



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-02087
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer Goldstein, Esquire, Department Counsel
For Applicant: *Pro Se*

February 17, 2009

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On August 20, 2008, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, and Department of Defense (DoD) Regulation 5200.2-R, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on October 3, 2008, and requested a hearing. The case was assigned to me on October 29, 2008, and was scheduled for hearing on December 16, 2008. A hearing was held on the scheduled date, for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny, Applicant's application for a security clearance. At hearing, the Government's case consisted of three exhibits; Applicant relied on one witness (himself)

and two exhibits. The transcript (R.T.) was received on December 24, 2008. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Summary of Pleadings

Under Guideline E, Applicant is alleged to have falsified the security clearance application (e-QIP) he completed in June 2007 by omitting his (a) past drug use and (b) his drug-related arrests (eight in all) between 1989 and 2001. Under Guideline J, the falsification and underlying arrest allegations made under Guideline E, were incorporated and re-alleged.

For his answer to the SOR, Applicant admitted his alleged arrests and criminal charges but denied falsifying his security clearance application. He claimed the charges covered in subparagraphs 1.b(5) through (8) were dismissed or dropped.

Findings of Fact

Applicant is a 45-year-old-frequency controller for a defense contractor who seeks a security clearance. The allegations covered in the SOR and admitted to by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant has been employed by his current employer since May 2007 (ex. 1; R.T., at 24-25). He is an Air Force (AF) veteran and considers himself to be very patriotic (R.T., at 26). He divorced his first wife in 1996 and remarried two years ago, after dating his current spouse for four to five years (R.T., at 37, 74). He has 15-year-old son who lives with him and his current wife (R.T., at 28).

Applicant was introduced to methamphetamine in the late 1980s (believed to be 1989). He was depressed at the time over losing his job and having no place to live (R.T., at 29-30). He experimented with the drug with friends and family members in social settings (R.T., at 30). He estimates to have used methamphetamine monthly for about five years (R.T., at 30), before increasing his use frequency of the drug in the mid-1990s to twice a week (R.T., at 31). During this time period, he was living with people who used it and made it more readily available to him for his personal use.

Between 1989 and 2001, Applicant was involved in eight separate drug-related arrests. In 1989, he was arrested for methamphetamine possession after police found meth in his car and tested him positive for the drug. Applicant pleaded no contest to possession charges, and the court sentenced him to three years of probation (see exs. 2 and 3). Records show that he was arrested again in 1991 and charged with possession of a controlled substance (methamphetamine), possession of drug paraphernalia, and being under the influence of a controlled substance. The court found Applicant guilty of these charges and sentenced him to 90 days in jail. The court also extended his probation stemming from his 1989 charges for an additional three years

and ordered him to attend weekly drug-related counseling (see ex. 2). Applicant recalled attending weekly drug-awareness group sessions, but he did not complete the program (ex. 2).

Records confirm that Applicant was charged with (a) possession of concentrated cannabis and violation of probation in 1993, for which he was fined, (b) possession of a controlled substance (methamphetamine), use/under the influence of a controlled substance, and possession of controlled substance paraphernalia in 1995, for which he pleaded no contest to the two possession charges and received extended probation to March 1998, (c) being under the influence of a controlled substance in 1999, which was dismissed, (d) under the influence of a controlled substance in November 2000, which was dismissed, and (e) controlled substance paraphernalia possession, being under the influence of a controlled substance, and possession of a controlled substance in May 2001 (see exs. 2 and 3). These 2001 charges were dropped after Applicant supplied the names of known drug dealers to the police (see ex. 2; R.T., at 50-51).

Applicant was treated for drug abuse in 1999 in accordance with his court-ordered treatment conditions (R.T., at 31-32). His treatment regimen consisted of a three-month inpatient and aftercare program that stressed the 12-step program of Drugs Anonymous (DA). He used methamphetamine just a few times after completing his drug rehabilitation program.

Faced with pressures from his wife and family to give up drugs, and concerned about his future, Applicant quit using illegal drugs altogether in 2002 (see ex. 2; R.T., at 34-36, 60). He no longer associates with people who use illegal substances. Although Applicant initially questioned the accuracy of the 1996-2002 time frame he used methamphetamine for recreational purposes, he acknowledged the possibilities of his using methamphetamine during this time frame when pressed by Department Counsel. The record is lacking in any Applicant request to the agent to correct the Office of Personnel Management (OPM) summary of interview he was shown (see ex. 2; R.T., at 35-37).

Applicant was asked to complete an e-QIP in early June 2007. Question 23 of his questionnaire asked him about drug-related arrests (no time limits specified). When answering subparagraph 32d, he checked "no." He checked "no," too, when answering question 24, which inquired about his use of illegal substances within the previous seven years. Applicant attributes his question 23 omissions to confusion and inadvertent mistakes over the date of his last use of methamphetamine (R.T., at 52-54). Even though he was afforded permission to take the e-QIP home with him to complete, he answered the questions in haste without double-checking with his wife for her recollection of his last use of the drug (R.T., at 52-54).

When answering question 24 of his e-QIP, Applicant explains that he misread the question to include a similar seven-year limitation governing the scope of the question (R.T., at 25-26, 52-57). He further explains that he could not remember the date of his last drug-related arrest (in 2001), and thought over seven years had elapsed since his

last arrest involving illegal drugs (R.T., at 56). He made no notes about the possible dates of his last arrest in the comments section of the e-QIP, and made no voluntary follow-up efforts to alert DoD of possible drug-related arrests within the seven-year time frame he cited in his e-QIP. Applicant did express remorse for the inconvenience his omissions have caused, and assured he has put his past behavior behind him (see ex. B).

Considering all of the circumstances surrounding the inclusive periods of his use of methamphetamine, his drug-related arrests and charges associated with them (dismissals in four of the eight reported cases), and his claimed misunderstandings about the scope of the respective questions, his explanations cannot be reconciled with the time-line of events that culminated with his guilty plea to the 2001 amended charges. Miscalculating a drug cut-off date, or misreading a question might be plausible if considered separately on a piece-meal basis. When his omissions are considered together, though, they tend more to reflect an omission pattern that is indicative of a concerted desire on Applicant's part to suppress his extensive drug involvement from DoD investigators. Inferences cannot be averted here that his omissions were knowing and intentional under all the circumstances manifest at the time, and calculated to conceal his recurrent use of illegal substances and drug-related arrests.

Not until confronted in an October 2007 interview by an OPM investigator about his arrest record covering his eight drug-related arrests/charges did Applicant disclose his arrest record and disposition of the same (see exs. 2 and 3; R.T., at 66-67). After showing Applicant his arrest record and eliciting admissions from Applicant about these arrests, the OPM investigator asked Applicant whether he ever used illegal drugs (R.T., at 66-67). He responded affirmatively to her questions. After completing his statement, the OPM investigator gave him a copy of her prepared statement for him to review. Applicant made no changes to the statement and indicated the prepared statement accurately reflected his answers (see ex. 2; R.T., at 66).

Applicant's spouse assures she has always loved him, beginning when they dated in high school (R.T., at 71, 73). Still, she gave him an ultimatum after they got back together in the 2002 time frame to clean up his finances and cease using drugs (R.T., at 38, 74-76). She credits him with changing his life for the better (R.T., at 74). She is certain he would never jeopardize the Government's national security interests. Her impressions are sincere and are accepted.

Applicant is well regarded by friends and coworkers who know him. They describe him as a responsible team player who helps his colleagues in resolving mission-related issues (see ex. A). His pastor describes him as an active member of his church's faith community and one who enjoys a very good reputation in the community for trustworthiness. His facility clearance officer (FSO) finds nothing disqualifying in Applicant's personnel security folder. And Applicant's mother credits him with making a good life for his son and wife of two years (see ex. A). She places considerable emphasis on Applicant's developed spiritual faith and the life he has made for his son and wife.

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision making process covering DOHA cases. These Guidelines require the judge to consider all of the "Conditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E.2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Personal Conduct

The Concern: "Conduct involving questionable judgment, untrustworthiness, unreliability, 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." Adjudication Guidelines (AG), ¶ 15.

Criminal Conduct

The Concern: "Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." AG ¶ 30.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires Administrative Judges to make a common sense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the Judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the Judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted facts alleged in the Statement of Reasons and (2) it must demonstrate that the facts

proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation or mitigation of the Government's case.

Analysis

Applicant is a good frequency controller and devoted father and husband who used illegal substances (methamphetamine) on a recurrent basis over a 13-year period (1989 through 2002), and was arrested/charged on eight separate occasions during this time for drug-related offenses. When asked about his arrests and drug-related activities in a June 2007 e-QIP, he answered in the negative. Applicant did not disclose his past drug use and arrests until confronted about his arrests by an OPM investigator four months later in a follow-up interview (*viz.*, in October 2007). Security concerns are raised over his omissions of his drug use and drug-related arrests.

Falsification issues

Potentially serious and difficult to reconcile with the trust and reliability requirements for holding a security clearance are the timing and circumstances of Applicant's multiple omissions of his drug use and drug-related arrests/charges in the security clearance application he completed in June 2007, and in his withholding of his arrest/charges until he was confronted in an ensuing OPM interview. So much trust is imposed on persons cleared to see classified information that deviation tolerances for candor lapses are gauged very narrowly.

Applicant makes clear that he approached questions 23 and 24 of his e-QIP with the intent to withhold as much information about his past use of illegal substances and drug-related arrest history as he believed he could safely rationalize. His omissions were knowing, deliberate, and material to a determination about his clearance suitability. They invite application of AG ¶ 16(a): "deliberate omission, concealment, falsification or misrepresentation of relevant and material 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."

Mitigation is difficult to credit Applicant with, since he failed to promptly correct his determined intentional e-QIP omissions and follow-up OPM interview before being confronted by the OPM investigator about his drug-related arrest history. In the past, the

Appeal Board has denied applicants availability of the predecessor mitigating condition of MC ¶ 27(a), “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts,” where the applicant has waited many months to timely correct a known omission. *Compare* ISCR Case No. 97-0289 (App. Bd. January 1998) with DISCR Case No. 93-1390 (App. Bd. January 1995). Even if Applicant’s corrections can be considered prompt (*i.e.*, within four months of his e-QIP omissions), his drug-related arrest acknowledgments were made only after he was confronted with his arrest records by the interviewing OPM investigation, and performe do not qualify as “good faith” corrections under current AG mitigating condition, MC ¶ 17(a).

By intentionally failing to disclose his prior drug use and drug-related arrests charges in his e-QIP Applicant concealed materially important background information needed for the government to properly process and evaluate his security updates. His attributed reasons for his omitting his drug use and arrest/charges (mistaken last use and reading in a seven-year qualifier in the question covering his drug-related arrests) are not sustainable grounds for averting inferences of falsification.

Weighing all of the circumstances surrounding his multiple e-QIP drug use and arrest/charge omissions and lack of any prompt, good faith corrections, Applicant’s claims lack the necessary probative showing to avert drawn conclusions that he knowingly and deliberately withheld material background information about his prior drug use and arrest/charges. Questions 23 and 24 are straightforward and contain no ambiguous instructions that could reasonably be expected to trip up an applicant. Applicant’s explanations considered together, and not in piecemeal, do not convincingly demonstrate plausible confusion and mistake on his part when he responded to the pertinent questions in his e-QIP.

Considering all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2(a) factors), unfavorable conclusions warrant with respect to subparagraphs 1.a and 1.b of Guideline E.

Criminal implications of Applicant’s e-QIP omissions

Applicant’s slate of multiple drug-related arrests over 13-year period and e-QIP omissions are potentially criminal in nature. Making a materially false statement under 18 U.S.C. § 1001 is a serious felony and is punishable by fine and incarceration. To be material, a falsification must have a “a natural tendency to influence, or [be] capable of influencing, the decision-making body to which it is addressed.” *See United States v. Gaudin*, 515 U.S. 506, 512 (1995). Applicant’s omitted drug-related arrests (eight in all), while reduced some in their overall seriousness by the dismissal or dropping of his last four arrests (covered by subparagraphs 1.b(5) through 1.b(8), retain their overall material significance to a security clearance eligibility assessment and merited inclusion in Applicant’s e-QIP.

Applicant's convictions that resulted from Applicant's previous arrests (1989 through 1995), his arrests/charges that were dismissed or dropped, and his e-QIP omissions retain enough serious trust implications to warrant consideration of two disqualifying conditions of AG ¶ 31. DC ¶ 31(a), "a single serious crime or multiple lesser offenses," and DC ¶ 31(c), "allegation or admission of criminal conduct, regardless of whether the person was formally charged," have application to his many drug-related arrests over a 12-year period and his most recent e-QIP omissions.

To be sure, mitigation of the criminal features of his omissions falls along a little bit different fault line than is the case with personal conduct considerations. Here, Applicant's positive work record, impressions of his pastor, and his demonstrated family commitments play some role in mitigating criminal conduct coverage of his omissions. MC ¶ 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," has application. Employment of this guideline and the use of separate whole-person weighing of Applicant's actions have only limited application to Applicant's lengthy pattern of drug-related arrests and imputed intentional omissions.

With the aid of the lessons he has learned since his marriage to his current wife and the responsibility he has shown in the care for his young son, Applicant has demonstrated important improvements in his maturity and responsibility levels. Employment of MC ¶ 32(d) might weigh heavily in applicant's favor were it not for his determined intentional e-QIP omissions.

However, there is more to be considered in determining whether the criminal conduct concerns can be mitigated than his omissions. Weighing the benefits of his shown professional achievements and his family/community support in juxtaposition to his collective arrests and omission history do not satisfy the rehabilitation requirements of either MC ¶ 32(d) or an overall whole person assessment. Put another way, the considered application of the AG mitigating conditions for criminal conduct and a separate whole person analysis do not absolve or mitigate security concerns associated with Applicant's drug-related arrests and more recent omissions.

Taking into account all of the evidence produced in this record and the available guidelines in the Directive (inclusive of the E2(a), unfavorable conclusions warrant with respect to subparagraphs 2.a and 2.b of Guideline J.

In reaching my decision, I have considered the evidence as a whole, including each of the E2(a) factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE E: (PERSONAL CONDUCT): AGAINST APPLICANT

 Sub-paras. 1.a and 1.b: AGAINST APPLICANT

GUIDELINE J: (CRIMINAL CONDUCT): AGAINST APPLICANT

 Sub-paras. 2.a and 2.b: AGAINST APPLICANT

Conclusions

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

