



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



In the matter of:)	
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)	ISCR Case No. 09-02545
)	
Applicant for Security Clearance)	

Appearances

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

06/27/2012

Amended Decision

WESLEY, Roger C., Administrative Judge:

Based upon a review of the pleadings, exhibits, and testimony, I conclude that Applicant has mitigated criminal conduct, drug involvement, and personal conduct concerns. Eligibility for access to classified information is granted.

Statement of the Case

On November 3, 2011, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which 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 Applicant, and recommended referral to an administrative judge to determine whether his clearance should be granted, continued, denied, or revoked. 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, 1962), as amended (Directive), and the Adjudicative Guidelines (AGs) implemented by the Department of Defense on September 1, 2006.

Applicant responded to the SOR on November 16, 2011, and requested a hearing. The case was assigned to me on December 22, 2011, and was scheduled for hearing on May 9, 2012. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, deny, or revoke Applicant's security clearance. At the hearing, the Government's case consisted of four exhibits (GEs 1-4); Applicant relied on one witness (himself) and six exhibits (AEs A-F). The transcript (Tr.) was received on May 16, 2012.

Procedural Issues

Before the close of the hearing, Applicant requested the record be kept open to afford him the opportunity to supplement the record with a letter of intent not to use drugs in the future. There being no objections from Department Counsel, and for good cause shown, Applicant was granted seven days to supplement the record. The Government was afforded one day to respond. Applicant did not provide any additional materials.

Summary of Pleadings

Under Guideline J, Applicant is alleged to have been arrested and charged on six occasions between July 2001 and March 2006 for assorted alcohol and drug-related offenses. Under Guideline H, Applicant is alleged to have used, purchased, and sold illegal drugs between 1996 and 2005. And under Guideline E, Applicant allegedly falsified his security clearance application (e-QIP) of November 14, 2008, by omitting his drug use, purchases, and sales.

In his response to the SOR, Applicant admitted all of the allegations covering his arrests, charges, convictions, and drug activities. He denied falsifying his security clearance application.

Findings of Fact

Applicant is a 29-year-old technician who installs weapon systems on Navy ships for a defense contractor. He seeks a security clearance. The allegations covered in the SOR and admitted by Applicant are adopted as relevant and material findings. Additional findings follow.

Background

Applicant has never married and has no children. (GE 1) He claims no military service. He earned advanced college credits from accredited local colleges between August 2001 and June 2002. He earned a diploma in chasis fabrication from a vocational institution in September 2003.

Applicant's drug history

Applicant was introduced to marijuana in 1996 at the age of 13. (GE 2; Tr. 48-49) In high school he succumbed to peer pressure, became a daily user of marijuana, and continued to use the drug until April 2005. (GE 2; Tr. 50) Beginning in 2001, he added cocaine to the drugs he used and used this drug occasionally until August 2003. (GE 2; Tr. 58-59) In June 2005, he began using heroin and used it biweekly on an habitual basis until March 2006. (GE 2; Tr. 58-59)

Applicant used his illegal drugs at friends' houses, generally to make himself feel better. (GE 2) He purchased the drugs from dealers and friends and occasionally sold them to friends for their personal use. (Tr. 59)

Between 2001 and 2006, Applicant was arrested six times for drug-related offenses. (GEs 1-4) In July 2001, he was arrested and charged with possession of marijuana and disturbing the peace. He pleaded "No Contest" to the possession charge and was fined. (GE's 2 and 3) The following year, he was arrested and charged with possession of marijuana (less than an ounce of marijuana), and disturbing the peace/loud noises/fighting in public. He pleaded guilty to the disturbing the peace charge and was fined. (GEs 2 and 3)

In March 2004, Applicant was cited for a third drug-related offense. He had spent the night at a friend's house in another state when police entered the home with a search warrant. After finding a bag of marijuana in the middle of the room that belonged to both Applicant and his friend, police cited Applicant and his friend with marijuana possession. (GEs 2 and 4) Applicant pleaded guilty to the charge and paid a fine of about \$600. (GE 2)

Applicant was cited for a fourth drug-related offense in October 2004. Specifically, he was charged with driving under the influence of drugs or alcohol and driving under the influence of alcohol (DUI), .08 % blood-alcohol content (BAC) or more. (GE's 2 and 3) The charges were later amended to include a count of reckless driving. Applicant pleaded "No Contest" to the reckless driving charge, was fined \$1,000, and was granted summary probation. (GEs 2 and 3) His probation was conditioned on his attending a three-month alcohol education class, which consisted of 30 meetings over a three-month period. (GE 2)

In March 2006, Applicant was arrested and charged with possession of a controlled substance and possession paraphernalia used for narcotics. He was in a parked car with an unidentified woman when police approached the car and spotted methamphetamine on his dashboard. Even though the methamphetamine was not his, he accepted responsibility for it. (GE 2) He pleaded guilty. (GE 2) Eight days later, he was arrested and charged with tampering with electric telephone and cable television equipment, battery, and acting under the influence of a controlled substance. (GEs 2 and 3; Tr. 56-57) Applicant pleaded guilty to acting under the influence of a controlled substance and was ordered by the presiding drug court to attend a two-year drug

rehabilitation program. His plea bargain was combined with his earlier possession charges in March 2006, and sentence terms were consolidated. (GE 2) His sentence term included attendance in a narcotics anonymous (NA) program as a part of his ordered two years of rehabilitation. (Tr. 63-64)

Under the drug court's probation conditions covering his March 2006 arrests, Applicant entered a substance abuse treatment facility (the facility) in April 2006 for opiod abuse and cocaine abuse. (GE 2; Tr. 30-31; 66-67) Facility records document that Applicant regularly participated in this outpatient program for almost two years (April 2006 through March 2008). The program included two phases: a phase one that required him to attend weekly court sessions, submit to random drug testing seven days a week, and attend NA or AA meetings at least three time a week. (GE 3 and AE A) Applicant is credited with successfully completing both phases one and two and continues to play an active role with the drug court's alumni group. (AE A; Tr. 31-38). His continuing efforts with the facility's professional staff include guest speaking at community outreach events where he carries a message of hope and recovery from substance abuse and criminal activity to attendees. In recognition of his ongoing efforts, Applicant received a very positive endorsement from the A facility's program manager and public defender. (AEs A and B)

Besides successfully completing the facility's two-year rehabilitation program, Applicant earned AA chips commemorating his six years of sobriety. (AE F) Applicant continues to be a participating member of his AA home group and has an AA sponsor with whom he maintains close contact. (AE C; Tr. 71) He has spoken at many AA group meetings nationally since 2007 and sponsors many men in his AA program. (AE E) Since entering the facility's rehabilitation program, he continues to work his 12-step program in his AA home group meetings and no longer associates with any of the friends and contacts associated with his years of drug abuse. (Tr. 59-60, 67-68) He assures he stopped using illegal drugs in March 2006, and hasn't resumed his use, purchases, or sales of illegal drugs since that time. (GE 2; Tr. 66-69) His assurances are well corroborated and are accepted.

Applicant's e-QIP omissions

Asked to complete a security clearance application (e-QIP) in November 2008, Applicant answered "no" to question 24(c). This question inquired about illegal purchase, manufacture, trafficking, production, transfer, shipping, receiving, or sale of any illegal substance within the past seven years. By answering "no," he omitted his drug sales between 2001 and 2006. He attributed his omissions to his misunderstanding of the term sales. (GE 2 and AE E; Tr. 40-43, 59-60) Considering he listed all of his drug use in the spaces provided in his 2008 e-QIP and shows overall honesty and candor, Applicant's explanations are plausible ones.

From the whole person perspective, Applicant has established independent probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on the use of illegal substances. His positive endorsements from his

colleagues and girlfriend who are familiar with his past marijuana involvement reinforce his discontinuance assurances. Applicant impresses as being honest and candid about his past drug use and activities in the statement he gave to the investigator from the Office of Personnel Management (OPM) who interviewed him in December 2008. When asked about his prior drug use and purchases he provided detailed explanations without any apparent prompting. His answers reflect honesty and candor.

Overall, Applicant's explanations of misunderstanding of the term sales in the e-QIP he completed in November 2008 are credible and persuasive considering all of the circumstances surrounding his answers and his demonstrated overall honesty and candor about his drug history. Inferences warrant, accordingly, that his omissions of his drug sales were the result of mistake and misunderstanding.

Endorsements

Applicant is well regarded by his site managers (past and present). (AE D; Tr. 34-46) Uniformly, they characterize him as responsible, level-headed, and reliable. (AE D; Tr. 34-46) Both site managers credit him with significant company contributions. They cite his strong working relationships with customers and suppliers when describing his earned reputation for sound judgment and honesty. (AE D) Both praise Applicant for his turning his life around into a solid, productive contributor. (AE D)

Policies

The AGs list guidelines to be used by administrative judges in the decision-making process covering DOHA cases. These guidelines take into account factors that could create a potential conflict of interest for the individual applicant, as well as considerations that could affect the individual's reliability, trustworthiness, and ability to protect classified information. These guidelines include "[c]onditions that could raise a security concern and may be disqualifying" (disqualifying conditions), if any, and many of the "[c]onditions that could mitigate security concerns." These guidelines must be considered before deciding whether or not a security clearance should be granted, continued, or denied. The guidelines do not require administrative judges to place exclusive reliance on the enumerated disqualifying and mitigating conditions in the guidelines in arriving at a decision. Each of the guidelines is to be evaluated in the context of the whole person in accordance with AG ¶ 2(c)

In addition to the relevant AGs, administrative judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in AG ¶ 2(a) of the revised AGs, which are intended to assist the judges in reaching a fair and impartial commonsense decision based upon a careful consideration of the pertinent guidelines within the context of the whole person. The adjudicative process is designed to examine a sufficient period of an applicant's life to enable predictive judgments to be made about whether the applicant is an acceptable security risk.

When evaluating an applicant's conduct, the relevant guidelines are to be considered together with the following AG ¶ 2(a) factors: (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.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Viewing the issues raised and evidence as a whole, the following adjudication policy concerns are pertinent herein:

Criminal Conduct

The Concern: 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. AG ¶ 30.

Drug Involvement

The Concern: 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.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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 ¶ 15.

Burden of Proof

By virtue of the principles and policies framed by the AGs, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. See *United States v. Gaudin*, 515 U.S. 506, 509-511 (1995). As with all adversarial proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record.

The Government's initial burden is twofold: (1) it must prove by substantial evidence any controverted facts alleged in the SOR, and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required materiality showing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, the judge must consider and weigh the cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the evidentiary burden shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation. Based on the requirement of Exec. Or. 10865 that all security clearances be clearly consistent with the national interest, the applicant has the ultimate burden of demonstrating his or her clearance eligibility. "[S]ecurity-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988). And because all security clearances must be clearly consistent with the national interest, the burden of persuasion must remain with the Applicant.

Analysis

Applicant is a dependable technician for his defense contractor who presents with a considerable history of drug involvement and drug-related arrests, charges, and convictions. Principal security issues in this case center on Applicant's arrest history, his drug involvement, and his omissions of his drug sales in his 2008 e-QIP.

Criminal arrest issues

Applicant's arrests, charges, and convictions are drug-related and cover multiple offenses over a five-year period spanning 2001 and 2006. Summarized, Applicant was

arrested, charged, and convicted of drug-related offenses on six occasions between 2001 and 2006.

Applicable disqualifying conditions under the criminal conduct guideline include DC ¶ 31(a), “a single serious crime or multiple lesser offenses,” and DC ¶ 31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.” This disqualifying condition embraces each of Applicant’s proven drug-related offenses.

Applicant’s criminal conduct concerns that are based on his history of recurrent arrests, charges, and convictions between 2001 and 2006 are entitled to mitigation credit. Applicant has avoided any incidents with law enforcement since his last reported arrest of March 2006, and demonstrates added growth and maturity in his professional and personal relationships with his program managers, work colleagues, and AA sponsor.

Applicant may rely on MC ¶ 32(a), “so much time has elapsed since the criminal behavior happened, or it happened under unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment.” Applicant’s arrests and convictions are currently aged and are outweighed by his substantial showing of good judgment and trust demonstrated with his current employer rehabilitation program.

Based on his own rehabilitative efforts to date that include encouraging contributions to his employer and changes in his personal life, the chances of any recurrent arrests and charges are remote. Applicant may take advantage of MC ¶ 32(d) of the criminal conduct guideline, “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.”

Both from a consideration of the applicable guidelines, and from a whole-person perspective, Applicant demonstrates he possesses the strength of overall character, rehabilitation, and maturity to meet all of the minimum requirements under the criminal conduct guideline for continued eligibility to hold a security clearance. Based on the confluence of corrective steps he has taken to date in his rehabilitation program and AA network, he persuasively demonstrates that he has learned important lessons from his lapses in judgment and will work earnestly to avoid any recurrent arrest problems with law enforcement agencies. Taking into account all of the facts and circumstances developed in the record, favorable conclusions warrant with respect to the allegations covered by subparagraphs 1.a through 1.g of the criminal conduct guideline.

Because of insufficient proof of Applicant’s deliberate omission of his drug sales in the e-QIP he completed in November 2008, he mitigates security concerns associated with his omission of his past sales of illegal drugs. Favorable conclusions warrant with respect to the allegations covered by subparagraph 1.h of the criminal conduct guideline.

Drug concerns

Over a ten-year period (between 1996 and March 2006), Applicant used assorted illegal drugs regularly with friends and contacts before permanently discontinuing his use, purchases, and sales in March 2006. Use, purchases, and sales of illegal drugs, (inclusive of marijuana) are proscribed by both state law and federal law (see 21 U.S.C. § 802, *et seq.*

Applicant's admissions of using illegal drugs raise initial security concerns over risks of recurrence as well as judgment issues. On the strength of the evidence presented, several disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," and DC ¶ 25(h), "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use."

While Applicant's recurrent use of illegal drugs over a ten-year period raises some questions over the strength of his abstinence commitments, it is not enough to prevent Applicant's successful mitigation of the issue. Applicant's recurrent use of illegal drugs between 1996 and 2006 has never been resumed since he entered the facility in March 2006 and permanently stopped using illegal drugs.

Applicant has made noticeable gains in his efforts to mitigate his past drug activities. While his multiple drug activities and arrests covered a considerable period (over ten years), he committed himself to an intense drug rehabilitation program under the supervising guidance of the presiding drug court in April 2006, and he has successfully completed the facility's two-year program without any slips or relapses. Applicant may invoke several mitigating conditions under the drug involvement guideline: specifically, MC ¶ 26(a), "the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment," is disjunctive and can be applied to Applicant's situation. Applicant's demonstrated intent not to abuse drugs in the future has some application. Available considerations under ¶ 26(b) include "(3) an appropriate period of abstinence."

Since quitting drugs altogether in March 2006, Applicant ceased contact with persons who use drugs. Accordingly, he may fully invoke MC ¶ 26(b)(1), "disassociation from drug-using associates and contacts," and MC ¶ 26(b)(2), "changing or avoiding the environment where drugs were used," as well to the merits of his situation. To Applicant's credit, he has exhibited open candor about his polysubstance abuse and his associations with friends and contacts involved in drug activities. Applicant's assurances that his drug involvement is a thing of the past are entitled to acceptance based on his displayed sustained abstinence, over an extended six-year period, his active communal involvement in addressing young people about the dangers of drug abuse, and his very strong character references from his drug counselors, site managers, and AA sponsor.

From a whole-person perspective, Applicant has established independent probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on the use of illegal substances. His positive endorsements from his counselors, work colleagues, and AA sponsor familiar with his drug involvement and judgment lapses reinforce his discontinuance assurances.

Considering the record on a whole, at this time there is sufficient credible seasoning of Applicant's mitigation efforts to make predictable judgments about Applicant's ability to avoid drugs and related activities in the foreseeable future. Taking into account all of the facts and circumstances surrounding Applicant's drug activities over a ten-year period, Applicant mitigates security concerns with respect to the allegations covered by subparagraphs 2.a through 2.k of the drug involvement guideline.

Personal conduct concerns

Security concerns over Applicant's judgment, reliability and trustworthiness are raised under Guideline E as the result of his omissions of his drug purchases in the e-QIP he completed in November 2008. By omitting his drug purchases, Applicant failed to furnish potentially material background information about his drug history that was needed for the Government to properly process and evaluate his security clearance application. By answering the questions truthfully, though, he averts any need to consider the application DC ¶ 16(a), "deliberate omission, concealment, or falsification of relevant facts to 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."

Because Applicant's answers to his completed e-QIP are considered truthful ones when made, there is no need either to consider any good-faith corrections in his ensuing OPM interviews. Summarized, Applicant's answers to questions posed by the OPM agent who interviewed him in 2008 were sufficiently reconcilable with his e-QIP answers to questions inquiring about his prior drug involvement and drug-related arrests to enable him to avoid any need to make prompt, good faith corrections.

In evaluating all of the circumstances surrounding Applicant's e-QIP omission, his explanations, and whole-person considerations, his disclosures are sufficient to enable him to convincingly refute or mitigate the deliberate falsification allegations. Questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations, are each core policy concerns of the personal conduct guideline (AG ¶ 15). Overall, Applicant's explanations are persuasive enough to warrant conclusions that the falsification allegations relative to his completed 2008 e-QIP covering his past drug purchases are mitigated.

Also covered under the personal conduct guideline are Applicant's arrests and convictions associated with his drug-related offenses, his omissions from his e-QIP, and his sales of illegal drugs during the same time frame. While mitigated under the criminal

conduct and drug guidelines, these arrests, convictions, omissions, and proven sales reflect pattern rule violations covered by DC ¶ 16 (a)(3), “a pattern of dishonesty or rule violations.” His actions are aged, though, and have not been repeated in the past six years. Mitigation credit is available to him under MC ¶ 17 (c), “ 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.”

Evaluating all of the facts and circumstances developed in the record, Applicant mitigates security concerns associated with the allegations covered by subparagraphs 1.a through 1.h and 2.j of the SOR, that are incorporated in the personal conduct guideline. Considered together, his past drug-related arrests and convictions covered by subparagraphs 3.a and 3.b of the personal conduct guideline are mitigated. Because his e-QIP omissions covered by subparagraph 3.c of the personal conduct guideline were not deliberate, they are successfully refuted.

Formal Findings

In reviewing the allegations of the SOR in the context of the findings of fact, conclusions, and the factors and conditions listed above, I make the following separate formal findings with respect to Applicant's eligibility for a security clearance.

GUIDELINE J (CRIMINAL CONDUCT):	FOR APPLICANT
Subparas. 1.a through 1.h:	For Applicant
GUIDELINE H (DRUG INVOLVEMENT):	FOR APPLICANT
Subparas. 2.a through 2.k:	For Applicant
GUIDELINE E (PERSONAL CONDUCT):	FOR APPLICANT
Subparas. 3.a through 3.c:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue Applicant's security clearance. Clearance is granted.

Roger C. Wesley
Administrative Judge

