



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-11070
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esquire
For Applicant: Sheldon I. Cohen, Esquire

June 19, 2008

Decision

CURRY, Marc E., Administrative Judge:

On February 29, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its denial of Applicant's request for a security clearance. Specifically, it alleged facts which raise concerns under Guidelines H, Drug Involvement, J, Criminal Conduct, and E, Personal Conduct. 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.

Applicant answered the SOR on March 20, 2008, and requested a hearing. I was assigned the case on April 10, 2008. On April 17, 2008, the hearing was scheduled for May 16, 2008. During the hearing, I received five government exhibits, 23 Applicant exhibits, and the testimony of six Applicant witnesses. I received the transcript on May

27, 2008. After reviewing the record evidence, I conclude that Applicant's eligibility for access to classified information is granted.

Findings of Fact

Applicant is a 30-year-old married man with three children. The two oldest are 13 years old and 22 months old, respectively. The third is an infant that he and his wife adopted from a developing country in September 2007 (Tr. 187). Applicant has taken some college courses.

From 1996 to 2003, Applicant served in the U.S. Army. He was an industrious soldier with an aptitude for satellite communications technology. He received multiple awards including Company Soldier of the Year, and Regional Soldier of the Year in 1999 (Exhibits H and I, Tr. 194). He frequently worked overtime on projects (Exhibit S at 1).

In May 2000, Applicant was promoted to a non-commissioned officer (NCO) position after completing a non-commissioned officer's course with honors (Exhibit O). Younger soldiers respected him, considering him one of the "company father figures" (Tr. 56). He was 24-years-old at the time. By approximately 2002, Applicant had a top secret clearance with access to Sensitive Compartmented Information (SCI) (Exhibit 1 at 14, Tr. 240).

From 1997 to 2003, Applicant smoked marijuana approximately 15 to 20 times with fellow soldiers in two duty locations. In one of the duty locations, he also smoked it with a family member who had been living in his home (Tr. 172). Fearing adverse job consequences, he did not disclose it on a security clearance application completed in 1999 (Tr. 245). One evening in March 2003 while at a party at a local college, Applicant shared two cigarettes laced with cocaine (Tr. 212 - 213). The next day, he was ordered to take a random drug test. Over the next two weeks, while the drug test was pending, he used marijuana once more (Tr. 239).

Applicant tested positive for cocaine (Tr. 214). Subsequently, he was the subject of Non-Judicial Punishment/Article 15 proceedings. He was reduced one paygrade, ordered to forfeit half of his pay for two months, and served 45 days restriction. Also, his security clearance was suspended.

Applicant's command gave him the option of transferring to another position or leaving the military (Tr. 218). He chose the latter option, and was honorably discharged in April 2003 (Exhibit A).

In November 2003, Applicant began working as a communications engineer for a defense contractor. He worked there for approximately three years. He spent all but two weeks of the first two years of his stint with this employer in either Iraq or Afghanistan installing and maintaining satellite communications systems, and securing radio frequencies (Tr. 116, 121, 222).

The work was dangerous. Applicant lived outside of the Green Zone in Iraq. He wore body armor and carried a weapon (Tr. 224). Once, he and some coworkers had to shoot suppression fire at a hostile crowd that was converging on the hotel where they were residing (Tr. 225). On another occasion, part of a convoy that was transporting Applicant was destroyed by a roadside bomb (Tr. 136). While in Afghanistan, Applicant provided onsite communications support to teams of Afghani workers, civilian police, and U.S. military tasked with poppy eradication (Tr. 138). Much of the area the teams covered was rural, desolate and littered with unexploded ordnance. On one occasion, a team member's hand was blown off by a land mine (Tr. 139).

In September 2005, after returning to the U.S., Applicant accompanied his then-supervisor to the U.S. Gulf Coast after Hurricane Katrina to help a local police department rebuild its communications infrastructure (Tr. 127). The job took approximately a month to complete. When he arrived, the municipality was under martial law (Tr. 198). The police department deputized Applicant during this period (Exhibit V). The department sheriff is "eternally grateful" for the assistance Applicant provided (Exhibit W).

Applicant was laid off in August 2006 for reasons unrelated to performance (Exhibit 1 at 13). His supervisor characterized him as dependable, hardworking, and dedicated (Tr. 121).

Since October 2006, Applicant has worked for his current employer as a radio frequency engineer. His duties include designing, maintaining, and securing satellite networks (Tr. 50, 84). He is "well respected by his colleagues and supervisors and relied upon as an esteemed member of [his] department" (Exhibit U). His current supervisor describes him as "second to none" (Tr. 98). Also, he is dedicated to his profession, continually researching new software updates and maintenance procedures (Tr. 62 - Testimony of Co-Worker).

Applicant has not used illegal drugs since July 2003 (Exhibit 3 at 2). Since then, he has attended pastoral counseling when not working out of town. He disclosed his drug use history to the state social service agency that facilitated the adoption of his youngest child. Before finalizing the adoption, the agency conducted a home study, and required him to undergo two months of random drug testing, which he passed (Tr. 177-179).

In December 2006, Applicant completed another security clearance application. In an effort "to leave no stone unturned" (Tr. 231), he was fully forthcoming about his drug use history.

Applicant is active in his church. He helps manage the church's nursery class (Tr. 170).

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." 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 ultimate burden of persuasion as 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. 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 an 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

Under this guideline, "use of an illegal 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). Here, Applicant's drug use while possessing a security clearance, and the subsequent failed drug test, triggers the application of AG ¶¶ 25(a), "any drug abuse," 25(b), "testing positive for illegal drug use," and 25(g), "any illegal drug use after being granted a security clearance."

During a six-year-period, Applicant used marijuana approximately three times per year, and used cocaine once. He did not use drugs before then, and he has not used in the five years since then. I conclude his use was not frequent. Its infrequency is outweighed, however, by the negative inferences generated by his decision to use drugs while in the Army, entrusted with a top secret clearance and SCI access, and his intentional failure to disclose it on a 1999 security clearance application.

Nevertheless, the amount of time that has elapsed since the last use outweighs the negative inferences generated by the nature and surrounding circumstances of his use. There is no bright line definition of what constitutes recent conduct. Instead, it depends on the totality of the record evidence (ISCR Case No. 03-02374). Applicant's drug abuse occurred between ages 19 and 25. Since then, his employers have repeatedly entrusted him with high-pressure tasks under unusual and/or dangerous circumstances. He has performed admirably.

Applicant's personal life has been equally distinguished. He adopted a child from a developing country, and is actively involved in a local church, attending pastoral counseling, and assisting with the church nursery school. The adoption is particularly significant because he had to participate in home study that included two months of random drug testing before it was finalized.

Applicant has been fully forthcoming about his past drug use during the current security clearance investigative process. His testimony reflected a recognition of the gravity of his past transgressions. He has always been a talented individual. During his years in the military, however, he lacked the equally important characteristics of maturity and good judgement. Throughout the past five years, he has developed these corresponding attributes. Upon considering these facts, in addition to Applicant's credible, introspective testimony, I conclude that the significant rehabilitation that has occurred since he last used drugs mitigates the possibility of recurrence. AG ¶ 24(a), "the behavior happened so long ago . . . that it is unlikely to recur . . .", and AG ¶24(b)(3), "a demonstrated intent not to abuse any drugs in the future, such as an appropriate period of abstinence" apply.

Applicant has mitigated the Drug Involvement Security concern.

Guideline J, Criminal Conduct

Under Article 112(a) of the Uniform Code of Military Justice, wrongful use of illegal substances such as marijuana and cocaine is a crime. Consequently, Applicant's repeated marijuana use and one-time cocaine use while in the military generates a

security concern under AG ¶ 31(a), “a single serious crime or multiple lesser offenses,” and AG ¶31(c), “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted.”

For the reasons set forth in the Drug Involvement section, above, I conclude AG ¶¶ 32(a), “so much time has elapsed since the criminal behavior happened . . . that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment,” and 32(d), “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement,” apply. Applicant has mitigated the Criminal Conduct security concern.

Guideline E, 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,” (AG ¶15). Here, Applicant’s drug use while in the military led to the suspension of his security clearance in addition to Article 15 proceedings. Ultimately, it hastened his departure from the military. AG ¶ 16(e), “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal professional, or community standing,” applies.

For the reasons set forth in the Drug Involvement Section, above, AG ¶ 17(c), “. . . so much time has passed . . . that [the conduct] is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment,” applies. Applicant has mitigated the Personal Conduct security concern.

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) 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.

By using illegal drugs and lying about it on a 1999 security clearance, Applicant committed a serious dereliction of his responsibilities as a soldier, and betrayed the trust bestowed upon him by his family. He has been drug-free for five years. In that time, he has lived an exemplary life, earning the trust, respect, and admiration of his professional colleagues, and has restored the trust of his family. I conclude the rehabilitation, and the time that has elapsed since the last drug use outweighs the nature, extent, and seriousness of the conduct. Clearance is granted.

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:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b	For Applicant
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	For Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

MARC E. CURRY
Administrative Judge