

DATE: July 22, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 02-29563

DECISION OF ADMINISTRATIVE JUDGE

DAVID S. BRUCE

APPEARANCES

FOR GOVERNMENT

Braden M. Murphy, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 55 years old and was employed with the federal government for nearly twenty years and held a top-secret security clearance. In February 2000, he tested positive for cocaine. As a result, removal proceedings were initiated against him and in August 2000, he entered into a Last Chance Agreement with his agency as a final opportunity to preserve his employment. He tested positive for cocaine again in September 2000, and he quit his job before the final termination process was completed. Applicant did not disclose these matters on his SF 86 completed in June 2001. Applicant failed to mitigate the security concerns raised by his drug involvement and personal conduct. Clearance is denied.

STATEMENT OF THE CASE

On March 3, 2004, The Defense Office of Hearings and Appeals (DOHA) pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Review Program*, dated January 2, 1992, as amended and modified (Directive), issued a Statement of Reasons (SOR) to Applicant in response to his application for a security clearance. The SOR itemized three security allegations pursuant to Guideline H, for drug involvement, and one security allegation pursuant to Guideline E, for personal conduct, detailing why DOHA could not preliminarily determine under the Directive that it is clearly consistent with the national interest to grant or continue Applicant's request for a security clearance.

In a sworn statement dated April 27, 2004, Applicant responded to each of the allegations set forth in the SOR and further represented he did not wish to personally present his case at a hearing. Department Counsel subsequently submitted the government's File of Relevant Materials (FORM) on August 18, 2004, which contained seven itemized documents. In Section III-Motion To Amend of the FORM, Department Counsel further moved to amend the SOR to add a second allegation under Guideline E, (subparagraph 2.b.) for personal conduct, alleging Applicant submitted certain falsified information in the Employment Record Section of his Security Clearance Application (SF 86). The complete file was forwarded to Applicant on August 20, 2004. Applicant was given an opportunity to file objections and

submit materials in refutation, extenuation, or mitigation. No further response was submitted by Applicant and the file was assigned to me on May 27, 2005.

FINDINGS OF FACT

Applicant has admitted the factual allegations of subparagraphs 1.a., 1.b., 1.c., and 2.a. of the SOR. Those admissions are incorporated herein by reference. In addition, after a complete and thorough review of the evidence in the record, I make the following findings of fact:

Applicant did not respond to the additional Guideline E allegation, subparagraph 2.b., of the SOR, submitted pursuant to Department Counsel's Motion to Amend set forth above. Accordingly, the Motion to Amend is granted.

Applicant is 55 years old, married, and has an eight-year-old son. He was employed as a mail clerk by a defense contractor and submitted a Security Clearance Application (SF 86) on June 25, 2001, required as a condition of his employment.

Applicant was previously employed by the federal government as a mail clerk from December 12, 1981 to September 15, 2000. (1) Applicant held a Defense Department/Top Secret clearance from 1981 while employed with the federal government. (2) Applicant tested positive for cocaine during mandatory government drug testing on February 28, 2000, while holding his government top secret clearance. On April 11, 2000, Applicant received a Notice of Proposed Removal and Offer of Assistance from the Department of Defense. (3) The Notice proposed Applicant's removal from Federal Service not earlier than thirty days from the date of the Notice, and detailed facts and circumstances related to Applicant's behavior to support the proposed termination. (4) The Notice further referred Applicant to his Agency's employee referral service to receive appropriate counseling services with an opportunity to enroll in a drug rehabilitation program, and was given an appointment on April 19, 2000. (5)

As a result of Applicant's acceptance into the counseling program, Applicant and his Agency entered into the Last Chance Agreement dated August 2, 2000 (LCA), that described the specific conditions upon which Applicant would retain his employment with the government. (6) Applicant was permitted to continue working so long as he remained drug free, and he was required to undergo monthly urinalysis drug testing to ensure his compliance. By Notice of Decision pursuant to the terms of the LCA, the Agency placed Applicant's removal in abeyance for a period of twelve months and withheld imposition of the decision removing Applicant from federal service.

Applicant admitted using cocaine again in August 2000 during a very stressful time in his life when his mother, sister, father and "step son" were all treated for cancer. (7) In September 2000, in violation of the terms of the LCA, Applicant again tested positive for cocaine in a random drug test conducted by his employer. Applicant voluntarily left his job thereafter before the formal employment termination process was completed in accordance with the LCA. (8) No evidence was presented that Applicant ever completed any drug rehabilitation program.

Applicant submitted his Security Clearance Application (SF 86) on June 25, 2001. Applicant answered "no" to Question 20 (*Your Employment Record: Has any of the following happened to you in the last 10 years? Fired from a job - Quit a job after being told you'd be fired - Left a job by mutual agreement following allegations of misconduct - Left a job by mutual agreement following allegations of unsatisfactory performance - Left a job for other reason under unfavorable circumstances.*). Applicant denied all aspects of the question, and in particular, that he ever quit a job after being told he would be fired, or that he otherwise left a job under any unfavorable circumstances. (9)

POLICIES

Enclosure 2 of the Directive, *Adjudicative Guidelines For Determining Eligibility For Access To Classified Information*, sets forth the criteria which must be evaluated when determining security clearance eligibility. The adjudicative guidelines specifically distinguish between those factors that are considered in denying or revoking an employee's request for access to classified information (Disqualifying Conditions), and those factors that are considered in granting an employee's request for access to classified information (Mitigating Conditions). By acknowledging that individual

circumstances of each case are always different, the guidelines provide substantive standards to assist an administrative judge in reaching fair and impartial common sense decisions.

The adjudicative process requires thorough consideration and review of all available, reliable

information about the applicant, past and present, favorable and unfavorable, to arrive at meritorious decisions. Section E2.2. of Enclosure 2 of the Directive describes the essence of scrutinizing all appropriate variables in a case as the "whole person concept." In evaluating the conduct of the applicant and the circumstances in any case, the factors an administrative judge should consider pursuant to the concept are: (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 voluntariness of the participation; (6) the presence or absence of rehabilitation and other pertinent 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.

Protecting national security is the paramount concern in reaching a decision in any case, and is dependent upon the primary standard that issuance of a clearance must be clearly consistent with the interests of national security.

Granting an applicant's clearance for access to classified information is predicated on a high degree of trust and confidence in the individual. Accordingly, decisions under the Directive must include consideration of not just the *actual* risk of disclosure of such information, but also consideration of any *possible* risk an applicant may deliberately or inadvertently compromise classified information in any aspect of his or her life. Any doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting classified information. ⁽¹⁰⁾ The decision to deny a security clearance request to an individual is not necessarily a determination of the loyalty of the applicant. ⁽¹¹⁾ It is merely an indication the applicant has not met the strict guidelines established by the Department of Defense for issuing a clearance.

In accordance with the Directive, the government bears the burden of proof in the adjudicative process to first establish conditions which indicate it is not clearly consistent with the

national interest to grant or continue an applicant's access to classified information. ⁽¹²⁾ When the government meets this burden, the corresponding heavy burden of rebuttal then falls on the applicant to present evidence in refutation, explanation, extenuation or mitigation sufficient to overcome the position of the government, and to ultimately demonstrate it is clearly consistent with the national interest to grant or continue the applicant's clearance. ⁽¹³⁾

Upon consideration of all the evidence submitted in this matter, the following adjudicative guidelines are appropriate for evaluation with regard to the facts of this case:

Guideline H - Drug Involvement is a security concern because improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

Guideline E - Personal Conduct is a security concern because conduct involving questionable judgment, trustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

The Guideline H and Guideline E disqualifying and mitigating conditions, either raising security concerns or mitigating security concerns applicable to this case are set forth and discussed in the Conclusions section below.

CONCLUSIONS

I have thoroughly considered all the facts in evidence in this case and the legal standards required by the Directive. The government has established a *prima facie* case for disqualification under Guideline H - Drug Involvement, and under Guideline E - Personal Conduct.

Considering all the evidence, Drug Involvement Disqualifying Conditions (DI DC) E2.A8.1.2.1. (*Any drug abuse*), and DI DC E2.A8.1.2.2. (*Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution*), apply in this case. Drug abuse is defined in provision E2.A8.1.1.3. (*The illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction*).

Applicant admits conduct that constitutes drug abuse. Applicant was provided a gratuitous reprieve and a clear opportunity to preserve his job after the initial positive drug test. The Last Chance Agreement mandated total abstinence and provided professional rehabilitation and counseling opportunities for his benefit. Nevertheless, the LCA was also clear in its directive and the consequences of failure to abide by its terms and conditions. Applicant admitted using cocaine again in August 2000, followed by his second positive test in September. Applicant's use of cocaine at a time he held a top secret clearance highlights his bad judgment causing very serious concerns. Even though Applicant's drug use occurred during a very stressful and emotional period of his life, his behavior and judgment regarding cocaine is clearly unpredictable. Applicant's conduct constituted a blatant disregard and lack of respect for critical rules and regulations related to his government work at the time, exemplifying the addictive nature of his drug of choice.

I have considered all the mitigating conditions, particularly Drug Involvement Mitigating Condition (DI MC) E2.A8.1.3.1. (*The drug involvement was not recent*), and conclude it applies in this case. I have also considered DI MC E2.A8.1.3.2. (*The drug involvement was an isolated or aberrational event*), and DI C E2.A8.1.3.3. (*A demonstrated intent not to abuse any drugs in the future*), and conclude they do not apply.

Applicant's most recent admitted use of cocaine was in 2000. A period of nearly five years has elapsed since then, and Applicant maintains he has not used drugs at all during this time period. Accordingly, I conclude Applicant's drug use is not recent. While there is also no indication of drug use by Applicant prior to the events of this matter, he dramatically demonstrated on three occasions over a period of seven months that during stressful times he resorted to drug use, which suggests his use is not necessarily isolated or an aberrational event. Using cocaine later in his life severely jeopardizing his job to the detriment of his family at a very emotional time, and then having squandered a genuine opportunity to retain his long time employment, with full exposure to benefit from professional drug counseling and rehabilitation, causes great concern. Applicant's disregard for the consequences of his acts is a security concern itself, aggravated by the fact that he then quit his job before he could be formally terminated upon testing positive for drugs the second time.

Applicant claims he was treated for addiction through his Agency and then was sent to a program which he suggests he completed. He has not, however, provided any proof regarding completion of any drug counseling, treatment or rehabilitation program, or, preferably, proof of abstinence from drugs to the present day as monitored by a credentialed after care medical professional, without recurrence of abuse, with a favorable prognosis for continued abstinence. Applicant's behavior is too unpredictable to ensure he can remain drug free. In addition, aggravating factors include Applicant's resumption of drug use after a positive drug test by his employer and a clear mandate to stop using drugs at a time when he held a security clearance, and not fully benefitting from professional intervention and assistance to genuinely combat his addiction. Applicant has not shown he has a better understanding of the effects of addictive drug use. His improper and illegal involvement with cocaine raises concerns regarding his willingness and ability to restrain from the use of illegal drugs at stressful times in the future, and to protect classified information. Applicant failed to fully mitigate the security concerns regarding his drug involvement.

Based on all the evidence, Guideline E Personal Conduct Disqualifying Condition (PC DC) E2. A5.1.2.2. (*The deliberate omission, concealment, or falsification of relevant and material 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*), and PC DC E2. A5.1.2.5. (*A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency*), apply in this case.

Applicant admitted he quit his federal employment position when he was about to be fired following the second positive drug test. ⁽¹⁴⁾ In answering Question 20 of his Security Clearance Application, he denied all aspects of the question, and, particularly, whether he ever quit a job after being told he would be fired. Omission of such a relevant and crucial event on the SF 86 suggests it was likely deliberate. Furthermore, Applicant's failure of the two random drug tests and his clear violation of the Last Chance Agreement demonstrate a consistent pattern of dishonesty and rule violations,

highlighted by Applicant's noncompliance with the terms and conditions of his written agreement with his agency.

In evaluating all the Personal Conduct Mitigating Conditions (PC MC), and specifically PC MC E2.A5.1.3.3. (*The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts.*), and PC MC E2.A5.1.3.5. (*The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress*), I find both do not apply in this case. Applicant was well aware of the circumstances which led to termination of his prior federal job when he completed his SF 86 in June 2001. He acknowledged having held the position for nearly twenty years, but he did not disclose the unflattering events which ended his service with the government. Applicant also claims he completed a drug treatment program for addiction but offered no independent verification of such completion, or verification of ever having successfully completed a drug rehabilitation program of any kind. Applicant has failed to demonstrate a *genuine* intent through positive actions to not abuse drugs in the future. Accordingly, Applicant has not provided any basis to reasonably conclude he has reduced or eliminated his potential vulnerability to compromise classified information.

I have further reviewed all the record evidence in this case with respect to the "whole person" concept required by the Directive in evaluating Applicant's vulnerability in protecting our national security. I am persuaded by the totality of the evidence in this case that it is not clearly consistent with the national interest to grant Applicant a security clearance. For the reasons stated, Applicant has failed to mitigate the security concerns caused by drug involvement and personal conduct issues. Accordingly, Guideline H and Guideline E are decided against Applicant.

FORMAL FINDINGS

In accordance with Section E3.1.25 of Enclosure 3 of the Directive, the following are the formal findings as to each allegation in the SOR and the government's option to Amend.:

Paragraph 1. Drug Involvement (Guideline H) AGAINST THE APPLICANT

Subparagraph 1.a. Against the Applicant

Subparagraph 1.b. Against the Applicant

Subparagraph 1.c. Against the Applicant

Paragraph 2. Personal Conduct (Guideline E) AGAINST THE APPLICANT

Subparagraph 2.a. Against the Applicant

Subparagraph 2.b. as amended 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

David S. Bruce

Administrative Judge

1. Item 4 (Applicant's Security Clearance Application dated June 25, 2001), at 2.

2. *Id.*, at 6.

3. Item 6 (Notice of Proposed Removal and Offer of Assistance dated April 11, 2000), at 1-3.

4. *Id.*, at 1.

5. *Id.*, at 2.

6. Item 7 (Last Chance Agreement dated August 2, 2000), at 1-3.

7. Item 5 (Applicant's written statement to Special Agent of the Defense Security Service dated October 23, 2001), at 2. It is noted that in Applicant's statement of April 27, 2004, he stated that his mother, sister and son, not "step son," had cancer at the time he used cocaine in August 2000, omitting any mention of his father.

8. Item 3 (SOR), at 2.

9. Item 4, *supra* note 1, at 4.

10. Directive, Enclosure 2, Para. E2.2.2.

11. Executive Order 10865, § 7.

12. ISCR Case No. 96-0277 (July 11, 1997) at page 2.

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

14. *Id.*