



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-04184
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

November 22, 210

Decision

LYNCH, Noreen A, Administrative Judge:

On April 14, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) enumerating security concerns arising under Guideline H (Drug Involvement), Guideline F (Financial Considerations), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG), implemented in September 2006.

Applicant timely answered the SOR and requested an administrative determination. Department Counsel submitted a File of Relevant Material (FORM), dated September 17, 2010.¹ Applicant received the FORM on September 24, 2010, but did not submit a response to the FORM. On November 5, 2010, the Director, DOHA, forwarded the case for assignment to an administrative judge. I received the case

¹The Government submitted twenty-two items in support of its case.

assignment on November 8, 2010. Based on a review of the case file, submissions, and exhibits, I find Applicant failed to meet his burden regarding the security concerns raised. Security clearance is denied.

Findings of Fact

In his answer to the SOR, Applicant admitted the factual allegations under Guideline F (Financial Considerations), Guideline J (Criminal activity), and Guideline H (Drug Involvement). He denied all allegations under Guideline E (Personal Conduct).

Applicant is a 42-year-old employee of a defense contractor. He graduated from high school in 1988 and received a diploma from a technical college in March 1992. Applicant is divorced and has one child. He has worked for his current employer since April 2007. (Item 6)

In 1987, Applicant was arrested twice. In October 1987, he was found guilty of petty theft. He spent time in jail. He also admitted that he was charged in November 1987, with burglary, possession of a controlled substance, and carrying a loaded firearm in public. (Item 10)

From 1987 until 1989, Applicant purchased and used cocaine. (Item 1 and 3) He also used marijuana during those years. (Item 7) He was arrested on five occasions between 1987 until 1989, on various drug charges. He admits that he was found guilty on the charges. The convictions were for Possession of a hypodermic needle (syringe). He spent time in jail for each offense.

Applicant was arrested in February 2006 on four charges, including possession of a narcotic drug, possession of a controlled drug, operating with a suspended registration, and open container. Applicant was fined for operating with a suspended registration. The other counts were either dismissed or *nolle prosequi*. (Item 11)

When Applicant was interviewed in 2007 by an OPM investigator, he acknowledged the use of marijuana three or four times a week in 1987. He recalls using cocaine on a weekly basis in 1987, and then on a daily basis from April 2005 until July 2006. Applicant explained that he used cocaine again from 2004 until 2006, because he met an old friend with whom he had used illegal drugs. He elaborated about his 2006 arrest for drug charges. He told the investigator that he had Valium and was arrested during a routine traffic stop. (Item 7) However, the police records detail Applicant was in possession of a hypodermic needle and a pipe used for smoking crack cocaine. (Item 10)

Financial

The SOR lists delinquent accounts totaling \$10,500. Applicant admitted the debts and the credit reports confirm them. (Item 6) He disclosed his delinquent debts on his latest security clearance application. (Item 1)

In November 2002, Applicant filed for bankruptcy under Chapter 7. The bankruptcy was discharged in April 2003. (Item 17) There is no information in the record as to the origin of the debts or the circumstances surrounding the bankruptcy. Applicant claims that the bankruptcy is the result of his 1999 divorce. (Item 6)

After Applicant's bankruptcy discharge in 2003, he broke his leg in 2005. He could not work from December 2005 until June 2006. However, the broken leg was the result of an auto accident when Applicant was using cocaine. He attributed his accumulation of debt to the fact that he was denied workman compensation. From 2004 until 2006, Applicant admitted using cocaine "many times." He attributed this use to associating with the wrong crowd. As a result of a 2005 positive drug test, Applicant lost his job in 2006. (Item 9)

When OPM interviewed Applicant in October 2007, he explained that he was attending a Narcotics Anonymous (NA) program. He denies that he omitted any material information concerning possession of the pipe or hypodermic needle. He states that he did not remember the facts or details of the incident. (Item 3)

Applicant responded to DOHA interrogatories in December 2009. Regarding his financial situation, he explained that he was starting to pay on his debts. He claimed he paid two debts with money from a tax refund (SOR 4.e and 4.f) He promised to start payment plans on the SOR debts when he was interviewed in 2007.

Applicant's 2009 monthly net income was \$2,759. He states that total monthly debt payments are \$150. It would appear that there is a net remainder of \$54 in disposable income. (Item 6) He has not received any credit counseling.

Applicant states that he has been in recovery for four years. He now lives within the law and has completely changed his life. He states that he pays back his debts as best he can. He also noted that he does not associate with any illegal drug users or has any intent to use marijuana or cocaine in the future.

Policies

When evaluating an applicant's suitability for a security clearance, an administrative judge must consider the adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, they are applied in conjunction with the factors listed in the adjudicative process. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. Under AG ¶ 2(c), this process is a conscientious scrutiny of a number of variables known as the "whole-person concept." An 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.

The United States Government (Government) must present evidence to establish controverted facts alleged in the SOR. An applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .”² The burden of proof is something less than a preponderance of evidence.³ The ultimate burden of persuasion is on the applicant.⁴

A person seeking access to classified information enters into a fiduciary relationship with the Government based on 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 classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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.”⁵ “The clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”⁶ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such information.⁷ The decision to deny an individual a security clearance does not necessarily reflect badly on an applicant’s character. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense established for issuing a clearance.

² See also ISCR Case No. 94-1075 at 3-4 (App. Bd. Aug. 10, 1995).

³ *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

⁴ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁵ See also EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information), and EO 10865 § 7.

⁶ ISCR Case No. 93-1390 at 7-8 (App. Bd. Jan. 27, 1995).

⁷ *Id.*

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.

include: (a) Drugs are defined as mood and behavior altering substances, and

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

AG ¶ 25 describes conditions that could raise a security concern and may be disqualifying:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) any illegal drug use after being granted a security clearance; and,

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Applicant admitted his use of illegal drugs (marijuana and cocaine) from 1987 until 1989 and again from 2004 until 2006. He used cocaine many times by his own admission. He also tested positive for cocaine in 2006 and lost his job as a result of the test.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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;

(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; and,

(4) a signed statement of intent with automatic revocation of clearance for any violation;

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and,

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant's last use of cocaine was in July 2006. This occurred after an abstinence of almost 15 years. He met an old friend and decided to use illegal drugs again. He did attend NA in 2006. There is no documentation that he continued attending the recovery program. Considering his history of illegal drug use, there is doubt about future use, and not sufficient passage of time for rehabilitation.

Guideline F, Financial Considerations

The security concern for For Financial Considerations is set out in AG ¶ 18:

Failure or an 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." It also states that "an individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

Applicant admitted that he filed for Chapter 7 bankruptcy in 2002. Applicant currently has delinquent debts in the amount of \$26,000. Consequently, Financial Considerations Disqualifying Condition (FC DC) AG ¶ 19(a) (inability or unwillingness to satisfy debts), and FC DC AG ¶ 19(c) (a history of not meeting financial obligations) apply. With such conditions raised, it is left to Applicant to overcome the case against him and mitigate security concerns.

Applicant had a fresh start in 2002 after filing for Chapter 7 bankruptcy. Applicant was unemployed for several months in 2005-2006. After that he was steadily employed. This may have exacerbated Applicant's ability to meet his obligations, but he provided no information about his efforts to otherwise meet those obligations during that period. He has not provided documentation to show he has made any payments on his delinquent accounts. Consequently, Financial Considerations Mitigating Condition (FCMC) 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) does not apply.

Financial Considerations Mitigating Condition (FC MC) AG ¶ 20(b) (the conditions that resulted in the behavior 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) does not apply. As noted, Applicant had a short period of unemployment. He noted that his 1999 divorce caused his initial financial problems. These events, no doubt, impacted his finances. However, there is no evidence that he acted reasonably under the circumstances. He allowed the delinquent debts to remain unpaid. There is no record of any attempts to resolve his debt until after he received the SOR.

FC MC AG ¶ 20(d), (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) does not apply. Applicant has not provided evidence of any consistent payment plans. He asserts that he entered a repayment plan but has not provided documentation to support this claim. His failure to provide information about financial counseling obviates the applicability of FC MC AG ¶ 20(c) (the person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control).

Guideline J, Criminal Conduct

AG ¶ 30 expresses the security concern pertaining 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."

AG ¶ 31 describes conditions that could raise a security concern and may be disqualifying:

- (a) a single serious crime or multiple lesser offenses;
- (b) discharge or dismissal from the Armed Forces under dishonorable conditions;
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;
- (d) individual is currently on parole or probation;
- (e) violation of parole or probation, or failure to complete a court-mandated rehabilitation program; and,
- (f) conviction in a Federal or State court, including a court-martial of a crime, sentenced to imprisonment for a term exceeding one year and incarcerated as a result of that sentence for not less than a year.

Applicant's arrests and convictions between 1987 and 1989, and again in 2006, show criminal conduct sufficient to raise AG ¶¶ 31(a) and 31(c). Applicant admitted the crimes. Although Applicant's latest offense was not serious, it does not diminish the pattern of criminal behavior. Although there was a gap in time between Applicant's crimes, he has not shown any insight into his behavior. He has not been successfully rehabilitated. His conduct shows a pattern of untrustworthy behavior and his ability and willingness to comply with laws, rules and regulations. This leaves me with doubts about his judgment and reliability.

AG ¶ 32 provides conditions that could mitigate security concerns:

- (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;

(c) evidence that the person did not commit the offense;

(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; and,

(e) potentially disqualifying conditions (b) and (f) above, may not be mitigated unless, where meritorious circumstances exist, the Secretaries of the Military Departments or designee; or the Directors of Washington Headquarters Services (WHS), Defense Intelligence Agency (DIA), National Security Agency (NSA), Defense Office of Hearings and Appeals (DOHA) or designee, has granted a waiver.

After reviewing the mitigating conditions, I find that none of them apply in this case. Applicant's behavior is recent. He failed to submit sufficient credible evidence to show he has been rehabilitated. Applicant has not provided any information for the record concerning his employment evaluation record. Although he listed his jobs, he provided no recommendations or performance evaluations demonstrating rehabilitation.

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.

AG ¶ 16 describes conditions that could raise a security concern and may be disqualifying. Under AG ¶ 16(a), a disqualifying conditions exists when there is "deliberate omission, concealment, or falsification of relevant facts from any personnel questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security eligibility or trustworthiness, or award fiduciary responsibilities." Under AG ¶ 16(b) a disqualifying condition exists when "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

Applicant's 2007 response to an OPM interviewer did not disclose the fact that police found a pipe and hypodermic syringe on his person when he was arrested in 2006. He claims that he only had Valium. Police records contradict his assertion This is a misleading statement. In light of his alleged "confusion", and past history of untrustworthy behavior, I do not find his explanations credible. His behavior and personal conduct are disqualifying as they raise questions about his judgment, reliability, truthfulness, and willingness to comply with the law.

After considering the mitigating conditions outlined in AG ¶ 17, I conclude that none of them apply. Applicant did not make prompt or good-faith efforts to correct his falsification or concealment. He provided no information that indicates he was ill-advised. The intentional omissions occurred in 2009, and are too recent and serious to be mitigated by the passage of time so far. I have serious doubts about his good judgment and reliability. He has not provided information in this record to show that he has met his burden of proof for his personal conduct.

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 an 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 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. As noted above, the ultimate burden of persuasion is on the applicant seeking a security clearance.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, as well as the "whole-person" factors. Applicant is 42 years old. He has a history of behavior that involves dishonesty. He has not shown successful rehabilitation or demonstrated true insight into his behavior. Applicant currently has unresolved financial difficulties, despite having a fresh start in 2002 after a Chapter 7 bankruptcy discharge. Part of his financial difficulties stem from a time when he admittedly was unemployed, used cocaine, and lost his job. Applicant shows a lack of candor and questionable judgment. Although Applicant's last

offense was in 2006, I have doubts about his reliability. He did not disclose material facts concerning the 2006 incident when talking to the OPM investigator in 2007.

In requesting an administrative determination, Applicant chose to rely on the written record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and carry his burden in this process. He failed to offer evidence of financial counseling. He failed to provide documentation regarding actual payments. I do not find his reasons and explanations credible for his criminal behavior. Accordingly, Applicant has not mitigated the security concerns under the four above referenced guidelines. Clearance is denied.

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:	AGAINST APPLICANT
Subparagraphs 1.a through 1.i:	Against Applicant
Paragraph 2., Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a through 2.c:	Against Applicant
Paragraph 3, Guideline J:	AGAINST APPLICANT
Subparagraphs 3.a through 3.c:	Against Applicant
Paragraph 4, Guideline F:	AGAINST APPLICANT
Subparagraphs 4.a through 4.g:	Against Applicant

Conclusion

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

NOREEN A. LYNCH.
Administrative Judge

