



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 11-05195
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank, Esq., Department Counsel
For Applicant: *Pro se*

07/25/2013

Decision

TUIDER, Robert J., Administrative Judge:

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

Statement of the Case

On October 27, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On December 12, 2012, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline E. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to continue a security clearance for Applicant, and it recommended that her

case be submitted to an administrative judge for a determination whether his clearance should be continued or revoked.

Applicant answered the SOR on December 27, 2012, and elected to have her case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated March 26, 2013, was provided to her by letter dated March 26, 2013. Applicant received the FORM on March 30, 2013. She was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any information within the 30 days after receipt of copy of the FORM. The case was assigned to me on May 24, 2013.

Findings of Fact

Applicant admitted the two SOR allegations of falsification, but contends her false answers were due to negligence and were unintentional.

Background Information

Applicant is a 49-year-old senior consultant, who has been employed by a defense contractor since January 2010. She had previously worked as a computer graphics technician for a defense contractor from July 1987 until she was involuntarily terminated in December 2009, discussed *infra*. (Items 4 and 6.)

According to her October 2009 e-QIP, Applicant attended an on-line university from March 2001 to June 2002. The FORM contains no further information regarding her education background. Applicant has been married since September 1983, and has two adult children. She did not serve in the U.S. armed forces. (Items 4 and 5.)

Personal Conduct

In October 2009, Applicant's former employer received an anonymous letter reporting that she had been engaged in insurance fraud over the past seven years. The employee, who submitted the anonymous letter subsequently came forward, but requested to remain confidential. The anonymous source reported that Applicant had bragged to coworkers over the years that she continued to enroll her adult daughter and two granddaughters in the company health insurance plan. The Applicant reportedly claimed them as dependents through the company for medical, dental, and vision insurance even though her daughter was married in 2002 and the grandchildren had not lived continuously in her household. Applicant complained to her coworkers about having to recertify her daughter and the grandchildren during the recertification period in February 2009.

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

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

(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)¹ 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 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

¹ 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).

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.²

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

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

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

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

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.

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