



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



In the matter of: ) ) ----- ) SSN: ----- ) ) Applicant for Security Clearance )	ISCR Case No. 09-00504
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**Appearances**

For Government: Candace Le'i, Esq., Department Counsel  
For Applicant: *Pro se*

September 14, 2009

**Decision**

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline F (Financial Considerations) and E (Personal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SF 86) on July 19, 2008. On May 28, 2009, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline F. 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. Applicant answered the SOR on in an undated document and requested a hearing before an administrative judge. DOHA received the request on June 11, 2009.

On June 26, 2009, DOHA issued a Supplemental SOR (captioned as an amendment to the SOR), adding four allegations under Guideline E. Applicant responded to the Supplemental SOR on June 29, 2009. Department Counsel was ready to proceed on July 1, 2009, and the case was assigned to me on July 7, 2009. DOHA issued a notice of hearing on July 8, 2009, scheduling the hearing for August 3, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 9 were admitted in evidence without objection. Applicant testified, but submitted no documentary evidence. I kept the record open until August 14, 2009, to allow him to submit documentary evidence. He timely submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. Department Counsel's response to AX A through F is attached to the record as Hearing Exhibit I. DOHA received the transcript (Tr.) on August 11, 2009. The record closed on August 14, 2009.

### **Amendment of SOR**

I granted Department Counsel's motions, without objection from Applicant, to correct SOR ¶ 1.d by substituting "\$1,000" for "\$1,00.00", to amend SOR ¶ 1.c by substituting the name of Applicant's homeowners' association for a medical provider, and to change the amount alleged in SOR ¶ 1.e from \$147 to \$913 (Tr. 27-28, 103-06). The amendments are handwritten on the SOR.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.d, 1.e, 1.g, 1.h, 1.k, 1.m, 1.n, and Supplemental SOR ¶ 2.d. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 48-year-old security officer employed by a federal contractor. He has worked for his current employer since July 2008. According to his current supervisor, he shows "utmost respect" to his co-workers and supervisors, is enthusiastic about his duties, and has not had any disciplinary problems (AX D).

Applicant served in the U.S. Army from July 1979 to July 1982. He attended college part-time from about September 1985 to August 2003, and he received a bachelor of science degree (GX 1 at 2; GX 2 at 6; Tr. 44-45). He received a security clearance in December 1983, and it was revalidated in August 1990 and March 1994. He was married in June 1992 and legally separated in April 2007.

In December 1999, Applicant applied for a federal job. He answered "no" to all drug-use questions on his application. In June 2000, he was offered a job, conditioned on a favorable background investigation. During a personal background interview on July 6, 2000, Applicant admitted using marijuana at his high school graduation in 1979, but he denied any other drug use. At some time on or after July 6, 2000, he submitted a supplement to his application, disclosing some unfavorable employment and financial information and a speeding ticket, but not disclosing any illegal drug use (GX 7 at 1). Neither the initial application nor the supplement to the application was offered in

evidence, but Applicant's answers are described in a narrative report from the agency that received them. On the same day as his interview, he submitted a urine sample for drug testing. The sample tested positive for cocaine (GX 7 at 2).

By letter dated July 28, 2000, Applicant was notified that the agency's conditional job offer was rescinded because of the positive drug test (GX 7 at 1, 2, and 6). Applicant testified he received a call asking if he had been to the dentist and informing him his urine sample was "dirty," but he denied being told his urine was "dirty" with cocaine, and he denied receiving a letter rescinding the job offer (Tr. 49, 80-81, 87-88).

After the federal job offer was rescinded, Applicant continued to work for a non-government employer until August 2001. He was unemployed from August to December 2001, and April 2006 to July 2008. During his periods of unemployment, he worked part-time from home as a computer repairman and withdrew funds from his retirement accounts (GX 1 at 3; GX 2 at 6; Tr. 45).

During his unemployment from April 2006 to July 2008, Applicant accumulated numerous delinquent debts. The table below summarizes the evidence regarding the delinquent debts alleged in the SOR.

<b>SOR</b>	<b>Debt</b>	<b>Amount</b>	<b>Status</b>	<b>Evidence</b>
1.a	Homeowners' Assn. (Judgment, Jan 07)	\$695	Paid	GX 3 at 7
1.b	Homeowners' Assn. (Judgment, May 06)	\$914	Paid	GX 3 at 9
1.c	Homeowners' Assn. (Judgment, Aug 05)	\$939	Paid	GX 3 at 6
1.d	Musical Instruments	\$1,000	Making payments	GX 3 at 12; AX C
1.e	Music Store	\$913	Same debt as 1.d	Tr. 62
1.f	Child Support	\$2,110	Paid (garnishment)	AX A at 10; Tr. 46-47
1.g	Home Mortgage	\$52,118	Payments current	GX 3 at 13; Tr. 47
1.h	Home Equity Loan	\$10,588	Payments current	AX A at 11; Tr. 71
1.i	Homeowners' Assn. (Judgment, Feb 03)	\$232	Paid	GX 4 at 2; GX 6 at 3
1.j	Homeowners' Assn. (Judgment, May 08)	\$799	Paid	GX 3 at 11
1.k	Collection Agency	\$949	Same debt as 1.d	Tr. 62
1.l	Student Loan	\$4,000	Deferred	GX 6 at 10; Tr.33
1.m	Cell Phone Bill	\$579	Making payments	AX F; Tr. 48
1.n	Home Mortgage	\$52,879	Same debt as 1.g	Tr. 33, 47

At the hearing, Applicant testified that drugs are not part of his life. On cross-examination by Department Counsel, he testified as follows:

DEPARTMENT COUNSEL (DC): Okay. Now, [Applicant], you deny that you have ever used cocaine?

APPLICANT: Yes.

DC: You've never used cocaine in your life?

APPLICANT: If so, I don't remember. It might have been a mistake, but not in my knowledge.

DC: What do you mean it might have been a mistake?

APPLICANT: If it was done, I – I guess you're talking ten years ago. I don't know exactly what with parties – I know I had past drug tests before. Again, that's why I mentioned that he asked me had I been to a dentist.

. . .

DC: You testified that it may have been possible that you were using cocaine ten years ago.

APPLICANT: It may have been, but I'm not sure and that's why I really basically put down that I denied because I don't really use drugs.

DC: Are you unsure if you've used – if you were using cocaine?

APPLICANT: At that time, I am not sure. Not sure.

DC: When have you used cocaine?

APPLICANT: That I don't even know.

DC: But, there has been a time when you have used cocaine?

APPLICANT: Again, that I don't remember.

DC: But, it's a possibility?

APPLICANT: It may be possible, but I'm not sure.

. . .

DC; Now, if there was a point that you may have used cocaine, where would you have gotten it from:

APPLICANT: You asked me something that I don't remember.

(Tr. 76-80.)

Department Counsel later asked Applicant if he had ever used any illegal drugs. He admitted he used marijuana once at his high school graduation in 1979 (Tr. 85).

### **Policies**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (AG). These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “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). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

## **Analysis**

### **Guideline F, Financial Considerations**

The SOR alleges 14 delinquent debts, including four unsatisfied judgments. The concern under this guideline is set out in AG ¶ 18 as follows:

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.

Several disqualifying conditions under this guideline are relevant. AG ¶ 19(a) is raised by an “inability or unwillingness to satisfy debts.” AG ¶ 19(c) is raised by “a history of not meeting financial obligations.” AG ¶ 19(e) is raised by “consistent spending beyond one’s means, which may be indicated by excessive indebtedness, significant negative cash flow, high debt-to-income ratio, and/or other financial analysis.” Applicant’s financial history raises these three disqualifying conditions, shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. 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. Sep. 22, 2005).

Security concerns based on financial problems can be mitigated by showing that “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.” AG ¶ 20(a). This mitigating condition is not established because Applicant’s debts were numerous, persisted until recently, and did not occur under such circumstances that they are unlikely to recur.

Security concerns under this guideline also can be mitigated by showing that “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.” AG ¶ 20(b). Both prongs, i.e., conditions beyond the person’s

control and responsible conduct, must be established. Applicant's periods of unemployment were beyond his control. There is no evidence that his unemployment from April 2006 to July 2008 was related to his positive urinalysis in December 1999. He acted reasonably, attempting to earn money by self-employment, continuing to seek full-time employment, and using his retirement funds to pay living expenses. I conclude AG ¶ 20(b) is established.

Security concerns under this guideline also can be mitigated by showing that "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." AG ¶ 20(c). This mitigating condition also has two prongs that may be either disjunctive or conjunctive. If the person has received counseling, it must also be shown that there are clear indications the problem is being resolved or under control. However, if the person has not received counseling, this mitigating condition may still apply if there are clear indications that the problem is being resolved or under control. Applicant is not enrolled in a credit counseling program, but his financial problems are being resolved. I conclude AG ¶ 20(c) is established.

Security concerns under this guideline also can be mitigated by showing that "the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts." AG ¶ 20(d). Good faith means acting in a way that shows reasonableness, prudence, honesty, and adherence to duty or obligation. ISCR Case No. 99-0201, 1999 WL 1442346 at \*4 (App. Bd. Oct. 12, 1999).

An applicant is not required, as a matter of law, to establish resolution of each and every debt alleged in the SOR. See ADP Case No. 06-18900 (App. Bd. Jun. 6, 2008). An applicant need only establish a plan to resolve financial problems and take significant actions to implement the plan. ISCR Case No. 07-06482 at 2-3 (App. Bd. May 21, 2008). There also is no requirement that an applicant make payments on all delinquent debts simultaneously, nor is there a requirement that the debts alleged in the SOR be paid first. *Id.*

Applicant has paid or negotiated repayment plans for all the debts alleged in the SOR. He is gainfully employed and financially stable. I conclude AG ¶ 20(d) is established.

### **Guideline E, Personal Conduct**

The Supplemental SOR alleges Applicant falsified an employment application for federal employment and a supplement to that application by not disclosing his cocaine use (Supplemental SOR ¶¶ 2.a and 2.b). It also alleges he falsified his responses during an interview on July 6, 2000, by denying any illegal drug involvement other than his one-time marijuana use in 1979 (Supplemental SOR ¶ 2.c), and he tested positive for cocaine during a pre-employment urinalysis on July 6, 2000 (Supplemental SOR ¶ 2.d). The concern under this guideline is set out in AG ¶ 15 as follows:

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.

The disqualifying condition in AG ¶ 16(a) is relevant to the falsifications alleged in SOR ¶¶ 2.a and 2.b. It is raised by:

[D]eliberate 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 disqualifying condition in AG ¶ 16(b) is relevant to the falsification alleged in SOR ¶ 2.c. It is raised by "deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative."

When a falsification allegation is controverted, as in this case, the government has the burden of proving it. An omission or misstatement, standing alone, does not prove an intentional falsification. An administrative judge must consider the record evidence as a whole to determine an applicant's state of mind at the time of the omission or misstatement. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004).

Applicant denied intentionally falsifying his employment application, his supplement to his employment application, and his answers during a follow-up interview. The record does not contain the employment application submitted by Applicant in December 1999. Thus, I cannot determine whether it asked whether he had ever illegally used a controlled substance, or whether it was similar to the SF 86 and asked if he had done so within the last seven years. The SOR does not allege that his failure to disclose his marijuana use was a falsification. Instead, it alleges only that his failure to disclose any cocaine use was a falsification. However, Applicant's positive urinalysis in July 2000 does not establish that he had used cocaine more than six months earlier when he submitted his application. In the absence of evidence showing the scope of the questions on his employment application and the absence of evidence that Applicant used cocaine before December 1999, I conclude that the falsification alleged in Supplemental SOR ¶ 2.a is not established by substantial evidence.

The record reflects that Applicant was interviewed on July 6, 2000, the day of his urinalysis, and he submitted the supplement to his employment application on or after the date of the interview. Although Applicant denied falsifying the supplement and his answers during the interview, his denial is contradicted by the positive urinalysis and his



evasive answers at the hearing about his cocaine use. The credibility of his hearing testimony claiming lack of memory about a nine-year-old use of cocaine is undermined by his very specific memory of using marijuana at his high school graduation, more than 20 years ago. His claim that he was never notified of his positive urinalysis is implausible, contradicted by the government's documentary evidence, and not persuasive. I conclude that the allegations in Supplemental SOR ¶¶ 2.b and 2.c are established by substantial evidence, and that the disqualifying conditions in AG ¶¶ 16(a) and 16(b) are raised.

Two disqualifying conditions under this guideline are relevant to the illegal cocaine use alleged in SOR ¶ 2.d:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

Applicant's cocaine use shortly before his urinalysis in July 2000 and his repeated efforts to conceal his cocaine use are sufficient to raise the disqualifying conditions in AG ¶ 16(c) and 16(e).

Security concerns raised by false or misleading answers on a security clearance application may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). It appears that Applicant may have volunteered the information about his marijuana use during his interview in July 2000, but he made no efforts to correct his omissions and misleading answers regarding his cocaine use. To the contrary, he persisted in his falsifications at the hearing. This mitigating condition is established for the omission of his marijuana use on his employment application, but not for his repeated failures to disclose his cocaine use.

Security concerns raised by personal conduct also may be mitigated if "the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment." AG ¶ 17(c). Illegal drug use is a serious offense, but Applicant's use of cocaine was nine years ago and there is no evidence it has been repeated. His isolated use of cocaine is mitigated, but his repeated falsifications to conceal it are not.

Security concerns under this guideline may be mitigated if “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.” AG ¶ 17(d). This mitigating condition is not established because Applicant has persistently refused to acknowledge his cocaine use.

Finally, security concerns may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). This mitigating condition is not established because Applicant has done nothing to reduce his vulnerability.

### **Whole Person Concept**

Under the whole person concept, an 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. An 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 have incorporated my comments under Guidelines F and E in my whole person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a mature, well-educated adult. He has served his country for many years, both in and out of uniform. He has held a clearance for many years, apparently without incident. He has overcome the financial adversity triggered by a substantial period of unemployment. His lack of candor about his cocaine use, however, raises grave doubts about his reliability, trustworthiness, and good judgment. After weighing the disqualifying and mitigating conditions under Guidelines F and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his financial history and his isolated cocaine use, but he has not mitigated the security concerns raised by his intentional concealment of his cocaine use. Accordingly, I conclude he has not carried his burden of showing that it is clearly

consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations set forth in the SOR and the Supplemental SOR, as required by Directive ¶ E3.1.25:

SOR Paragraph 1, Guideline F:	FOR APPLICANT
Subparagraphs 1.a-1.n:	For Applicant
Supplemental SOR Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraphs 2.b-2.c:	Against Applicant
Subparagraph 2.d:	For Applicant

### **Conclusion**

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge