



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



In the matter of:	)	
	)	
	)	ISCR Case No. 08-08726
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

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

January 15, 2010

**Decision**

RICCIARDELLO, Carol G., Administrative Judge:

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

On July 27, 2009, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, J, and E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on September 8, 2009, and requested a hearing before an administrative judge. The case was assigned to me on November 16, 2009. DOHA issued a notice of hearing on the same day. I convened the hearing as

scheduled on December 2, 2009. The government offered Exhibits (GE) 1 through 5. Applicant did not object and they were admitted into evidence. Applicant testified and offered Exhibits (AE) A through C. They were admitted into evidence without objection. DOHA received the transcript of the hearing (Tr.) on December 9, 2009.

### **Procedural Matters**

Department Counsel moved to amend the SOR to correctly note that the allegations under Guideline E should be numbered paragraph 3 instead of 2, which included the allegations under Guideline J. There were no objections and the motion and amendment were granted.

### **Findings of Fact**

After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is 62 years old. He graduated from high school and attended college for four years, but did not earn a degree. He served in the Army for two years and was honorably discharged. He has never been married and has no children. He is an information assurance analyst for a federal contractor.<sup>1</sup>

Applicant used marijuana with varying frequency from 1970 to 2007. He used cocaine, with varying frequency, from about 1970 until about October 1996. He used heroin, with varying frequency from about 1970 to 2002. He admitted he was addicted to drugs in the 1970s and 1980s. He used hypodermic needles up until 1985, when he stopped due to the AIDS epidemic. He then used heroin nasally. He admitted he was addicted to heroin.<sup>2</sup>

In 1998, Applicant moved to a new state and stated he remained drug-free for six years. He attended Narcotics Anonymous (NA) and Alcoholics Anonymous. In 2002, when he lost his job due to an economic downturn, he moved back to his former area of residence, and relapsed by using heroin on two occasions. He stated he had urges to use "opiates." He went to the Veteran's Administration Hospital and sought treatment. He entered a detoxification and substance abuse program. He explained he got progressively better in the program. He attended daily group counseling. He got a job in 2004. He took methadone on a daily basis from June 2002 to February 2005, and stayed in the program until 2006. Applicant moved to his current area of residence in 2006, and while attending a party in September 2007, he used marijuana.<sup>3</sup>

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<sup>1</sup> Tr. 85-90.

<sup>2</sup> Tr. 23-33, 44-48, 54.

<sup>3</sup> Tr. 29-33, 44-48, 61-63, 84-85.

Applicant admits the criminal conduct alleged in the SOR with some minor variances. From 1971 through 1997, he was arrested 16 times. He believes he served a cumulative total of approximately four years in jail for various offenses. Some of the charges were dismissed or he pled guilty to lesser offenses. The charges included: possession of dangerous drugs, petit larceny, possession of stolen property, possession of a hypodermic, person not entitled to sign name of another to credit card, fraud, fraudulent use of credit card, possession of forged instrument, criminal possession of stolen property, unlawful use of credit cards, criminal possession of stolen credit cards, grand larceny, false application to bank, failure to appear, obstruction of government administration, possession controlled substance, forgery-deed, will, codicil, forgery, criminal possession of forged instruments, and attempted criminal possession of controlled substance. In some instances, Applicant was charged on different dates with the same charges as noted above.<sup>4</sup>

Applicant was convicted of the following offenses: person not entitled to sign name of another to credit card, sentenced to eight months in jail, suspended; fraud and fraudulent use of credit card, sentenced to five years in jail, suspended; petit larceny, sentenced to four months in jail and fined; possession of stolen property, sentenced to conditional discharge; false statements, sentenced to probation; obstruction of government administration, sentenced to 30 days in jail and fine; petit larceny, sentenced to 60 days in jail and fine; felony forgery-deed, will codicil, sentenced to one year in prison; criminal possession forged instrument, felony, sentenced to one to three years in correctional facility; attempted forgery 2<sup>nd</sup> degree, sentenced to 18 months to three years in prison; petit larceny, sentenced to six months in prison; attempted criminal possession of controlled substance, criminal solicitation, sentenced to conditional discharge; and obstructing government administration, fined.<sup>5</sup>

The government conceded that Applicant provided sufficient information in his e-QIP to put it on notice regarding his arrests, criminal convictions, and bankruptcy petition. Applicant admitted that he had many arrests and convictions, but had difficulty remembering all of the dates, charges, and sentences. Specifically, the government concedes the allegations in SOR ¶¶ 3.b, 3.c, and 3.d. I find for Applicant on those allegations.

On February 19, 2008, Applicant completed an Electronic Questionnaire for Investigative Processing (e-QIP). In response to question 24a, he failed to disclose he illegally used heroin and marijuana, in 2002 and 2007, respectively. Applicant's explanation for failing to disclose his heroin use in 2002 was that shortly after he used heroin, he participated in a VA substance abuse program and he was prescribed methadone. He stated he did not believe his 2002 heroin use was relevant or within the scope of the question. He also stated he did not think the heroin use was an issue because he had been in a drug program, so he decided not to divulge it. He first stated

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<sup>4</sup> Tr. 23-27, 68-78.

<sup>5</sup> Tr. 68-78; GE 5. The convictions are presented in chronological order from 1971 through 1997. The same charges are repeated where Applicant was arrested on a different occasion.

he did not know why he did not divulge his 2007 marijuana use. He admitted he knew using marijuana was illegal. He admitted he did not want to disclose his marijuana use on his e-QIP because he did not want anyone to know about it. When he was interviewed by an Office of Personnel Management (OPM) investigator, in May 2008, he was asked about his past drug use. He told the investigator that his last drug use was in 1997. He intentionally and deliberately concealed the 2002 heroin use and 2007 marijuana use. He now realizes he should have divulged it. Applicant intentionally and deliberately falsified his e-QIP and provided false information during his OPM interview, both are felonies in violation of 18 U.S. C. § 1001.<sup>6</sup>

Applicant explained that many of his criminal offenses involved stealing people's credit cards and forging signatures to obtain money for drugs. He would steal wallets from store dressing rooms and buy gift certificates and make a small purchase so he would then receive the remaining amount of the gift certificate in cash. He would also steal cash from the wallet, if there was any.

No one at his place of work, other than his facility security officer, is aware of his drug or criminal history. Outside of work, only his mother is aware of his past drug and criminal history. His father is deceased.<sup>7</sup>

Applicant attends a recovery support group through his church once a week for two hours. He has been attending since February 2008.<sup>8</sup>

Applicant provided certificates of course completions. He provided a copy of his performance appraisal which shows a grade of 3.10 on a 5.0 scale. I have considered all of the information provided by Applicant.<sup>9</sup>

### **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 used 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 commonsense decision. According to AG ¶

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<sup>6</sup> Tr. 34-43, 56-58, 62-67;GE 1.

<sup>7</sup> Tr. 58-60.

<sup>8</sup> Tr. 78-79.

<sup>9</sup> AE A, B and C.

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 safeguard 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.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline H, Drug Involvement**

AG ¶ 24 expresses the security concern pertaining to drug involvement: Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are defined as mood and behavior altering substances, and include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2)

inhalants and other similar substances; Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

I have considered the disqualifying conditions under Drug Involvement AG ¶ 25 and especially considered the following:

- (a) any drug abuse;
- (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 as prescribed by a duly qualified medical professional; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

Appellant has an extensive drug abuse history. He attended drug treatment, but relapsed when he used heroin in 2002, and again when he used marijuana in 2007. There is no evidence that Applicant was diagnosed by a duly qualified medical professional, or licensed clinical social worker, or that a drug treatment program was prescribed to him by a qualified medical professional. Therefore, disqualifying conditions (d), (e), and (f) cannot be applied. There is sufficient evidence of Applicant's drug abuse, possession of illegal drugs, and possession of drug paraphernalia. Therefore, I find disqualifying conditions (a) and (b) apply. There is sufficient evidence to show Applicant's failure to clearly and convincingly commit to discontinue drug use. Applicant completed an extensive drug treatment program, discontinued using illegal drugs for a period of time, and then relapsed by using heroin in 2002 and most recently in 2007, by using marijuana. I find disqualifying condition (h) applies.

I have considered all of the mitigating conditions under Drug Involvement AG ¶ 26 and especially considered the following:

- (a) the behavior happened so long ago, was so infrequent or happened under circumstances that it is unlikely to recur or does not cast doubt on the individual's 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; (4) a signed statement of intent with automatic revocation of clearance for any violation; 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 has a 37-year-history of drug abuse. His most recent use was in 2007, after completion of an extensive drug treatment program. Based on Applicant's past history of abuse and relapses, and his most recent use, I cannot find that it is unlikely Applicant will abuse illegal drugs again. I find mitigating condition (a) does not apply. Applicant used marijuana with friends while at a party, after he completed a methadone program. I cannot find that he has demonstrated an intent not to use drugs in the future or that he has disassociated himself from those that do use drugs. I find mitigating condition (b) does not apply. Although Applicant completed a drug treatment program, the evidence supports that he had a relapse after the program. No prognosis from a duly qualified medical professional was provided. Therefore, I find mitigating condition (d) does not apply.

#### **Guideline J, Criminal Conduct**

AG ¶ 30 sets out the security concern relating to criminal conduct:

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

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and especially considered the following:

(a) a single serious crime or multiple lesser offense; and

(c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Appellant has an extensive criminal history, including numerous felony and misdemeanor convictions. Cumulatively, he has served approximately four years in jail. I find both of the above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and especially considered the following:

(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;

(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.

Appellant has an extensive criminal record involving drug offenses, theft, fraud, and forgery. Most of his criminal conduct was prior to 1997. Many of the offenses were related to his drug abuse and many of the offenses committed were crimes of deception. Although he has attempted to put his life on track, he continued to violate the law by using drugs, as recently as 2007. He also lied on his security clearance application in February 2008, and to an OPM investigator in May 2008, when he was interviewed, both felonies. His actions reflect a continuing pattern of criminal conduct and his most recent offenses are crimes of deception. I find none of the above mitigating conditions apply.

#### **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. 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 conditions that could raise a security concern and may be disqualifying. I have considered all of them and specifically considered the following:

(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;

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

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.



Appellant falsified material facts during his May 2008 security interview when he told the OPM investigator he had stopped using illegal drugs in 1997, when in fact he had used heroin and marijuana in 2002 and 2007, respectively. He also intentionally failed to list his recent drug use on his security clearance application. Appellant's personal conduct raises all of the above disqualifying conditions.

The guideline also includes examples of conditions that could mitigate security concerns arising from personal conduct. I have considered all of the mitigating conditions under AG ¶ 17 and especially considered the following:

- (a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;
- (c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under 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.

Appellant intentionally lied to the OPM investigator and deliberately concealed relevant information about his past drug history on his e-QIP. He did not want anyone to know about his background. At his hearing, he stated he did not believe this information was relevant. He acknowledged that no one other than his mother and his facility security officer, are aware of his drug and criminal history. Considering Applicant's extensive drug and criminal history and his willingness to lie about it, I find none of the above mitigating conditions applies.

### **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 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. Applicant served his country in the Army and has taken steps in an attempt to put his life back on track. However, he has a long drug and criminal history, with his most recent uses occurring in 2002 and 2007. In addition, he lied to the OPM investigator and lied on his e-QIP. He has shown a continuing pattern of deception and violating the law. Overall, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for Drug Involvement, Criminal Conduct, and Personal Conduct.

### **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-1.d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a-2.q:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a:	Against Applicant
Subparagraphs 3.b-3.d:	For Applicant
Subparagraphs 3.e:	Against Applicant

## **Conclusion**

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

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Carol G. Ricciardello  
Administrative Judge