



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



In the matter of:	)	
	)	
XXXXXXXXXXXX, XXXXX	)	ISCR Case No. 09-05111
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Stephanie Hess, Esq., Department Counsel  
For Applicant: *Pro se*

May 17, 2011

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline E (personal conduct). Clearance is denied.

**Statement of the Case**

On August 5, 2008, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On June 10, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline E (personal conduct). 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.

Applicant answered the SOR on June 22, 2010, and requested a hearing before an administrative judge. DOHA received his response on June 25, 2010. Department Counsel was prepared to proceed on July 20, 2010. The case was initially assigned to another administrative judge on July 27, 2010; and was reassigned to me on August 8, 2010. DOHA issued a notice of hearing on September 7, 2010, scheduling the hearing for September 28, 2010. The hearing was held as scheduled.

The Government offered Government Exhibits (GE) 1 through 7, which were received without objection. The Applicant offered Applicant Exhibits (AE) A through M, which were received without objection, and he testified on his own behalf. DOHA received the hearing transcript (Tr.) on October 6, 2010.

### **Findings of Fact**

Applicant admitted all of the SOR allegations. His admissions are incorporated as findings of fact. After a complete and thorough review of the evidence, I make the following additional findings of fact.

### **Background Information**

Applicant is a 32-year-old custodian, who has worked for a defense contractor since August 2008. He seeks a security clearance to enhance his position within his company. A clearance would allow Applicant access to secure areas without the need for an escort. He also holds another job as lead custodian with his father's cleaning company. (GE 1, Tr. 16-20.)

Applicant graduated from high school in May 1997. He attended a nine-month trade school course from January 2006 to September 2006, and was awarded a veterinary assistant certificate. He has never married; however, he lives with a woman and they have two minor children together. (GE 1, Tr. 20-27.)

### **Personal Conduct**

The SOR lists ten separate allegations covering a range of conduct spanning the ten-year period from 1998 to 2008. Such conduct includes drug involvement, traffic infractions to include driving under the influence (DUI), and falsification of his August 2008 e-QIP. (GE 1 – GE 7.) These allegations are not in dispute and a brief description of each occurrence follows:

#### Drug Use/Involvement

Applicant used marijuana with varying frequency from 1998 to 2004. He estimated that he used marijuana three times a week during that six-year period. Applicant stopped using marijuana shortly after his daughter was born in July 2003 "realizing that [he] needed to change [his] ways." He adamantly asserted that he has not used marijuana since 2004 and has no intention of using it in the future. (GE 2(I-20, I-22), GE 4, Tr. 27-30, 62.)

In February 1998, Applicant was charged with (1) possession of marijuana, (2) possession of drug paraphernalia, and (3) failure to appear. He was found guilty of possession of drug paraphernalia and ordered to pay a fine and obtain counseling. The remaining charges were dismissed. Applicant stated he was about 19 years old at the time of this arrest and was "young and dumb." (GE 2(I-19), Tr. 30-31, 62-63.)

In June 2001, Applicant was charged in two separate cases. In the first case, he was charged with (1) assault, (2) criminal damage, and (3) possession of drug paraphernalia. He was found guilty of criminal damage and the remaining charges were dismissed. In the second case, he was charged with (1) second degree assault, (2) third degree assault, and (3) criminal damage. He was found guilty of second degree assault and criminal damage. The remaining charge was dismissed. As a result of these convictions, he was sentenced to 30 days in jail, ordered to pay a fine and court costs, ordered to obtain counseling, and was placed on 12 months probation. As of the date the SOR was issued, Applicant had not paid his fine and court costs. Applicant stated he attended anger management counseling which he described as "somewhat helpful." The charges stem from a party at night that got out of hand and evolved into a "big fight." (GE 2(I-17, I-19), Tr. 31-34, 63-65.)

In March 2004, Applicant was charged with possession of marijuana. He pled guilty to the lesser offense of drug paraphernalia possession. He was ordered to pay a fine and obtain counseling, and was placed on 12 months probation. As of the date the SOR was issued, Applicant had not paid his fine. Applicant stated that he was pulled over by the police for a traffic-related offense. The police searched his car and discovered "seeds in the car" which they considered paraphernalia. (GE 2(I-16, I-18), Tr. 34-36, 65.)

#### Traffic Infractions/DUI

In April 2006, Applicant was charged with (1) improper light on license plate, and (2) driving with a suspended license for failure to appear or pay fines. He pled guilty to both charges and was fined. Applicant stated that he paid this fine. (GE 2(I-17), Tr. 36-38, 66.)

In November 2008, Applicant was arrested and charged with (1) speeding 22 miles per hour over posted limit, (2) DUI, and (3) DUI with BAC greater than .08. He pled guilty to DUI and was sentenced to one day in jail, ordered to pay a fine and court costs, ordered to obtain alcohol screening and have an interlock device installed on his vehicle, and was placed on probation. The remaining charges were dismissed. Applicant is no longer required to have the interlock on his car and is making monthly payments to pay down his fine. He promptly reported his DUI arrest to his Facility Security Officer, who made a follow-up report. (GE 2(I-16), GE 7, AE A, Tr. 38-42, 60-61, 66-67.)

### Falsification of e-QIP

Applicant falsified his August 2008 e-QIP in four separate areas. When queried whether he had ever been charged with or convicted of any offense related to alcohol or drugs, he responded “no.” He deliberately failed to respond truthfully by not listing his drug and alcohol arrests and convictions, discussed *supra*. When queried whether he had been arrested for, charged with, or convicted with any offenses not listed in the last seven years, he responded “no.” He deliberately failed to respond truthfully by not listing his April 2006 charge for improper light on his license plate and driving with a suspended license for failure to appear and pay fines.

When queried whether he had ever illegally used any controlled substance such as marijuana in the last seven years, he responded “no.” He deliberately failed to respond truthfully by not listing his marijuana use, discussed *supra*. When queried whether he had been over 180 days delinquent in the last seven years or was currently over 90 days delinquent on any debt, he answered “no.” He deliberately failed to respond truthfully by not listing 12 separate debts that were in a collection or past-due status. (Tr. 42-60.)

By way of explanation, Applicant stated, “I was so anxious to get the job and I was overwhelmed by getting accepted and getting to that point that I basically rushed through the e-QIP which I know was a mistake and I’m aware of that now but I was so excited to actually get a start on a positive aspect of my life that I just – I rushed through it.” (Tr. 52-53.)

### **Character Evidence**

Applicant’s father testified on his behalf. He retired from the U.S. Army as a sergeant first class (E-7) after serving a 20-year career. Applicant’s father stated that the Applicant has matured significantly since graduating from high school. He opined the murder of his son’s friend in 1997 greatly impacted him causing him to focus on school and a career. He noted that his son is a “good dad,” who tries to do what is best for his children. His son is doing well at his current job and has received a number of “kudos” from his employer. Applicant attends church where his father is an ordained minister. (Tr. 75-81.)

Applicant submitted four work-related reference letters. The collective sense of these reference letters is that the authors view Applicant as a good worker and as a valued and trusted employee. (AE E- H.) Applicant also submitted four certificates of achievement, a \$500 bonus award, and a certification by education request. (AE I – M.)

### **Policies**

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of

Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or 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 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed 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 or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). 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). “[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

Under Guideline E, the concern is that 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. (AG ¶ 15.)

AG ¶ 16 describes two conditions that could raise a security concern and may be disqualifying in this case:

(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; and

(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.

The Government established through Applicant's admissions and its evidence all ten allegations alleged under this concern. The allegations covered a spectrum of misconduct spanning a ten-year period. Of particular concern are Applicant's recent falsifications when completing his e-QIP.<sup>1</sup> The Government established through the evidence presented the disqualifying condition in AG ¶¶ 16(a) and 16(c).

Seven personal conduct mitigation conditions under AG ¶ 17 are potentially applicable:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

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<sup>1</sup> Deliberate and materially false answers on a security clearance application violate 18 U.S.C. § 1001. The Supreme Court defined "materiality" in *United States v. Gaudin*, 515 U.S. 506, 512 (1995): as a statement having a "natural tendency to influence, or [be] capable of influencing, the decision making body to which it is addressed." See also *United States v. McLaughlin*, 386 F.3d 547, 553 (3d Cir. 2004). Making a false statement under 18 U.S.C. § 1001 is a serious crime, a felony (the maximum potential sentence includes confinement for five years and a \$10,000 fine).

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(d) 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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

I have reviewed the mitigating conditions under this concern and conclude none of them fully apply. Applicant's drug involvement spanned a six-year period, which included his using marijuana two to three times a week during that time frame as well as incurring three separate criminal arrests or charges involving marijuana in 1998, 2001 and 2004. His involvement with substance abuse was not limited to marijuana. Alcohol was also involved in his 2001 assault arrest and in his 2008 DUI arrest.

In 2006, he was convicted of driving with improper light on license plate and driving on a suspended license for failure to appear or pay fines. In light of Applicant's e-QIP falsifications, I am less inclined to accept his assertion that his last drug use occurred in 2004. The ongoing and repeated nature of his substance abuse history and lack corroborating evidence leaves me with doubt that Applicant's substance abuse problems are truly behind him.

More recent and serious are Applicant's deliberate falsifications of his e-QIP. A statement is false when it is made deliberately, knowingly, and willfully. An omission of relevant and material information is not deliberate if the person genuinely forgot about it, inadvertently overlooked it, misunderstood the question, or genuinely thought the information did not need to be reported. Here, Applicant knew of his reportable conduct,

including his drug and alcohol history as well as his financial problems, and chose not to disclose them. He certified his answers to be true and correct. Had Applicant's information been relied upon without verification, he may well have been successfully vetted for a security clearance. Regardless of the reason Applicant chose not to be forthcoming, the process does not allow for applicants to pick and choose which questions they will answer correctly. When applicants lie on their security clearance applications, as Applicant did in this case, they seriously undermine the process.<sup>2</sup>

Under the totality of the circumstances, I find Applicant's behavior is recent and not isolated. Considering his behavior, the nature and seriousness of his misconduct, his exercise of repeated poor judgment and other factors identified *supra*, I find his favorable information is not sufficient to mitigate Guideline E security concerns. His conduct raises questions about his ability and willingness to follow the law, and ultimately, to protect classified information. His conduct also raises serious doubts and questions about his judgment. Further time and additional evidence is needed before my concerns or doubts regarding Applicant's questionable judgment, reliability, and trustworthiness are satisfied.

To conclude, Applicant presented insufficient evidence to explain, extenuate, or refute personal conduct security concerns. 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"<sup>3</sup> and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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<sup>2</sup> The Appeal Board has cogently explained the process for analyzing falsification cases, stating:

(a) when a falsification allegation is controverted, Department Counsel has the burden of proving falsification; (b) proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred; and (c) a Judge must consider the record evidence as a whole to determine whether there is direct or circumstantial evidence concerning the applicant's intent or state of mind at the time the omission occurred. [Moreover], it was legally permissible for the Judge to conclude Department Counsel had established a prima facie case under Guideline E and the burden of persuasion had shifted to the applicant to present evidence to explain the omission.

ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006) (citing ISCR Case No. 02-23133 (App. Bd. June 9, 2004)).

<sup>3</sup> See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).



### **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 E:	AGAINST APPLICANT
Subparagraphs 1a - 1j:	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 or continue eligibility for a security clearance for Applicant. Eligibility for access to sensitive information is denied.

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ROBERT J. TUIDER  
Administrative Judge