



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



In the matter of:)	
)	
)	ISCR Case No. 10-04596
)	
Applicant for Security Clearance)	

Appearances

For Government: D. Michael Lyles, Esquire, Department Counsel
For Applicant: Sheldon I. Cohen, Esquire

July 29, 2011

Decision

CURRY, Marc E., Administrative Judge:

Applicant failed a drug test in April 2007 and provided an explanation at the hearing that was not credible. This raises unmitigated security concerns regarding his personal conduct. Clearance is denied.

Statement of the Case

On November 23, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns 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; of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR, admitting all of the allegations, and requesting a hearing. DOHA received the answer on December 16, 2010. The case was assigned to me on January 25, 2011. On March 29, 2011, a notice of hearing was issued,

scheduling the case for April 27, 2011. The hearing was held as scheduled. At the hearing, I received seven Government exhibits, 27 Applicant exhibits, and the testimony of Applicant and four character witnesses. The transcript (Tr.) was received on May 5, 2011.

Evidentiary Ruling

At the hearing, Department Counsel moved to strike SOR subparagraph 1.b and the portion of SOR subparagraph 2.b that cross-referenced subparagraph 1.b. Applicant did not object and I granted the motion.

Findings of Fact

Applicant is a 44-year-old single man with no children. He is a U.S. Army veteran, serving from 1985 to 1993. He was honorably discharged. (Tr. 85) While in the Army, Applicant earned, among other things, six Army Achievement Medals and one Army Commendation Medal. (AE C-I) Since leaving the military, Applicant has worked for various defense contractors on the same contract, excluding a stint with the federal government from March 2007 through June 2007. Over the years, he has been steadily promoted, advancing from administrative specialist, the position he first held upon leaving the Army, to operations officer, the position he currently holds. (Tr. 84)

Since March 2008, Applicant has worked for the same employer. (GE 4 at 15) He monitors a database containing all of the contractor and government personnel that are deployed abroad. (Tr. 34)

Applicant is highly respected on the job. According to a former supervisor, his "reliability [was] continually unsurpassed," and his contributions to the company were "invaluable." (AE T) Another former supervisor characterized Applicant's work ethic as "second to none." (AE V) His current supervisor characterizes him as "a top-notch employee" who "thinks outside of the box." (Tr. 46-47) In 2010, Applicant's supervisor nominated him for employee of the year. (AE Q)

One Saturday evening in March 2007 while socializing at a Veterans of Foreign Wars (VFW) post, Applicant met a woman who invited him to attend a party to watch a pay-per-view championship boxing match. (Tr. 98, 123) Applicant then left the VFW post with the woman. The party was in a basement of a home. People were playing cards, mingling, shooting pool, and smoking cigars. (Tr. 98)

The following Monday morning, Applicant was administered a random drug test and failed, testing positive for cocaine. (Tr. 95) Applicant then requested that the urine specimen be re-tested. His employer re-tested it, and it again was positive for cocaine. (Tr. 96)

After Applicant failed the drug test, his employer suggested that he participate in counseling through the company's employee assistance program. (Tr. 101) Applicant then met with a counselor who told him that, as a first-time offender, he may be able to

keep his job if he enrolled in a drug program. (Tr. 101) Applicant refused to enroll because he vehemently denied using cocaine and considered enrolling in the drug program tantamount to an admission of drug use. (Tr. 102)

In June 2007, Applicant's employer fired him. (Tr. 103) Also, his security clearance, which he held at the time he failed the drug test, was suspended. (GE 6) Applicant was unemployed for ten months before his current company hired him.

Applicant contends that he has never knowingly used any illegal drugs or substances. (Tr. 116) He testified that he left the fight party around 12:30 a.m. because he started feeling "hot," "sweaty," and "out of sorts." (Tr. 122, 123) He had never felt that way before. (Tr. 122) He did not leave the party with the woman with whom he had gone to the party, and went home alone.

When Applicant got home, he called another woman and asked her to come to his apartment and "hang out." (Tr. 126) When she arrived, he told her that he suspected someone "put something in a drink of [his]." (Tr. 123) Applicant did not seek emergency medical attention. (Tr. 123)

During an interview with an investigative agent in March 2010, Applicant stated that some of the people at the fight party were smoking marijuana. (GE 7 at 3) At the hearing, he said that no one at the party was smoking marijuana. (Tr. 124)

Applicant's current second-tier supervisor was aware of Applicant's failed drug test when he hired him. (Tr. 33) He decided to hire Applicant, in part, because of an impressive recommendation from his previous employer. (Tr. 31)

Policies

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions.

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 conscientious 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 for 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’s failed drug test in 2007 triggers the application of AG ¶ 25(b), “testing positive for illegal drug use.”

Applicant denies using illegal drugs, and suspects that he failed the drug test because someone at a fight party he attended two days before the drug test must have slipped some cocaine into his drink. In support of this contention, he testified that while at the party he began feeling unusually ill shortly after midnight, and this feeling was so troubling that he left the party and went home. This explanation is inconsistent with later testimony that once he got home, he immediately called a friend and invited her to his home to hang out. I conclude Applicant’s testimony that he felt sick when he left the party was not credible.

The credibility of Applicant’s explanation for testing positive for cocaine is additionally undercut by his contradictory accounts of whether people were smoking marijuana at the fight party. Consequently, I conclude that Applicant used cocaine before the drug test, and that this use caused him to fail a drug test. AG ¶¶ 25(a), “any drug abuse,” and 25(g), “any illegal drug use after being a security clearance,” also apply.

Because Applicant denies ever using illegal drugs, it is difficult to assess the applicability of the mitigating conditions. Nevertheless, there is no evidence that Applicant has used illegal drugs since failing the drug test in March 2007. Consequently, AG ¶¶ 25(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,” and 25(b)(3), “an appropriate period of abstinence,” applies. Applicant has mitigated the drug involvement 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) Applicant used cocaine at some point in 2007. Subsequently, he failed a drug test and lost his job. 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.

Applicant's current supervisor is aware of the failed drug test. Applicant has not used any illegal drugs since 2007. AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress," applies.

Applicant is a highly respected professional who has made invaluable contributions to his employers and to the U.S. government over the years. Nothing in his record indicates that he was ever a habitual illegal drug user. Based on his background, and the favorable testimony of the witnesses, I conclude the drug use that caused Applicant to fail the drug test in 2007 was an anomaly.

However, providing truthful and candid information during the security clearance process is especially important in security clearance evaluations. (AG ¶ 15) Applicant's testimony failed to meet this threshold. The negative ramifications of this failure outweigh the isolated and remote nature of the misconduct. I conclude Applicant has failed to mitigate the security concern generated by his failed 2007 drug test.

Whole-Person Concept

Under the whole-person concept, 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.

I have considered the applicability of the whole-person factors in my analysis of the guidelines above, and I conclude that they do not warrant a favorable conclusion.

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	WITHDRAWN

Paragraph 2, Guideline E:

AGAINST APPLICANT

Subparagraph 2.a - 2.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