



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-04604
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: Alan V. Edmunds, Esquire

November 30, 2009

Decision

CURRY, Marc E., Administrative Judge:

Applicant’s 30-year history of illegal drug use, his two drug-related arrests, and his failure to be forthcoming about his drug involvement on two security clearances applications make him an unacceptable candidate for a security clearance. Clearance is denied.

Statement of the Case

On April 9, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing a security concern under Guidelines H, Drug Involvement, 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 April 22, 2009, denying all of the allegations. The case was assigned to me on August 12, 2009. On August 31, 2009, a notice of video-teleconference was issued scheduling the case for September 23, 2009. The hearing was conducted as scheduled. I received 13 government exhibits, marked and identified as Exhibits 1 through 13, and 18 Applicant exhibits, marked and identified as Exhibits A through R. Department Counsel objected to Exhibit A, and I reserved judgment.¹ I also received the testimony of two Applicant witnesses. The transcript was received on September 30, 2009.

Evidentiary Ruling

Exhibit A sets forth the results of a drug test. The date on the exhibit is two weeks after the hearing. Also, the results are in a foreign language. Department Counsel objected arguing that Exhibit A lacked a proper foundation. I reserved judgment on Exhibit A's admissibility, and left the record open at Applicant's request to provide him an opportunity to submit a translated copy and any other supplementary documentation clarifying when he underwent drug testing (Tr. 24).

On September 29, 2009, Applicant provided three additional documents. I marked them as follows:

Exhibit S - Drug Test dated May 26, 2009;
Exhibit T - Drug Test dated September 8, 2009; and,
Exhibit U - Drug Test dated October 6, 2009.

Department Counsel renewed his objections to their admissibility.

Like Exhibit A, Exhibits S and U are in a foreign language. Exhibit T is in English. Upon considering Applicant's motion for admission of these documents and Department Counsel's objections, I hereby deny Applicant's motion to admit Exhibits A, S, and U, and grant his motion to admit Exhibit T.

Findings of Fact

Applicant is a 50-year-old man with two children, ages 19 and 12. Two prior marriages ended in divorce. His first wife is the mother of the older child and his second wife is the mother of the younger child. Currently, Applicant lives with his girlfriend and her two teenage sons (Exhibit K).

Applicant graduated from high school in 1977. Two years later he joined the U.S. Army where he served for seven years until his honorable discharge in 1986 (Exhibit 8 at 11).

¹See Evidentiary Ruling section of Decision, *infra*.

Since leaving the military, Applicant has worked in the telecommunications field (Exhibit 10 at 1; Tr. 31). Among other things, he develops communication networks for the military in various combat theaters, and maintains battle command video wall displays (Exhibits Q, L). He has deployed with the military to multiple combat theaters during the past 20 years (Exhibit O). Because of the nature of his work, he has typically been one of the first group of civilians to deploy with the military to various flashpoints and combat theaters. Consequently, his work is hazardous (Exhibit I).

Applicant has lived abroad since leaving the military. He has been working with the same telecommunications contractor since 2001 (Exhibit I). He has lived in the same foreign country for the past two years (Exhibit C). He has held a security clearance continuously since 1979 (Tr. 44).

Applicant's second-line supervisor, who oversees 87 people, describes Applicant as one of his top performers (Tr. 31). Applicant's supervisor, who worked with him from 2003 to 2004 while stationed in Iraq, characterized his work as extraordinary (Exhibit D). According to another former supervisor, Applicant's "work ethic is beyond reproach" (Exhibit H).

Applicant is equally well-respected by his coworkers. According to one coworker, he is extremely meticulous in handling classified material, and on one occasion, implemented a training program to ensure that security standards were upheld (Exhibit O). Another coworker characterized him as an on-the-job leader who is always willing to share his expertise with coworkers (Exhibit I).

Applicant has used marijuana and hashish intermittently for more than 30 years. He began smoking marijuana in 1976 while in high school, and continued to smoke it after entering the Army. In 1982, he experimented with hashish while at a party with friends (Answer). He used hashish two or three more times over a one-month period between May and June of 1985 (Answer).

In July 1985, while stationed abroad, Applicant was arrested by the police of the country where he was stationed after being caught purchasing hashish (Exhibit 1 at 2). While being booked, he attempted to flee. The police again detained him, and later released him to Army's custody. He was then punished under the Uniform Code of Military Justice for resisting arrest and wrongful possession of hashish. He was reduced to a lower pay grade, forfeited \$300 pay per month for two months, and ordered to perform extra duty for 45 days (Exhibit 1 at 6). Later, he was barred from re-enlisting (Exhibit 2).

As part of a periodic review of Applicant's security clearance eligibility in 1987, a Defense Investigative Service agent interviewed him (Exhibit 6). When the agent asked Applicant if he intended to use illegal drugs in the future, he responded, "not only no, but hell no!" (Exhibit 6 at 1).

In 1992, Applicant shared some hashish with a friend while playing video games (Exhibit 10 at 1). He used it on three other occasions that year (Tr. 37). During a periodic reinvestigation of his security clearance eligibility in 2000, a Defense Security Service agent interviewed him (Exhibit 10). He disclosed the 1992 drug use, but stated he had no intention of using illegal drugs in the future (*Id.*).

In March 2004, Applicant, while cleaning his recently deceased brother's apartment, "came across a drawer with a shoe box of seeds and stems and one rolled joint" of marijuana (Tr. 52). He decided to sample some of it (Tr. 52).

In September 2004, Applicant, while travelling through Europe to visit his son, decided to stop in a country where hashish was legal, and purchase some (Tr. 50). His intention was to use the hashish while in the country where his son lived, and hide the remainder at his son's house, for his next visit, before returning home (Exhibit 13 at 7). Shortly after leaving the country where hashish is legal, Applicant was stopped by police of a bordering country where hashish possession constitutes a misdemeanor criminal offense. The police arrested and charged him with possession of hashish (Tr. 51). Applicant subsequently paid a fine (Answer).

In 1986, Applicant completed a security clearance application (Tr. 45). He failed to disclose past hashish use and his 1985 drug-related arrest (Exhibit 5 at 2). He omitted this information because he was afraid that he would not get the job for which he had applied (Tr. 45).

In 2006, Applicant completed another security clearance application. He failed to disclose his drug-related arrests and his 2004 episodes of illegal drug use, as required (Exhibit 11 at 33). He omitted this information because he did not want his new employer to perceive him as "the new druggie that just came in, just got busted by the police" (Tr. 48-49).

In May 2009, Applicant executed a statement of intent never to use illegal drugs again (Exhibit E). In September 2009, Applicant passed a drug test (Exhibit T).

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. 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. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

Analysis

Guideline H, Drug Involvement

Under this guideline, “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 has used marijuana and hashish periodically for 30 years. During much of this time, he held a security clearance. AG ¶¶ 24(a), “any drug abuse,” 24(c), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;” and 24(g), “any illegal drug use after being granted a security clearance,” apply.

Applicant’s signed statement of intent not to use illegal drugs in the future triggers the application of mitigating condition AG ¶ 26(b)(4), “a signed statement of intent with automatic revocation of clearance for any violation.” The application of this mitigating condition, however, has little probative value given Applicant’s repeated, earlier promises to stop using illegal drugs.

None of the remaining mitigating conditions apply. Applicant’s most recent episodes of marijuana abuse occurred less than six years ago. Moreover, his explanation that he used it most recently to help him counteract the loss of appetite precipitated by a chronic illness is not credible given the number of years he has been abusing marijuana recreationally.

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). Applicant’s deliberate omission of his drug usage and drug-

related arrests from his security clearance applications of 1986 and 2006 trigger the application of AG ¶ 16(a), “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire”

Applicant attributes his 1986 omission to a fear of not getting the job if his potential employer knew of his drug history. He attributes his 2006 omission to concerns of how his employer would perceive him if his drug involvement history was known. Applicant has a duty to provide truthful, candid information throughout the security clearance process. According to the Appeal Board, “[s]elf-interest is not a valid justification for falsifying” (ISCR Case No. 96-0685 (App. Bd. November 14, 1997) at 1)) I have considered the mitigating conditions and conclude none apply.

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) 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.

Applicant’s drug abuse has spanned 30 years, but has been sporadic. He has a stellar work history. The sporadic nature of his drug use is outweighed by his repeated promises to quit abusing drugs, and his strong work credentials are outweighed by his lack of honesty demonstrated through his repeated falsification of security clearance applications. Upon considering this case in the context of the whole person concept, I conclude Applicant is an unacceptable candidate for a security clearance.

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:	AGAINST APPLICANT
Subparagraphs 1.a-1.g:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT

Subparagraphs 2.a-2.d:

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 continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

MARC E. CURRY
Administrative Judge