



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
XXXXXXXXXX, XXXXX ) ISCR Case No. 08-00434  
SSN: XXX-XX-XXXX )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Robert E. Coacher, Esq., Department Counsel  
For Applicant: *Pro Se*

November 13, 2009

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns under Guideline E (Personal Conduct.)  
Clearance is granted.

**Statement of the Case**

On April 6, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On March 13, 2009, the Defense Office of Hearings and Appeals (DOHA) issued an SOR to Applicant, under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified. The revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, are effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR alleged security concerns under Guideline E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or

continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether Applicant's clearance should be granted, continued, denied, or revoked.

On April 29, 2009, Applicant responded to the SOR. On May 4, 2009, DOHA received his response. On July 14, 2009, Department Counsel was prepared to proceed, and I received the case assignment on July 16, 2009. On July 28, 2009, DOHA issued a notice of hearing scheduling the case for August 25, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 through 3, which were received without objection. Applicant offered Applicant Exhibit (AE) A, which was received without objection. I held the record open until September 11, 2009, to afford the Applicant an opportunity to submit additional documents. Applicant timely submitted AE B through E, which were received without objection. On September 1, 2009, DOHA received the hearing transcript (Tr.).

### **Findings of Fact<sup>1</sup>**

Applicant denied all of the SOR allegations with explanations. Applicant testified at his hearing and I found his testimony credible. After a complete and thorough review of the evidence, I make the following findings of fact.

#### **Background Information**

Applicant is a 39-year-old technical manager who has been employed by a defense contractor since August 2006. GE 1, Tr. 38. He supervises nine developers and describes himself as the "senior architect." Tr. 63-64. Applicant seeks a security clearance as a first-time applicant to enhance his position within his company. Tr. 39.

Applicant graduated from high school in June 1988. Following high school, he pursued his education and graduated from college in May 1994 with a Bachelor of Science degree in Natural Resource Management. He continued his studies as a graduate student until August 1997, and completed all of his course work for a Master's Degree in Geographic Information Systems, but did not complete or defend his thesis. GE 1, Tr. 35-37. Applicant married in September 1997, and has a nine-year-old daughter and a five-year-old son. GE 1, Tr. 38-39.

Applicant has never been charged with any felony, firearms, or explosives offenses. He has not been charged with any minor or misdemeanor-type, non-traffic-related offenses. He has not had any debts delinquent over 180 days, bankruptcy petitions, unpaid judgments, or unpaid liens. Apart from his self-disclosure of drug and alcohol abuse discussed *infra*, the case file contains no derogatory information about the Applicant. GE 1 – GE 3.

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<sup>1</sup>Some details have not been included in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

## **Personal Conduct (falsification concerns)<sup>2</sup>**

The security concerns alleged in the SOR center on Applicant's purported submission of false information regarding his past drug use, or alternatively stated, his underreported past drug use. In response to Section 24 on his April 2007 e-QIP, Applicant stated he had used cocaine on two occasions in May 2005. The SOR alleged that he deliberately failed to disclose on that same e-QIP that he had used cocaine with varying frequency between 2000 and 2005, and illegally used Xanax between 2001 and 2003, by using the medication in dosages exceeding levels prescribed by his physician. (SOR ¶ 1.a.)

Additionally, when Application was interviewed by a Special Agent of the Office of Personnel Management (OPM) in July 2007, he is purported to have deliberately falsified material facts to the Special Agent when he stated that he had used cocaine on two occasions in May 2005. (SOR ¶ 1.b.)

During his OPM interview in July 2007, he revealed his use of Xanax, which was not included in his April 2007 e-QIP. In his August 2008 Interrogatories, he provided a more comprehensive answer regarding past cocaine use, which included varying use of cocaine from 2000 and 2005. GE 3, Tr. 29-32. This information conflicted with his e-QIP response and with what he is reported to have told the OPM Special Agent during his July 2007 interview.

Regarding past cocaine use, Applicant stated in his February 2009 Interrogatories:

I checked my copy of the original questionnaire. I did answer yes to 24A, however I overlooked the space below for details. Smaller print & I missed. Accidental & not intentional. GE 3.

During his hearing testimony, he reiterated his Interrogatory response and added:

In regard to the Xanax, you know, this was so long ago that I don't remember, but, I mean, the way that I read this, I either just missed it, not intentionally, or I read this differently looking at illicit, illegal drugs. The Xanax I had was a prescribed prescription, and I'm not about to say that I didn't abuse it because I did, and I was addicted to it. But I think at the time I probably read this as a legal use, controlled substances, and I probably – I either missed it or I considered the Xanax as it was a

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<sup>2</sup> Identified security concerns were limited Applicant's alleged falsifications pertaining to past drug use. Applicant successfully completed an intensive outpatient drug and alcohol outpatient treatment program from May 31, 2005 to July 20, 2005, and his aftercare continued to November 2005. His doctor recommended that Applicant's outpatient treatment include attending a 12-step Alcoholics Anonymous (AA) program. Applicant did enroll in AA and regularly attends AA meetings. GE 3, AE E, Tr. 45-50. The record contains no evidence of any drug use after 2005.

prescription I had from a doctor. I might have not put it on there because of that. Tr. 32.

During his hearing testimony, he reiterated his Interrogatory response:

In regard to the, the cocaine use, like I said, I've tried to be honest with this whole process. And like I said, the notes I have, you know, I put that on here. Obviously I, to me at least, I read that incorrectly, or I didn't put it on there. And I do have on my notes, [OPM Agent] and I did discuss more than just the two times that I did that.<sup>3</sup> So it's possible that I just misread it. But, again, I didn't intentionally do anything.

For me, one thing at looking at all these documents, you know, I'm not proud of my past, and, you know, when I look at these documents and stuff I don't really see anything I would have to gain by saying I didn't do an illegal drug this many times versus I did it this many times, to me at least. I mean, I've been forthcoming about it, and if I've done it twice, I don't, it's pretty much as bad as doing it, you know, ten times, in my mind, maybe not from the Government's point of view.

By my point is that, you know, I was told from the get go from several people, you know, "Put everything on there you did, and you'll likely get your clearance on there, or be dishonest about something, you will not get it." And I would have been honest anyway, but through this whole process I put everything on there that I could think of.

The last thing I wanted to say in regard to that is, you know, if the Government asked me to get a check from the bank or something like that, that I had a document, I could do that, but I don't have detailed records of my drug use, you know. So I tried to piece this together and, you know, recollect it to the best of my abilities. And like I said, as far as [OPM Agent] goes, I did have that [with] her and I discussed that, and I think I might have just read or misinterpreted it in the original application. Tr. 33-34.

## **Character Evidence**

Applicant submitted a reference letter from his supervisor. The supervisor stated that she has known the Applicant since his initial employment with their company in 2006. She has found Applicant to be "diligent, trustworthy, and honest in all his professional and personal dealings with employees, clients and subcontractors." AE D.

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<sup>3</sup> During Applicant's testimony, he produced his handwritten notes from his July 2007 OPM interview, which corroborated his version of past cocaine use. AE A, Tr. 50-58. The OPM Special Agent's testimony revealed that she did not take a signed, sworn statement from Applicant, but rather prepared a summary of her interview with Applicant. She added that she believed the Applicant was truthful during his interview. Tr. 15-27.

His company's promotion letter announcing his current position of technical manager lauded his technical leadership in high profile projects. Applicant also submitted a performance evaluation from his previous employer that reflected above average performance. AE B.

Lastly, Applicant's AA sponsor submitted a letter stating that Applicant has been "clean and sober" and an active member of AA for over four years. He further stated that Applicant has rebuilt his family, personal, and professional life and that Applicant is an honest and upstanding member of his community. AE E.

Applicant testified that he spends most of his spare time with his children, and enjoys playing golf. Tr. 55-56.

### **Policies**

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant Applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the Applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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. Clearance decisions must be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned." See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication the Applicant has not met the strict

guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the Applicant that may disqualify the Applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an Applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the Applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An Applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

### **Analysis**

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concern is under Guideline E (Personal Conduct).

#### **Personal Conduct**

AG ¶ 15 explains why personal conduct is a security concern stating:

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 describes two conditions that could raise a security concern and may be disqualifying in this case in regard to the allegation Applicant provided a false security clearance application:

(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 official government representative.

In April 2007, Applicant submitted an e-QIP that asked questions about past drug use. As noted *supra*, Applicant provided incorrect or incomplete answers regarding his past misuse of prescription drugs and cocaine use. In a July 2007 OPM interview, he was cited for failing to disclose the full extent of his past cocaine use. During that interview, he disclosed his past misuse of prescription drugs. In his August 2008 response to Interrogatories, he expanded on his past cocaine use. AG ¶¶ 16(a) and 16(b) both apply because of the conflicting information he provided regarding the full extent of his past drug use. Further review is necessary.

AG ¶ 17 provides seven conditions that could mitigate personal conduct security concerns in this case:

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's

reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

Applicant credibly stated when he completed his e-QIP his failure to list the full extent of past cocaine use and his misuse of prescription drugs was unintentional. He stated when interviewed by the OPM investigator, it was his recollection that he did discuss his more comprehensive cocaine use. His interview notes corroborate his recollection. It was also during this interview, he freely revealed his past misuse of prescription drugs. He explained that he did not keep records of past drug use and tried to answer the questions as truthfully and accurately as possible at the time. When he completed his Interrogatories in August 2008 and upon further reflection, he amended his previous response regarding past cocaine use.

He was candid and forthright at his hearing about his past drug use. I conclude Applicant's alleged falsifications were not intentional. Although he provided incomplete information in his April 2007 e-QIP, AG ¶ 17(f) fully applies. The falsification allegations are not substantiated. I am satisfied he did not deliberately and intentionally fail to disclose his past drug use on his e-QIP or during his OPM interview with intent to deceive.<sup>4</sup> I find "For Applicant" in the Findings section of this decision with respect to SOR ¶ 1.

### **Whole Person Concept**

Under the whole person concept, the administrative judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

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<sup>4</sup>The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).



for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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. AG ¶ 2(c). I have incorporated my comments under Guideline E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant's conflicting versions of past drug use placed his credibility into question warranting further inquiry. The government relies on each applicant to thoroughly and accurately respond to questions asked. Information applicants provide form the basis to grant or deny security clearances. Applicant's failure to provide accurate and complete information required further costly and time consuming inquiries that could have been avoided. Fortunately for Applicant, his lack of due diligence was not imputed to be intentional or deliberate.

The mitigating evidence under the whole person concept is sufficient to warrant granting Applicant's security clearance. There is no evidence of any security violation(s). Applicant has achieved some important educational, employment, and personal milestones, demonstrating his self-discipline, responsibility and dedication. He is a college graduate, who completed his course work for his master's degree. He was recently promoted by his employer and is responsible for nine subordinates. Applicant is well regarded by his employer. He has overcome alcohol addiction and drug abuse, and regularly attends AA meetings. Applicant is a dedicated and responsible husband and father of two young children. Applicant has demonstrated his loyalty, patriotism, and trustworthiness through his service to the Department of Defense as an employee of a defense contractor.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude Applicant has mitigated considerations and personal conduct security concerns.

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 and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has fully mitigated or overcome the government's case. For the reasons stated, I conclude he is 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 2, GUIDELINE E: FOR APPLICANT

Subparagraphs 1.a. – 1.b.: For Applicant

## **Conclusion**

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

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ROBERT J. TUIDER  
Administrative Judge