



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



In the matter of:)	
)	
XXXXX, Xxxxx Xxx)	ISCR Case No. 11-03302
)	
Applicant for Security Clearance)	

Appearances

For Government: Raashid S. Williams, Esquire, Department Counsel
For Applicant: Richard L. Morris, Esquire

02/12/2013

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ Applicant's clearance is denied.

On 8 May 2012, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guidelines H, Drug Involvement, J, Criminal Conduct, and E, Personal Conduct.² Applicant timely answered, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 9 August 2012, and I convened a hearing 13 September 2012. DOHA received the transcript (Tr.) 24 September 2012.

¹Consisting of the transcript (Tr.), Government exhibits (GE) 1-7, and Applicant exhibits (AE) A-C.

²DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant largely admitted the SOR allegations with some explanations. He denied SOR 2.b. He is a 48-year-old software developer employed by a defense contractor since January 2010. He has been employed by federal contractors doing similar work since at least April 2003. He has had several background investigations and clearances since August 1983, but the investigations record is unclear which investigations were solely for his military service, which may have been for both military and contractor employment, and which—aside from this most recent application—have been solely for contractor employment.

There are three clearance applications in the record: September 1995 (GE 3), April 2001 (GE 4) and October 2010 (GE 1). The clearance applications reference completed background investigations in August 1983, November 1989, August 1995, May 1998, and March 2005. The record contains none of the clearance applications for the referenced background investigations. The current background investigation dates to 2011.

Applicant has an extensive history of falsification and misrepresentation regarding his past history of drug abuse. Applicant was born in September 1964, and used marijuana for the first time in 1976, when he was about 12 years old. He did not use marijuana again until he was in high school, and fell in with the wrong crowd. He was about 16 years old when he began using marijuana about every other week. He also bought and sold marijuana occasionally. He experimented with hashish on two or three occasions in 1981 (SOR 1.h) and with quaaludes once in 1981 (SOR 1.i).

After graduating from high school in 1982, Applicant enlisted in the U.S. military. He falsified his enlistment documents and a clearance application by failing to disclose any of his earlier drug abuse (SOR 3.a). In his May 1996 sworn statement (GE 3), Applicant acknowledged these falsifications and claimed no extenuating circumstances. In his Answer to the SOR, Applicant claimed for the first time that his recruiter recommended that he omit his drug use from his enlistment documents. At hearing, he repeated and expanded upon this claim. He stated that the recruiter told him that he would not get into the military if he disclosed his drug use, and claimed the recruiter told him not to list it (Tr. 63-64). He later repeated that assertion, and further claimed that his parents gave him the same advice (Tr. 78-80). Applicant asserts that he never completed a clearance application during his enlisted service, but his April 2001 clearance application—initiated specifically to update his military clearance—believes that claim. Further, the military unit to which he was assigned in 1982, and the military specialty he performed, are entirely consistent with his having to complete a clearance application in August 1983 as reflected in GE 4.

Applicant completed another clearance application in September 1995 (GE 7). Responding to questions about drug abuse and drug activity, Applicant disclosed using marijuana once per month from May 1977 to 1989, and once in January 1993; using cocaine 25-40 times between November 1987 and October 1989; using two cycles of

steroids from September 1988 to August 1989; and selling marijuana five times between September 1981 and January 1983. He also disclosed having been granted a clearance by the military in November 1989, and having been investigated by another government agency in August 1995. He failed to disclose that he had used hashish, LSD, PCP, speed, and quaaludes as listed below (SOR 3.e). He also failed to disclose that he had bought and sold cocaine and bought LSD as listed below, and had purchased marijuana from 1980 to 1989 (SOR 3.f).

Applicant provided many of these missing details in his May 1996 sworn statement (GE 3), but acknowledged that he had used marijuana about three times between 1989 and January 1993, instead of the single time he disclosed on his clearance application. He also disclosed using a muscle relaxant prescribed for his dad, when he injured his back in April 1996 (SOR 1.b).³ As noted above, Applicant acknowledged falsifying his enlistment documents and clearance application in 1982, but claimed that he did not falsify his September 1995 clearance application, or an earlier sworn statement in January 1995 (that is not contained in the record).

In April 2001, Applicant completed another clearance application for the periodic reinvestigation of his military clearance (GE 4). He denied having used illegal drugs within the last seven years and he denied having used illegal drugs while possessing a clearance (SOR 3.d).⁴ This application disclosed that Applicant had a military background investigation in August 1983. Applicant failed to disclose use of marijuana, LSD, PCP, cocaine, and speed that occurred after 1983 and by 1993, or that he had ever used drugs while possessing a clearance.⁵

In October 2010, Applicant completed the final clearance application at issue in this case (GE 1). He again denied having used illegal drugs while possessing a clearance (SOR 3.b).⁶ He also allegedly falsified this clearance application by failing to

³He later went to the doctor and obtained his own prescription for the injury. The use of the unprescribed drug technically falls within the security concerns of Guideline H. However, under the circumstances of this case, the use of an unprescribed drug consistent with its prescribed use lacks security significance.

⁴The question specifically asks if the applicant has ever illegally used a controlled substance “while employed as a law enforcement officer, prosecutor, or courtroom official; **while possessing a security clearance**; or while in a position directly and immediately affecting public safety?”

⁵Applicant’s claim that he misunderstood the question and answered “no” because he had never held any of the listed employments or positions is wholly unbelievable. Professionally, Applicant is an electrical engineer—a line of work requiring extreme precision. I find it unlikely Applicant read and understood the two portions of the question that he used to justify his “no” answer, while overlooking or misunderstanding the portion of the question that required a “yes” answer. Moreover, the language regarding possession of a clearance is clear and unequivocal here. His explanation here is even more incredible as applied to his falsification of the same question on his 2010 clearance application, where the language about possession of a clearance appears first.

⁶The question had been rearranged from the question on the 2001 application. This question asks if the applicant has ever illegally used a controlled substance “**while possessing a security clearance**; while employed as a law enforcement officer, prosecutor, or courtroom official; or while in a position directly and

disclose that he had his clearance denied/revoked in 1993 and 2002 (SOR 3.c). However, it appears that the adverse clearance action taken in 2002 (GE 5) was taken after Applicant resigned from the military (AE A), and had not been communicated to the him. Moreover, the record evidence does not clearly establish any adverse clearance action taken by another agency in 1993, or communicated to Applicant.

After enlisting in the military in 1982, Applicant served on active duty for almost four years.⁷ Upon his discharge, he went to college, but also participated in a Reserve Officer Training Corps (ROTC) program. He entered the program in June 1986 and served nearly five years in the reserves before obtaining his commission in December 1991, after receiving his undergraduate degree in electrical engineering in November 1991. He was granted a secret clearance based on a background investigation in December 1990. He served an initial, brief period of active duty for training beginning in January 1992. He later served about 13 months active duty in 1994-1995, most of which time was spent in officer professional training. Following active duty, he remained active in the reserve until February 2002, when he resigned his commission. He had accumulated 21 years of service for retirement purposes (AE A).

Applicant used marijuana with varying frequency from 1976 to 1993, during which time he occasionally bought and sold it (SOR 1.c). He experimented with LSD a few times in 1985 and 1986, and bought and sold it a couple of times (SOR 1.d). He tried PCP once in 1987 (SOR 1.e). He used cocaine from 1988 to 1989, occasionally buying and selling it (SOR 1.f). He used speed from 1985 to 1987 (SOR 1.g). He began using cocaine again about January 2002 and tested positive for cocaine use in a June 2002 urinalysis (GE 5)(SOR 1a). The record contains no corroboration of Applicant's claim that he self-reported his cocaine use, and while the timing of his resignation is not entirely clear, it appears that he resigned before any disciplinary action was taken regarding his positive urinalysis or before any adverse clearance action was taken or communicated to him.

In addition to his extensive history of illegal drug use, Applicant also has a lengthy history of criminal conduct, largely related to his problematic use of alcohol. He had a driving under the influence (DUI) conviction in August 1983 while in the military (SOR 2.a). He had an untoward situation with his young son in 1989 that was never investigated or the subject of any criminal proceedings (SOR 2.b). He pleaded guilty to spousal battery in 1989 after getting into an altercation with his wife while intoxicated (SOR 1.c). He was charged with domestic violence in June 2005 but the charges were later dismissed as unfounded [and not involving alcohol](SOR d). He had a second DUI in March 2008 (SOR 1.e), and was also arrested a second time when he crashed into a neighbor's car, but did not report it immediately (SOR 1.f).

immediately affecting public safety?"

⁷ Applicant did not present his discharge certificate from that period of service, but the time of service, if not the dates of service, is accounted for in his May 1991 Report of Separation and Record of Service (AE A).

After his March 2008 DUI, Applicant started going to Alcoholics Anonymous (AA) and attending alcohol counseling (AE B). He and his second wife decided together to stop drinking in 2009. He relapsed in November 2010, but she gave him an ultimatum about his drinking, and he has been alcohol free since then (Tr. 28-30). He attends AA on a regular basis, and successfully completed the alcohol counseling.

Applicant's work and character references consider him honest and trustworthy and recommend him for his clearance (AE C). However, it is not clear that they are aware of the full extent of his illegal drug use or the extent of his alleged falsifications and misrepresentations of that drug use on his clearance documents.

Policies

The adjudicative guidelines (AG) list factors to evaluate a person's suitability for access to classified information. Administrative judges must assess disqualifying and mitigating conditions under each issue fairly raised by the facts and situation presented. Each decision must also show a fair, impartial, and commonsense consideration of the factors listed in AG ¶ 2(a). The applicability of a disqualifying or mitigating condition is not, by itself, conclusive. However, specific guidelines should be followed when a case can be measured against them, as they are policy guidance governing the grant or denial of a clearance. Considering the SOR allegations and the evidence as a whole, the relevant adjudicative guidelines are Guideline H (Drug Involvement), Guideline J (Criminal Conduct), and Guideline E (Personal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an applicant's security clearance. The Government must prove, by substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to applicant to refute, extenuate, or mitigate the Government's case. Because no one has a right to a security clearance, the applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the required judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels deciding any reasonable doubt about an Applicant's suitability for access in favor of the Government.⁸

Analysis

The Government established a case for disqualification under Guideline H, by demonstrating Applicant's illegal drug use between 1976 and June 2002, including

⁸See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

periods during which he had a clearance.⁹ However, Applicant has mitigated the security concerns. Although there was nothing infrequent or unusual about the circumstances of his illegal drug use, the 10 years that have elapsed since the last drug use suggests the drug use is unlikely to recur.¹⁰ The passage of time, if nothing else, has demonstrated intent to not abuse these drugs in the future.¹¹ Under these circumstances I conclude that Applicant is unlikely to use drugs in the future. Accordingly, I resolve Guideline H for Applicant.

The Government established a case for disqualification under Guideline J by demonstrating Applicant's lengthy history of criminal conduct from August 1983 to March 2008, much of which was related to Applicant's problematic use of alcohol.¹² However, Applicant mitigated these security concerns. There has been no recurrence of criminal conduct since his March 2008 DUI, and Applicant has completed alcohol-abuse counseling, addressing the most significant underlying cause of his criminal conduct.¹³ I resolve Guideline J for Applicant.

The Government established a case for disqualification under Guideline E by demonstrating Applicant's extensive history of falsification and misrepresentation regarding his past history of illegal drug use. The record contains no clear indication that Applicant ever fully disclosed the full extent of his illegal drug use, or has ever acknowledged using illegal drugs while possessing a security clearance, despite overwhelming evidence that he had done so.

Applicant failed to mitigate the security concerns raised by his multiple misrepresentations and falsifications on Government documents and to Government investigators. Applicant falsified his enlistment documents and clearance application in approximately 1982. He did so to first obtain, and then retain, his military employment. He failed to disclose the full extent of his drug history and his drug transactions on his September 1995 clearance application. Although not alleged in the SOR, he also

⁹¶ 25.(a) any drug abuse ; (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; (g) any illegal drug use after being granted a security clearance.

¹⁰¶ 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 [Emphasis supplied];

¹¹¶ 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.

¹²¶ 31 (a) a single serious crime or multiple lesser offenses; (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

¹³¶ 32 (a) so much time has elapsed since the criminal behavior happened . . . (d) there is evidence of successful rehabilitation without recurrence of criminal activitygood employment record . . .

appears to have failed to disclose the full extent of his drug involvement during his May 1996 subject interview with a Government investigator. He failed to disclose that he had used illegal drugs while possessing a security clearance on his April 2001 clearance application. He repeated that falsification on his October 2010 clearance application.¹⁴ Applicant's falsifications and omissions were made to first obtain, and then retain, the clearances necessary for his employment with a Government contractor. The falsifications and omissions alleged were enough to shift the burden of persuasion to Applicant to refute or mitigate the Government's information.¹⁵

None of the Guideline E mitigating conditions apply. The concealed information was relevant to a clearance decision. His eventual disclosures cannot be considered either forthright or prompt. Indeed, they are best characterized as piecemeal. Applicant's failure to disclose his illegal drug use shows a lack of candor required of cleared personnel. The Government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The Government relies on applicants to truthfully disclose that adverse information in a timely fashion, not only when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the Government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate Government interests. I resolve Guideline E against Applicant.

Beyond the specific guidelines alleged by the Government, the generally applicable disqualifying and mitigating conditions lead to the same result. Falsifications are core security concerns [AG ¶2(a)(1)]. His behavior was deliberate and not due to circumstances beyond his control [AG ¶2(a)(2); AG ¶2(a)(5)]. His misconduct was both recent and frequent [AG ¶2(a)(3)]. I have considered Applicant's relative youth when his first falsifications occurred in 1982, but that consideration does not overcome the adverse inferences of his misconduct, particularly with honesty being a core requirement for access, and not a difficult concept to understand or hold applicants to, particularly where the falsifications and misrepresentations continued nearly another 30 years [AG ¶2(a)(4).]. Rehabilitation or behavioral changes are difficult to measure under these circumstances, particularly where those changes are evident mostly regarding his substance-abuse issues [AG ¶ 2(a)(6)]. He clearly sought to mislead the Government about his drug record, or was at least willing to benefit from his misconduct [AG ¶2(a)(7)]. Applicant's willingness to put his personal needs ahead of legitimate

¹⁴¶ 16(a) deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, . . . [or] determine security clearance eligibility or trustworthiness. . . ; (b) deliberately providing false or misleading information regarding relevant facts to an . . . investigator . . . ;

¹⁵The falsifications and omissions that were not alleged in the SOR are not considered on the merits of the Guideline E allegations, but are relevant to the Applicant's credibility, his whole-person analysis, and to establish absence of mistake on the falsifications that were alleged.

Government interests increases his potential vulnerability and he has not demonstrated that the misconduct is unlikely to recur [AG ¶ 2(a)(8); AG ¶ 2(a)(9)]. The concern is whether Applicant would disclose situations or circumstances, whether deliberate or inadvertent, that raise security concerns. Overall, the record evidence leaves substantial doubt about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude Applicant has not mitigated the security concerns arising from his falsifications.

Formal Findings

Paragraph 1. Guideline H:	FOR APPLICANT
Subparagraphs a-f:	For Applicant
Paragraph 2. Guideline J:	FOR APPLICANT
Subparagraphs a-f:	For Applicant
Paragraph 3. Guideline E:	AGAINST APPLICANT
Subparagraphs a-b:	Against Applicant
Subparagraph c:	For Applicant
Subparagraphs d-f:	Against Applicant

Conclusion

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

JOHN GRATTAN METZ, JR
Administrative Judge