



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



In the matter of:)
)
) ISCR Case No. 11-04978
)
)
Applicant for Security Clearance)

Appearances

For Government: Richard Stevens, Esquire, Department Counsel
For Applicant: *Pro se*

10/05/2012

Decision

CREAN, THOMAS M., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a Questionnaire for National Security Position, Standard Form 86, on June 28, 1999. Applicant was granted access to classified information. On September 7, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to retain a security clearance as part of his employment with a defense contractor. After an investigation conducted by the Office of Personnel Management (OPM), the Defense Office of Hearings and Appeals (DOHA) issued interrogatories to Applicant to clarify or augment potentially disqualifying information in his background. After reviewing the results of the background investigation and Applicant's responses to the interrogatories, DOHA could not make the preliminary affirmative findings required to issue a security clearance. On April 4, 2012, DOHA issued Applicant a Statement of Reasons (SOR) detailing security concerns for drug involvement (Guideline H) and personal conduct (Guideline 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 in the Department of Defense on September 1, 2006. Applicant acknowledged receipt of the SOR on April 19, 2012

Applicant answered the SOR in an undated response. He denied all allegations under Guideline E pertaining to falsification but admitted the part of the SOR allegations alleging arrests (SOR 1.b (1), (2), and (3); SOR 1.k, and SOR 1.l (1), (2), and (3). He denied the two allegations under Guideline H.

Department Counsel was prepared to proceed on June 11, 2012, and the case was assigned to me on June 27, 2012. DOHA issued a Notice of Hearing on June 28, 2012, scheduling a hearing for July 26, 2012. I convened the hearing as scheduled. The Government offered nine exhibits, which I marked and admitted into the record without objection as Government Exhibits (Gov. Ex.) 1 through 9. Applicant testified and introduced 24 documents, which I marked and admitted into the record without objection as Applicant Exhibits (App. Ex.) A through X. DOHA received the transcript of the hearing (Tr.) on August 16, 2012.

Procedural Issues

The SOR allegations under Guideline E were incorrectly numbered. There were two SOR allegations 1.h, 1.i, and 1.j. On my own motion, and without objection from Department Counsel and Applicant, I corrected the error and renumbered the second SOR allegations 1.h, 1.i, and 1.j as SOR allegations 1.j, 1.k, and 1.l. (Tr. 19-21)

Findings of Fact

Applicant denied the factual allegations under both Guideline H and Guideline E. He admitted the allegations about his arrests under Guideline E. Applicant's admissions are included in my findings of fact. After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is 40 years old. He served on active duty in the Army in chemical operations from October 1999 until receiving an honorable discharge as a sergeant (E-5) in January 2007. During his active duty tour, he deployed to Kuwait and Iraq for Operation Iraqi Freedom from July 2002 until late 2003. After leaving the Army, he worked for defense contractors in chemical operations. He deployed as a defense contractor to Iraq from August 2007 until August 2008, from October 2008 until October 2009, from November 2009 until November 2011, and from December 2011 until July 2012. For the last five years, he has been almost continually deployed to Iraq. He has been married three times. His first marriage was from 1995 until 2004, and there were three children from the marriage. His second marriage was from 2005 until 2007, and he had one child. He pays child support for these children. He married for the third time in November 2009. His third wife had three children of her own and they had a child together. In total, he has five children of his own and three stepchildren. (Tr. 14-18, 35-

46; Gov. Ex. 1, e-QIP, dated September 7, 2010; App. Ex. G, Discharge Certificate, dated January 24, 2007; App. Ex. H, DD Form 214)

Applicant completed a security clearance application on June 28, 1999. He was granted access to classified information. On the application, he responded no to the question concerning his police record asking if he had ever being charged or convicted of an offense related to a firearm or use of illegal drugs or alcohol. Federal Bureau of Investigation (FBI) records show that Applicant was arrested for breaking and entering, larceny of a handgun, and possession of stolen goods and property in 1993. In his response to the SOR, he also admitted an arrest for driving while intoxicated and aiding and abetting driving under the influence of alcohol in June 1994; an arrest in September 1993 for the felonies of larceny of a handgun, and possession of stolen goods and property; and an arrest in July 1993 for the felony of carrying a concealed weapon. At the hearing, he admitted an arrest for theft of a handgun, possession of stolen property, and carrying a concealed weapon. He stated the theft of a handgun charge was dropped by the victim because he paid the victim restitution. He stated he did not possess stolen goods because the friend he was with stole the items from cars and took them to his home. He was merely present when the thefts took place. In regard to the concealed weapons charge, he stated that he was driving his girlfriend's mother's car when he was stopped by police. A loaded handgun was found in the glove compartment of the car. He had been given the gun to use for target practice but forgot it was in the car. He also admits that he was with a friend who was driving a car after drinking beer. He was charged and convicted of aiding and abetting the driving while intoxicated offense, but denied ever having been convicted of driving while intoxicated. Applicant explained that he answered no to the questions because of the circumstances of the events and his belief that the arrests did not have to be listed on the form. (Tr. 56-68; Gov. Ex. 3 and 4, Responses to Interrogatories, dated January 1, 2012; Gov. Ex. 5, Federal Bureau of Investigation Criminal Report, dated October 26, 2010)

Police reports and arrest records show that Applicant was arrested a number of times. Applicant was arrested for a reckless force and violence assault following a domestic dispute in January 2007. (Gov. Ex. 7, Police Report, dated January 1, 2007) In August 2007, Applicant was depressed because he and his wife were having marital problems. He met a person at a hotel and started to use cocaine to ease his depression. In February 2008, he was arrested for possession of drug paraphernalia. He was watched by police officers while acting suspiciously in a neighborhood known for drug dealing. When stopped by police, he told the arresting office that he was looking for a computer power cord. A search of the vehicle revealed a metal pipe with drug residue. (Gov. Ex. 9, Arrest Record, dated February 7, 2008) At the hearing, he admitted he was in the neighborhood to purchase crack cocaine. (Tr. 48-52) Applicant was arrested at a highway rest stop in October 2008. He admitted to the arresting police officer that he had used cocaine three days before and that a soda can used to smoke cocaine was in the car. (Tr. 53-55; Gov. Ex. 6, Arrest Record, dated October 9, 2008) The FBI criminal records confirm the arrest for possession of cocaine in October 2008. (Gov. Ex. 5, Record, dated October 26, 2010) Applicant also admitted at the hearing that he used crack cocaine as late as October 2008. (Tr. 46-52)

Applicant completed another security clearance application on September 7, 2010. He completed the application while on assignment in Iraq. He did not have access to his complete arrest record. He also did not want to remember his police record. He was remorseful about his past and did not want everyone to know about it. He made a lot of mistakes in his life. He admitted lying on the application about his use of drugs in the last seven years. (Tr. 33-36)

Applicant responded yes to the question asking if in the last seven years he had been arrested by a police officer. He listed two drug offenses but not a January 2007 arrest for assault by reckless use of force. (SOR 1.a) In response to the question if he had ever been charged with a felony offense or a firearm or explosive offense, he responded no. He did not list a September 1993 arrest for larceny of a handgun and the felony of possession of stolen goods; a July 1993 felony arrest for carrying a concealed weapon; and a 1990 felony arrest for breaking and entering and larceny. (SOR 1.b) In response to the questions asking whether he had ever been charged with an offense related to alcohol or drugs, he answered yes and listed a September 2008 arrest for possession of drugs. He further stated that he did not nor had he done drugs. This arrest was a misunderstanding and treated as such by a court of law. He had a negative drug screen approximately six hours after the arrest. (SOR 1.c) In response to the same question, he listed an April 2007 arrest for possession of drug paraphernalia but wrote that the charges were dropped due to a mistake in evidence. The device was a pen cap in his ex-wife's car that he borrowed. It was not paraphernalia and he never used or intended to use any type of illegal drug. (SOR 1.d) In response to the same question, he failed to list a June 1994 driving while intoxicated offense (SOR 1.e). He responded no to the question asking if in the last seven years he had used or possessed illegal drugs. (SOR 1.f)

Applicant was interviewed by a security investigator on December 14, 2010. He discussed his cocaine use with the security investigator and told him that he does not know why he responded no to the questions on his security application. He told the investigator that the October 2008 arrest for possession of an illegal substance and the February 2008 arrest for possession of drug paraphernalia were unfounded (SOR 1.g and 1.h) In the same interview, he told the security investigator that he only used crack cocaine between April 2007 and August 2007 (SOR 1.i). He told the security investigator that he was not intentionally trying to mislead the investigator about his arrests. (Tr. 46-47; Gov. Ex. 3, Response to Interrogatories, dated January 1, 2012, at 8)

Applicant responded to the interrogatory while on a family vacation in January 2012. The family members were all staying in the same hotel room. He did not want his children to know that he had used illegal drugs. In answering the interrogatory, he denied using illegal drugs. Applicant responded no to the questions asking if he had ever illegally used a controlled substance or a prescription drug, been counseled about drug use, or attended any program for illegal drug use. He further stated he had no intention of using illegal drugs in the future, He stated that he was arrested in 2008 for possession of a controlled substance but the charge was dropped. He admitted an arrest for possession of drug paraphernalia in 2007 but again the charge was dropped.

The possession of drug paraphernalia charge was dropped because he took a voluntary blood test that was negative, and the drugs found in his car in 2008 did not belong to him. He said "Bottom line, I do not or have not used drugs at all, ever." (Tr. 59-61; Gov. Ex. 4, Response to Interrogatory, dated January 1, 2012)

Applicant admits he was arrested in September 2001 for speeding, driving on a suspended license, and disorderly conduct for giving false information. (SOR 1.1) Applicant admits that when stopped by the police, he told them he was in the military, but he had been discharged. He also presented a driver's license that had been suspended. (Tr. 50-51; Gov. Ex. 8, Police Report, dated September 19, 2001) He also admitted to using marijuana in 1985, and being charged with breaking and entering when he was a teenager before he entered the Army in 1990. (Tr. 47-48)

Applicant presented numerous character references and letters of recommendation from friends, fellow workers, and supervisors. They all attest that he was an extremely hard worker under difficult and combat conditions in Iraq. They attest to his good character and trustworthiness. They note that he is honest, pleasant, and that his character and integrity are impeccable. (App. Ex. A, Letters, various dates) Applicant provided a spreadsheet to show the extent of the work he performed in Iraq in support of soldiers. (App. Ex. Y, Spreadsheet. Undated) Applicant presented information from his service in the Army. The information shows that he was an excellent soldier who performed his duties and missions effectively. (App. Ex. B, C, and D, e-Mails and Letters, Various dates) Applicant presented a newspaper article concerning his speaking to veterans and citizens about his service in Iraq. (App. E. Article, date May 30, 2004)

Applicant presented his commander's recommendation and citations for four awards of the Army Commendation Medal (App. Ex. F, Recommendation, dated January 15, 2007; App. Ex. K, Citation, dated July 9, 2002; App. Ex. L, Citation, dated May 5, 2003; App. Ex. Q, Certificate, dated January 17, 2007), and an award of the Army Achievement Medal (App. Ex. R, Citation, dated June 22, 2001). He presented Certificates of Appreciation and diplomas for his schooling and service in the Army. (App. Ex. M, N, O, P, U, W Certificates, various dates) His enlisted record brief shows his service in Iraq and Kuwait. (App. Ex. I, enlisted Record Brief) His last evaluation report from active duty shows that he was successful in all his values and responsibilities and was rated superior. (App. Ex. J, Evaluation Report, dated March 2006) He was awarded the Army Driver's badge (App. Ex. V and X, Order, dated February 3, 2004) and multiple awards of the Good Conduct Medal. (App. Ex. V, Orders, various dates)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the Administrative Guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful 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 over-arching adjudicative goal is a fair, impartial and common sense 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.

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, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by department counsel. . ." The applicant has the burden of persuasion to obtaining 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 protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Analysis

Guideline H, Drug Involvement

The use of an illegal drug can raise questions about an individual's reliability and trustworthiness, because it may impair judgment and raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are mood and behavior-altering substances, and include those listed in the Controlled Substances Act of 1970. Cocaine is an illegal drug. (AG ¶ 24) Applicant admits the illegal use of cocaine from August 2007 until October 2008 and the possession of paraphernalia to use cocaine. Applicant's use and possession of cocaine raises Drug Involvement Disqualifying Conditions AG ¶ 25(a) (any drug use); and AG ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia).

The Government produced sufficient evidence to establish the disqualifying conditions in AG ¶¶ 25(a) and 25(c). The burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the security concerns under drug involvement. An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden to prove or disprove it never shifts to the Government.

I considered Drug Involvement Mitigating Conditions AG ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); and AG ¶ 26(b) (a demonstrated intent not to abuse 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). While there is no "bright line" rule for determining when conduct is recent or sufficient time has passed since the incidents, a determination whether past conduct affects an individual's present reliability and trustworthiness must be based on a careful evaluation of the totality of the evidence. If the evidence shows a significant period of time has passed without evidence of drug involvement, there must be an evaluation whether that period of time demonstrates changed circumstances or conduct sufficient to indicate a finding of reform or rehabilitation.

These mitigating conditions do not apply. Applicant used cocaine from August 2007 until at least October 2008, approximately four years ago. He used the illegal drug that was given to him by a person he met in a hotel when he was depressed because of marital problems with his wife. The marital problems can certainly recur, and someone can again talk him into using illegal drugs to cheer him up. During the four years since he used cocaine, he was deployed to Afghanistan where drug use is strictly prohibited. Lack of illegal drug use under such circumstances does not demonstrate rehabilitation or reform. In addition, he was not candid about his drug use in completing his security clearance application, and responding to questions from a security investigator, and responding to an interrogatory concerning drug use. Applicant promised not to use illegal drugs in the future. Applicant has not met his burden to show changed circumstances or conduct that indicates he has reformed and will no longer use illegal drugs. His lack of candor concerning his drug use, and his failure to demonstrate intent not to use illegal drugs in the future, shows that his drug use may recur and continues to cast doubt on his reliability, trustworthiness, and good judgment. Applicant has not mitigated security concerns for drug involvement.

Guideline E, Personal Conduct

A security concern is raised for personal conduct based on Applicant's responses to drug use questions on a security clearance application, on an interrogatory, to a security investigator. Personal conduct is a security concern because conduct involving questionable judgment, untrustworthiness, unreliability, 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). Personal conduct is always a security concern because it asks whether the person's past conduct justifies confidence the person can be trusted to properly safeguard classified information. The security clearance system depends on the individual providing correct and accurate information. If a person conceals or provides false information, the security clearance process cannot function properly to ensure that granting access to classified information is in the best interest of the United States Government.

Applicant completed security clearance applications on June 28, 1999, and September 7, 2010. He answered either no or provided incomplete information to questions concerning use of drugs and criminal conduct. He misrepresented facts concerning drug use to a security investigator. He answered no to an interrogatory concerning his use of illegal drugs and emphatically stated he did not and had not used illegal drugs. Criminal records and police reports confirm that Applicant was arrested and charged with possession of cocaine and drug paraphernalia, an assault with reckless force and violence, driving while under the influence of alcohol, and breaking and entering. He provided false information to police when questioned about his drug use and criminal activities. He also admitted, at various times in the security clearance process, including at the hearing, to drug use and some of the criminal conduct. Applicant's inaccurate and incomplete answers to these security clearance questions raise a security concern under Personal Conduct Disqualifying Condition AG ¶ 16(a) (the deliberate omission concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history, or similar form used to conduct investigations, to determine security eligibility or trustworthiness); and AG 16(b) (deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative).

I have considered Personal Conduct Mitigating Conditions AG ¶ 17(a) (the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; AG ¶ 17(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); and AG ¶ 17(c) (the offense 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.)

Applicant was involved in criminal activity as early as 1985, and was charged with breaking and entering in 1990, for carrying a concealed weapon in July 1993, and for larceny of a handgun and possession of stolen property in September 1993. Applicant has shown a pattern of providing false, wrong, or incomplete information to law enforcement personnel for almost 15 years. He had explanations for his criminal

offenses that were nothing more than an attempt to obscure the truth. He did not provide full and complete information on a security clearance application in 1999. After entering the Army, he was arrested in September 2001 on a traffic offense, and he deliberately provided the arresting officer with incorrect personal information. He admitted that he intentionally failed to provide accurate and complete information in response to questions concerning drug use and criminal conduct on a security clearance application in 2010. He provided false and misleading information again on drug use and criminal conduct to a security investigator in December 2010, and in response to an interrogatory in January 2012. He admits that he intentionally lied in the processing of his security application. He flatly stated in response to some questions that he did not and had never used illegal drugs. He then admitted his illegal cocaine drug August 2007 until October 2008.

While there is a security concern for an omission, concealment, or falsification of a material fact in any written document or oral statement to the government when applying for a security clearance, not every omission, concealment, or inaccurate statement is a falsification. A falsification must be deliberate and material. It is deliberate if it is done knowingly and willfully with intent to deceive. Applicant admitted that he knowingly and willfully omitted the drug use information on his security clearance application and lied to the investigator. He admitted his drug use in response to some questions from security investigators and then denied it in others. He admitted to drug use when questioned at the hearing. It is difficult to discern the truth from Applicant. He presented no evidence to show any of his statements to be credible. Applicant's action in providing false information in the security clearance process was recent and a major issue for the security clearance process. His actions were deliberate with intent to deceive. He acted on his own without advice from anyone to provide false and misleading information. He did not provide correct information until confronted at the hearing, and maybe not even then. Applicant has not mitigated the security concern about his inaccurate answers concerning drug use and criminal activity on two security clearance applications, in response to questions from a security investigator, and in response to questions on an interrogatory. He has not mitigated security concerns for personal conduct.

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 considered that Applicant is an excellent worker and is highly thought of by his supervisors and coworkers. I considered his over seven years of excellent service in the Army and his record of accomplishments on active duty. I considered his many deployments to combat zones as a civilian in support of soldiers.

Applicant used cocaine from at least August 2007 until October 2008. The illegal drugs were first supplied by a stranger in a hotel and he used them to lessen depression caused by marital problems. He has not shown that his use of illegal drugs will not happen again and that he is reformed and rehabilitated. He did not mitigate security concerns for drug involvement.

Applicant has a pattern of not being truthful when confronted by law enforcement personnel. He provided false, inaccurate and misleading information as far back as 1999. More importantly, he acknowledged that he provided false and misleading information concerning drug use and criminal conduct on two security clearance applications, to a security investigator, and in response to questions on an interrogatory. His false answers are a strong indication of his questionable judgment, lack of candor, dishonesty, and unwillingness to comply with rules and regulations. It shows that he is unreliable, untrustworthy and not candid. A person with these traits cannot be trusted to safeguard classified information. For all of these reasons, I conclude that Applicant has not mitigated the security concern for personal conduct. Overall, the record evidence leaves me with questions and doubts as to Applicant's judgment, reliability, and trustworthiness. He should not be granted access to classified information.

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 1.a - 1.i:	Against Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraphs 2.a – 2.b:	Against 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 eligibility for a security clearance. Eligibility for access to classified information is denied.

THOMAS M. CREAN
Administrative Judge