

_____Applicant's 2000 felony drug charge, 2002 dismissal from a job for surfing pornography on a work computer, 2003 job dismissal for failing a drug test, and his failure to be fully forthcoming about this history on his security clearance application generate a security concern. He provided contradictory, implausible explanations for this conduct throughout the investigative process, and has failed to mitigate the security concern. Clearance is denied.

STATEMENT OF THE CASE

On March 21, 2006, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) explaining why it was not clearly consistent with the national interest to grant or continue a security clearance. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended. Applicant answered the SOR on April 18, 2006, and requested an administrative determination. Within 20 days of receiving the answer, the government requested a hearing. The case was converted to a hearing, then assigned to me on May 14, 2007, after originally being assigned to another administrative judge. DOHA scheduled a notice of hearing on May 31, 2007, scheduling it for June 21, 2007.

During the hearing, I received five government exhibits, the testimony of a government witness, 20 Applicant exhibits, and Applicant's testimony. DOHA received the transcript on July 27, 2007.

RULING OF EVIDENCE

_____At the hearing, the government objected to Applicant's Exhibit C, a drug test report, dated June 16, 2003. I sustained the objection. After the hearing, as I reviewed the record, I discovered that Exhibit C is part of a personnel file that is referenced in Exhibit B. Consequently, I have reconsidered my earlier decision *sua sponte*, and have admitted Exhibit C into the record.

FINDINGS OF FACT

_____Applicant admitted SOR subparagraph 1.b and denied the remainder. It is incorporated into the findings of fact. Also, I make the following findings of fact.

Applicant is a 50-year-old single man who is a U.S. Army veteran, serving from 1975 to 1978 when he was honorably discharged. He earned a bachelor of science degree in engineering in 1986, and currently works as a communications systems engineer. His responsibilities include building radio and satellite links.

Applicant is highly respected at work. A supervisor considers him an expert in his field, and characterizes him as a man with exceptional "strength of character [and an] outstanding work ethic

... ”¹ Another supervisor describes him as diligent and industrious, “. . . always willing to go the extra mile to provide our warfighters what they need, when they need it.”²

In February 2000, Applicant was arrested and charged with felony possession of cocaine. Approximately eight months later, he pleaded no contest, and he was placed on 18 months probation.

In October 2002, Applicant’s employer, while in the process of conducting routine maintenance of his computer, discovered pornography. The technology support staff support person printed the images, and gave them to Applicant’s third-level supervisor who confronted Applicant with them.³ Applicant admitted to downloading them onto his hard drive, and he was fired.⁴

At the hearing, Applicant denied downloading the pornography onto his work computer. He asserted that he traveled frequently, leaving the computer on in his absence, and that anyone could have downloaded the material.⁵

Applicant was unemployed for the next two months. In January 2003, he obtained another job. On January 16, 2003, he took a drug test. The government alleges in subparagraph 1.c that he failed, testing positive for cocaine. Applicant denied he failed the drug test. He submitted an excerpt from his personnel file that appears to be a drug test result. It indicates he tested negative for illegal drugs.⁶ It is unsigned. Exhibit 2 is a document from his employer indicating he failed a drug test. It is signed by a physician. I find that he failed the January 2003 drug test. He was terminated on January 23, 2003, two days after the drug test results became available.⁷

On February 26, 2004, Applicant completed a security clearance application (SF-86). He answered “no” in response to Question 27 (*Your Use of Illegal Drugs and Drug Activity - Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methaqualone, tranquilizers, etc.) hallucinogenics (LSD, PCP, etc.), or prescription drugs?*). He denied using cocaine on or about the date he failed the drug test, as alleged in subparagraph 1.a.

In response to Question 20 (*Your Employment Record - Has any of the following happened to you in the last 7 years? - Fired from job - Quit a job after being told you’d be fired - Left a job*

¹Exhibit N.

² Exhibit O.

³Tr. 26 - Testimony of Applicant’s Third-Level Supervisor.

⁴Tr. 30 - Testimony of Applicant’s Third-Level Supervisor.

⁵Tr. 97.

⁶Exhibit C.

⁷Exhibit 2, Employer’s Adverse Information Report, dated January 27, 2003.

by mutual agreement following allegations of misconduct - Left a job for other reason under unfavorable circumstances), Applicant omitted his January 2003 termination. In his Answer, he asserted that the company that administered the drug test never officially hired him, and that he had “never received any monies, termination notice or W-2 form”⁸ after leaving. At the hearing, he initially testified that his employer did not fire him, and that they instead put him on extended leave.⁹ Later during the hearing, he stated that he was employed there, but “completely forgot”¹⁰ about the termination when completing the SF-86.

Applicant met with a DoD investigator in March 2005. He did not disclose the 2003 failed drug test.¹¹

POLICIES

The adjudicative guidelines apply to the analysis of this case. In addition to brief introductory explanations for each guideline, they are divided into those that may be considered in deciding whether to deny or revoke an individual’s eligibility for access to classified information (disqualifying conditions) and those that may be considered in deciding whether to grant an individual’s eligibility for access to classified information (mitigating conditions).

Because the entire process is a scrutiny of a number of variables known as the “whole person concept,” all available, reliable information about the person, past and present, favorable and unfavorable, should be considered in making a meaningful decision. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future.

The following adjudicative guidelines are raised:

Guideline H - Improper or illegal involvement with drugs, raises questions regarding an individual’s willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Guideline E - Personal Conduct: Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

⁸Answer at 7.

⁹Tr. 25.

¹⁰Tr. 116.

¹¹Tr. 70.

Guideline J - A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

Conditions pertaining to these adjudicative guidelines that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns, are set forth and discussed in the conclusions below.

Since the protection of national security is the paramount consideration, the final decision in each case must be reached by applying the standard that the issuance of the clearance is "clearly consistent with the national interest."¹² In reaching this decision, I have drawn only those conclusions that are based on the evidence contained in the record.

The Government is responsible for presenting evidence to establish facts in the SOR that have been controverted. The applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by the Government, and has the ultimate burden of persuasion as to obtaining a favorable security decision.

CONCLUSIONS

Drug Involvement

Applicant's 2000 arrest and charge for felony cocaine possession triggers the application of Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.2 (*illegal drug possession*). Despite pleading no contest to the charge, he denied the cocaine was his at the ISCR hearing. He testified that the charge occurred after he discovered that someone had stolen one of his personal checks, and attempted to make a purchase with it. Suspecting that it was a woman whom he had been dating for approximately a month, he contacted a mutual friend and sought her assistance in finding the girlfriend. While Applicant was in the car with the mutual friend, the police stopped him for rolling through a stop sign.¹³ Then, the friend, who was sitting in the passenger seat, threw a crack cocaine pipe on the floor.¹⁴ When the police approached the car, they observed the pipe, and arrested him.

This explanation is not credible.

The 2003 drug test failure is sufficient evidence to establish that he was using cocaine at or about the date of the test. DI DC E2.A8.1.2.1 (*Any drug abuse*), applies.

Applicant's last episode of drug involvement was more than four years ago. The remote nature of this conduct, however, is outweighed by the lack of credibility displayed when describing the circumstances of the 2000 charge. Consequently, although DI MC E2.A8.1.3.1 (*The drug involvement was not recent*), applies, I conclude that his drug involvement remains a security concern.

¹²See generally, Directive, Sec. 2.3, Sec. 2.5.3, Sec. 3.2, and Sec. 4.2.

¹³Tr. 143.

¹⁴Tr. 142.

Personal Conduct

Applicant's 2004 SF-86 omissions trigger the issue of whether Personal Conduct Disqualifying Condition (PC DC) E2.A5.1.2 (*The 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, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*), applies. Applicant's farfetched explanation for his 2000 arrest, and his contradictory explanations for his SF 86 omissions undermined his credibility. I conclude he falsified SF 86 Questions 20 and 27.

Applicant had an opportunity to correct these falsifications when he met with an agent in 2005. He failed to do so. PC DC E2.A5.1.2 applies without mitigation.

Applicant's former third-level supervisor testified that he fired him in October 2002 for surfing pornography on his work computer. Less than three months later, Applicant was fired from another job after failing a drug test. PC DC E2.A5.1.2.1 (*Reliable, unfavorable information provided by associates, employer, coworkers, neighbors, and other acquaintances*), and E2.A5.1.2.5 (*A pattern of dishonesty or rule violations . . .*), apply. Applicant denied the circumstances of both terminations. He asserted that the 2002 termination occurred because his former supervisor had a vendetta against him related to a professional disagreement, and he challenged the accuracy of the drug test.

Given Applicant's lack of credibility displayed throughout the investigative process, his explanation for the 2002 termination has limited probative value. Also, the disputed drug test result was signed and dated by a physician. Both PC DC E2.A5.1.2.1 and PC DC E2.A5.1.2.5 apply without mitigation.

Criminal Conduct

This guideline applies without mitigation for the same reasons as set forth in the Personal Conduct section, above.

Whole-Person Concept

Applicant's drug involvement was infrequent and remote. In conjunction with the on-the-job misconduct in 2002, and his lack of credibility displayed throughout the investigative process, however, it remains a concern. Evaluating this case in the context of the whole-person concept, I conclude that Applicant's drug involvement and personal conduct remain significant security concerns. Clearance is denied.

FORMAL FINDINGS

Paragraph 1 – Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant

Subparagraph 1.b: Against Applicant
Subparagraph 1.c: Against Applicant

Paragraph 2 - Guideline E: AGAINST APPLICANT

Subparagraph 2.a: Against Applicant
Subparagraph 2.b: Against Applicant
Subparagraph 2.c: Against Applicant
Subparagraph 2.d: Against Applicant
Subparagraph 2.e: Against Applicant

Paragraph 3 - Guideline J: AGAINST APPLICANT

Subparagraph 3.a: 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 a security clearance for Applicant. Clearance is denied.

Marc E. Curry
Administrative Judge