



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 09-06080
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

February 25, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines H (drug involvement) and E (personal conduct). Clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on February 2, 2009. On June 29, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guidelines H (drug involvement) and E (personal conduct). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated 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 SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant answered the SOR on July 21, 2010, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated October 5, 2010, was provided to him by cover letter dated October 6, 2010. Applicant received his copy of the FORM on October 13, 2010. He was given 30 days from the date he received the FORM to submit any objections, and information in mitigation or extenuation. He submitted additional information within the 30-day period. The case was assigned to me on November 18, 2010.

Findings of Fact

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

Applicant is a 44-year-old technician, who has been employed by a defense contractor since December 2003.¹ Information contained in the FORM indicates that he attended a vocational school from January 1989 to May 1990 and earned an airframe and power plant certificate. The FORM does not reflect any further education beyond vocational school. Applicant completed three years of enlisted service in the U.S. Army from October 1985 to October 1988 and was honorably discharged as a specialist (pay grade E-4). (Item 7.) He married his wife in February 1991, and has two teenage children.

The Defense Industrial Security Clearance Office (DISCR) suspended Applicant's security clearance in May 2009 after being notified that another government agency (AGA) denied him access to Sensitive Compartmented Information in August 2008, discussed *infra*. (Item 6.) He seeks to reinstate his security clearance.

Applicant has a four and one-half year episodic history of marijuana use from about September 2003 to about April 2008. He also used prescription Tylenol that was prescribed to his wife from about May 2005 to about October 2005. This drug use occurred during a time period when Applicant held a security clearance. Applicant had been granted an interim DoD security clearance in December 2003, which became permanent in September 2004. He was again granted an interim DoD security clearance in November 2006, which became permanent in October 2007. As noted *supra*, DISCR suspended his clearance in August 2008.

¹ Background information is derived from Application's e-QIP unless otherwise stated.

In 2004 while on a 90-day work assignment in the Middle East, Applicant purchased two AK-47 rifles for \$500 at a flea market in Iraq. He was not authorized to make these purchases nor was he designated as an armed contractor. Applicant claimed that he purchased these weapons for protection and to serve as a deterrent on an upcoming trip from Kuwait to Iraq. Furthermore, he withheld this information from his supervisor for fear of getting caught. (Items 6 and 7.)

In May 2008, Applicant completed a security clearance application (SF-86) seeking access to Sensitive Compartmented Information with an AGA. In that SF-86, he denied any illegal drug use. However, during a security testing session, Applicant admitted using marijuana about two times a month from September 2003 to 2005. He further advised that his brother gave him a 35 mm canister half full of marijuana in 2004, and that he used this marijuana once every week and a half to two weeks from 2005 to April 2008. It was during this testing session that Applicant also admitted misusing his wife's Tylenol prescription and his illegal purchase of AK-47s in Iraq. The AGA disapproved Applicant's access to classified information in August 2008. (Items 6 and 7.)

When Applicant completed three separate security applications -- a February 2009 e-QIP, a November 2006 SF-86, and a December 2003 SF-86, he deliberately failed to disclose any history of his past drug use or drug use while holding a security clearance. Such denials included his failing to disclose his marijuana use from 2003 to 2008 and his misuse of prescription drugs in 2005. As noted *supra*, Applicant's drug use occurred while holding a security clearance and when queried on this topic, he denied illegal drug use while holding a security clearance.

Applicant explained that his marijuana use and misuse of prescription drugs occurred some years ago, was infrequent, and was limited to his own personal use at home. He added that he made efforts to correct his denial of past drug use during his security testing session with an AGA. Lastly, and with regard to his illegal purchase of AK-47s in Iraq, he said he was in a unique situation in a dangerous country, adding that he did not bring the firearms to the United States. He "volunteered" this information at his security testing session and the purchase of weapons occurred under unique circumstances and is not likely to reoccur. (SOR Response.)

In further mitigation, Applicant reiterated that his drug use discontinued in April 2008, that contact with his brother is limited to family gatherings, and that no drug use has taken place at these gatherings. Applicant explained that his wife was prescribed Tylenol after a December 2004 hysterectomy and that he used her prescription without her knowledge to relieve back pain. Applicant stated that he does not associate with any known drug users to his knowledge. Regarding falsification allegations, Applicant stated his actions were "not intended as deliberate defiance to anyone person(s) or agency." He indicated that he cooperated during his security testing session with an AGA and will continue to act in good faith, provide truthful answers, and comply with rules and regulations to correct his errors and "reinstate" his integrity. (FORM response.)

Applicant submitted two reference letters. The first was from his son's scoutmaster and the second was from a close personal friend. The authors have known the Applicant for five and ten years, respectively, and discuss his positive attributes such as integrity and honesty. Lastly, Applicant submitted a signed statement of intent with automatic revocation of clearance for any drug violation. (FORM response.)

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 (4th 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

Drug Involvement

Under Guideline H, the concern is that an Applicant's 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.)

The Government established its case under Guideline H through Applicant's admissions and the evidence presented. A review of the evidence supports application of three drug involvement disqualifying conditions. AG ¶ 25(a): "any drug abuse (see above definition);"² AG ¶ 25(c) "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia," and AG 25(g) ¶ "any illegal drug use after being granted a security clearance" apply.

Considering the totality of the circumstances in this case, none of the drug involvement mitigating conditions fully apply: AG ¶ 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" does not apply. While Applicant states that his drug use occurred "some years ago" and was "infrequent," Applicant's last known drug use occurred in April 2008 at age 41. Before that, Applicant had been using marijuana for almost five years. See timeline discussion under AG ¶ 26(c) *infra*. The fact that Applicant used marijuana and misused prescription drugs while going through the security clearance

² AG ¶ 24(b) defines drug abuse as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medication direction.

process three times and after receiving a clearance clearly casts doubt on his good judgment.

I note that Applicant's drug use only came to light after he was subjected to an AGA's security testing session. In three separate security clearance applications in December 2003, November 2006, and February 2009, Applicant denied using drugs, which he knew to be false. During the almost five-year timeframe he used drugs from 2003 to 2008, he was granted two interim and two permanent security clearances. At the time Applicant used drugs, he was a mature adult, a father and husband, and a trusted employee. Furthermore, this was not an isolated incident, but rather a course of conduct that spanned almost five years. All of these factors, when taken as a whole, demonstrate a severe lack of judgment and cast doubt on Applicant's reliability and trustworthiness.

Concerning AG ¶ 26(a), there are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the Directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."³ There is no evidence from qualified medical professionals or other individuals corroborating Applicant's statement that he is drug-free and leading a life of

³ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

sobriety or that he is not engaged in further misconduct. Again, my analysis is limited to those facts contained in the record.⁴

AG ¶ 26(b): “a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation” partially applies. Applicant submitted a signed statement of intent with automatic revocation of clearance for any violation. However, I was unable to make an in-person assessment of Applicant’s credibility regarding his assertion that he no longer uses drugs or associates with drug users and has changed his environment.

I am unable to evaluate further the surrounding circumstances of Applicant’s drug use and the sincerity and determination of his reported reform. This assessment is warranted in light of the fact that Applicant’s credibility became a significant issue as a result of his falsifications, discussed *infra*. I note that less than one year transpired between Applicant’s last marijuana use in April 2008 and the submission of his February 2009 e-QIP, less than two years transpired between his last marijuana use and his June 2010 SOR, and less than three years transpired between his last marijuana use and the date of the FORM. AG ¶¶ 25(c) and 25(d) are not applicable.

Personal Conduct

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.)

The Government established its case under Guideline E through Applicant’s admissions and the evidence presented. 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

⁴In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information 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. This includes but is not limited to considerations of:

(3) a pattern of dishonesty or rule violations.

Applicant deliberately provided false information or omitted required information on his December 2003, November 2006, and February 2009 security clearance applications. He also purchased two AK-47s on company assignment at a flea market in the Middle East in 2004. Such acquisition of weapons was in violation of applicable rules regarding acquisition and retention of weapons. The Government established through the evidence presented the disqualifying condition in AG ¶¶ 16(a)⁵ and 16(d).

AG ¶ 17 lists seven potential mitigating conditions under this concern:

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

(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

⁵ 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). Applicant's failure to disclose past drug use, misuse of prescription drugs, and drug use while holding a security clearance are sufficiently serious to potentially jeopardize approval of his security clearance. 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).

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.

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. Applicant admitted his falsifications and as such cannot claim that he forgot, inadvertently overlooked, misunderstood, or genuinely thought such information did not need to be reported. Had Applicant's information been relied upon without verification, he may well have 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 answers they will answer correctly. When applicants lie on their security clearance applications, they seriously undermine the process as Applicant did in this case.

Concerns under this Guideline are not limited to falsification. Applicant's marijuana use and misuse of prescription drugs while holding a security clearance are cross-alleged in the SOR. My discussion *supra* regarding this conduct is incorporated under this section. Also, alleged and admitted by Applicant is his being denied access to classified information in 2008 by an AGA. This disapproval was based on Applicant's marijuana use, misuse of prescription drugs, and purchase of AK-47s in Iraq. The collective behavior discussed under this section raises significant concerns regarding Applicant's ability or willingness to comply with rules and regulations. I find that none of the mitigating conditions fully apply.⁶

⁶ 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.

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 relevant circumstances. The 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.

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. AG ¶ 2(c).

The comments in the Analysis section of this decision are incorporated in the whole-person concept analysis. Applicant's history of drug use and misuse of prescription drugs while holding a security clearance is a significant violation of the trust and confidence placed in him by the Government. Furthermore, his unauthorized purchase of two AK-47s while in Iraq was a further breach of conduct. Applicant's history of drug use and purchase of AK-47s was only uncovered after being vetted for Sensitive Compartmented Information by an AGA. Applicant's deliberate repeated failure to disclose information on his security clearance applications is serious, recent, and not mitigated. As such, I have concerns about his current ability and willingness to comply with laws, rules, and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole-person, I conclude he has not mitigated security concerns pertaining to financial considerations and personal conduct.

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 and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

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

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
Subparagraphs 1a – 1f:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2a – 2h:	Against Applicant

Decision

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

ROBERT J. TUIDER
Administrative Judge