

KEYWORD: Drugs; Criminal Conduct; Personal Conduct

DIGEST: Applicant failed to mitigate security concerns under the Drug Involvement, Criminal Conduct, and Personal Conduct Guidelines of the Directive. Clearance is denied.

CASENO: 06-23318.h1

DATE: 05/24/2007

DATE: May 24, 2007

In Re:	)	
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	)	
-----	)	ISCR Case No. 06-23318
SSN: -----	)	
	)	
Applicant for Security Clearance	)	
	)	

**DECISION OF ADMINISTRATIVE JUDGE  
JOAN CATON ANTHONY**

**APPEARANCES**

**FOR GOVERNMENT**

Robert E. Coacher, Esq., Department Counsel

**FOR APPLICANT**

Michael C. Bruno, Esq.

**SYNOPSIS**

\_\_\_\_ Applicant failed to mitigate security concerns under the Drug Involvement, Criminal Conduct, and Personal Conduct Guidelines of the Directive. Clearance is denied.

## STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. On January 4, 2007, under the applicable Executive Order<sup>1</sup> and Department of Defense Directive,<sup>2</sup> DOHA issued a Statement of Reasons (SOR) detailing the basis for its decision—security concerns raised under Adjudicative Guidelines H (Drug Involvement), J (Criminal Conduct), and E (Personal Conduct), promulgated December 29, 2005, and applicable in DoD adjudications of SORs issued as of September 1, 2006, and thereafter. With the SOR, DOHA provided Applicant with a copy of the Directive and the applicable Adjudicative Guidelines. On February 9, 2007, Applicant executed a notarized answer to the SOR. He requested his case be determined on the record in lieu of a hearing. The Government compiled its File of Relevant Material (FORM) on March 7, 2007. The FORM contained documents identified as Items 1 through 6.

On March 13, 2007, Applicant was provided a copy of the FORM, with instructions to submit any additional information and/or objections within 30 days of receipt. He submitted additional information within the 30-day time period, and Department Counsel did not object to the admission of Applicant's submission. On April 16, 2007, the case was assigned to me for a decision. After a careful review of Applicant's submission in response to the FORM, I admitted it to the record as Applicant's Exhibit (Ex.) A.

## FINDINGS OF FACT

\_\_\_\_\_ Applicant is 50 years old, never married, and employed as a nuclear pumper by a defense contractor. He is the father of an adult daughter. He has worked for his present employer since 1975, and he has held a security clearance since 1976. (Item 4; Item 5.)

The SOR (Item 1) alleges under Guideline H, Drug Involvement, that Applicant used cocaine, with varying frequency, from about 1989<sup>3</sup> to about November 1997 and from 2004 to at least June 2005 (SOR ¶ 1.a.) and that he purchased cocaine (SOR ¶ 1.b.). The SOR also alleges Applicant was arrested in about November 1996 and charged with Possession of Drugs, a felony. (*See* Item 6.) Applicant pled guilty to Possession of Cocaine, was sentenced to two years probation, and ordered to attend drug counseling. (SOR ¶ 1.c.)

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<sup>1</sup>Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified.

<sup>2</sup>Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified.

<sup>3</sup>In his answer to the SO, Applicant admitted cocaine use "from about 1986 to about 1997 and from 2004 to at least June 2005...."

The SOR further alleges Applicant was arrested again in about March 1998 and charged with Possession of Drugs, a felony. (See Item 6.) At that time, Applicant pled guilty to Possession of Cocaine, was sentenced to two years probation, and was ordered to attend drug counseling (SOR ¶ 1.d.).

The SOR alleges, and Item 6 corroborates, that in October 1998, Applicant was arrested and charged with Possession of Controlled Substance, a felony. The charge was Nolle Prossed. (SOR ¶ 1.e.) The SOR alleges under Guideline H that Applicant used cocaine while holding a security clearance in 1976. (SOR ¶ 1.f.) Applicant admitted all Guideline H allegations. His admissions are incorporated herein as findings of fact.

In February 1992, Applicant completed a Department of Defense National Agency Questionnaire (NAQ). (Item 5) Question 20 on the NAQ reads as follows: “20. **Drug/Alcohol Use and Mental Health** Have you ever tried or used or possessed any narcotic (to include heroin or cocaine), depressant (to include quaaludes), stimulant, hallucinogen (to include LSD or PCP), or cannabis (to include marijuana or hashish), or any mind-altering substance (to include glue or paint), even one-time or on an experimental basis, except as prescribed by a licensed physician?” Applicant responded “no” to Question 20. On February 11, 1992, he signed and dated the following certification upon completion of the NAQ: “I certify that the entries made by me are true, complete, and accurate to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See U.S. Code, Title 18, Section 1001).” DOHA alleged Applicant falsified material facts by deliberately failing to list his cocaine use from 1989 to at least 1992, as set forth in SOR allegation 1.a. (SOR ¶ 2.a.)

In September 2005, Applicant executed an Electronic Questionnaire for Investigations Processing (e-QIP). (Item 4.) Section 24 on the e-QIP reads as follows: “**Section 24: Your Use of Illegal Drugs and Drug Activity** The following questions pertain to the illegal use of drugs or drug activity. You are required to answer the questions fully and truthfully, and your failure to do so could be grounds for an adverse employment decision or action against you, but neither your truthful responses nor information derived from your responses will be used as evidence against you in any subsequent criminal proceeding. a. Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics (opium, morphine, codeine, heroin, etc.), amphetamines, depressants (barbiturates, methacholine, tranquilizers, etc.), hallucinogenic (LSD, PCP, etc.) or prescription drugs?” Applicant answered “yes” and stated he used cocaine about six times from March 1997 to October 1998. After completing the questionnaire, Applicant signed and certified the following statement:

My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both. (See Section 1001 of title 18, United States Code.)

DOHA alleged Applicant materially falsified material facts in his answer by deliberately failing to fully disclose his use of cocaine to at least June 2005. (SOR ¶ 2.b.)

In the SOR, DOHA also alleged under Guideline E that Applicant used cocaine while holding a security clearance granted in 1976. (SOR ¶ 2.c.) Applicant admitted all Guideline E allegations,

which are admitted herein as findings of fact. In mitigation, Applicant stated he had no intention to falsify his answers to Question 20 and Section 24. He also stated he had changed his life drastically and had become a religious person. (Item 3 at 2.) He also claimed he did not clearly understand the questions and should have proofread his answers thoroughly before submitting them. (Item 3 at 2.)

In his response to the FORM, Applicant admitted he did not include his 2004 cocaine use in his answer to Section 24 on the e-QIP because he was not convicted of the use and mistakenly thought Section 24 required him to list only convictions for illegal drug use. He pointed out he had answered “yes” to Section 24 and offered his affirmative answer as proof of his intent not to deceive the government. (Response to FORM at 1-2.)

Also in his response to the FORM, Applicant stated he answered “no” to Question 20 by mistake and did not intend to deliberately falsify material facts on his 1992 NAQ. (Response to FORM at 1-2.) Applicant further asserted he had not used cocaine since 2005, had possessed a security clearance since 1976, and his recent conduct presented no threat to national security. (Response to FORM at 2-3.)

In the SOR, DOHA alleged under Guideline J, Criminal Conduct, that the information alleged in subparagraphs 2.a. and 2.b. under Guideline E above constituted a violation of Federal law, pursuant to section 1001 of Title 18, U.S.C. and was a felony crime. (SOR ¶ 3.a.) DOHA also alleged that the information set forth in SOR allegations 1.c., 1.d., and 1.e. under Guideline H also constituted criminal conduct. (SOR ¶ 3.b.)

DOHA also asserted in the SOR that criminal conduct security concerns were raised by the following: that Applicant was arrested in about 1977 and charged with Driving Under the Influence (DUI) (SOR ¶ 3.c.); that he was arrested in 1978 and charged with DUI (SOR ¶ 3.d.); that he was arrested in November 1987, charged with Driving While Intoxicated (DWI), found guilty, referred by the court to a substance abuse program, and his driver’s license was suspended for six months (SOR ¶ 3.e.); that he was arrested in March 1998, charged with (1) DWI and (2) Driving Under Revocation or suspension, that he was found guilty on both counts, and his driver’s license was suspended for one year for Count (1) and 90 days for Count (2) (SOR ¶ 3.f.). Applicant admitted all Guideline J allegations and asserted he had “attended all classes and followed the rules and guidelines set forth in all programs that were issued to [him] and completed them accordingly.” (Item 3 at 2.) He provided no credible evidence to corroborate his assertion. Applicant’s admissions are admitted herein as findings of fact.

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## **POLICIES**

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Id.* at 527. The President has restricted eligibility for access to classified information to United States citizens “whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.” Exec. Or. 12968,

*Access to Classified Information* § 3.1(b) (Aug. 2, 1995). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.

By Memorandum dated August 30, 2006, the Under Secretary of Defense directed implementation of revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, promulgated December 29, 2005, and effective September 1, 2006, as modified. The revised Adjudicative Guidelines replaced the guidelines published in Enclosure 2 to DoD Directive 5220.6 and Appendix 8 to DoD 5200.2-R, and they apply to all adjudications and other determinations in which a SOR had not been issued by September 1, 2006. Accordingly, since the SOR in this case was issued January 4, 2007, the revised Adjudicative Guidelines apply.

The revised Adjudicative Guidelines set forth personal security guidelines, as well as the disqualifying conditions and mitigating conditions under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication that the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a security clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. The Directive presumes a nexus or rational connection between proven conduct under any of the disqualifying conditions listed in the guidelines and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

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## **CONCLUSIONS**

### **Guideline H - Drug Involvement**

An individual's use of an illegal drug or misuse of a prescription drug raises questions of reliability and trustworthiness because drug use or misuse can impair judgment and raise questions about the person's ability or willingness to comply with laws, rules, and regulations. Guideline H, ¶ 24. Guideline H defines drugs as *mood and behavior altering substances*. . . . *Drugs include: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.* Guideline H, ¶ 24(a)(1) and ¶ 24(a)(2). The Guideline further defines drug abuse as *the illegal use of drug or use of a legal drug in an manner that deviates from approved medical direction.* Guideline H, ¶ 24(b).

Applicant's admitted using cocaine, an illegal drug, with varying frequency, from about 1989 to about November 1997, and from 2004 until at least June 2005. He admitted purchasing cocaine, and he admitted using cocaine while holding a security clearance granted in 1976. This conduct raises security concerns under Disqualifying Conditions (DC) 25(a), 25(c), and 25(g)<sup>4</sup> of Guideline H.

Several Mitigating Conditions (MC) under Guideline H might be applicable to Applicant's case. If the drug abuse 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*, then MC 26(a) might apply. If Applicant intended not to abuse drugs in the future and demonstrated that intent in one of the four ways specified in the Guideline, then MC 26 (b) might apply.<sup>5</sup> Additionally, drug abuse that is of security concern can be mitigated under MC 26(d) by *satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional*.

The record shows that Applicant's cocaine abuse began in about 1989 and continued through 1997. Between 2004 and at least June 2005, he abused cocaine again. Thus, his drug abuse is recent, and Applicant provided no credible evidence to corroborate his assertion that he no longer uses drugs and has no intent to use them in the future. During his nearly ten years of cocaine use, Applicant held a security clearance granted him in 1976. While he stated he had completed drug rehabilitation, he provided no credible evidence that he had actually done so. Moreover, Applicant provided no credible evidence to demonstrate his current reliability, trustworthiness, and good judgment. Accordingly, I conclude that none of the Guideline H MCs apply to the facts of Applicant's case.

### **Guideline E - Personal Conduct**

Personal 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 special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.* Guideline E, ¶ 15.

Under Guideline E, a security concern is raised by an individual's *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.* Guideline E, ¶ 16(a).

Applicant completed a Department of Defense NAQ in February 1992. Applicant's signed and dated NAQ is entered in the record as Item 5. In his responses to Question 20, Applicant denied

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<sup>4</sup> DC 25(a) reads: "any drug abuse [as defined in ¶ 24(b)]." DC 25(c) reads: "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia." DC 25(g) reads: "any illegal use after being granted a security clearance."

<sup>5</sup> Specific examples of demonstrated intent that might apply under MC26(b) are as follows: (1) *disassociation from drug-using associates and contacts*; (2) *changing or avoiding the environment where drugs were used*; (3) *an appropriate period of abstinence*; and (4) *A signed statement of intent with automatic revocation of clearance for any violation.*

illegal use of drugs and purchase of illegal drugs, conduct which he later admitted occurred from at least 1989 through 1997. In September 2005, Applicant completed an e-QIP as a part of his security clearance investigation. Applicant's completed, signed, and certified e-QIP is entered in the record as Item 4. In response to Section 24, Applicant listed cocaine use about six times in 1997 and 1998 but failed to list his use of cocaine to at least June 2005. Through Applicant's admissions and the record evidence, the Government established a prima facie case that Applicant falsified his answers to Question 20 and Section 24. The burden of proof thus shifted to Applicant to rebut or mitigate the Government's allegations. Applicant denied he falsified his answers to the questions, but he provided no credible evidence in support of his denials.

Two Guideline E mitigating conditions (MC) might be applicable to Applicant's conduct. Pursuant to MC 17(a), personal conduct security concerns might be mitigated if *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*. Pursuant to MC 17(e), personal conduct security concerns might be mitigated if *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress*.

Applicant provided no credible evidence to mitigate his failure to list his illegal drug use on his 1992 and 2005 security clearance questionnaires. At the time he completed his NAQ in 1992, Applicant was approximately 25 years old and a mature adult. In 2005, when he completed his e-QIP, he was 48 years old and had held a security clearance since 1976. Although he knew, or should have known, the importance of telling the truth to the Government, he had reason to attempt to minimize his knowledge of his drug use. His assertions that his falsifications were inadvertent were not credible. He did not make good-faith efforts to correct his omissions, concealment, or falsifications before being confronted with the facts, and he did not take positive steps to reduce or eliminate the vulnerability to exploitation, manipulation, or duress caused by his on-going use of illegal drugs. I conclude that MC 17(a) and MC 17(e) do not apply to the facts of Applicant's case.

### **Guideline J - Criminal Conduct**

The record in this case shows that Applicant was arrested in once in 1996 and once in 1998 and charged with cocaine possession. Also in 1998, he was arrested and charged with possession of a controlled substance. In addition, he was arrested and charged with DUI in 1977 and 1978. In 1987, he was arrested for DWI, found guilty, referred to a substance abuse program, and his driver's license was suspended for six months. In 1998, Applicant was again arrested and charged with (1) DWI and (2) Driving Under Revocation or suspension. He was found guilty on both counts, and his driver's license was suspended for one year for Count (1) and for 90 days for Count (2). Additionally, Applicant falsified his drug activity on two security clearance applications and failed to rebut the Government's prima facie case that his falsifications were deliberate and therefore criminal conduct under 18 U.S.C. section 1001.

Criminal conduct creates a security concern because it raises doubts about an individual's judgment, reliability, and trustworthiness. Additionally, it raises doubts about a person's ability or willingness to comply with laws, rules, and regulations. Applicant's admitted criminal activity raises security concerns under Disqualifying Condition (DC) 31(a)<sup>6</sup> of Guideline J.

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<sup>6</sup>DC 31(a) reads: "a single serious crime or multiple lesser offenses."

Two mitigating conditions under Guideline J might apply to the facts of Applicant's case. Applicant's admitted criminal conduct might be mitigated under Mitigating Condition (MC) 32(a) if he provided credible evidence to show that *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.* MC 32(d) might apply if *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.* Some of Applicant's criminal conduct dates to the 1970s and 1980s, while other criminal conduct occurred as recently as 2005. Applicant's criminal activity is recent, and it also suggests a pattern of conduct, since it spans approximately 28 years, from 1977 to 2005. There is no credible evidence in the record to indicate successful rehabilitation. Applicant's criminal conduct raises serious doubts not only about his reliability, trustworthiness, and good judgment but also about his ability to follow laws, rules, and regulations. Applicant failed to provide credible evidence under MC 32(a) and MC 32(d) to mitigate the criminal conduct alleged in the SOR. No other MCs apply.

### **Whole Person Analysis**

In addition to evaluating the disqualifying and mitigating conditions under each guideline, an administrative judge must thoroughly consider and review all available reliable information about the appellant, past and present, favorable and unfavorable, to arrive at a balanced decision. DoD Regulation 5200.2-R, Appendix 8, describes this process of scrutiny and evaluation as "the whole person concept." The factors to be considered in a whole person analysis include the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; the frequency and recency of the conduct; the individual's age and maturity at the time of the conduct; the voluntariness of participation; the presence or absence of rehabilitation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; and, the likelihood for continuation or recurrence.

Applicant's admissions and the record evidence establish that he failed to offer credible evidence of drug rehabilitation, and it is reasonable to conclude his drug-related conduct is likely to recur, a situation that casts doubt on his current reliability, trustworthiness, and good judgment. Applicant's criminal conduct spans a period of 28 years, and he offered no credible evidence of rehabilitation, also casting doubt on his trustworthiness. Finally, Applicant deliberately misled the Government regarding his illegal drug use, and he used illegal drugs while holding a security clearance. These actions cast serious doubts on his security worthiness.

In ISCR Case No. 98-0761 at 3 (Dec. 27, 1999), DOHA's Appeal Board states that an administrative judge, in deciding an Applicant's security worthiness, "must consider the record as a whole (Directive Section F.3.) and decide whether the favorable evidence outweighs the unfavorable evidence, or *vice versa.*" I have considered the record as a whole and have evaluated Applicant's conduct under the whole person concept of the Directive. I conclude that Applicant has neither rebutted nor mitigated the security concerns raised by the allegations in the SOR, and he has not demonstrated that it is clearly consistent with the national interest to grant him a security clearance.

### **FORMAL FINDINGS**



The following are my conclusions as to each allegation in the SOR:

Paragraph 1.: Guideline H: AGAINST APPLICANT

Subparagraphs 1.a. through 1.f: Against Applicant

Paragraph 2.: Guideline E.: AGAINST APPLICANT

Subparagraphs 2.a. through 2.c.: Against Applicant

Paragraph 3.: Guideline J.: AGAINST APPLICANT

Subparagraphs 3.a. through 3.f.: Against Applicant

### **DECISION**

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 or continue a security clearance for Applicant. Clearance is denied.

Joan Caton Anthony  
Administrative Judge