DATE: March 12, 2004

In Re:

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

Applicant for Security Clearance

CR Case No. 02-06194

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Harold J. Tulley, Esq.

SYNOPSIS

Applicant is a 43-year-old vehicle engineering technician who has been employed by a government contractor since April 1999. He deliberately failed to disclose his use of cocaine in a Security Clearance Application he submitted in February 2001, fearing he would lose his job if he was truthful. Applicant has failed to mitigate the security concern that arises from his personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On September 8, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.[(1)] The SOR, which is in essence the administrative complaint, alleges a security concern under Guideline E, involving personal conduct. Applicant submitted an answer to the SOR (Answer) with a cover letter from his attorney that was dated October 29, 2003, requested a hearing, admitted the arrests and cocaine use alleged in the SOR, but provided explanations for why he failed to disclose the information in the Security Clearance Application (SF 86) he submitted on February 26, 2001.

The case was assigned to me on November 21, 2003. A notice of hearing was issued on January 14, 2004, scheduling the hearing for January 28, 2004. The hearing was conducted as scheduled. The government submitted five documentary exhibits that were marked as Government Exhibits (GE) 1-5, and admitted into the record without an objection. The Applicant testified, called four witnesses, and offered thirteen documentary exhibits that were marked as Applicant Exhibits (AE) 1-13, and admitted into the record without an objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. Two additional documents were timely received, marked as AE 14 and 15, and admitted into the record over Department Counsel's objection. The transcript was received on February 6, 2004.

PROCEDURAL ISSUES

Department Counsel moved to amend the SOR at the hearing, prior to commencing the presentation of evidence. Subparagraphs 1.a., 1.a.i., and 1.b.i. were amended without an objection.

Department Counsel filed a *Motion to Exclude Applicant's Supplementary, Post Trial Evidence* in which he objected to admission of AE 14 and 15 into the record. His objection was based upon assertions that the authors of those documents were offering "merely anecdotal evidence," and that neither person "provides a basis for their respective positions." I interpret his objection as raising claims that the proffered evidence in irrelevant (FRE 402) and the authors lack personal knowledge (FRE 602).

The author of AE 14 provides information about problems military veterans and civilians may encounter in seeking admission into substance abuse treatment programs. He bases his observations on his years working on a substance abuse unit, and conversations he has had with patients.

The author of AE 15 provides information about insurance companies refusal to pay for in-house treatment and people being coached on what they should claim in order to gain admission into a treatment program. She bases her observations on being a former employee at the treatment center where Applicant obtained treatment, and her present position as the president of an extended care recovery program for alcoholics and drug addicts.

Having considered Department Counsel's arguments in opposition to admission of AE 14 and 15, I find both documents are relevant and the authors of those documents have provided adequate evidence to establish they have the requisite personal knowledge to testify to the observations noted therein.

FINDINGS OF FACT

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 43 years old, divorced, and has been employed by a defense contractor since April 1999, presently as a vehicle engineering technician. He was married in 1981, divorced in 2001, and has one 20-year-old daughter who resides with him. He received an associate degree in May 2001, and indicated he intends to obtain a bachelor degree. Applicant served on active duty with the United States Army from April 1982 to June 1996, received an honorable discharge, and was a Sergeant, paygrade E-5, when he was discharged. He presently is serving in the Army Reserve as a Staff Sergeant, paygrade E-6.

Applicant was arrested on or about October 3, 1988, and charged by the military with Drunk Driving and Fleeing the Scene of a Traffic Accident. He credibly asserted in his Answer and testified at the hearing that the ensuing investigation concluded he had not committed the offenses, the charges were dismissed, and no other action was taken against him.

Applicant was again arrested on or about April 25, 1989, and charged by the military with Drunk Driving. He was sentenced to 45 days of extra duty and fined $500.00.[(2)] His driving privileges were also suspended for six months.

Applicant was arrested in approximately 1994 and charge with Driving While Intoxicated or Impaired. He was found guilty in a civilian court and placed on probation before judgment and ordered to attend an alcohol awareness program.

Applicant's last arrest was aboard a military installation in March 1995, again for the offense of Driving While Intoxicated. He was convicted in magistrates court and placed on supervised probation, fined approximately $500.00, and ordered to attend an alcohol education program.

Applicant used cocaine in 1996. It is impossible to determine how many time or how frequently he used the drug because of the various statements he has given that range from a single use to three to four times a week for a period of approximately four months.

Applicant submitted a SF 86 on February 26, 2001. He answered "Yes" in response to question 24: *Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs? For this item, report information regardless of whether the record in your case has been "sealed" or otherwise stricken from the record. The single exception to this requirement is for certain convictions under the Federal Controlled Substances Act for which the court issued and expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.* However, Applicant only disclosed the March 1995 conviction.

Applicant credibly testified he did not disclose the 1988 conviction because the charges were dismissed and he therefore did not think he had to disclose the arrest. He testified he did not list the 1989 conviction because he thought he only had to go back seven years. Considering that he did list the March 1995 conviction, I find this explanation to be credible. In a statement he provided to a special agent from the Defense Security Service (DSS) on November 14, 2001, Applicant claimed he did not list the 1994 conviction because he forgot about it in his hurry to submit the SF 86. That explanation was apparently acceptable to the government because the 1994 arrest was not alleged in the SOR.

Applicant answered "No" in the SF 86 to question 27: *Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs - Since the age of 16 or in the past 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, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs?* Based upon his use(s) of cocaine in 1996 his answer was false.

Applicant did not mention his illegal drug use in the November 14, 2001 DSS statement; although there is also no indication he was asked about abusing controlled substances. Applicant provided another DSS statement on December 4, 2001 in which he admitted smoking crack cocaine on one and possibly two occasions between August 1996 and November 1996. He stated at that time he did not list information about his drug use on the SF 86 because he thought a person who had used drugs within the past 7 years would not be granted a security clearance and he was concerned about losing his job.

During the intake process into a substance abuse rehabilitation program in November 1996, Applicant told a counselor he had been abusing cocaine three to four times a week from August to November 1996. In the December 2001 DSS statement he claimed he had exaggerated his use of cocaine during that intake process solely to expedite his acceptance into treatment.

Applicant testified he had been rejected for admission into the substance abuse rehabilitation program in 1996, and thereafter used cocaine for the first time, and then on only one or two occasions. Those uses occurred on occasions when he was out with friends drinking and one of those friends produced cocaine that he smoked. He also testified that upon admission into the program he had been assured his participation would be kept confidential and he therefore did not think he needed to disclose his drug use.

Applicant also claims in his Answer and testimony that he approached the chief of security for his employer, after receiving some sort of request for information concerning his financial situation and drug and alcohol use, and told him he may have left some things out of the SF 86. He did not, however, disclose what information was left out, and the chief of security told him to just wait and see what happens. He is uncertain when this conversation took place.

Applicant successfully completed the substance abuse program, and has been involved in an alcohol and drug abuse addiction ministry program since. He has not abused a controlled substance since his last use prior to admission into the program in 1996. He has not drunk alcohol since 1997. Applicant presented numerous character witnesses, including his sponsor in the program, and letters of reference attesting to his continued sobriety and his outstanding reputation, both as an employee and as an individual. He is deemed by those people who know him well, both on a personal and professional level, to be completely trustworthy and to not pose any threat to national security if granted access to classified information.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the Disqualifying Conditions (DC) and Mitigating Conditions (MC) for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline E, pertaining to personal conduct, with its DC and MC, is most relevant in this case.

BURDEN OF PROOF

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.[(3)] The government has the burden of proving controverted facts.[(4)] The burden of proof in a security clearance case is something less than a preponderance of evidence[(5)], although the government is required to present substantial evidence to meet its burden of proof.[(6)] "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."[(7)] Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.[(8)] Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.[(9)]

No one has a right to a security clearance[(10)] and "the clearly consistent standard indicates that

security clearance determinations should err, if they must, on the side of denials."[(11)] Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.[(12)]

CONCLUSIONS

Personal conduct under Guideline E is always a security concern because it asks the central question if a person's past conduct justifies confidence the person can be trusted to properly safeguard classified information.

Applicant's explanations for failing to disclose his alcohol related arrests in the SF 86 he submitted in February 2001 are credible. However, he intentionally provided a false answer when he failed to disclose his use of cocaine in 1996. Whether his real reason for not disclosing the information was the fear of losing his job or because he believed the information would be kept confidential by the treatment center and therefore not discovered in the course of a background investigation, Applicant severely undermined the ability to place trust and confidence in him. His false

answer, and the various reasons he has given for providing that answer, raise significant security concerns. Disqualifying Condition (DC) 2: *The deliberate omission, concealment, or falsification of relevant and material fact 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* applies in this case.

Applicant has unquestionably rehabilitated himself from the alcohol and drug, minimal as it was, related problems that plagued him prior to 1997. He has established a commendable reputation for trustworthiness and is highly thought of by supervisors, co-workers, and friends. Still, I have considered all itigating Conditions (MC) under Guideline E and find none apply.

I have specifically considered MC 2: *The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*; and MC 3: *The individual made prompt, good-faith efforts to correct the falsification before being confronted with the facts* and conclude that neither apply. Applicant did not disclose his drug use in the November 14, 2001 statement he provided to a DSS special agent. Further, he did not disclose what it was he omitted from the SF 86 when he spoke with his employer's chief of security. Applicant only admitted to abusing cocaine when he was directly confronted by the DSS with information that Applicant believed was confidential, would not be uncovered, and would disqualify him from possessing a security clearance if it was revealed or discovered. Guideline E is decided against Applicant.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find that Applicant has failed to overcome the case against him and satisfy his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance.

FORMAL FINDINGS

SOR ¶ 1-Guideline E: Against the Applicant

Subparagraph a: For the Applicant

Subparagraph b: Against the Applicant

DECISION

In light of all 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.

Henry Lazzaro

Administrative Judge

1. This action was taken under Executive Order 10865 and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).

2. The record does not disclose whether this punishment was imposed by a court-martial or at an Article 15, Uniform Code of Military Justice proceeding.

3. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

4. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

5. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

6. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

7. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

8. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

9. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15

10. *Egan*, 484 U.S. at 528, 531.

11. Id at 531.

12. *Egan*, Executive Order 10865, and the Directive.