



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



In the matter of:	)	
	)	
	)	ISCR Case No. 07-08719
SSN:	)	
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Thomas Coale, Esquire, Department Counsel
For Applicant: *Pro Se*

May 30, 2008

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the government's security concerns under Guidelines, H, Drug Involvement, E, Personal Conduct, J, Criminal Conduct, and F, Financial Considerations. Applicant's eligibility for a security clearance is denied.

On November 26, 2007, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H, Drug Involvement, E, Personal Conduct, J, Criminal Conduct, and F, Financial Considerations. 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 answered the SOR in writing on January 2, 2008, and elected to have his case decided on the written record. Department Counsel submitted the government's file of relevant material (FORM) on March 11, 2008. The FORM was

mailed to Applicant on March 13, 2008, and it was received on April 7, 2008. Applicant was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not object to the FORM and did not submit additional material. The case was assigned to me on May 27, 2008.

Findings of Fact

Applicant admitted all of the allegations in the SOR, except ¶ 2.b. After a thorough and careful review of the pleadings, exhibits, and statements submitted, I make the following findings of fact.

Applicant is 32 years old and has worked for a federal contractor since November 2006. Prior to then he was unemployed from September 2006. He was previously employed from May 2004 until September 2006 by two different employers. He was also unemployed from March 2004 until May 2004. Applicant was on active duty in the Army from May 1998 to March 2004. He received a General Discharge under Honorable Conditions. He married in 1998 and has two children ages 9 and 6 years old.

While on active duty in the Army, Applicant was arrested on July 5, 2003, for Driving While Intoxicated (DWI) and Possession of a Controlled Substance, cocaine. On July 7, 2003, he received a drug test and the results were received on July 18, 2003, confirming the presence of marijuana and cocaine in his system. During an interview, Applicant admitted using cocaine between June 1st and June 30th, 2001, and using cocaine and marijuana on July 5, 2003.¹

On July 18, 2003, Applicant was charged with wrongful use of marijuana and cocaine in violation of Article 112a of the Uniform Code of Military Justice (UCMJ). On August 27, 2003, Applicant went to a hearing conducted under Article 15 of the UCMJ and received nonjudicial punishment. He was awarded a reduction in pay grade from E-4 to E-1; forfeitures of \$575 pay per month for two months, which was suspended; and 45 days extra duty.

On August 29, 2003, Applicant was convicted in civilian court of DWI. He was sentenced to three days confinement and fined \$750.

Applicant was administratively separated from the Army by reason of misconduct due to drug abuse and received a General Discharge under Honorable Conditions.

Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) on December 20, 2006. In response to Question 24 which inquired whether Applicant had illegally used any controlled substance since age 16 or in the past 7 years, he answer "no." In response to Question 23d which inquired if he had been charged with or convicted of any offense(s) related to alcohol or drugs, he answered

¹ Answer to SOR.

“yes” and divulged his DWI conviction, but failed to list the charge for possession of cocaine. Applicant denied he falsified his answer. He stated:

I understood that I needed to put down my convictions and it was my DWI because to the best of my knowledge my [p]ossession of a controlled substance was dropped although I was originally charged with it.²

In his response to Question 23e which inquired if Applicant had been subject to a court martial or other disciplinary proceeding under the UCMJ in the past 7 years, he listed his DWI arrest, but again failed to list the charge for cocaine and marijuana use.

Applicant had two opportunities to divulge he used marijuana and cocaine in responding to the e-QIP questions. He states he listed his DWI, but because the possession charge was dropped he did not include it. His statement is clear in that he understood he had been charged. The question is clear asking Applicant to list offenses he was charged with. It is also clear that he went to an Article 15 hearing and was charged under Article 112a for use of a controlled substance. He was discharged from the Army for misconduct due to drug abuse. It is clear to me that he understood what information the questions were requesting as to if he had any drug incidents in his past and no where on his e-QIP application did he divulge this information. I find Applicant deliberately and intentionally falsified his e-QIP application.

Applicant completed and swore to interrogatories on September 24, 2007. A written question asked: “Have you used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP) and/or any Cannabis (to include marijuana and hashish), except prescribed by a licensed physician?” Applicant answered “no” to this inquiry.³ He explained in his answer that he did not read the question thoroughly. In response to the question: “When did you decide to stop using illegal substances?” he answered “When I got in trouble while serving in the Army [in] 2004.”⁴ He also stated in response to a question as to why he stopped using illegal drugs the following: “I caused myself and my family a lot of legal & family problems that should of never happened do (sic) to my poor judgment.”⁵ I find Applicant did not intend to falsify the inquiry about using drugs. Clearly, he references when he stopped using illegal drugs and that he no longer associates with those who do. These answers obviously correspond with his admission of using drugs in the past.

Applicant was arrested on or about March 30, 1996 and charged with Unlawful Carrying Weapon, a Class A misdemeanor. On May 14, 1996, he pled guilty to the

² Answer to SOR.

³ Item 6 pg. 2.

⁴ *Id.*

⁵ *Id.*

offense and was sentenced to nine months probation, fined \$300, which was suspended, and assessed court costs of \$202.

Applicant has eleven delinquent debts, of which eight are in collection status, two are charged off, and one is past due. The total amount of debts in collection status is \$7,449. The total amount of debts that are charged off is \$5,086. The amount past due on the remaining debt is \$2,000.

Applicant admitted he owes the balances on the debts listed in the SOR. He provided documents to show he has set up a consolidated payment plan that included six debts. It appears from the documents that a plan was set up sometime in April 2007 and he began making payments in July 2007. The documents support he made three monthly payments, totaling \$915.⁶ Applicant failed to provide information as to which specific delinquent debts listed in the SOR he is making payments on. Only one debt listed in the documents he provided corresponds to a debt listed in the SOR. Regarding the other debt, they may be the same, but without further information it is unclear. He did not provide any additional information about the other debts listed in the SOR.

Applicant explained in his answer that before his “incident,” presumably he is referring to his alcohol and drug arrest in 2003; he was living within his means. After the “incident” he stated:

Taking a big pay cut, paying my fines, [losing] my job and still trying to keep a roof so that my family wouldn't be on the streets is not easy. I didn't neglect my bills I just put my families priority first and any extra income was sent to pay on what I could. My incident hasn't been an easy thing to overlook and overcome. Since my discharge I have been employed although it took me a long time to get my first job.⁷

Applicant stated in his interrogatories that since his “incident” he no longer associates with people who use drugs.⁸

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.

⁶ *Id.* pgs. 8-11.

⁷ Answer to SOR.

⁸ Item 6 at pg. 2.

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

AG ¶ 24 expresses the security concern pertaining to drug involvement: "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 judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and

regulations. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.”

I have considered all of the drug involvement disqualifying conditions under AG ¶ 25 and especially considered (a) (“any drug abuse”), (b) (“testing positive for illegal drug use”), and (c) (“illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia”). Applicant admitted he used cocaine between June 1st and June 30th, 2001, and used marijuana and cocaine, on July 5, 2003. To use the drugs he had to possess them. Therefore, I find all of the above disqualifying conditions apply.

I have considered all of the drug involvement mitigating conditions under AG ¶ 26 and especially considered (a) (“the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment”), and (b) (“a demonstrated intent not to abuse drugs in the future, such as (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation”). Applicant did not adequately articulate the circumstances when he used drugs in 2001 or 2003. He did state that he has not used illegal drugs since his “incident” in 2003. He used drugs while on active duty in the Army, fully aware of the potential consequences. He was discharged because of his actions. Since then he has not associated with those who use drugs. It appears he has moved on from this period of his life and is attempting to stay focused on providing for his family. It has been almost five years since his latest drug incident. I find Applicant’s behavior was so long ago and appears to have been infrequent. However, under the circumstances, Applicant was serving on active duty in the Army and his actions at that time cast doubt on his reliability, trustworthiness and good judgment. Therefore, I find (a) only partially applies. It also appears Applicant has moved on and is no longer using drugs. He does not associate with those that do and is committed to his family. He did not sign a statement of intent with automatic revocation. I find (b) (1) (2) and (3) apply based on the above facts. No evidence was provided to conclude (4) in Applicant’s favor.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.”

I have considered the personal conduct disqualifying conditions under AG ¶ 16 and especially considered (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”). Applicant answered three questions on his e-QIP falsely. He failed to divulge his drug possession charge and his drug use. He did divulge his DWI. He admitted in his answer that he did not divulge his drug use. Considering all of the questions together and Applicant’s explanation, I find his denial that he falsified the information not believable or credible. If Applicant truly believed that he did not have to list his drug offense when asked if he had been charged or convicted of an offense, because it had been dismissed in civilian court, then he should have listed it when asked about any offenses that were subject to a court martial on nonjudicial punishment. His statements provided in his answer and interrogatories repeatedly refer to “the incident.” This “incident” clearly had a devastating effect on his life, forcing him out of the Army, being unemployed for a period of time and effecting his finances. It is obvious and clear he did not want authorities to be aware of his drug history. Applicant’s falsifications were deliberate, made with the intent to deceive and mislead, and were in violation of 18 U.S.C. § 1001. I also find that Applicant’s answer to the interrogatories was not a deliberate falsification, as alleged in SOR ¶ 2.d.

I have considered the all of the personal conduct mitigating conditions under AG ¶ 17 and especially considered (a) (“the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts”), (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”), (e) (“the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress”). I find that none of the mitigating conditions apply. Applicant was untruthful on his e-QIP application and took no action to provide truthful information until he was confronted.

Guideline J, Criminal Conduct

Paragraph 30 of the new adjudicative guidelines sets out the security concern relating to criminal conduct: “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.”

I have considered all of the criminal conduct disqualifying conditions under AG ¶ 31 and especially considered (a) (“a single serious crime or multiple lesser offenses”) and (b) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted”). I find both disqualifying

conditions apply. Applicant was convicted of unlawfully carrying a weapon in 1996 and DWI in 2003. He was also found guilty in 2003 of cocaine and marijuana use while on active duty. He was discharged from the Army for misconduct due to drug abuse. As stated above, I found Applicant deliberately and intentionally falsified his e-QIP application by providing false answers to questions; felony offenses under 18 U.S.C. § 1001. Consequently, I find both (a) and (c) apply.

I have also considered all of the criminal conduct mitigating conditions for under AG ¶ 32 and especially considered (a) (“so much time has elapsed since the criminal behavior happened, or it happened under 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 weapons offense occurred more than 12 years ago, and his alcohol and drug offense almost five years ago. Although a considerable amount of time has elapsed since these offense occurred, they cannot be viewed separately or in a vacuum from his most recent and serious offense of falsifying his e-QIP application, a felony. It appears Applicant has moved on and has become a devoted family man. However, his failure to be truthful when applying for a security clearance and divulging his complete past and drug history is a serious concern and constitutes a continuing course of criminal conduct. Consequently his falsifications negate any successful rehabilitation he may have exhibited. Therefore, I find (a) and (d) do not apply.

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18: “Failure or inability to live within one’s means, satisfy debts, and meet financial obligations may indicate poor self-control, lack of judgment, or unwillingness to abide by rules and regulations, all of which can raise questions about an individual’s reliability, trustworthiness and ability to protect classified information. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.”

The guideline notes several conditions that could raise security concerns. I have considered all of them, especially AG ¶ 19(a) (“inability or unwillingness to satisfy debts”) and (c) (“a history of not meeting financial obligations”). Applicant has numerous delinquent debts that remain unpaid. Although he has a payment plan for some debts, it is unclear if they are the same debts as in the SOR and his payment plan does not include all of the debts. He failed to provide adequate information to address this concern. I find both disqualifying conditions apply.

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. I have considered all of the mitigating

conditions. I especially considered AG ¶ 20(a) (“the behavior happened so long ago, was so infrequent, or occurred under such circumstances that it is unlikely to recur and does not cast doubt on the individual’s current reliability, trustworthiness, or good judgment”), (b) (“the conditions that resulted in the financial problem were largely beyond the person’s control (e.g., loss of employment, a business downturn, unexpected medical emergency, or a death, divorce or separation), and the individual acted responsibly under the circumstances”), (c) (“the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control”), and (d) (“the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts”).

Applicant has numerous delinquent debts. He admitted he owes the debts in the SOR. He has a payment plan that includes at least one debt listed in the SOR, but did not provide any information as to the specific status as to the other remaining debts. There are numerous debts that remain delinquent. Therefore, I find (a) does not apply. Applicant found himself in financial difficulty after losing his job and being discharged from the Army. His loss of employment was due to his own misconduct, a condition that was well within his control. Hence, I find (b) does not apply. There is no evidence Applicant has received financial counseling. He has made some effort to pay some delinquent debts, but many remain. Consequently, I find (c) does not apply, but (d) applies partially because he has started a payment plan on some of his debts.

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 common sense 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 was charged and convicted of DWI and went to nonjudicial punishment for his drug offense while in the Army. This “incident” caused him to be discharged under other than honorable conditions. It also effected his financial situation. Applicant has made some attempts to pay his delinquent creditors, but failed to provide enough information to show he is resolving all of his debts. Applicant has made significant efforts to put his life back on track. However, he failed to be honest about his drug past and lied on his e-QIP

application. Applicant has mitigated the security concerns regarding his drug involvement, but failed to mitigate the security concerns raised under personal conduct, criminal conduct and financial considerations. Overall the record evidence leaves me with serious questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I find Applicant mitigated the security concerns arising from drug involvement, but failed to mitigate the security concerns arising from personal conduct, criminal conduct and financial considerations.

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 H:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	For Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Paragraph 4, Guideline F:	AGAINST APPLICANT
Subparagraphs 1.a-1.k:	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.

Carol G. Ricciardello
Administrative Judge