



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-09763
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esq., Department Counsel
For Applicant: *Pro Se*

May 29, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines H (Drug Involvement), G (Alcohol Consumption), and E (Personal Conduct). Clearance is denied.

Statement of the Case

On May 6, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On February 2, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.¹ The SOR alleges security

¹On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guidelines to all adjudications and other determinations made under the Directive and Department of Defense (DoD) Regulation 5200.2-R, Personnel Security Program

concerns under Guidelines H (Drug Involvement), G (Alcohol Consumption), and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On February 24, 2009, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated March 25, 2009, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.² Applicant did submit information within the 30-day time period after receiving a copy of the FORM. The case was assigned to me on May 7, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations except for SOR ¶¶ 1.e. and 2.a., which he denied. His admissions are incorporated herein as findings of fact. I make the following additional findings of fact:

Applicant is a 30-year-old technical writer, who has been employed by his defense contractor employer since May 2008. Applicant attended a community college from August 1999 to May 2003 and was awarded an associate of arts degree in May 2003. He has never married and has no dependents.³

Applicant's background investigation included a review of his May 2008 e-QIP,⁴ his May 2008 FBI Report, his December 2008 Response to Interrogatories, and his February 2009 Response to SOR.

Drug Involvement/Alcohol Consumption/Personal Conduct

The Government established by Applicant's admissions and/or evidence presented that he used cocaine from about 1994 to June 2008 and purchased cocaine; used marijuana from about 1994 to January 2006, tested positive for marijuana in

(Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

² DOHA transmittal letter is dated March 25, 2009; and Applicant received the FORM on April 2, 2009. The DOHA transmittal letter informed Applicant that he had 30 days after his receipt to submit information. Applicant timely submitted a letter dated April 23, 2009, which was within the 30-day time period after receipt of FORM.

³ Item 5. These facts were derived from Applicant's May 2008 e-QIP.

⁴ *Id.*

February 2006, and purchased marijuana; used LSD from about 1994 to about 2001, and purchased LSD; and used ecstasy from about 1996 to about 1999, and purchased ecstasy. (SOR ¶¶ 1.a. – 1.d.) In February 2006, he tested positive for illegal drug use during his 12-week AA program to reinstate his driver's license following his driving under the influence (DUI) arrest, discussed *infra*.⁵ Medical treatment records reveal that Applicant was diagnosed with Cannabis Abuse (DSM IV 305.20) by a Certified Addiction Professional (CAP) in May 2006, that he successfully completed his treatment program, and that he was recommended for “total abstinence from mind altering substances, continue involvement with AA & sponsorship.”⁶ Applicant continues to consume alcoholic beverages as he stated in his December 2008 Response to Interrogatories.⁷ (¶¶ 1.e., 2.c.)

In Applicant's Response to FORM, which was a letter dated April 23, 2009, he took exception to the May 2006 CAP comments contained in her discharge summary:

Also, in regards to [treatment facility] and my counselor [] I noticed in my report written by her that there was mixed information of someone else and my own put together in the report, which I believe makes my report look worse then (sic) it should be. As well as that I was never asked by [treatment facility] or even my probation officer to further continue to take counseling. If they had asked I would have gone on my own free will. I did learn from my previous classes.

Applicant did not provide any documentation supporting his contention of error in his treatment facility discharge summary.

The Government established by Applicant's admissions and/or evidence presented that he consumed alcohol, at times to excess and to intoxication, from approximately 1995 to at least December 2008. In his Personal Subject Interview, Applicant indicated he started drinking alcohol in high school when he was 17 or 18 years old.⁸ He further indicated that “[p]robably two weekends out of a month he drank to intoxication: and “[e]ither drove himself home or his friends drove him.”⁹ As noted *supra*, Applicant continues to consume alcoholic beverages. (SOR ¶ 2.a.)

In December 2005, Applicant was arrested and charged with DUI of alcohol or drugs first offense. He refused the breathalyzer and pled nolo contendere to the DUI offense, which was reduced to reckless driving.¹⁰ Applicant was sentenced to three

⁵ Item 4 at 13.

⁶ Item 6 at 6-9.

⁷ *Id* at 13.

⁸ Item 6 at 20.

⁹ *Id*.

¹⁰ *Id*.

months supervised probation, required to attend DUI Level 1 class and victim awareness program, and ordered to pay a fine and court costs. (SOR ¶ 2.b.)

Applicant signed his e-QIP on May 6, 2008. He incorrectly responded “No” or did not provide complete and accurate information in his response to a question pertaining to past drug use. Section 24 of his e-QIP (SOR ¶ 3.a.) asked:

Section 24: Your Use of Illegal Drugs and Drug Activity a. 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.) amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs.

In his Response to SOR, Applicant stated:

I admit that I knowingly falsified information on the [defense contractor] job application regarding the use of illegal drugs. I deeply regret this action and my only defense was that my father was present during the on-line application procedure and since he was unaware of the drug issue, I was apprehensive to tell him about it at that moment. I obviously regret that decision and have since informed him of what occurred. My actions were foolish and wrong. I should have been honest with both my father and [defense contractor].¹¹

In his Response to SOR, Applicant provided a number of character statements to include his state representative, work supervisors, colleagues, and parents. These character references were very favorable attesting to his positive work habits, reliability, and trustworthiness. With the exception of his parents, none of those persons made reference to having knowledge of Applicant’s extensive drug and alcohol use.

Also in his Response to SOR, Applicant stated, “I sincerely apologize for my momentary lapse of judgment and hope that I be given an opportunity to redeem myself.” He repeated this statement in his Response to FORM.

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.

¹¹ Item 4 at 6.

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. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"¹² demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).¹³

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

¹² See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). "Substantial evidence" is "more than a scintilla but less than a preponderance." See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994).

¹³ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

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* Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Drug Involvement/Alcohol Consumption/Personal Conduct

Under Guideline H, the Government’s concern is:

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. AG ¶ 24.

Under Guideline H, there are four Disqualifying Conditions raised by Applicant’s conduct: AG ¶ 25(a) “any drug abuse . . . ;” AG ¶ 25(c) “illegal drug possession, including . . . purchase . . . ;” AG ¶ 25(e) “evaluation of drug abuse . . . by a licensed clinical social worker who is a staff member of a recognized drug treatment program;” and AG ¶ 25(h) “failure to clearly and convincingly to commit to discontinue drug use.” The Government established these Disqualifying Conditions through Applicant’s admissions and evidence presented.

Under Guideline G, the Government’s concern is:

Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual's reliability and trustworthiness.

Under Guideline G, there are three Disqualifying Conditions raised by Applicant’s conduct: AG ¶ 22(a) “alcohol-related incidents away from work, such as driving while under the influence, . . . or other incidents of concern, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;” AG ¶ 22(c) “habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent;” and AG ¶ 22(e) “evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.” The Government established these Disqualifying Conditions through Applicant’s admissions and evidence presented.

Under Guideline E, the Government's concern is:

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.

Under Guideline E, there is one Disqualifying Condition raised by Applicant's conduct: AG ¶ 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." The Government established this Disqualifying Condition through Applicant's admissions and evidence presented.

As noted *supra* in his Response to SOR, Applicant provided a number of character references. Considering the nature, recency, and security implications arising from Applicant's substantiated misconduct, Applicant has not met his burden of establishing any of the mitigating conditions under Guidelines H, G, and E. Given the recency of his cocaine use, which occurred after his treatment program, Applicant has failed to provide persuasive evidence that he has put his illegal drug usage behind him. Applicant's character references must be weighed in light of their intrinsic value and record evidence as a whole.¹⁴ In doing so, the Appeal Board has stated, "it is not a simple matter of considering whether other people expressed favorable opinions about Applicant, but rather: (a) whether the favorable opinions about Applicant are reasonable and well-founded; and (b) and what weight reasonably can be placed on such favorable opinions in light of the record evidence as a whole."¹⁵

Furthermore, the Appeal Board has stated:

In the face of Applicant's serious criminal conduct – which involved deception and deceit directed against the federal government . . . – the favorable character statements had to be viewed with a grain of salt and discounted somewhat. See, e.g., ISCR Case No. 96-0083 (January 10, 1997) at p. 4 (favorable reputation for honesty and reliability must be discounted in face of proven acts of falsification).¹⁶

¹⁴ ISCR Case No. 97-0727 at 4, n. 1 (App. Bd. Aug. 3, 1998).

¹⁵ *Id.*

¹⁶ ISCR Case No. 97-0727 at 4 (App. Bd. Aug. 3, 1998).

The Government must be able to repose a high degree of trust in those to whom it grants access to sensitive information.¹⁷ Applicant's drug involvement, alcohol consumption, and falsification create doubts about his eligibility for a security clearance. Absent significant evidence of mitigation or extenuation, those doubts must be resolved against the Applicant.¹⁸ I do not accept Applicant's characterization of his conduct as a "momentary lapse of judgment," but rather a course of illegal and irresponsible behavior that spanned the majority of his adult life until recently.

To conclude, Applicant presented little or no evidence to explain, extenuate, or mitigate the security concerns raised. Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. In reaching this conclusion, the whole person concept was given due consideration, and that analysis does not support a favorable decision.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹⁹ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: Subparagraphs 1.a. – 1.e.:	AGAINST APPLICANT Against Applicant
Paragraph 2, Guideline G: Subparagraph 2.a. – 2.c.:	AGAINST APPLICANT Against Applicant
Paragraph 3, Guideline E: Subparagraph 3.a.:	AGAINST APPLICANT Against Applicant

¹⁷ *Snepp v. United States*, 444 U.S. 507 (1980).

¹⁸ See, *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) and *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir., 1990).

¹⁹ See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge