



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



In the matter of: )  
)  
) ISCR Case No. 10-10276  
)  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Fahryn E. Hoffman, Esq., Department Counsel  
For Applicant: *Pro se*

December 30, 2011

**Decision**

COACHER, Robert E., Administrative Judge:

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

**Statement of the Case**

On August 10, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guideline J, Criminal Conduct and 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 (Answer) the SOR on August 23, 2011, and requested a hearing before an administrative judge. The case was assigned to me on October 4, 2011. DOHA issued a notice of hearing on October 31, 2011, and the hearing was convened as scheduled on November 15, 2011. The Government offered exhibits (GE) 1 through 6, which were admitted into the record without objection. Department Counsel's exhibit index is marked as Hearing Exhibit (HE) I. Applicant testified, called two witnesses, and offered exhibits (AE) A and B that were admitted into the record without objection. DOHA received the hearing transcript (Tr.) on November 23, 2011.

### **Findings of Fact**

In Applicant's answer to the SOR, he admitted ¶¶1.a, 1.b, and 1.d, but denied ¶¶1.c and 1.e. He failed to admit or deny SOR ¶ 2.a, which will be treated as a denial. The admissions are incorporated as findings of fact. After a thorough and careful review of the pleadings, testimony, and exhibits submitted, I make the following findings of fact.

Applicant is 26 years old. He has worked for a defense contractor for about two years. He was married on November 30, 2010. This is his first marriage. He does not have any children. He received his GED (General Educational Development) degree and has completed two years of college. He has no military experience and does not currently hold a security clearance.<sup>1</sup>

Applicant's conduct raised in the SOR includes: (1) being arrested, charged and pleading guilty to felony counts of armed robbery in March 2004 (admitted); (2) being arrested for possession of marijuana in May 2002 (admitted); (3) being charged with selling-furnishing liquor to a minor in July 2003 (denied); (4) testing positive on a urinalysis test for opiates in April 2006 while he was in prison (admitted) and, (5) using marijuana, methamphetamine, cocaine, and LSD on a daily basis between 1999 and 2003 (denied daily use of these drugs). This conduct is alleged under both criminal conduct (Guideline J) and personal conduct (Guideline E).

In September 2003, Applicant and two other people broke into the house of an acquaintance. He then proceeded to rob the acquaintance of money and drugs at gunpoint. Applicant was arrested and charged with numerous offenses including kidnapping, burglary, and armed robbery. During the course of the robbery, he pointed handguns at the victims. He ultimately pleaded guilty to armed robbery and the remaining charges were dropped. He was sentenced to prison for seven years. He served six of the seven years and was released early to serve probation for three years. He began his probation in October 2009 and was released early from probation in June 2011, because of his good behavior. Applicant is no longer under any probation restrictions.<sup>2</sup>

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<sup>1</sup> Tr. at 4-5, 81; GE 1.

<sup>2</sup> Tr. at 57-58; GE 2.

In 2006, while in prison, Applicant tested positive on a random urinalysis for opiates. He admitted using his cellmate's prescription medicine to relieve the pain he was experiencing due to shingles. No documentation was provided to support the shingles claim. He was administratively punished and lost 10 days of early release credit for this prison infraction. Applicant testified that his last drug use was the illegal use of his cellmate's prescription drugs in 2006; however, his earlier statement to a defense investigator indicated his last use of drugs was in November 2009 with no further explanation.<sup>3</sup>

Applicant admitted using marijuana, methamphetamine, cocaine, and LSD on a regular basis between 1999 and 2003. He also admitted his arrest for possession of marijuana in 2002. There is no evidence in the record to support the selling/furnishing liquor to a minor allegation and Applicant denies that allegation.<sup>4</sup>

Applicant presented testimony from both his wife and mother about the changes that he has made in his life. He also presented character evidence from friends, coworkers, and his probation officer about the positive changes they have seen in him. All thoroughly support Applicant and believe he is worthy of receiving a security clearance.<sup>5</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.

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<sup>3</sup> Tr. at 81; GE 2, 5.

<sup>4</sup> GE 2; Answer.

<sup>5</sup> Tr. at 26-55; AE A-B.

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.

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

Criminal activity creates doubt about an Applicant’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.

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying in this case. The following are potentially applicable:

- (a) a single serious crime or multiple lesser offenses; and
  
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant pled guilty to a felony count of armed robbery and served six years in prison for the offense. He also admitted to various drug use between 1999 and 2003, and illegal use of prescription drugs while in prison. I find that the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for Criminal Conduct under AG ¶ 32 and considered the following relevant:

(a) 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; and

(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.

Applicant's criminal conviction is somewhat remote, but it was very serious. Additionally, he admitted to drug use in 2006 and 2009, which is much more recent. He has only been off supervised probation since June 2011. Applicant failed to provide sufficient evidence that his reliability, trustworthiness and judgment is not in question based upon the nature of his previous offenses. Not enough time has passed to determine whether his rehabilitative efforts have succeeded. So, while some aspects of both mitigating conditions are present, on the whole Applicant has not presented sufficient evidence for either to completely apply.

#### **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 condition is potentially applicable:

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other 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.

Applicant's criminal actions were thoroughly discussed under the criminal conduct analysis. His questionable judgment was apparent by his involvement in the

serious crime of armed robbery. He also showed a disregard for rules and regulations when he used unauthorized drugs while in prison. AG ¶ 16(c) applies.

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 relevant:

(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.

Although some time has passed, it is too soon to say whether Applicant's criminal ways are unlikely to recur. Applicant failed to present sufficient evidence to establish his reliability, trustworthiness or 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 have considered Applicant's current position, his early release from probation, and his supportive character evidence. However, I also considered that Applicant's actions involved serious crimes for which he spent six years in prison. Although Applicant has made positive strides toward his rehabilitation, it is too early to determine whether those efforts will ultimately prove successful. Applicant failed to provide sufficient evidence to mitigate the security concerns.

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 failed to mitigate the security concerns arising under Guideline J, Criminal Conduct and 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 J:	AGAINST APPLICANT
Subparagraphs 1.a -1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraphs 1.d -1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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 E. Coacher  
Administrative Judge