



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



In the matter of:)	
)	
)	ISCR Case No. 10-02110
)	
Applicant for Security Clearance)	

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

August 11, 2011

Decision

RICCIARDELLO, Carol G., Administrative Judge:

Applicant failed to mitigate the Government’s security concerns under Guidelines F, Financial Considerations, J, Criminal Conduct, and E, Personal Conduct. Applicant’s eligibility for a security clearance is denied.

Statement of the Case

On February 8, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines F, J, and E. 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) effective within the Department of Defense on September 1, 2006.

Applicant answered the SOR on March 10, 2011, and requested a hearing before an administrative judge. The case was assigned to me on April 13, 2011. DOHA issued

a Notice of Hearing on April 19, 2011. I convened the hearing as scheduled on May 26, 2011. The Government offered Exhibits (GE) 1 through 6, and they were admitted into evidence without objections. Applicant did not offer any documents. DOHA received the hearing transcript (Tr.) on June 2, 2011.

Procedural Issues

During the hearing, it became known that Applicant had at one time worked at DOHA as a contractor. I did not recognize Applicant until this fact was disclosed. At that point, Applicant confirmed that he had had interactions with me when he worked at DOHA. I advised Applicant that I remembered him and did not recall any negative contact. To the contrary, I remembered him as being helpful. However, I advised him that, upon his request, I would recuse myself from the proceeding, and another administrative judge would be detailed to his case. I told him that there would be no negative implication if he chose to have another administrative judge. I advised him that this was his right. Applicant chose to waive his rights and elected to have me continue with the case. I granted his request.¹

Department Counsel withdrew SOR ¶ 2.a.

Findings of Fact

Applicant admitted all of the allegations in SOR except ¶¶ 1.f and 1.k. I incorporated his admissions into the findings of fact. After a thorough and careful review of the pleadings, exhibits, and testimony, I make the following findings of fact.

Applicant is a 42 years old. He was married in 1994 and his marriage was voided in 2004. When he filed for divorce he learned his wife had not been legally divorced from her first husband. Applicant was unaware of this when they married. She had five children when they married. Together they have a 10-year-old son and a 16-year-old daughter. Applicant has custody of his two children. He had custody of one of his stepchildren until 2008. Applicant served in the Army from 1989 to 1999. He was honorably discharged.²

Applicant was granted a secret security clearance in about 2000. In approximately 2003 he began using cocaine. He obtained the cocaine from friends. He was going through a divorce at the time and was not able to see his children. He used cocaine, on the weekends, to manage his stress. At the time, he was working as a contractor for the federal government. He used cocaine four to five times a month from about 2003 until he was arrested in October 2006. He did not use any other types of illegal drugs.³

¹ Tr. 60-66.

² Tr. 24, 28-29.

³ Tr. 25, 29-43.

In October 2006, Applicant's friend wanted to buy cocaine. He and his friend had used cocaine together in the past. He asked Applicant if he could buy some cocaine for him. Applicant met him at a predetermined location to sell him the drugs. He estimated he had approximately 27 grams of cocaine, worth about \$600 to \$700. In the past, he had sold his friend cocaine two or three times. He did not make a profit from the sale. Applicant purchased the cocaine from a street seller that he found hanging out in the inner city. The drug transaction was arranged by his friend who wanted to buy some cocaine. It was actually a law enforcement sting operation. Applicant was arrested and charged with three felony counts of manufacture, sale, and possession of a controlled substance. Applicant explained that because he had sold cocaine twice, presumably to the same friend, he was charged with three counts.⁴

Applicant pled guilty to felony possession of a controlled substance and was sentenced to six months in jail, suspended, and supervised probation for one year. At the suggestion of his attorney, he attended drug counseling and therapy for 12-weeks, which he successfully completed. He has not used any illegal drugs since he was arrested in October 2006.⁵

Applicant lost his job because of his arrest and felony conviction. He had been working two jobs and earning approximately \$85,000. He had been paying his bills until he was arrested.⁶

In February 2007, Applicant obtained a job paying about \$11 to \$12 an hour and a second part-time job that paid about \$9 an hour. In August 2009, he found a better job, but was laid-off in February 2011, because the company lost their contract. He recently got a job with a federal contractor earning about \$51,000. He stated that he told his new employer that he had some past issues.⁷

Applicant was unable to pay his bills when he lost his job due to his drug arrest and conviction. He stated that the judgment in SOR ¶ 1.a (\$2,606) is the same debt as ¶ 1.f (\$2,394), and SOR ¶ 1.k (\$15,424) is a consolidation of the debts in SOR ¶ 1.b and ¶ 1.c.⁸ He did not provide any documentation to verify his assertions. Applicant has approximately \$70,000 in delinquent debts that he admitted he owes. He disputed about \$16,000 of delinquent debts as duplicates. He has not paid any of them. He stated he filed for bankruptcy on May 7, 2011. He anticipated the debts will be discharged in

⁴ Tr. 29-43.

⁵ Tr. 27, 29-43; GE 3.

⁶ Tr. 26, 46-48, 52.

⁷ Tr. 20, 54, 55-59, 72-75.

⁸ GE 5 verifies the debts Applicant denied.

bankruptcy in about a month. He completed the mandatory financial counseling required when filing for bankruptcy.⁹

On September 18, 2009, Applicant completed a security clearance application (SCA). Section 23 asked about his use of illegal drugs or drug activity. He admitted his prior drug use and listed he used cocaine from October 2005 to October 2006. He did not list he used cocaine from at least 2003 to October 2006. When Applicant was interviewed by an authorized investigator, he disclosed his drug use was from October 2005 to September 2006.¹⁰

Applicant attributed the different dates to an honest mistake and misunderstanding the question. He stated he initially made a mistake and thought he would be able to correct his mistake at his hearing. He disclosed the earlier drug usage through interrogatories pertaining to the drug rehabilitation program he completed. In those documents, he disclosed his drug use began in 2003 until his arrest in 2006. Applicant credibly testified that he was not trying to minimize or hide his drug use from the government. I find he did not intentionally or deliberately provide false or misleading statements to the government.

Applicant admitted he used remarkably bad judgment when he used illegal drugs. He decided to file for bankruptcy as a way of putting his finances in order. He is a hard worker and provides for his family. He is embarrassed and sorry for his past conduct, but has to move forward.¹¹

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are used in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole-person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

⁹ Tr. 43-57, 67-68.

¹⁰ Tr. 70, 80-99.

¹¹ Tr. 21.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that “[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, an “applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel and has the ultimate burden of persuasion to obtain a favorable security decision.”

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern for personal conduct;

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 ¶ 16 describes conditions that could raise a security concern and may be disqualifying. I find the following potentially applicable:

(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;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging activities which, if known, may affect the person's personal, professional, or community standing.

Applicant listed on his SCA that he used cocaine from October 2005 to October 2006 and while holding a security clearance during that period. It is alleged that Applicant deliberately failed to list that he used cocaine from 2003 to at least October 2006. He provided documents to the government admitting his drug use began in 2003 and he was not trying to hide the earlier date, but made a mistake. I have considered all of the evidence and Applicant's testimony and find him credible and that he did not deliberately misrepresent the period of time he used cocaine. I find for him regarding the falsification allegations. Therefore, none of the above disqualifying conditions apply for SOR ¶¶ 3.c, 3.d, and 3.e.

Applicant used cocaine while holding a security clearance from at least 2003 until he was arrested in October 2006. He was charged with three felony counts of manufacture, sale, and possession of a controlled substance. He was found guilty of the amended charge of felony possession of a controlled substance. He was sentenced to six months in jail, which was suspended, and one year supervised probation. Those charges may make him vulnerable if known in the community. I find disqualifying condition AG ¶ 16(e) applies.

The guideline also includes conditions that could mitigate security concerns arising from personal conduct. I have considered the following mitigating conditions under AG ¶ 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;

(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; and

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

Applicant's felony conviction for possession of cocaine is serious. He regularly used cocaine from 2003 to October 2006. He did not stop until he was arrested. During that entire time he was entrusted with a security clearance and repeatedly and regularly violated that trust. He used the illegal drug because he was going through a stressful time in his life. He has completed a drug rehabilitation program. He appears to be putting his life back together and no longer using drugs. He acknowledged he made serious mistakes. I find AG ¶¶ 17(d) and 17(e) partially apply, in that he has taken some positive steps to change his past behavior and reduce his vulnerability to exploitation, manipulation, or duress. It is unclear if Applicant still associates with those who use drugs. I find that his criminal activity and his association with persons involved in criminal activity did not occur under unique circumstances. His drug use, especially while holding a security clearance, and his criminal activity casts doubt on his reliability, trustworthiness, and good judgment. Considering the length of time that he used cocaine while holding a security clearance, I question his willingness to comply with rules and regulations. I find AG ¶¶ 17(c) does not apply.

Guideline J, Criminal Conduct

AG ¶ 30 sets out the security concern for criminal conduct:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.

I have considered the disqualifying conditions under Criminal Conduct AG ¶ 31 and the following are potentially applicable:

- (a) a single serious crime or multiple lesser offense; and
- (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.

Applicant was arrested in October 2006 and charged with three counts of manufacture, sale, and possession of a controlled substance. He pled guilty to an amended charge of possession of a controlled substance, a felony. The above disqualifying conditions apply.

I have also considered all of the mitigating conditions for criminal conduct under AG ¶ 32 and the following are potentially applicable:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur

and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) 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.

Applicant pled guilty to felony possession of cocaine. He was caught in a sting operation selling cocaine to his friend. He admitted he had done it before. The same comments and analysis that were discussed under the Personal Conduct guideline mitigating conditions apply under the Criminal Conduct mitigating conditions. Applicant's actions were ongoing and serious. His use of cocaine occurred while he worked as a contractor for the federal government and occurred over a three-year period. His actions did not happen under unique circumstances and cast doubt on his reliability, trustworthiness, and good judgment. I find AG ¶ 32(a) does not apply. There is evidence that he is working, taking care of his children, and has completed a drug rehabilitation program. He is remorseful and admitted he made a serious mistake. I find AG ¶ 32(d) applies.

Guideline F, Financial Considerations

The security concern relating to the guideline for Financial Considerations is set out in AG ¶ 18:

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.

The guideline notes several disqualifying conditions that could raise security concerns under AG ¶ 19. Two are potentially applicable in this case:

(a) inability or unwillingness to satisfy debts; and

(c) a history of not meeting financial obligations.

Applicant has approximately \$70,000 in delinquent debt that he admitted he owes and is unable to pay. His debts became delinquent when he lost his job in October 2006 due to his drug arrest and conviction. I find there is sufficient evidence to raise the above disqualifying conditions.

The guideline also includes conditions that could mitigate security concerns arising from financial difficulties. The following five mitigating conditions under AG ¶ 20 are potentially applicable:

- (a) 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;
- (b) 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;
- (c) 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;
- (d) the individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts; and
- (e) the individual has a reasonable basis to dispute the legitimacy of the past-due debt which is the cause of the problem and provides documented proof to substantiate the basis of the dispute or provides evidence of actions to resolve the issue.

Applicant has not resolved his delinquent debts. He indicated he filed for bankruptcy and anticipated his debts would be discharged. His debts remain current because he has not paid or had them discharged. I find AG ¶ 20(a) does not apply. Applicant's financial problems are the direct result of his criminal conduct. He lost his job and ability to pay his debts because he was arrested for selling cocaine to a friend. His financial problems are not a result of conditions that were beyond his control. I find AG ¶ 20(b) does not apply. Applicant did not provide any supporting documents to show the current status of his bankruptcy. He did not provide evidence that he has paid any of the alleged delinquent debts. The only financial counseling he has participated in was through the bankruptcy proceeding. At this time, it is too early to conclude that there are clear indications that his financial problems are being resolved or under control and there is insufficient evidence to document that he has made a good-faith effort to pay or resolve his obligations. I find AG ¶ 20(c) partially applies and AG ¶ 20(d) does not apply. He stated that certain debts alleged were duplicates, but he did not provide any supporting documentation to substantiate his dispute or evidence of his actions to resolve the issue, which evidence is necessary to trigger the application of AG ¶ 20(e).

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all the circumstances. 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.

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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I have incorporated my comments under Guidelines E, J, and F in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant was experiencing stress due to marital problems and a pending divorce. He was supporting his children and stepchildren. He began using cocaine due to the stress. He regularly used cocaine from 2003 to October 2006. During this time, he held a security clearance and was working for a federal contractor. He was arrested in a sting operation when he sold cocaine to a friend. He pled guilty to felony possession of cocaine and completed the terms of his sentence, including probation and a drug rehabilitation program. He lost his job due to his arrest and conviction and was subsequently unable to pay his debts. He stated he filed bankruptcy, but it has not been completed. Applicant is working again and has custody of his two children. He is putting his life back on track. He acknowledged his errors and admitted his mistakes. However, Applicant was previously entrusted with a security clearance and for a three-year-period he violated that privilege by using cocaine while he was working for a federal contractor. Although he is turning his life around and has taken steps to rehabilitate himself, it is not enough to mitigate his repeated conduct under the circumstances. Overall, the record evidence leaves me with questions and doubts about Applicant's eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising under the guidelines for Personal Conduct, Criminal Conduct and Financial Considerations.

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 F:	AGAINST APPLICANT
Subparagraphs 1.a-1.m:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraph 2.a:	Withdrawn
Subparagraph 2.b:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraph 3.a:	Against Applicant
Subparagraph 3.b:	Against Applicant
Subparagraph 3.c:	For Applicant
Subparagraph 3.d:	For Applicant
Subparagraph 3.e:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant Applicant a security clearance. Eligibility for access to classified information is denied.

Carol G. Ricciardello
Administrative Judge