DATE: March 3, 2005

In Re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 01-23356

REMAND DECISION OF ADMINISTRATIVE JUDGE

PAUL J. MASON

APPEARANCES

FOR GOVERNMENT

Perregrine Russell-Hunter, Esq., Chief Department Counsel

Rita C. O'Brien, Esq., Department Counsel

Eric Borgstrom, Esq., Department Counsel

FOR APPLICANT

Patrick O'Donnell, Esq.

SYNOPSIS

Although Government Exhibit (GE) 13A has been determined to be legally admissible as a public record under Federal Rule of Evidence (F.R.E.) 803 (8), the weight I give this exhibit is reduced for the following reasons: (1) the exhibit, a Report of Investigation (ROI), is hearsay and not an admission by a party-opponent (not an admission by Applicant); and, (2) the lack of sufficient consistency between GE 13A and other evidence in the record regarding Applicant's purported use of heroin. While Applicant has always admitted drug use in the security forms and statements, he has not always been consistent in describing the types of drugs he used as well as the length of time he used those drugs. However, that lack of clarity in explaining his drug use over the years must be weighed and balanced against the passage of an increasing number of years that would challenge even the best memory to recollect at various stages of the security investigation the specific types of drugs used as well as the exact duration of each type of drug used. I conclude Applicant did not deliberately try to deceive the government about his drug use over the years. Clearance is granted.

STATEMENT OF CASE

On August 9, 2002, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865 and Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, amended April 4, 1999, issued a Statement of Reasons (SOR) to Applicant.

Applicant answered the SOR on September 4, 2002 and requested a hearing. The hearing was held on February 13, 2003. The Government called one witness and presented 14 exhibits which have been identified as GE followed by the number or letter of the exhibit. Applicant called three witnesses and testified himself. He also presented 12 exhibits which have been identified by letter. The transcript was received on February 26, 2003. I issued my Decision on June 18, 2003 that it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant.

(1)

On November 24, 2003, the Appeal Board issued a DECISION AND REMAND ORDER, "to reopen the record and allow the parties to relitigate those portions of the SOR that were affected by Department Counsel's failure to comply with E.3.1.13., that is SOR paragraphs 1.d. through 1.f." (to provide sufficient notice of Government Exhibit 13, ROI) After holding that GE 13 is not an admission by a party-opponent under Federal Rule of Evidence (F.R.E.) 801(d)(2), the Appeal Board instructed me to conduct a supplemental hearing to fully relitigate matters covered by paragraphs 1.d. through 1.f; rule on the admissibility of Government Exhibit (GE)13; then issue a new decision consistent with the requirements of the Directive. After a full review of the Appeal Board DECISION AND REMAND ORDER, the pertinent personal conduct conditions of the Directive and the record, I issue the following Remand Decision.

RULING ON GOVERNMENT EXHIBIT 13A

At the supplemental hearing on July 13, 2004, the parties agreed to add a page to GE 13 (Supplemental hearing, Tr. 14-15.) to make the exhibit complete. With the additional page the exhibit (GE 13) has become three pages in length and has been re-identified as GE 13A. The supplemental hearing, which was held on July 13, 2004, replicated the first hearing in that the agent had no independent recollection of contents of GE 13A, and was only able to identify the exhibit through the job-related inventory codes that appear at various locations of the exhibit. Department Counsel then sought to admit GE 13A in evidence as a business record under F.R.E. 803 (6) or public record under 803 (8). Applicant's objections to the admission of GE 13A in evidence were based on a lack of foundation and trustworthiness, as well as not being properly authenticated. The parties submitted briefs (August 20, 2004) and reply briefs (August 27, 2004), regarding the issue of the admissibility of GE 13A. Having considered the Appeal Board Decision, the record of the Hearing and Supplemental Hearing on July 13, 2004, and the briefs, I conclude GE 13A, a report of investigation (ROI) by a federal investigator dated July 2, 1986, is a public record and is admitted in evidence under F.R.E. 803 (8). The exhibit has been authenticated under F.R.E. 901 by the special agent. (hearing, Tr. 19-28; Supplemental hearing Tr. 9-46.)

REVISED FINDINGS OF FACT

While GE 13A is determined to be legally admissible in evidence, I shall render revised findings as to the weight to be given this exhibit as well as Applicant's testimony about his past drug use. My decision to reassess the weight of GE 13A is prompted by the correct observation of the Appeal Board in their DECISION AND REMAND ORDER:

[G]iven the record evidence in this case, the Board does not conclude that the Administrative Judge's findings and conclusions about SOR paragraphs 1.d through 1.f can be affirmed on the basis of record evidence apart from the Report of Investigation. Our reading of the decision below persuades us that the Administrative Judge's findings and conclusions about Applicant 's credibility and SOR paragraphs 1.d through 1.f relied heavily on the Report of Investigation. (Appeal Board Decision, p. 6)

Applicant is 46 years old and is employed by a defense contractor constructing shielded enclosures for a defense contractor. He seeks a top secret clearance.

On March 31, 1986 Applicant submitted a security clearance questionnaire (SCA, GE 3) in which he answered "yes" to questions 18a. and 18b., requiring information about the use or purchase of narcotics, depressants, stimulants, hallucinogens or Cannabis. On July 6, 1986, Applicant provided a sworn statement indicating (GE 6) he had used several types of drugs (though no drugs were identified) for about 10 years. He also stated he did not plan to use drugs again. GE 13A, also dated July 2, 1986, admitted in evidence over objection as a public record, contains information the special agent wrote regarding Applicant's use of marijuana, amphetamines, LSD, barbiturates and heroin.

On August 7, 1992, Applicant submitted another SCA (GE 2) in which he answered "yes" to question 22a. requiring information about use of any narcotic, depressant, stimulant, hallucinogen, cannabis, or any mind altering substance. Applicant answered "yes" to question 22b. asking for information about the purchase of any narcotic, depressant, stimulant, hallucinogen or cannabis. In the remarks section of the SCA (GE 2), Applicant stated he used hashish three times in 1976. On December 7, 1992, Applicant provided another sworn statement (GE 5) indicating he had no intention of using drugs in the future and also had no dealings with drug use or the purchase of drugs.

On May 5, 1998, Applicant submitted an SCA and answered "no" to drug questions 27 and 29 requiring information about drug use or purchase in the last 7 years or since the age of 16, whichever is shorter.

On March 6, 2001, Applicant provided another sworn statement (GE 4) indicating he "briefly" used cannabis, LSD and cocaine, and he also stated these were the only drugs he used. He stated he had never used heroin as had been alleged by someone. Having weighed and balanced the sworn statements with the SCAs since 1986, Applicant has always answered the SCA drug questions correctly by disclosing the fact he has used drugs. The problem is why he would state in arch 2001 (GE 4) he only used cocaine, LSD and marijuana, when he also used amphetamines and barbiturates. While most reasonable minds would have trouble recalling various kinds of drugs used approximately 20 years ago or earlier and the length of time the drugs were used, Applicant seemed to have some additional difficulty in recalling all the drugs he used. Though the piecemeal disclosures of his drug use could suggest Applicant was selectively covering up his drug use either by drug type or duration, he could have simply chosen to deny any other drug use altogether after 1986. Yet, in his SCA in August 1992 he admitted using hashish back in 1976. Even in his March 2001 sworn statement where he incorrectly stated he only used cocaine, LSD and cannabis, he admitted for the first time using cocaine during a brief period in approximately 1980. (Tr. 157.) Because he believes hashish is the same kind of drug as Cannabis, he did not list hashish in his March 2001 sworn statement. (Tr. 137.)

Given Applicant 's testimony (Tr. 157-160.) about the extent of his marijuana use, Applicant's description in March 2001 that his marijuana use was only "brief" is incorrect. Though Applicant denied using amphetamines and barbiturates in his answer to the SOR, he corrected himself at the hearing (Tr. 153-155.) and admitted using amphetamines and perhaps barbiturates but not more than a few times.

GE 13A makes a reference to heroin use by Applicant on six occasions in 1975. Applicant's denial of heroin use in his sworn statement (GE 4), in his answer to the SOR and also at the hearing, places this allegation in issue. Even though the word "heroin" is also referenced is GE 11, a medical data classification sheet, I give the exhibit no weight because it lacks sufficient indicia of reliability. I find as persuasive Applicant 's reason for not using heroin because he would have to use a needle or puncture his arm even though it is recognized there are different ways to ingest the drug. In sum, I find GE 13A carries no weight with respect to Applicant's alleged heroin use.

Considering the evidence as a whole, even though Applicant stated in March 2001 that Cannabis, LSD and cocaine were the only drugs he had used, he clearly was mistaken by not also identifying amphetamines and barbiturates which had been listed in GE 13A.

POLICIES

Enclosure 2 of the Directive sets forth policy conditions which must be given binding consideration in making security clearance determinations. These conditions must be considered in every case according to the pertinent guideline; however, the conditions are in no way automatically determinative of the decision in any case nor can they supersede the Administrative Judge's reliance on his own common sense. Because each security case presents its own unique facts and circumstances, it should not be assumed that the conditions exhaust the entire realm of human experience or that the conditions apply equally in every case. In addition, the Judge, as the trier of fact, must make critical judgments as to the credibility of witnesses. Conditions most pertinent to evaluation of the facts in this case are:

Personal Conduct

Disqualifying Conditions (DC):

3. Deliberately providing false or misleading information concerning relevant and material matters to an investigator...in connection with a personnel or trustworthiness determination;

4. Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation, or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail.

Mitigating Conditions (MC):

2. The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

5. The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress.

General Policy Factors (Whole Person Concept)

Every security clearance case must also be evaluated under additional policy factors that make up the whole person concept. Those factors (found at page 2-1 of Enclosure 2 of the Directive) include: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other behavioral changes; (7) the motivation for the conduct; and, (8) the potential fro pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

Burden of Proof

As set forth in the Directive, every personnel security determination must be a fair and impartial overall commonsense decision based upon all available information, both favorable and unfavorable, and must be arrived at by applying the standard that the granting (or continuance) of a security clearance under this Directive may only be done upon a finding that to do so is clearly consistent with the national interest. In reaching determinations under the Directive, careful consideration must be directed to the actual as well as the potential risk involved that an applicant may fail to properly safeguard classified information in the future. The Administrative Judge can only draw those inferences or conclusions that have a reasonable and logical basis in the evidence of record. The Judge cannot draw inferences or conclusions based on evidence which is speculative or conjectural in nature.

The Government must make a case with substantial evidence under the personal conduct guideline. Then, the burden shifts to applicant to remove that doubt with substantial refute, explain, mitigate, or extenuate the facts. An applicant has the ultimate burden of persuasion to demonstrate the past conduct is unlikely to repeat itself and he qualifies for a security clearance.

CONCLUSIONS

Security concerns are raised when an individual deliberately furnishes false information during the course of a security investigation. Subparagraphs 1.d., 1.e., and 1.f. allege Applicant falsified his March 6, 2001 sworn statement concerning one or more of the drugs listed in GE 13A. The applicable disqualifying condition is DC 3 that addresses deliberate concealment of material matters to an investigator in connection with a personnel security investigation.

In his March 6, 2001 sworn statement (GE 4), Applicant indicated he briefly used cannabis, LSD, and cocaine. Subparagraph 1.d. alleges he deliberately sought to conceal his heroin use. However, having weighed and balanced all the evidence relevant to whether Applicant used heroin in 1975, I find Applicant did not use the drug because he did not want to puncture or stick a needle in his arm.

Subparagraph 1.e. refers to Applicant's March 6, 2001 sworn statement (GE 4) a second time in alleging Applicant intentionally failed to disclose heroin, barbiturates, amphetamines, and hashish among those drugs he also used. While Applicant did not disclose those drugs just identified in the March 6, 2001 statement, at the hearing he remembered he had used amphetamines and probably barbiturates. His amphetamine and barbiturate use is also described in GE 13A. Considering all the evidence concerning the omission of barbiturates and amphetamines from the GE 13A, I conclude Applicant had forgotten he used amphetamines and barbiturates when he completed his sworn statement (GE 4) in March 2001. Significantly, Applicant also stated in his answer to the SOR he did not use amphetamines or barbiturates. His admission at the hearing of barbiturate and amphetamine use persuades me to believe he did not intentionally conceal material information from the March 2001 sworn statement. Applicant's failure to include heroin in his March 2001 statement has been addressed in the preceding paragraph. With regard to his failure to mention hashish in the

March 2001 statement (GE 4), I accept Applicant's explanation that he did not include hashish because the drug and Cannabis are both a type of Cannabis.

Subparagraph 1.f. refers to Applicant's March 6, 2001 statement (GE 4) again in alleging his description of marijuana use as "brief" was an intentional effort on his part to conceal his 10 year history of marijuana use. Even though he made a poor choice of words to describe the ten year period he used marijuana, his marijuana use occurred about twenty years ago. While he should have used a more definitive word, e.g., lengthy, regular, to describe 10 years of marijuana use, he provided an adequate description of his marijuana use at the hearing. Additionally, his marijuana use is also described in GE 13A. Having weighed and balanced the word "brief" with GE 13A and Applicant's testimony describing his marijuana use, I conclude he did not intend to conceal his marijuana use. Accordingly, subparagraphs 1.d., 1.e., and 1.f. of the personal conduct guideline are found for Applicant.

As noted in my original Decision, the evidence in rehabilitation from Applicant's three witnesses and character statements describes a very honest and professional individual. In addition to supporting a finding in Applicant's favor under the financial considerations guideline, the favorable evidence provides a solid foundation for finding in Applicant's favor under the general factors of the whole person concept. Not using drugs for at least twenty years represents strong evidence of rehabilitation while possessing a reputation for trustworthiness and professionalism among his colleagues certainly entitles Applicant to significant consideration under whole person factor 6 (the presence or absence of rehabilitation and other pertinent behavioral changes. Under whole person factor 9 (the likelihood of continuation or recurrence), the favorable character evidence justifies complete confidence there will be no recurrence of illegal drug use by Applicant in the future.

FORMAL FINDINGS

Paragraph 1 (personal conduct, Guideline E): FOR THE APPLICANT.

d. For the Applicant.

e. For the Applicant.

f. For the Applicant.

Formal Findings for Applicant under subparagraphs 1.a., 1.b., and 1.c., and Paragraphs 2 and 3 remain the same as in my original Decision dated June 18, 2003.

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant a security clearance.

Paul J. Mason

Administrative Judge

1. I found against Applicant under paragraph 1 (personal conduct), subparagraphs 1.d., 1.e., and 1.f., and for him under 1.a., 1.b., and 1.c. I also found for Applicant under paragraph 2 (sexual behavior) and paragraph 3 (alcohol consumption).