



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-11600
)	
Applicant for Security Clearance)	

Appearances

For Government: Jeff A. Nagel, Esquire, Department Counsel
For Applicant: *Pro se*

May 4, 2010

Decision

CEFOLA, Richard A., Administrative Judge:

The Applicant submitted his Electronic Questionnaires for Investigations Processing (e-QIP), on June 27, 2008. On October 29, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guidelines H, J and E for the 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 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.

The Applicant acknowledged receipt of the SOR on November 2, 2009. He answered the SOR in writing on November 15, 2009, and requested a hearing before an Administrative Judge. DOHA received the request on November 20, 2009, and I received the case assignment on January 12, 2010. DOHA issued a notice of hearing that same day, and I convened the hearing as scheduled on January 28, 2010. The

Government offered Exhibits (GXs) 1 through 4, which were received without objection. The Applicant testified on his own behalf. DOHA received the transcript of the hearing (TR) on February 4, 2010. I granted the Applicant's request to keep the record open until March 1, 2010, to submit additional matters. On February 26, 2010, and again on March 1, 2010, he submitted Exhibits (AppXs) A and B, which were received without objection. The record closed on March 1, 2010. 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, the Applicant admitted all of the factual allegations of the SOR, with explanations. He also provided additional information to support his request for eligibility for a security clearance.

Drug Involvement

1.a.~1.d. The Applicant was involved with crack cocaine, and to a lesser extent marijuana, from about 1989 until his last usage of cocaine in December of 2007. (TR at page 20 line 2 to page 24 line 4, and at page 42 line 10 to page 43 line 17.) He was also involved in the sale of cocaine. (TR at page 25 line 25 to page 26 line 15.) The Applicant's involvement was periodic, and his older brother, a drug abuser, was a great influence on the Applicant. (TR at page 20 line 2 to page 24 line 4.) In 2004, he was depressed as his sister was diagnosed with cancer. (GX 2 at page 5.) "During a 3-4 week period," he used "crack cocaine' on 3-4 occasions." (*Id.*) In 2004, he also tested positive for cocaine. (TR at page 24 line 23 to page 25 line 20.)

1.e. As a result of his drug involvement, the Applicant was arrested twice, once in December of 1986, and again in April of 1988. (TR at page 28 line 9 to page 30 line 18.) Both arrests are cross referenced as Criminal Conduct; and as such, will be discussed at length under Paragraph 2 of the SOR.

Criminal Conduct

2.a. In 1977, the Applicant was arrested for, and subsequently found guilty of, two counts of Robbery. (GX 4 at page 3.) He drove the getaway car for his brother, who unbeknownst to the Applicant, had "robbed a store." (TR at page 27 line 3 to page 28 line 8.) As a result of his involvement, the Applicant was sentenced to six months in jail, and was placed on probation for three years. (TR at page 27 line 3 to page 28 line 8, and GX 4 at page 3.)

2.b. In December of 1986, the Applicant was arrested and subsequently charged with Possession of a Controlled Substance. (GX 4 at page 3.) He was in a park with a couple of friends, one of whom was in the possession of drugs. (TR at page 28 line 9 to page 30 line 1.) The Applicant was unaware of this possession, but all were arrested.

(*Id.*) The charge against the Applicant was ultimately dismissed. (TR at page 28 line 9 to page 30 line 1, and GX 4 at page 3.)

2.c. In April of 1988, the Applicant was arrested for, and subsequently found guilty of two felonies, Possession of Rock Cocaine and Possession/Purchase of Cocaine Base for Sale. (GX 4 at page 3.) He was very much influenced by his older brother; and as a result, although he was found guilty, he was only sentenced to attend Narcotics Anonymous meetings, to community service, and was placed on probation for three years. (TR at page 30 lines 2~18.)

2.d. In July of 1990, the Applicant was arrested and subsequently charged with being a Felon in Possession of a Gun/Firearm, and Battery on a Person. (GX 4 at page 3.) The Applicant's brother, who had a key to the Applicant's apartment, secreted a firearm on the premises. (TR at page 31 lines 13~25, and at page 32 line 21 to page 34 line 14.) The police were called to the apartment in response to a domestic disturbance involving the Applicant and his girl friend, and found the gun. (*Id.*) The charges against the Applicant were ultimately dismissed. (TR at page 31 lines 13~25, and at page 32 line 21 to page 34 line 14, and GX 4 at page 3.)

2.e. In June of 1999, the Applicant was arrested and subsequently pled guilty to Driving Under the Influence. (GX 3 at page 4.) He had consumed "a few beers" prior to this arrest. (TR at page 34 line 15 to page 35 line 11.) The Applicant, in part, was placed on probation for five years, fined and ordered to attend Alcoholics Anonymous meetings. (TR at page 34 line 15 to page 35 line 11 and GX 3 at page.)

2.f. In October of 2003, the Applicant was arrested and charged with of Driving Under the Influence (DUI). He had consumed "a couple beers . . . three to four hours" prior to this arrest. (TR at page 35 line 14 to page 38 line 10.) As he was not over the legal blood/alcohol limit when driving, this case was *nolle prossed*. (*Id.*)

Personal Conduct

3.a. On Applicant's June 2008 e-QIP, Section 24a asks about "Use of Illegal Drugs or Drug Activity . . . Since the age of 16 or in the last 7 years," to which the Applicant answered, "No." (GX 1 at page 30.) He answered, "No," as "it was an embarrassment." (TR at page 38 line 13 to page 39 line 20.) This is a wilful falsification.

3.b. On Applicant's June 2008 e-QIP, Section 23a asks about "Your Police Record . . . Have you **ever** been charged with or convicted of any felony offense," to which the Applicant answered, "No." (GX 1 at page 29, emphasis supplied.) He answered, "No," as he "was under the impression that anything under three to seven years, . . . [he] didn't have to list." (TR at page 38 line 13 to page 39 line 20.) In 1977, he was charged and convicted of two counts of Robbery. In 1988, he was charged and convicted of two drug charges, both felonies. Finally, in July of 1990, he was charged with being a Felon in Possession of a Gun/Firearm. His explanation is not believable,

as the language in the question is in plain English and there is no reference to a 3~7 year window of disclosure. This is a wilful falsification.

3.c. On Applicant's June 2008 e-QIP, Section 23b asks about "Your Police Record . . . Have you **ever** been charged with or convicted of a firearms or explosives offense," to which the Applicant answered, "No." (GX 1 at page 29, emphasis supplied.) Again, he answered, "No," as he "was under the impression that anything under three to seven years, . . . [he] didn't have to list." (TR at page 38 line 13 to page 39 line 20. In July of 1990, he was charged with being a Felon in Possession of a Gun/Firearm. His explanation is not believable, as the language of the question is in plain English and there is no reference to a 3~7 year window of disclosure. This is a wilful falsification.

3.d. On Applicant's June 2008 e-QIP, Section 23d asks about "Your Police Record . . . Have you **ever** been charged with or convicted of any offense(s) related to alcohol or drugs," to which the Applicant answered, "No." (GX 1 at page 30, emphasis supplied.) He answered, "No," as he "was under the impression that anything under three to seven years, . . . [he] didn't have to list." (TR at page 38 line 13 to page 39 line 20. In December of 1986, he was charged with Possession of a Controlled Substance. In 1988, he was charged and convicted of two drug charges. Finally, in June of 1999 and again in October of 2003, he was charged with DUIs. His explanation is not believable, as the language of the question is in plain English and there is no reference to a 3~7 year window of disclosure. This is a wilful falsification.

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 commonsense 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.

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 H - Drug Involvement

The security concern relating to the guideline for Drug Involvement is set out in Paragraph 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 also notes several conditions that could raise security concerns. Under Subparagraph 25(a), “*any drug abuse*” may be disqualifying. In addition, “*illegal drug possession, including . . . sale*” under Subparagraph 25(c) may also be disqualifying. Here, the Applicant used crack cocaine, and to a lesser extent marijuana, from about 1989 until his last usage of cocaine in December of 2007. I find no countervailing mitigating condition that is applicable, as the Applicant last used cocaine only two years prior to his hearing.

Guideline J - Criminal Conduct

Paragraph 30 of the new adjudicative guidelines 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.

The adjudicative guidelines set out certain conditions that could raise security concerns. Paragraph 31(a) provides that "*a single serious crime or multiple lesser offenses,*" may raise security concerns. As the Government does not allege the drug involvement or the wilful falsifications as Criminal Conduct, the Applicant's last culpable act of Criminal Conduct was in June of 1999, when he was charged with and convicted of a DUI, more than 10 years ago. However, the first countervailing mitigation is not applicable, for although "*much time has elapsed since the criminal behavior,*" it is likely "*to recur,*" and does "*cast doubt on the individual's reliability, trustworthiness, or good judgment.*" Since 1999, the Applicant has abused drugs, and has repeatedly falsified his June 2008 e-QIP.

Guideline E - Personal Conduct

The security concern relating to the guideline for Personal Conduct is set out in AG Paragraph 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.

The guideline notes several conditions that could raise security concerns. Under Subparagraph 16(a), "*deliberate omission, concealment, or falsification of relevant facts from an personnel security questionnaire . . . or similar form*" Here, the Applicant falsified his answers to Sections 23 and 24 on his June 2008 e-QIP. No mitigating conditions apply.

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. 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.

The Administrative Judge should also 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.

I considered all of the evidence, including the potentially disqualifying and mitigating conditions surrounding this case. The Applicant has the unqualified support of his colleagues, his sister, and his pastor. (AppXs A and B.) However, the record evidence leaves me with questions and doubts as to Applicant's eligibility and suitability for a security clearance. He was clearly less than candid with the Government on his e-QIP. Furthermore, his past Drug Involvement and Criminal Conduct is fairly extensive. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from his 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
Paragraph 2, Guideline J:	AGAINST APPLICANT
Paragraph 3, Guideline E:	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.

Richard A. Cefola
Administrative Judge