



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-08765
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Paul M. DeLaney, Esquire, Department Counsel  
For Applicant: *Pro Se*

February 14, 2008

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**Decision**  
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MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted his security clearance application (SF 86) on December 7, 2004. On November 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing the security concerns under Guideline E and Guideline J. 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 November 27, 2007. He answered the SOR in writing on December 5, 2007, and requested a decision based on the record without a hearing. On December 21, 2007, the government submitted a File of Relevant Material (FORM) consisting of six exhibits (Items 1-6). DOHA forwarded a copy of the FORM to Applicant and instructed him to respond within 30 days of receipt. On January 14, 2008, Applicant submitted his rebuttal to the FORM consisting of his

statement (Ex. A) and two character references (Ex. B, Ex. C). On January 22, 2008, Department Counsel indicated no objections to the documents being admitted into evidence. On January 28, 2008, the case was assigned to me to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Based upon a review of the Government's FORM and Applicant's response, eligibility for access to classified information is denied.

### **Procedural and Evidentiary Rulings**

DOHA alleged under Guideline E that Applicant deliberately falsified a December 7, 2007, security clearance application. In the FORM, Department Counsel correctly indicated that Applicant submitted his SF 86 on December 7, 2004. The Government did not move to amend the SOR to correct the obvious typographical error in the date, but there is no dispute between the parties about the date of the SF 86 at issue. SOR ¶ 1.a is hereby amended to change the date of the SF 86 to December 7, 2004, to conform to the evidence in the record.

### **Findings of Fact**

DOHA submits under Guideline E, Personal Conduct, that Applicant used marijuana with varying frequency from high school to at least 2003 (SOR ¶ 1.a) and that he deliberately falsified his December 2004 SF 86 by denying any illegal drug use since age 16 or in the last seven years (SOR ¶ 1.b, as amended). DOHA also alleged under Guideline J, Criminal Conduct, that Applicant committed a felony violation of 18 U.S.C. § 1001 by falsifying his response to the drug inquiry on his SF 86 (SOR ¶ 2.a). In his Answer to the SOR, Applicant admitted "experimenting" with marijuana in high school. He denied intentional falsification, and attributed his negative response to question 27 to the fact that he had not used drugs since 2003 ("The timeframe [sic] was an oversight on my part." Item 4). After consideration of the evidence of record, I make the following findings of fact.

Applicant is a 24-year-old warehouse specialist for a defense contractor. He requires a security clearance for his job duties on a U.S. military installation (Item 5, Ex. C).

Applicant began using marijuana in his early teens, initially to cope with stress and depression. He smoked it in rolled joints approximately every other day. After he turned 18 in 2001, his use of marijuana varied. Some months he used it more frequently, up to ten times, other months only about twice. Applicant purchased the marijuana himself and/or went in with a friend to buy it. The drug induced feelings of confidence and peace. Applicant stopped using marijuana completely in 2003 when he realized he could not continue to live his life as he had been, and marijuana had turned him into a person he did not want to be. Applicant had difficulty giving up the drug but dealt with cravings through prayer. He sought no professional help to deal with what he considered to be a psychological addiction. Applicant no longer has any cravings or

desires to smoke marijuana and he does not associate with those friends with whom he used marijuana in the past. He does not intend to use marijuana in the future.

At age 18, Applicant went to work as a sales associate at a toy store. He stayed in that job for only a few months. From January 2002 to May 2002, he worked as a cook at a restaurant, but was unemployed for two years thereafter.<sup>1</sup> In June 2004, he got a job as a porter at a car dealership but he did not report back to work in July 2004 after some time off for a family funeral. In November 2004, he was hired by his current employer as a light truck driver on a military installation.

Needing a security clearance for his duties, Applicant completed a security clearance application on December 7, 2004. He indicated he had been fired from his employment with the car dealership in July 2004, but responded "NO" to question 27 ["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?"] (Item 5).

On May 17, 2007, Applicant was interviewed by an Office of Personnel Management (OPM) investigator about his use of marijuana and possible falsification of his security clearance application. Applicant admitted that he smoked marijuana in rolled joints, approximately every other day from his early teens until he was 18. He described his use as sporadic thereafter. Applicant indicated it would be difficult to gauge the average frequency of his use, as he "might use it ten times one month and twice another month." Applicant could not recall the month of his last use, but averred he stopped using marijuana in 2003. Applicant denied any intent to use marijuana or other illegal drug in the future. Applicant also denied any ongoing contact with his former friends who had witnessed his marijuana use. As for his failure to disclose his marijuana use on his SF 86, Applicant told the investigator that he did not list his marijuana use because he really needed work and also he was not thinking as clearly as he now does. Also asked about the loss of his job at the car dealership, Applicant related he assumed he had been fired after he failed to return to work following his cousin's funeral, although he never was notified directly. Applicant did not provide a written statement during his interview, but the investigator codified Applicant's personal testimony in a written report transmitted May 30, 2007 (Item 6).

In August 2007, DOHA furnished Applicant with a copy of the OPM investigator's report of the subject interview and asked him to authenticate it. On August 17, 2007, Applicant responded "Yes" to whether the report of investigation accurately reflects the information he had provided to the authorized investigator on the day he was interviewed (Item 6).

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<sup>1</sup>Applicant indicated on his December 2004 SF 86 (Item 5) that he earned his high school diploma from an academy in Florida in September 2002. Neither his address nor work history show any other connection to Florida.

On November 19, 2007, DOHA issued an SOR, notifying Applicant of security concerns because of his marijuana use to 2003 and his failure to disclose that involvement on his security clearance application (Item 1). On December 7, 2007, Applicant admitted “to experimenting with [the] drug in high school but not to using it on a frequent basis.” Applicant denied any intentional concealment, stating in part:

I would not intentionally withhold any information that would prevent me in receiving a security clearance or jeopardize my employment. I answered No because I haven’t used drugs since 2003. The timeframe [sic] was an oversight on my part.

Item 4.

In rebuttal to the Government’s FORM, Applicant acknowledged he had not provided accurate information regarding his past drug use on his SF 86, but denied it was deliberate (“I did not intentionally conceal my past drug use as I understand in so doing it would preclude any employment that requires a security clearance.” Ex. A). Applicant averred he was no longer the same person that he was when he had used marijuana:

When I experimented with illegal drugs I was young, easily persuaded and a very confused individual. However, I no longer use illegal drugs nor do I associate with individuals who participate in that type of activities. Also, I no longer suffer from depression and my quality of life and living conditions and environment has improved for the best. I currently reside in [city and state omitted] in an apartment of my own. I am a Christian and regularly attend [church name and location omitted]. I also attend bible study and other Christian events.

Applicant denied any intent to return to his former lifestyle and indicated he did not want “past indiscretions” to negatively impact his career or future (Ex. A).

As a warehouse specialist for a defense contractor, Applicant issues mandatory supplies and equipment to military personnel deploying overseas. Applicant has demonstrated honesty, reliability, and dependability over the past three years. In the opinion of a unit security manager familiar with Applicant’s work, Applicant has “great integrity” and is extremely dedicated to his family and work. She has observed nothing over her three years’ association with him that causes her security concerns (Ex. C).

## 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 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 E, Personal Conduct

The security concern related 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.

Applicant smoked marijuana in high school, as frequently as every other day at times. After he turned 18, his use of marijuana became more sporadic, but it continued until sometime in 2003. Applicant exercised unquestionably poor judgment in using marijuana during his adolescence and as a young adult. It falls within the overall security concern underlying AG ¶ 15. AG ¶ 16(g) (association with persons involved in criminal activity) is also implicated. Applicant purchased marijuana, and those acquaintances who provided him with the drug committed criminal conduct.

However, the Government's evidence does not support its reliance on AG ¶ 16(c). Under AG ¶ 16(c) there must be "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." Applicant's lack of candor about his drug use warrants an adverse determination (see Guidelines E and J, *infra*), so AG ¶ 16(c) does not apply on its face.

The Government had the evidence to allege drug-related judgment concerns under Guideline H AG ¶ 25 (a) (any drug abuse) and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia). An assessment that Applicant's drug abuse was not sufficient for an adverse determination under Guideline H—a threshold finding for AG ¶ 16(c) to apply to his drug use—would mean that Applicant met one or more of the mitigating conditions under AG ¶ 26. Apparently the Government was satisfied that Applicant's drug abuse either happened so long ago (see AG ¶ 26(a)), or Applicant demonstrated intent not to abuse any drugs in the future by dissociating himself from drug-using contacts (see AG ¶ 26(b)(1)), changing his environment (see AG ¶ 26(b)(2)), abstaining for an appropriate period (see AG ¶ 26(b)(3)), or executing a signed statement of intent (see AG ¶ 26(b)(4)). Lifestyle changes sufficient to mitigate the judgment concerns under Guideline H (see AG ¶ 24, "Use of an illegal drug . . . raises questions about a person's ability or willingness to comply with laws, rules, and

regulations”), should be sufficient to mitigate the drug-related judgment issues underlying Guideline E (see AG ¶ 15, “conduct involving questionable judgment . . . or unwillingness to comply with rules and regulations can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information.”). The Government has not explained its seemingly inconsistent position. Applicant has exercised good judgment in maintaining a drug-free lifestyle for the past four years (see AG ¶ 17(d) (the individual has acknowledged the behavior and obtained counseling to change the behavior or taken positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy behavior, and such behavior is unlikely to recur), dissociating himself from known drug users (see AG ¶ 17(g) (association with persons involved in criminal activity has ceased), and forswearing any future drug involvement to overcome any residual concerns for his judgment caused by his past drug use.

However, the Government established its case for disqualification under AG ¶ 16(a). Personal conduct concerns are raised by the “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.” Applicant’s abuse of marijuana to as recently as 2003 fell within the scope of question 27 (since age 16 or in the last seven years) of the SF 86 he completed in December 2004. Applicant does not contest that he answered “No” to the drug inquiry, but submits he did not intentionally falsify his SF 86. When he answered the SOR, Applicant indicated he failed to note the time frame in the question (Item 4). In rebuttal to the FORM, he admitted he “neglected” to provide accurate information about his drug use on his SF 86, but persisted in denial of intentional falsification (“I did not intentionally conceal my past drug use as I understand in doing so it would preclude any employment that requires a clearance.” Ex. A). The record evidence instead shows that Applicant deliberately concealed his drug abuse. When first questioned about the possible falsification of his SF 86, Applicant told the OPM investigator in May 2007 that he did not list his marijuana use on his SF 86 because he needed the work (Item 6). His false answer to question 27 was knowing and wilful.

Applicant is credited with acknowledging his marijuana use and providing some details about his drug involvement during his May 2007 interview, although he was unable to recall the month of his last use of marijuana or to estimate the frequency of his abuse after age 18. It also does not appear that Applicant disclosed his drug involvement before being confronted, which is required under AG ¶ 17(a) (“the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts”). Moreover, after becoming aware that his false response to the drug inquiry could cost him a clearance, Applicant compounded the doubts about his judgment in refusing to take responsibility for his false statement on his SF 86 and in minimizing the extent of his marijuana abuse in high school. Marijuana use on the order of every other day or up to ten times per month cannot reasonably be characterized as experimental. None of the mitigating conditions apply to his deliberate false statements.

## **Guideline J, Criminal Conduct**

The security concern related 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.

When Applicant signed his security clearance application in December 2004, he certified that his statements on the form and any attachments were "true, complete and correct to the best of [his] knowledge and belief and [were] made in good faith," and that he understood that a knowing and willful false statement could be punished by a fine or imprisonment or both. By deliberately falsifying his response to question 27, Applicant violated 18 U.S.C. § 1001, which provides in pertinent part:

a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowing and willfully: (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

Disqualifying conditions 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) are pertinent in evaluating Applicant's current security suitability.

Although Applicant's SF 86 falsification occurred more than three years ago, his recent denials of intentional concealment and fabricated excuses preclude me from considering AG ¶ 32(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). Applicant's favorable work reference is not enough to satisfy AG ¶ 32(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"). As noted above, Applicant presented inconsistent explanations in 2007 for his failure to disclose his illegal drug involvement on his SF 86. Applicant has not yet demonstrated that his representations can be relied on.

## **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. Applicant's drug abuse was serious, but it ceased before he turned 21 (see AG ¶ 2(4)). Applicant was only 21 when he lied about his drug use on his SF 86. Applicant could have gone a long way toward demonstrating the maturity and judgment that must be demanded of those with a clearance had he acknowledged his falsification and expressed appropriate remorse in his Answer or even in his rebuttal to the FORM. Instead he put his self-interest before his obligation of candor. Based on the record before me, I am unable to conclude that it is clearly consistent with the national interest to grant him access.

## **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:	For Applicant
Subparagraph 1.b:	Against Applicant
Paragraph 2, Guideline J:	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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ELIZABETH M. MATCHINSKI  
Administrative Judge