



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



In the matter of:)	
)	
)	ISCR Case No. 08-09105
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Caroline H. Jeffreys, Esquire, Department Counsel
For Applicant: Pro se

June 8, 2009

Decision

HOGAN, Erin C., Administrative Judge:

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on February 13, 2008. On February 3, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline F, Financial Considerations; Guideline J, Criminal Conduct; Guideline H, Drug Involvement; and Guideline E, Personal Conduct, for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On February 16, 2009, Applicant answered the SOR and requested a hearing before an administrative judge. Department Counsel was ready to proceed on March 11, 2009. The case was assigned to me on March 20, 2009. On March 31, 2009, a Notice of Hearing was issued, scheduling the hearing for April 22, 2009. The case was heard on that date. The Government offered six exhibits which were admitted as Government Exhibits (Gov) 1 – 6. Applicant testified and submitted no documents. The record was held open until May 6, 2009, to allow Applicant to submit additional

documents. No additional documents were received. The transcript was received on March 7, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Findings of Fact

In his Answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.c, 1.d, 1.e, 2.a, 2.b, 2.c, 2.d, 2.e, 2.f, 3.a, 3.b and 3.c. He denies the allegations in SOR ¶¶ 4.a and 4.b.

Applicant is a 48-year-old truck driver for a Department of Defense contractor. He has been employed in his current position since September 2007. He is applying for a security clearance for the first time. He has a general equivalency diploma (G.E.D.). He is divorced and has a grown daughter, age 26. (Tr at 4-6, 15; Gov 1)

On February 13, 2008, Applicant completed an Electronic Questionnaire for Investigations Processing (e-QIP) in order to apply for a security clearance. Applicant answered "No" in response to section 23(a) Police Record "Have you ever been charged or convicted of any felony offense? (Include those under the Uniform Code of Military Justice.) He did not list his arrest on August 24, 2000, for the charges of Out-of State Fugitive, and Forgery. He also answered "No" in response to section 24(a) Your Use of Illegal Drugs and Drug Activity, "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), hallucinogens (LSD, PCP, etc.), or prescription drugs?" Applicant's subsequent background investigation revealed he has used marijuana on a regular basis from 1974 to January 1, 2004. He was required to disclose on his e-QIP application any marijuana use within the past seven years, i.e. from February 13, 2001 to 2004. (Gov 1; Gov 3)

Applicant admits to using marijuana on a daily basis for 30 years. He started around age 16 and stopped when he was 44. When he was using, he purchased marijuana about every two weeks. He spent approximately \$150 a month to purchase marijuana during his last ten years of use. He never used other drugs. He stopped using marijuana in 2004. He testified that he did not list his marijuana use on his e-QIP application because he forgot about it. He had no intent to deceive. (Tr at 35-40; Gov 2 at 4; Gov 3 at 2, 7,12)

Applicant's background investigation revealed that Applicant has the following delinquent accounts that were placed for collection: a \$598 medical account (SOR ¶ 1.a: Gov 3 at 15; Gov 5; Gov 6 at 5); a \$475 medical account (SOR ¶ 1.b: Gov 3 at 15; Gov 5; Gov 6 at 4); a \$323 medical account (SOR ¶ 1.c: Gov 5); a delinquent child support obligation in the approximate amount of \$54,000 (SOR ¶ 1.d: Gov 3 at 14; Gov 5; Gov 6 at 4); and a \$265 Direct TV account (SOR ¶ 1.e: Gov 3 at 15; Gov 6 at 4-5).

Applicant testified that he has been paying his past due child support payments for the past two years. An allotment of \$150 is taken out of his weekly paycheck. He pays about \$600 a month. He believes that he is currently \$25,000 in arrears. After he and his wife divorced, she remarried. He believed that her new husband was going to adopt his daughter and that he no longer owed child support. He did not realize that he owed delinquent child support for 20 years. He learned that he owed delinquent child support when he applied for his commercial truck driver's license and the issue came up during a background check. He was given the opportunity to submit documents after the hearing verifying that he was paying child support. He did not submit additional documents. (Tr at 14-17) He has not made payments towards any of his other debts. He intends to pay his debts off one at a time. He has no credit cards and no checking account. He lives on a cash basis. (Tr at 18-19, 21)

In 2007, Applicant discovered that he had cancer. He had surgery in June 2007. He had no health insurance. The debts alleged in SOR ¶¶ 1.a, 1.b, and 1.c are costs related to the surgery. He was unable to work for about a month after the surgery. Between 2003 and 2006, Applicant did not have a job. He did not feel like working. During this time, he stayed with friends. (Tr at 40-42)

Applicant's current net monthly income varies. He earns between \$1,200 to \$1,400 per month when he works in the office. He earns between \$2,400 to \$3,000 per month when he is driving trucks on the road. His monthly expenses include: rent \$200, groceries \$75, utilities \$100, car expenses \$50, past-due child support \$650, and miscellaneous \$50. His total monthly expenses are \$1,125. Applicant testified that he usually has \$400 to \$500 left over each month after his bills are paid. (Tr at 20-23)

Applicant has a history of criminal arrests from August 1984 to June 2005. The arrests include:

A December 9, 2007, arrest for a probation violation. He was arrested for not paying all of the fines related to the April 15, 2007, offense. He claims he still owed 50 cents. He appeared in court paid the 50 cents and the judge dismissed the charge. (Gov 2 at 5; Gov 3 at 7, 12)

An April 15, 2007, ticket for Registration/Title Fail to Transfer and Vessel Derelict Abandoned. Applicant purchased a house boat. The boat sank. Prior to the boat sinking, he did not get a bill of sale or title. He did not register the boat. The Fish and Game Department issued him a ticket for abandoned vessel. He was fined \$525 and placed on probation. (Tr at 24-25; Gov 2 at 5; Gov 3 at 11)

A June 29, 2005, arrest and charge for Dangerous Drugs, a Controlled Substance. Applicant was living with someone who he knew to be drug dealer. The police raided the home and Applicant was arrested because he was at the house at the time of the raid. He claims he did not participate in any drug activity. He lived with his friend for a year. Applicant never appeared in court or heard of any further requirements. He believes the case was dismissed because Hurricane Katrina

destroyed the court records. He moved out of the area after the Hurricane. (Tr at 28-30; Gov 3 at 12). The record does not indicate the disposition of this charge.

An August 24, 2000, arrest and charges for Out of State Fugitive, and Forgery, a felony. In 1996, Applicant bought a pickup truck from a friend in another state. He asked his friend if he could sign the title in order to trade in the car since title had not transferred. His friend told him it was okay but later changed his mind after Applicant had forged his name on the title. His friend went to the police. He was not aware that his friend went to the police until he was arrested in 2000. On October 5, 2008, Applicant pled no contest and paid a fine and forfeitures. (Tr at 31-33; Gov 2 at 5; Gov 3 at 7, 16-17; Gov 4)

A November 17, 1984, arrest and charge for Shoplifting. He was 22 and homeless at the time. He stole some groceries. (Tr at 34; Gov 2 at 6)

An August 27, 1984, arrest and charge for Damage to Property, Burglary, and Larceny. He admits to breaking and entering a grocery store. The charges were dismissed. (Tr at 35; Gov 2 at 6)

Applicant did not provide any evidence pertaining to his work performance and overall character.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

Failure or 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. An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.

The guideline notes several disqualifying conditions that could raise security concerns. I find Financial Considerations Disqualifying Condition (FC DC) ¶19(a) (an inability or unwillingness to satisfy debts); and FC DC ¶19(c), (a history of not meeting financial obligations) apply to Applicant’s case. Applicant owes approximately \$54,000 in delinquent child support and had four other delinquent accounts, an approximate total of \$1,661.

The Government’s substantial evidence and Applicant’s own admissions raise security concerns under Guideline F. The burden shifted to Applicant to produce

evidence to rebut, explain, extenuate, or mitigate the security concerns. (Directive ¶E3.1.15) An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the government. (See ISCR Case No. 02-31154 at 5 (App. Bd. Sept, 22, 2005)).

The guideline also includes examples of conditions that could mitigate security concerns arising from financial difficulties. Financial Considerations Mitigating Condition (FC MC) ¶ 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) is not applicable. Applicant owes a significant amount of past due child support. He neglected his child support obligation over a long period of time. His daughter is now an adult. He has not taken any action towards resolving his four other delinquent accounts even though it appears to be within his means to do so. His failure to address his delinquent accounts continues to raise questions about his reliability, trustworthiness and judgment.

FC MC ¶ 20(b) (the conditions that resulted in the financial problem 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. While it is acknowledged Applicant was diagnosed with cancer in 2007 which resulted in the three delinquent medical accounts alleged in the SOR, his financial information reveals that it is within his means to pay his delinquent accounts. By his own volition, Applicant did not work for three years from 2003 to 2006 which aggravated his child support issue. While Applicant's illness was a factor beyond his control, looking at his conduct over the past six years, I cannot say that he acted responsibly under the circumstances. It was and is within his discretion to take control of his financial situation. He chose not to do so. He did not act responsibly under the circumstances.

FC MC ¶20(c) (the person has received or is receiving counseling for the problem and/or there are clear indications that the problem is being resolved or is under control) does not apply. Applicant has not attended financial counseling. All of five delinquent accounts remain unresolved. It is unlikely that his financial situation will be resolved in the near future.

FC MC ¶20(d) (the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts) does not apply. Although Applicant testified that he is paying \$650 a month towards his delinquent child support obligation, he provided no proof to corroborate his assertion even though the record was held open to allow him the opportunity to do so. He took no steps towards resolving his remaining four delinquent accounts even though each debt's balance is relatively low and within his means to resolve.

Applicant has not mitigated the concerns raised under Guideline F.

Guideline J, Criminal Conduct

The security concern raised under the criminal conduct guideline is set forth in ¶ 30 of the Revised Adjudicative Guidelines:

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.

There are two Criminal Conduct Disqualifying Conditions (CC DC) which apply to Applicant's case. CC DC ¶ 31(a) (a single serious crime or multiple lesser offenses) and CC DC ¶ 31(c) (allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted) apply. Between 1984 to 2007, Applicant was arrested and/or cited for criminal offenses on seven occasions. Three of the arrests occurred within the past five years. His August 24, 2000, arrest involved a felony offense – forgery. In 2005, he was arrested for Dangerous Possession of a Controlled Substance.

The following Criminal Conduct Mitigating Conditions (CC MC) are relevant to Applicant's case:

CC MC ¶ 32(a) (so much time has elapsed since the criminal behavior happened, or it happened under such circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment) does not apply. Appellant's last criminal citation occurred in December 2007 - a year and a half ago. Considering his overall history of criminal offenses, I cannot conclude sufficient time has elapsed since his last offense or that it is unlikely to recur. Applicant's criminal history raises questions about his reliability, trustworthiness, and good judgment.

CC MC ¶ 33(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) does not apply. Insufficient time has passed since Applicant's last criminal offense to conclude Applicant has been successfully rehabilitated. Applicant provided no information about his employment record.

Considering his history of criminal conduct, Applicant has not met his burden to mitigate the security concerns raised under criminal conduct.

Guideline H, Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in AG ¶24:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may

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

The guideline notes several disqualifying conditions that could raise security concerns. I find Drug Involvement Disqualifying Condition (DI DC) ¶ 25(a) (any drug abuse); and DI DC ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia) are relevant to Applicant's case. Applicant admits to a 30-year history of illegally using marijuana on a regular basis.

The guideline also includes examples of conditions that could mitigate security concerns arising from drug involvement. Two potentially apply to Applicant's case. Drug Involvement Mitigating Condition (DI MC) ¶ 26(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. While Applicant claims that he stopped using marijuana in 2004, not enough time has passed to conclude his past marijuana use is no longer a concern based on his admitted daily use of marijuana over such a lengthy period of time. Doubts about Applicant's reliability, trustworthiness, and judgment remain because of Applicant's lengthy history of marijuana use. DI MC ¶ 26(a) does not apply.

The second mitigating condition that potentially applies is FC MC ¶ 26(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.) Applicant testified that he no longer uses marijuana and no longer associates with anyone who uses marijuana. Considering Applicant's lengthy history of illegal marijuana use and his omission of his illegal drug use on his security clearance application, I give Applicant's testimony little credibility. FC MC ¶ 26(b) does not apply.

The drug involvement concerns are not mitigated.

Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG ¶ 15:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Personal conduct concerns are raised because Applicant failed to list an arrest that included a felony offense in response to question 23(a) on his e-QIP application, dated February 13, 2008. He also omitted his illegal marijuana use in response to question 24(a) on the same e-QIP application.

Personal Conduct Disqualifying Condition (PC DC) ¶ 16(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) potentially applies in Applicant's case. For PC DC ¶ 16(a) to apply, Applicant's omission of his delinquent accounts must be done with a deliberate intent to deceive. I find Applicant intended to falsify his security clearance application with respect to his failure to list his illegal marijuana use in response to question 24(a). The question required him to list his illegal drug use within 7 years prior to completing his application. He did not stop using marijuana until 2004. As such, he was required to list any illegal marijuana use occurring after February 13, 2001 – the seven-year time period required by the question. From February 2001 to January 2004, Applicant used marijuana on a daily basis. His claim that he simply forgot to list his past marijuana use on his e-QIP application is not credible.

I considered the mitigating conditions under personal conduct and find that none apply with respect to his deliberate omission of his marijuana use on his e-QIP application.

With regard to Applicant's omission of his August 24, 2000 arrest for Out-of-State Fugitive and Forgery – a felony in response to section 23(a) on the e-QIP application, I find his omission was not deliberate. Based on his educational background, it is unlikely Applicant would distinguish between the nuances of criminal charges that are felonies and criminal charges that are misdemeanors. SOR ¶ 4.a is found for Applicant.

Security concerns under personal conduct remain due to Applicant's deliberate omission of his illegal marijuana on his e-QIP application. Applicant provided insufficient evidence to mitigate the security concerns raised under 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 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 common sense 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 is a mature adult. Considering his history of criminal offenses, his 30-year history of illegal drug use, the deliberate omission of his illegal drug use on his e-QIP application, and his failure to adequately address his financial issues, concerns about Applicant’s trustworthiness, judgment and reliability remain. Applicant has not mitigated the security concerns raised under Financial Considerations, Criminal Conduct, Drug Involvement, 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 F:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	Against Applicant
Subparagraph 2.c:	Against Applicant
Subparagraph 2.d:	Against Applicant
Subparagraph 2.e:	Against Applicant
Subparagraph 2.f:	Against Applicant
Paragraph 3, Guideline H:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	Against Applicant
Paragraph 4, Guideline H:	AGAINST APPLICANT
Subparagraph 4.a:	For Applicant
Subparagraph 4.b:	Against Applicant

Conclusion

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

ERIN C. HOGAN
Administrative Judge