



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



In the matter of: )  
)  
) ISCR Case No. 09-06640  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Candace L. Garcia, Esq., Department Counsel  
For Applicant: Joseph Testan, Esq.

June 20, 2011

**Decision**

COACHER, Robert E., Administrative Judge:

Applicant failed to mitigate the security concerns under Guideline E, Personal Conduct. Applicant's eligibility for a security clearance is denied.

**Statement of the Case**

On November 17, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline E, Personal Conduct. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR (Answer) on December 10, 2010. He requested a hearing before an administrative judge. The case was assigned to me on March 3,

2011. DOHA issued a notice of hearing on March 10, 2011, with a scheduled hearing date of April 11, 2011. Because of the threat of a government-wide shutdown, the hearing was postponed. A new notice of hearing was issued on April 12, 2011, setting the hearing for May 9, 2011. The hearing was convened as scheduled. The Government offered exhibits (GE) 1 through 6, which were admitted into evidence without any objection. Department Counsel's exhibit index was marked as hearing exhibit (HE) I. Applicant testified, presented three witnesses, and offered exhibits (AE) A through H that were admitted into evidence without any objections. DOHA received the hearing transcript (Tr.) on June 9, 2011.

### **Findings of Fact**

In Applicant's Answer, he admitted SOR ¶¶ 1.a, 1.b, 1.e, 1.f, 1.g, 1.h, and 1.i. He denied SOR ¶¶ 1.c, 1.d, and 1.e. The admissions are incorporated into the findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits, I make the following findings of fact.

Applicant is 47 years old. He is married and has no children. He has worked as an engineer for a defense contractor since 1984. He holds an associate's degree in engineering. He held a security clearance from 1984 through 2008.<sup>1</sup>

Applicant's conduct raised in the SOR includes: (1) making false statements in response to security clearance application questions in 1997, 2004, and 2009 concerning past drug use (SOR ¶¶ 1.a - 1.d); (2) making false statements to a defense investigator on June 9, 2009, concerning past drug use (SOR ¶ 1.e); (3) using cocaine and marijuana at various times after being granted a security clearance (SOR ¶¶ 1.f – 1.h); and (4) having his security clearance access revoked by another government agency in 2008 because of drug involvement and personal conduct (SOR ¶ 1.i).

As indicated above, Applicant went to work for a defense contractor in 1984 as an engineer. During the course of his employment, he was required to periodically complete security clearance applications either to upgrade his clearance or for periodic reinvestigations. Consequently, he completed applications in 1997, 2004, and 2009. All three applications asked a form of the following questions: First, in the last seven years, or since you were 16 years old, whichever is shorter, have you ever illegally used any controlled substances (including cocaine and marijuana)? Second, have you ever illegally used any controlled substance (including cocaine and marijuana) while possessing a security clearance? He responded by indicating "no" to both questions on both the 1997 and 2004 applications.<sup>2</sup> These answers were false. He answered falsely

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<sup>1</sup> Tr. at 74; GE 1-3.

<sup>2</sup> The SOR did not allege the falsification concerning the question about using a controlled substance while possessing a security clearance for the 2004 application. Because it is not alleged conduct, Applicant's false answer to this question will be used by me solely to judge his credibility and when considering the whole-person factors.

because he was afraid truthful answers would prevent him from receiving a security clearance. Concerning the 2009 application, he admitted to earlier cocaine use (1995) and marijuana use (1988). He did not include his marijuana use in 2001 because he believed it was not illegal use since he used it in Amsterdam where it is legal. Likewise, when he was interviewed by a defense investigator in June 2009, he admitted to his earlier uses of cocaine and marijuana, but not to his use of marijuana in 2001.<sup>3</sup>

Applicant used marijuana on a recreational basis between 1985 and 1988. He held a security clearance during the time of this use. He estimated that he used marijuana approximately 50 times during this period. He also used cocaine from 1985 to 1995 on a sporadic basis. He estimated that he used cocaine approximately 200 times during this period. He stopped using because he and his wife (who was also using cocaine at the time) made a pact to stop using cocaine. Applicant used cocaine one more time after he made the pact with his wife. This occurred in 1995 when he went on a fishing trip with some friends. He claimed that this was his last use of cocaine. His claimed last use of marijuana was in 2001. On this occasion, he and his wife were visiting family in Amsterdam, the Netherlands. Marijuana use is legal there. He and his wife went to a coffee house with some friends and used marijuana that was available at the coffee house. He knew that marijuana use was prohibited for someone who held a security clearance.<sup>4</sup>

Applicant's drug involvement was disclosed in 2008 when he was interviewed by another government agency (AGA). During the course of that process, Applicant revealed his prior marijuana and cocaine use. He also revealed his use of marijuana while in Amsterdam. As a result of his disclosures, the AGA revoked his access to certain programs. He did not appeal that decision. In June 2009, during a subsequent interview with a defense department investigator, Applicant revealed his 1985-1988 marijuana use and his 1985-1995 cocaine use. He did not disclose his 2001 marijuana use in Amsterdam because he believed the investigator was only interested in illegal drug use. Since his use in Amsterdam was legal, he did not believe he needed to mention it to the investigator.<sup>5</sup>

During his testimony, Applicant expressed remorse for his earlier falsifications about his drug activity. However, when he was asked if he had it to do over again would he lie again? He gave conflicting testimony. Initially, he said, "That's hard to say." Later in his testimony, he stated that he would tell the truth if he had to do it over again.<sup>6</sup>

Applicant presented the testimony and statements of several coworkers, friends and neighbors who have known Applicant in various capacities over the years. He also

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<sup>3</sup> Tr. at 76-80; GE 1-4.

<sup>4</sup> Tr. at 76-84; GE 1, 4.

<sup>5</sup> Tr. at 82-83; GE 5.

<sup>6</sup> Tr. at 86-87, 104.

offered several years worth of job performance appraisals that show he is a “successful contributor.” All the testimony and statements characterize Applicant as loyal, trustworthy, and dependable.<sup>7</sup>

## **Policies**

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

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge’s overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the “whole-person concept.” The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and has the ultimate burden of persuasion to obtain a favorable 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 that an 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.

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<sup>7</sup> Tr. at 43-70; AE A-H.

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 E, Personal Conduct**

AG ¶ 15 expresses the security concern for personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying in this case. The following disqualifying conditions are potentially applicable:

- (a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire;
- (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 gave false information about his drug use on his security clearance application (1997), misled a defense department investigator about his use of marijuana, and used cocaine and marijuana while holding a security clearance. All three of the above disqualifying conditions apply to this conduct. Applicant's non-disclosure of his 2001 marijuana use in Amsterdam on his 2004 and 2009 security clearance applications was not false because the questions specifically asked about illegal drug use. Although the use was contrary to U.S. law and the security clearance directive, it was not illegal in the Netherlands. Therefore, AG ¶ 16(a) does not apply to SOR ¶¶ 1.c

and 1.d. The revocation action by AGA (SOR ¶ 1.i) was a procedural action that is of little consequence to this action, except regarding the underlying facts that may be similar in both cases.

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

(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.

Applicant's use of cocaine and marijuana and his subsequent lies about those actions on his security clearance applications are not minor offenses, nor infrequent. However, his last drug use was over 10 years ago and can be considered remote. Applicant's false security application in 1997 could be considered remote, except that he continued his deceit by providing false information in his 2004 application and by misleading the defense investigator in 2009 by not informing him of his most recent use of marijuana in 2001. Despite the testimony and numerous statements attesting to Applicant's good character, he has established a pattern of deceitful behavior over the years that casts doubt of his reliability, trustworthiness, and good judgment. AG ¶ 17(c) does 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 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 service to

his company and his character evidence. I also considered the passage of time since his last drug use. However, I also considered Applicant's series of false statements about his past drug use while holding a security clearance. This was not an isolated lie, but one that was perpetrated in his 1997 security clearance application, continued in his 2004 application, and stated again in his 2009 interview with a defense investigator. Applicant failed to present evidence to overcome the security concerns in this case.

Overall the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant did not mitigate the security concerns arising under Guideline E, Personal Conduct.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline E:	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant
Subparagraphs 1.c-1.d:	For Applicant
Subparagraph 1.e:	Against Applicant
Subparagraphs 1.f-1.i:	For 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 E. Coacher  
Administrative Judge