



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 07-16386
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Thomas Coale, Esq., Department Counsel
For Applicant: *Pro se*

August 29, 2008

Decision

TUIDER, Robert J., Administrative Judge:

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

Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP), on October 12, 2006. On March 5, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines F, J and H 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 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 in an undated response, which DOHA received on April 8, 2008, and requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed on April 28, 2008, and I received the case assignment on April 29, 2008. DOHA issued a notice of hearing on May 2, 2008, scheduling the case to be heard on May 22, 2008. The hearing was convened as scheduled.

The Government offered Government Exhibits (GE) 1 and 2, which were received without objection. Applicant did not offer any exhibits, and testified on his own behalf. DOHA received the hearing transcript (Tr.) on June 2, 2008.

Findings of Fact

Applicant admitted SOR ¶¶ 1.a., 1.b., 1.d., and 1.e. He denied SOR ¶ 1.c, and did not respond to ¶¶ 2., 2.a., 3., and 3.a. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact:

Applicant is a 55-year-old security officer, who has been employed by a government contractor since October 2006. He seeks to retain the interim secret security clearance he was granted shortly after completing his e-QIP in October 2006. GE 1, Tr. 15, 35.

Applicant dropped out of high school in 1971 after completing the 11th grade. He participated in a home study course offered through a vocational/technical/trade school from June 2000 to January 2003, and was awarded his high school diploma in February 2003. GE 1, Tr. 14-15, 33-35. He served in the U.S. Marine Corps from June 1972 to May 1976, and was honorably discharged as a lance corporal (pay grade E-3). His Military Occupational Specialty was 3051/Warehouse Clerk. GE 1, Tr. 36-37. Applicant has been married since July 1980, and has three adult stepchildren.

When Applicant completed his October 2006 e-QIP, he failed to disclose material facts regarding his employment record, his past drug use, and his financial record. Regarding his employment record, he failed to disclose that he had been terminated in April 2006 by a previous employer for testing positive for marijuana during a drug test. (SOR ¶ 1.a.)

Regarding his past drug use, he failed to disclose that he used marijuana, with varying frequency, to include four times weekly from about 1973 to April 2006. (SOR ¶ 1.b.) Regarding his financial record, he failed to disclose that his home went into foreclosure in March 2001, and was later sold at a public auction in May 2001. (SOR ¶ 1.c.) He denied this falsification, and testified that he “didn’t see that question on the security application” and that he “didn’t understand the question.” Tr. 29.

For purposes of clarification, Applicant was interviewed two times by an Office of Personnel Management (OPM) Investigator following submission of his October 2006 E-QIP. The first interview occurred in November 2006, and the second interview occurred in April 2007. When Applicant was interviewed the first time by an OPM Investigator, he was asked about his April 2006 termination for testing positive for marijuana. He lied to the OPM Investigator, telling him that he resigned from his job in anticipation of obtaining a different job. (SOR ¶ 1.d.)

During his first interview in November 2006 interview, Applicant stated the mortgage company foreclosed on his property and after doing so never contacted him or took any action against him. He added he became aware of the foreclosure when he saw it reported on his credit bureau report. GE 2. During that same interview, when asked about his past drug use, Applicant lied to the OPM Investigator telling him he had used marijuana 10 to 15 times during a one month period in 1994 and denied any further use of any illegal drugs.

Applicant explained:

When I was interviewed by an investigator for a clearance I did not think the interview was a serious matter and did not want anyone to know anything about shameful things in my past that I did which is why on the 2nd interview I told everything. I found out from a friend how serious the matter is. . . . I am a loyal citizen of these United States. I love my country very much and would never betray her. I am also not a thief. The only way I would give up classified info is to be killed defending it being at my post. (Response to SOR)

It was during the second interview that he was more forthcoming about his April 2006 termination for drug use and his past use of drugs. GE 2. Applicant later revealed in the second interview he used marijuana, with varying frequency, to include four times weekly, from about 1973 to April 2006, discussed *supra*, and used heroin and cocaine one time in about 1974. (SOR ¶ 1.e.)

Applicant has worked as a security officer for several employers since at least November 1983. GE 1. Other than his testimony, Applicant did not offer any additional evidence.

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.

Two Personal Conduct Disqualifying Conditions listed under AG ¶ 16 could raise a security concern and may be disqualifying in this case:

(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

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative.

The Government produced substantial evidence of Applicant's falsifications by evidence submitted and his admissions. Together, they warrant application of these disqualifying conditions.

AG ¶ 17 provides for potentially applicable personal conduct mitigating conditions:

(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.

Applicant denied deliberately falsifying his October 2006 e-QIP response regarding his March 2001 foreclosure. In that same e-QIP, Applicant provided false responses regarding his employment record and past drug use, and also false and misleading responses to the OPM Investigator during his November 2006 interview. Having provided conflicting versions of past events, Applicant places the trier of fact in the difficult position of trying to determine when he is being truthful and when he is not being truthful. Once an Applicant's credibility has been seriously compromised, it is difficult to accept an Applicant's testimony at face value. Having evaluated the evidence, and observed the Applicant, I do not find him to be credible.

Applicant's falsifications prohibited the Government from evaluating his past employment record, his past illegal drug use, and his past foreclosure history in a timely fashion. He further inhibited the process by later lying to an OPM Investigator when asked about his employment record and past illegal drug use. Such revelations would in all likelihood have raised significant security concerns. In addition, it was not until the second OPM interview that Applicant disclosed the extent of his employment history and past drug use.

Finally, while Applicant's disclosure of his 2001 foreclosure in November 2006 may have been forthright, it cannot be considered prompt. While I give Applicant some credit for coming forward, that credit is diluted by other factors to include his other falsifications. Applicants are expected to tell the Government the truth as part of the security clearance vetting process. Under the facts of this case, I am unable to apply any of the mitigating conditions under this concern.

Guideline J, Criminal Conduct

The security concern relating to the Guideline for Personal 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.

Two Criminal Conduct Disqualifying Conditions listed under AG ¶ 31 could raise a security concern and may be disqualifying in this case:

(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 employment history, illegal drug use, and financial history from the Government and affect the course of his background investigation. For a violation of 18 U.S.C. § 1001 to occur, the falsification must be material. The Supreme Court defined “materiality” in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a “natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed.” See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir.2004).

If Applicant had provided accurate answers to his e-QIP, such answers were capable of influencing the Government to deny him eligibility for a security clearance. His employment history, past drug use, and home foreclosure are sufficiently recent and serious to jeopardize his application for a security clearance. His omission from his e-QIP is material. Accordingly, Guideline ¶¶ 31(a) and (c) apply to SOR ¶ 1 because Applicant violated 18 U.S.C. § 1001.

AG ¶ 32 provides for potentially applicable Criminal Conduct Mitigating 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 required information, discussed *supra*, 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.

Guideline H, Drug Involvement

The security concerning 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 judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

AG ¶ 25 indicates three conditions that could raise a security concern and may be disqualifying in this case:

- (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.

The Government produced substantial evidence of these disqualifying conditions through evidence submitted and Applicant's admissions.

AG ¶ 26 provides for potentially applicable Drug Involvement Mitigating Conditions:

- (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 any 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;

Given Applicant's lengthy involvement with drug abuse while in a position of trust and responsibility, absence of any rehabilitative evidence, and recent usage, I am unable to apply any of the potential mitigating conditions under this Guideline.

In all of the security concerns discussed *supra*, the burden shifted to Applicant to produce evidence and prove a mitigating condition or conditions. The burden of disproving a mitigating condition never shifts to the Government.

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. Applicant's 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 1973 and continued until 2006, a period of 33 years. He failed to disclose his drug use by falsifying his October 2006 e-QIP, and compounded his first falsification when he later lied to the OPM Investigator about his past drug use in his first interview. I have considered Applicant's explanation and evidence presented, but that does not overcome the adverse inferences of his misconduct. Honesty is a core requirement for clearance access, and is not a difficult concept to understand or adhere to.

Rehabilitation or behavioral changes are difficult to measure under these circumstances, given the length of time Applicant used drugs when compared to the relatively short time since he quit using drugs. He clearly sought to mislead the Government about his drug, employment, and foreclosure history, 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.

Overall, the record evidence leaves me without questions 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"¹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my

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

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.

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. – 1.e.:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a.:	Against Applicant
Paragraph 3, Guideline H:	AGAINST APPLICANT
Subparagraph 3.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. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge