



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



In the matter of:	)	
	)	
	)	ISCR Case No. 11-08589
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Melvin A. Howry, Esquire, Department Counsel  
For Applicant: Alan K. Hahn, Esquire

September 12, 2013

\_\_\_\_\_  
**Decision**  
\_\_\_\_\_

MOGUL, Martin H., Administrative Judge:

On December 3, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H and E for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), effective within the Department of Defense for SORs issued after September 1, 2006.

On February 28, 2013, Applicant replied to the SOR (RSOR) in writing, and he requested a hearing before an Administrative Judge. The case was assigned to this AJ on May 13, 2013. DOHA issued a notice of hearing on May 14, 2013, and I convened the hearing as scheduled on June 6, 2013. The Government offered Exhibits 1 through 6, which were received without objection. Applicant testified on his own behalf and submitted Exhibits A and B, which were also admitted without objection. DOHA received the transcript of the hearing (Tr) on June 20, 2013. Based upon a review of the

pleadings, exhibits, and the testimony of Applicant, eligibility for access to classified information is granted.

### **Findings of Fact**

In his RSOR, Applicant admitted both SOR allegations 1.a. and 1.b, under Guideline H; and both SOR allegations 2.a. and 2.b, under Guideline E. The admitted allegations are incorporated herein as findings of fact.

After a complete and thorough review of the evidence in the record, including Applicant's RSOR, the admitted documents, and the testimony of Applicant, and upon due consideration of that evidence, I make the following additional findings of fact:

Applicant is 33 years old. He is married, and he has two children. He received a GED certificate in 2005 or 2006. Applicant has been employed by a defense contractor in his current position since April 2008, and he seeks a DoD security clearance in connection with employment in the defense sector.

### **Guideline H - Drug Involvement**

The SOR lists two allegations (1.a. and 1.b.) under Adjudicative Guideline H.

1.a. The SOR alleges, and Applicant has admitted in his RSOR that he, "used cocaine from about June 2005 until December 2006." At the hearing, Applicant testified that he had used cocaine at social gatherings with friends with whom he used to associate. He could not recall exactly how many times he used cocaine, but he estimated it to be approximately once a month, for a total of six or seven times. He stated that he stopped using the cocaine because he wanted to start a family and "stay away from that type of stuff." He has not used cocaine since he stopped in 2006. (Tr at 40-41.)

1.b. The SOR alleges, and Applicant has admitted in his RSOR that he, "used marijuana in about 2005." Applicant testified that he only used marijuana one time, and since he did not like the effects, he never used it again. Applicant averred credibly that he does not associate with anyone who uses drugs, and he has no intention of using marijuana or any other illegal substance in the future. (Tr at 41-42.)

Applicant submitted a statement (Exhibit B), signed by him under penalty of perjury on June 6, 2013, in which he wrote:

1. I have not used marijuana, cocaine or any controlled substance since December 2006.
2. I will not use marijuana, cocaine or any controlled substance in the future.
3. I understand and agree that any future use of any controlled substance will result in the automatic revocation of my security clearance.

## **Guideline E - Personal Conduct**

2.a. Applicant executed a Security Clearance Application (SCA) on August 28, 2008. (Exhibit 1.) The SOR alleges that Applicant failed to provide truthful and candid answers to Question 23, subparagraph a. "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, . . . or prescriptions drugs." (Emphasis in original.) Applicant answered, "No" to this question, and it is alleged in the SOR that he deliberately failed to disclose that information set forth in subparagraphs 1.a., and 1.b., above.

Because the question on the SCA is 24, not 23, the SOR was amended to show that the SOR allegation concerned question 24. (Tr at 73-74.)

Applicant testified that he filled out the SCA online at one sitting, and he averred credibly that he did not intend to hide his cocaine or marijuana usage from the Government when he completed the SCA. He explained that when he filled out a second SCA in 2009, (Exhibit B) the question was a little more detailed, and he "read it a little more clearly." For the second SCA in 2009, Applicant did reveal his cocaine usage, even though he had not been confronted by anyone because of his answer on his first SCA when he did not reveal any drug usage.

Applicant also met with Government investigators on two occasions and two subject interviews were created. (Exhibit 4.) During the first investigation in 2009, the investigator asked him about his cocaine usage, which he already had identified on the 2009 SCA. (Exhibit 2.) When the investigator asked Applicant if he had ever used any other drugs, Applicant informed him that he had used marijuana one time. The investigator had not indicated to Applicant that he had been aware of any additional drug usage by Applicant when he informed him about his one time marijuana usage.

2.b. The SOR alleges, and Applicant has admitted in his RSOR, that on or about April 29, 2001, he was arrested and charged with 1) Defrauding Providers of Food, Fuel, Services or Accommodations, 2) Driving under the Influence of Alcohol/Drugs (DUI), 3) Driving with a Blood Alcohol of over .08%, and 4) Trespassing. Applicant plead No Contest to charges 2 and 4, and charges 1 and 3 were dismissed. Applicant was sentenced to 36 months probation and ordered to pay a fine.

Applicant testified that this event occurred when he was 21, after he and his wife had been watching a sporting event at a friend's house, and they had been consuming "a little too much to drink." They stopped to eat at a restaurant, and they decided to leave without paying the bill. They were stopped by the police after they left, and Applicant was arrested and held overnight. Applicant stated that the next day he returned to the restaurant, paid his bill, and apologized to the restaurant manager and the waiter. (Tr at 35-36.)

When Applicant returned to court, he showed the judge the receipt for \$40 that he had paid, and he plead guilty to DUI and Trespass. As a result of the plea and conviction, he paid a fine of approximately \$2,500, attended DUI classes for eight

weeks, and performed 220 hours of community service. Applicant averred that this was his only arrest, and he intends to remain a law abiding citizen. He also makes sure to abstain from driving a vehicle if he consumes any alcohol. (Tr at 37-40.)

## **Mitigation**

Applicant submitted three extremely positive character letters from three individuals who identified themselves as co-workers and friends of Applicant. He has been described as someone who is "very professional with good work ethics." (Exhibit A.)

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

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

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of

the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline 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 judgement and because it raises questions about a person’s ability or willingness to comply with laws, rules and regulations.

With respect to Guideline H, the Government has established its case. Applicant’s improper and illegal drug abuse, specifically the use of cocaine and marijuana, is of great concern, especially in light of his desire to have access to the nation’s secrets. Applicant’s overall conduct pertaining to his illegal substance abuse clearly falls within Drug Involvement ¶ 25(a) “any drug abuse” and (c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.”

However, I find credible his testimony and his written statement that he intends to abstain from using cocaine, marijuana, or any other illegal substance in the future. Applicant only used marijuana one time in 2005, and cocaine, approximately six or seven times over the period of a year and a half in 2005 and 2006. Applicant testified credibly, and there has been no evidence to the contrary, that he has not used any illegal substance for more than 6 and a half years, and he has no intention to use any substance in the future. He also signed a statement under the penalty of perjury that he does not intend to ever use any illegal substance in the future. Therefore, I conclude that ¶ 26(b) “a demonstrated intent not to abuse any drugs in the future,” including (3) “an appropriate period of abstinence;” and (4) “a signed statement of intent with automatic revocation of clearance for any violation,” is applicable and mitigating.

In this case, the Government has met its initial burden of proving that Applicant has used illegal drugs under Guideline H. Applicant, on the other hand, has introduced persuasive evidence in rebuttal, explanation, or mitigation, which is sufficient to overcome the Government’s case against him. Accordingly, Guideline H of the SOR is concluded for Applicant.

## **Guideline E - Personal Conduct**

The Government relies heavily on the honesty and integrity of individuals seeking access to our nation's secrets. If such an individual intentionally falsifies material facts, it is extremely difficult to conclude that he nevertheless possesses the judgment, and honesty necessary for an individual given a clearance.

In reviewing the disqualifying conditions under Guideline E, I conclude that Applicant did fail to provide the information about his drug usage on his first SCA. However, based on Applicant's credible testimony that he did not intend to mislead the Government, and since he did ultimately reveal his drug usage without any independent evidence from any other source, I find that there was no "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire" by Applicant. Therefore, I find that disqualifying condition ¶ 16(a), does not apply against Applicant.

While Applicant's arrest and conviction for DUI and Trespass in 2001 does show questionable judgement and potential unreliability and unwillingness to comply with rules and regulations, I find that since it did occur on only one occasion, more than 11 years ago when Applicant was 21 years of age, and Applicant has had no other involvement with illegal activity since that time, that this conduct does not create a pattern of dishonesty or rule violations. Therefore, no other disqualifying condition applies against Applicant. I resolve Guideline E for Applicant.

## **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. Based on all of the reasons cited above as to why the mitigating conditions are applicable under Guideline H and no

disqualifying conditions are applicable under Guideline E, I find that the record evidence leaves me with no significant questions or doubts as to Applicant's eligibility and suitability for a security clearance under the whole-person concept. For all these reasons, I conclude Applicant has mitigated the security concerns under the whole-person concept.

### **Formal Findings**

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

Paragraph 1, Guideline H:	FOR APPLICANT
Subparagraph 1.a.:	For Applicant
Subparagraph 1.b.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a.:	For Applicant
Subparagraph 2.b.:	For Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

Martin H. Mogul  
Administrative Judge