



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



In the matter of:)	
)	
-----)	ISCR Case No. 06-02925
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Emilio Jaksetic, Esq., Department Counsel
For Applicant: Sheldon I. Cohen, Esq.

March 31, 2009

Decision

CURRY, Marc E., Administrative Judge:

On November 7, 2008, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) detailing the security concern under Guidelines G, H, 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

On November 22, 2008, Applicant filed an answer to the SOR, denying all of the allegations except SOR subparagraphs 2.a, and 3.a, and requesting a hearing. I received the case assignment on January 5, 2009. DOHA issued a notice of hearing on January 14, 2009, and I convened the hearing as scheduled on February 17, 2009. During the hearing, I received seven government exhibits (Ex. 1-7), 17 Applicant exhibits (Ex. A-Q), and the testimony of five Applicant witnesses. I received the

transcript on February 25, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Rulings of Evidence

Exhibit 4 is Applicant's Response to Written Interrogatories, notarized August 5, 2008. It includes excerpts from an Office of Personnel Management (OPM) Report of Investigation (ROI) that contain the OPM agent's written summary of three personal subject interviews with Applicant conducted on March 19, 2008, July 23, 2007, and November 14, 2005, respectively. Interrogatory Question 2 asked Applicant to review the subject interviews, and "verify the report on the last page of [the] interrogatories" (Exhibit 4 at 2). Under Interrogatory Question 3, Applicant was asked if the ROI accurately reflected the information that he provided to the investigator on the days he was interviewed. Applicant answered "no" (Exhibit 4 at 3). Also, he provided a two-page explanation, comprehensively discussing each personal subject interview, and identifying what he believed to be inaccuracies in the investigator's written record of them.

On February 12, 2009, Applicant's counsel filed a Motion in Limine seeking to exclude Exhibit 4, arguing that DoD Directive 5220.6 ¶ E 3.1.20 prohibits the admission of ROIs without authenticating witnesses, and that the government cannot circumvent this requirement by including the ROI with Interrogatories to Applicant, and asking him to authenticate it. Alternatively, he argued that the majority of the subject matter of the ROI - foreign contacts, foreign travel, risque internet chatroom discussions, were irrelevant.

I overruled Applicant's objection as to the admissibility of the ROI excerpts. Applicant frequently cross-referenced the ROI in his Interrogatory Responses, elaborating upon it, and identifying inaccuracies. Under these circumstances, the ROI constitutes non-hearsay evidence that is admissible not for the truth of the matters asserted within it, but to facilitate my understanding of Applicant's Interrogatory Responses.

I sustained Applicant's objection as to the inadmissibility of the information within the ROI about foreign contacts, foreign travel, and risque internet chatroom discussions. Similarly, I did not consider information about these subjects contained within Exhibit 4. None of this information is listed in the SOR. Although SORs are not criminal indictments, they must be drafted, at minimum, with enough specificity to put applicants on notice of the nature of the allegations. The government alleged no security concerns under the Foreign Influence or Sexual Behavior guidelines, therefore, I considered none of the information in the ROI covering these subjects.

Findings of Fact

Applicant is a 48-year-old married man with two teenage children. He earned a Bachelor of Science degree in computer science in 1983 and a Master of Science in computer engineering in 1985 (Tr. 152). He has spent his career developing cryptograph standards for financial institutions, and developing network security systems (Tr. 77 - Supervisor's Testimony). Currently, he is a senior-level supervisor for a defense contractor who supervises "about 30 individuals doing security research in computer security . . ." (*Id.*). He is an excellent employee who deftly balances multiple roles at his company, and delivers high quality products to clients in a timely manner (Tr. 43 - Testimony of Former Supervisor). He has held a security clearance for nearly 20 years (Tr. 187).

Applicant has a drinking problem. For the majority of his life, his alcohol consumption was "fairly normal" (Tr. 156). In 2000, his desire to drink gradually began to increase. By approximately 2001, he was drinking alcohol daily, socializing less, and isolating himself from his family to conceal the extent of his alcohol consumption (Tr. 158; see *also*, Exhibit 5 at 11).

As Applicant's drinking problem worsened, his health deteriorated. Also, it began to affect his work, as he increasingly awoke with hangovers, arrived to work late, or took sick leave (Tr. 159). He never drank at work (Tr. 159).

On July 12, 2006, Applicant checked into an alcohol-rehabilitation clinic, and took a leave of absence from his job (Tr. 161, 165). By then, he had been consuming a half of a fifth of liquor every evening (Tr. 164). A psychiatrist at the clinic diagnosed him with alcohol dependence (Exhibit 5 at 17).

On July 21, 2006, Applicant transferred to another inpatient alcohol-rehabilitation clinic where he attended through August 18, 2006 (Answer). The program consisted of individual and group counseling, in addition to educational activities (Exhibit F). Applicant completed all aspects of the program successfully (Exhibit F). Upon discharge, he received a good prognosis to remain sober (Exhibit G). His counselor recommended that he attend Alcoholic's Anonymous (AA) meetings daily for three months, obtain a sponsor, and work with the sponsor "on a regular basis" (Exhibit 6 at 9).

Currently, Applicant remains involved with AA. He is active in AA outreach, expanding groups to other areas in his community (Tr. 173). He chairs one group and is the treasurer of another (Tr. 102-103 - Testimony of AA Sponsor). He has not drunk any alcohol since he entered the in-patient treatment center in July 2006. His health, emotional well-being, and relationship with his family have improved since he stopped drinking.

Applicant has continued to meet with his counselor since his discharge from the alcohol treatment center. His counselor reiterated that his prognosis for continued sobriety remains good (Exhibit G).

Applicant smoked marijuana monthly for approximately 25 years. He began at age 14, smoking it once or twice per week (Tr. 182). By college, his use had increased to several times per week (Tr. 183). After graduating, he continued to smoke marijuana “consistently, several times a week, throughout [his] young and middle adult life” (Tr. 184). He used it primarily at home, but “on some occasions at parties or when visiting with friends” (Tr. 209).

By the time he entered his 40s, Applicant’s use had declined to “maybe several times a month” (Tr. 184). He gradually quit smoking marijuana entirely in 2004 (*Id.*). He decided to quit because he grew increasingly wary of the bad example he would be setting for his children if they were to discover his marijuana use. He continues to socialize with some of the people with whom he used marijuana in the past (Tr. 209).

Applicant did not disclose his marijuana use, as required, on a security clearance application completed in January 2005 (Tr. 190). Although he had stopped smoking by then, he “still had the illusion that [he] could continue the lie that [he] had been perpetuating” since 1989, when he was untruthful about the extent of his use on his original security clearance application (Tr. 192, *see also*, Tr. 203-204).

In late 2005, Applicant met with an investigator from the U.S. Office of Personnel Management (Tr. 207). He then disclosed his marijuana use in response to a question from the investigator (*Id.*).

Policies

When evaluating an applicant’s suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). 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 overarching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a 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. 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. . . .” Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

Analysis

Alcohol Consumption

Under this guideline, “excessive alcohol consumption often leads to the exercise of questionable judgment or failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness” (AG ¶ 21). Here, Applicant’s lost control of his alcohol consumption prompting him to seek in-patient treatment. Upon beginning the treatment, a psychiatrist diagnosed him with alcohol dependence. AG ¶ 22(c), “habitual or binge consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed as an alcohol abuser or alcohol dependent, and AG ¶ 22(d), “diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence,” apply.

Applicant successfully completed inpatient treatment, and successfully followed the discharge plan. He remains active in AA, chairing meetings, and participating in outreach projects. He has not drunk any alcohol since completing inpatient treatment in 2006, and received a favorable prognosis upon his discharge. In 2009, his counselor reiterated his favorable prognosis. AG ¶ 23(b), “the individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent), or responsible use (if an alcohol abuser), and AG ¶ 23 (d), “the individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare, has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in meeting of AA or a similar organization, and has received a favorable prognosis by a staff member of a recognized alcohol treatment program” apply.

Drug Involvement

“Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment, and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations (AG ¶ 24). Applicant’s 25 years of marijuana use, much of which occurred while possessing a security clearance, triggers the application of AG ¶ 25(a),

“any drug abuse,” and AG ¶ 25(g), “any illegal drug use after being granted a security clearance.”

Applicant has not smoked marijuana in five years. Given the length of time he smoked it, the frequency of his use, and the fact that he still socializes with some of the people with whom he had used marijuana, it is too soon to conclude that either AG ¶ 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,” AG ¶ 26(b)1), “disassociation from drug-using associates and contacts,” or AG ¶ 26(b)(3), “an appropriate period of abstinence,” apply.

Personal Conduct

Under this guideline, “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 particular interest is any failure to provide truthful answers during the security clearance process (*Id.*).

Applicant admits to deliberately failing to disclose his marijuana use on a 2005 security clearance application. AG ¶ 16(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” applies.

I have considered all of the mitigating conditions and conclude none apply. Applicant did not disclose the falsification until approximately nine months later, in response to a question from an investigative agent who had contacted him to arrange an interview. Moreover, this was not the first time he falsified a security clearance application.

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 his 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) 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.

Applicant testified insightfully about the link between his on-the-job stress and his abuse of marijuana and alcohol. Having completed alcohol counseling, he appears to have learned the dangers of using alcohol to reduce stress. He also recognizes that using marijuana in this manner is similarly harmful. He appears to sincerely appreciate the beneficial effects to his family relationships and health that have accompanied his abstinence from marijuana and alcohol.

I conclude that Applicant's alcohol dependence no longer poses a security concern. I am not prepared to conclude, however, that his marijuana abuse no longer poses a security concern. Unlike alcohol use, marijuana use is illegal. Applicant used marijuana regularly for more than 20 years. This included approximately 15 years of uninterrupted use after he was granted a security clearance in 1990.

Also, Applicant falsified two security clearance applications regarding his marijuana use, and did not disclose it until an investigative agent asked him about it during an interview. Consequently, although the presence of rehabilitation is evident, it is outweighed by the recency, severity, and extent of the conduct. Evaluating this case in the context of the whole person, I conclude it is not clearly consistent with the national interest to grant Applicant a security clearance. Clearance is denied.

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 G:	FOR APPLICANT
Subparagraphs 1.a - 1.b:	For Applicant
Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant
Paragraph 3, Guideline E:	AGAINST APPLICANT
Subparagraphs 3.a - 3.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.

MARC E. CURRY
Administrative Judge