about his past drug use, alcohol consumption, and arrest record. However, the adverse conduct documented in his background investigation is likely to recur. Additionally, Applicant has not presented any information about other facets of his professional and personal background that might invoke one or more of the whole-person factors. A fair and commonsense assessment of this record shows that significant doubts remain about Applicant's suitability for access to classified information. Because protection of the national interest is paramount in these determinations, those doubts must be resolved for the Government.

### **Formal Findings**

Formal findings 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 H:	AGAINST APPLICANT
Subparagraphs 1.a - 1.b:	Against Applicant
Paragraph 2, Guideline G:	AGAINST APPLICANT
Subparagraphs 2.a - 2.e:	Against Applicant



Paragraph 3 Guideline J:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Paragraph 4, Guideline E:	AGAINST APPLICANT
Subparagraph 4.a:	Against Applicant

**Conclusion**

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant's request for a security clearance. Eligibility for access to classified information is denied.

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MATTHEW E. MALONE  
Administrative Judge