



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 07-05304  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Braden E. Murphy, Esq., Department Counsel  
For Applicant: Kathleen E. Voelker, Esq.

February 12, 2008

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**Decision**  
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TUIDER, Robert J., Administrative Judge:

Applicant has not mitigated security concerns pertaining to Personal and Criminal Conduct. Clearance is denied.

Applicant submitted his Security Clearance Application (SF-86), on October 6, 2005. On September 21, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines E (Personal Conduct) and J (Criminal Conduct). 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant acknowledged receipt of the SOR on September 29, 2007. He answered the SOR in writing on October 17, 2007, and requested a hearing before an Administrative Judge. DOHA received the request on October 18, 2007. Department Counsel was prepared to proceed on November 29, 2007, and I

received the case assignment on December 3, 2007. DOHA issued a notice of hearing on December 18, 2007, scheduling the case to be heard on January 16, 2008. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 through 4, which were received without objection. Applicant testified on his own behalf and offered Applicant Exhibits A through I, which were received without objection. DOHA received the transcript of the hearing (Tr.) on January 30, 2007.

### **Findings of Fact**

In his Answer to the SOR, dated October 17, 2007, Applicant admitted the factual allegations in ¶¶ 1.a. through 1.d. He denied the factual allegations in ¶ 2.a.

Applicant is a 39-year-old senior consultant, who has been employed by a defense contractor since February 2005. He seeks to retain the security clearance he obtained fraudulently in June 1994. Tr. 101-103, GE 4.

Applicant attended junior college from September 1986 to December 1989, and attended a four-year college from September 1991 to June 1996. Tr. 92. He was awarded a bachelor of science degree, majoring in mechanical engineering, in June 1996. He has never been married and has no dependents.

When Applicant first applied for an industrial clearance in January 1994, he deliberately concealed his prior marijuana usage to 1994 by answering “No” to Question:

**20. DRUG/ALCOHOL USE AND MENTAL HEALTH** a. Have you ever tried or used or possessed any narcotic (to include heroin or cocaine), depressant (to include quaaludes), stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish) or any mind-altering substance (to include glue or paint); even one-time or on an experimental basis, except as prescribed by a licensed physician? GE 3.

Applicant admitted he falsified this answer in his Answer to SOR and reconfirmed this falsification during his testimony. His explanation for falsifying his response *supra* was:

Again, it was fear. When I was filling out this application, I had already been inside this co-operative position for a few months now, and then suddenly I was filling out an application. Again, it was fear – at this point it was definitely not taking the process seriously, because prior to this, a security clearance was not something I was really familiar with. And it was foolish, but it was also a matter of I was – it was bad judgment. I was younger, and didn’t understand what I was doing. It was a mistake. Tr. 77.

Applicant was granted a secret clearance in June 1994. GE 4.

When Applicant submitted his SF-86 for the renewal of his industrial clearance in October 2005, he again deliberately concealed his prior marijuana usage by answering "No" to Sections 24a. and b.

**Section 24: Your Use of Illegal Drugs and Drug Activity** The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding.

a. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?

b. Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting public safety?

Applicant admitted he falsified this answer in his Answer to SOR and reconfirmed this falsification during his testimony. His explanation for falsifying his response *infra* was:

MS. VOELKER: Now, I'd like to call your attention to Government Exhibit 1, which is a security clearance application which was submitted by you in October of 2005. Do you recall completing that application?

Applicant: I do.

MS. VOELKER: Did you truthfully answer question A in Section 24, regarding illegal use of controlled substances in the previous 7 years?

Applicant: I did not answer it truthfully.

MS. VOELKER: What would the truthful answer have been?

Applicant: That yes, I had used marijuana in the previous 7 years.

MS. VOELKER: Now, as of today, when is the last time you used marijuana?

Applicant: It was on a trip to Europe in Amsterdam in April 2004.

MS. VOELKER: All right. And prior to that, when had you last used marijuana?

Applicant: It was almost a year earlier, in July 2003. At approximately the time I left to go move in with my mom.

MS. VOELKER: Okay. Prior to 2003, how frequently had you been using marijuana, up until then?

Applicant: It went through difference phases, you know, there was (sic) times when I would – if I had it and it was available, I would use it, you know, a few times a week. There were times when I would go without it for months at a time, and it's hard to recall exactly what the – which timeframes I was using and was not, but you know, when I had it I was probably using it a few times a week. Tr. 71-73.

MS. VOELKER: So, in the same application that I just showed you a moment ago, which is Government's Exhibit 1, did you truthfully answer question B in Section 24, regarding whether you'd ever used illegal drugs while holding a security clearance?

Applicant: No, I did not answer that truthfully.

MS. VOELKER: And why didn't you answer these questions truthfully?

Applicant: I was definitely concerned about, you know, I was scared. It was – realizing now, where I am now, it was a big mistake to not answer this truthfully, but I was scared about my job situation, I was scared about having already held a clearance and having used marijuana at that time. I was concerned about getting in trouble, you know. It was a mistake. Tr. 75-76.

Applicant described his marijuana usage as beginning in the 12<sup>th</sup> grade. He continued to use marijuana in junior college and in college and intermittently until about July 2003. And, as indicated above, the last time he used marijuana was while on vacation in Amsterdam in April 2004. He never received any drug treatment or participated in any drug treatment program. Tr. 78-81, 91-93. Applicant did reveal his past drug use during his background investigation interview in March 2006. Tr. 83-87, 100-101, GE 2.

Three witnesses testified on behalf of Applicant. One was his former manager and the remaining two witnesses were individuals who knew Applicant on a social basis. These individuals consider Applicant an excellent employee and/or friend and praise his honesty and integrity. Applicant's documentary evidence included favorable work-related and commendatory correspondence. AE A through H. Applicant is a home owner and established in his community. AE I.

## Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised 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 overarching 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 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.

AG ¶ 16 indicates two conditions that could raise a security concern and may be disqualifying in this case, including:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(e) personal conduct, or concealment of information about one's conduct, that creates 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.

The Government produced substantial evidence of this disqualifying condition through Applicant's admission. The burden shifted to Applicant to produce evidence and prove a mitigating condition. The burden of disproving a mitigating condition never shifts to the Government.

Five Personal Conduct Mitigating Conditions under Guideline ¶ 17 are potentially applicable to this disqualifying condition:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(d) 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; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

AG ¶ 17(e) partially applies because Applicant quit using marijuana in 2004. However, he is unable to receive full credit under this AG because the falsification of his security clearance applications concealed drug use which in all likelihood would have precluded him from being granted a clearance. What is certain, however, is the concealment of Applicant's past drug use seriously undermined the security clearance application process. None of the remaining mitigating conditions apply. The concealed information was relevant to a clearance decision.

Applicant's falsifications prohibited the Government from evaluating his illegal drug use in a timely fashion, and at a time when such recent drug use might have raised significant security concerns. In addition, the Government detrimentally relied on Applicant's falsifications in granting his clearance. Once granted a clearance, Applicant continued to violate the trust the Government placed in him by using marijuana.

Finally, while his disclosure of illegal drug use in March 2006 may have been forthright, it cannot be considered prompt. While I give Applicant some credit for coming forward, that credit is diluted by several factors. It is irrelevant that no Government records would have otherwise disclosed his drug use. Applicants are expected to tell the Government the truth as part of the security clearance vetting process.

### **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.

AG ¶ 31 indicates two conditions that could raise a security concern and may be disqualifying in this case, including:

- (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.

Record evidence clearly established that Applicant intended to conceal his illegal drug from the Government and effect the course of his background investigation. This conduct violated 18 U.S.C. § 1001, whether or not he was successful in effecting the course of his investigation. However, in this case his falsifications did alter the investigation, as he was granted his clearance in 1994.

Three Criminal Conduct Mitigating Conditions under Guideline ¶ 32 are potentially applicable to these disqualifying conditions:

- (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;
- (b) the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life; 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.

None of the mitigating conditions are applicable. Applicant's failure to disclose his illegal drug use demonstrates lack of candor required of cleared personnel. The Government has an interest in examining all relevant and material adverse information about an Applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate Government interests.

## 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) 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. Falsifications are a core security concern. His behavior was deliberate and not due to circumstances beyond his control. His misconduct was both recent and frequent. I note Applicant's drug use began in 12<sup>th</sup> grade and continued into his mid-30s. He failed to disclose his drug use by falsifying his 1994 SF-86 in his early 20s, and compounded his first falsification by falsifying his 2005 SF-86 in his mid 30s. I have considered Applicant's relative youth at the time of his first falsification, but that does not overcome the adverse inferences of his misconduct, honesty being a core requirement for access, and not a difficult concept to understand or expect Applicant to comply with.

Rehabilitation or behavioral changes are difficult to measure under these circumstances, given the scrutiny Applicant has been under since his drug use came to light. He clearly sought to mislead the Government about his drug record, or was at least willing to benefit from his misconduct. Applicant's willingness to put his personal needs ahead of legitimate Government interests increases his potential vulnerability and he has not demonstrated that the misconduct is unlikely to recur. The concern is whether Applicant would disclose situations or circumstances, whether deliberate or inadvertent, that raise security concerns.

Overall, the record evidence leaves me without questions and/or doubts as to Applicant's eligibility and suitability for a security clearance. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"<sup>1</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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<sup>1</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

### **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 |
| Subparagraph 1.a. – d.:   | Against Applicant |
| Paragraph 2, Guideline J: | 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 national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied).

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ROBERT J. TUIDER  
Administrative Judge