

DATE: June 2, 2004

In Re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 03-01273

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Marc E. Curry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used cocaine as recently as 2002, and marijuana as recently as 2000. He was charged with possession with the intent to deliver cocaine, a felony, in 1976. He failed to disclose his drug use and criminal charge as required in a security clearance application (SF 86) he submitted on June 26, 2002. Applicant has failed to mitigate the security concerns caused by his history of drug abuse and the personal conduct issues that arise from the false information he provided in the SF 86. Clearance is denied.

STATEMENT OF THE CASE

On November 25, 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating they were unable to find 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 security concerns under Guideline H (drug involvement), Guideline J (criminal conduct), Guideline F (financial considerations), and Guideline E (personal conduct). Applicant submitted a response to the SOR, dated January 6, 2004, and a supplemental response that was undated. He requested a clearance decision based on the written record without a hearing on May 5, 2003. In his response to the SOR, Applicant denied all allegations contained in the SOR except those under SOR subparagraph 1.a., which he admitted with explanations and clarifications.

Department Counsel prepared a File of Relevant Material (FORM) on March 22, 2004, that was mailed to Applicant on March 24, 2004, and informed him he had 30 days from receipt of the documents to submit his objections or information he wished to be considered. Applicant submitted an undated response to the FORM that was postmarked April 20, 2004. Applicants' response was forwarded to Department Counsel on April 22, 2004, who filed a reply that was mailed to Applicant on April 26, 2004. Applicant thereafter filed two additional pleadings that were postmarked April 29, 2004 and May 1, 2004. The case was assigned to me April 28, 2004.

PROCEDURAL ISSUES

Department Counsel conceded in the FORM that SOR paragraph two, pertaining to criminal conduct, had been mitigated by the passage of time

(more than twenty-five years has passed since Applicant's only arrest), and that the government did not possess any admissible evidence to establish the allegations contained in SOR paragraph three, pertaining to financial considerations. Accordingly, the Guideline J and F allegations are mitigated and will not be further discussed in this decision except as they relate to the SOR allegations under Guidelines H and E.

In his reply to Applicant's response to the FORM, Department Counsel objected to one of the affidavits attached to Applicant's response and requested that it be excluded from the record. Department Counsel's objection to the affidavit was that it directly contradicted an SOR allegation and Department Counsel would be deprived of his right to cross-examine the affiant if the affidavit were admitted.

The Directive⁽²⁾ provides that an applicant may submit a documentary response to a FORM that may include rebuttal, extenuation, mitigation, and explanation.⁽³⁾ The Directive also provides that Department Counsel may request a hearing in those cases where an Applicant has not requested a hearing.⁽⁴⁾ The net effect of neither party requesting a hearing is the waiver by both parties of the right to cross-examine the opposing party's witnesses and the agreement to submit otherwise admissible documentary evidence for consideration without cross-examination. Department Counsel's objection is overruled and the affidavit at issue is admitted into the record and I will consider it in arriving at a decision.

Department Counsel objected to consideration of the pleadings and attachments filed by Applicant postmarked April 29, 2004 and May 1, 2004, except for one affidavit. The basis for the objection was the pleadings and attachments were either not responsive to Department Counsel last pleading, and therefore untimely, or were duplicates of documents previously filed. Department Counsel's objection is overruled and the documents are admitted into the record and will be considered by me in arriving at a decision.

FINDINGS OF FACT

Applicant's partial admission to an allegation contained in the SOR is incorporated herein. In addition, after a thorough review of the pleadings and exhibits,⁽⁵⁾ I make the following findings of fact:

Applicant is 52 years old and has been employed as an electrical engineer by a defense contractor since January 2002. He was previously employed as a vice-president of an electrical company from August 1991 to January 1998, and as an engineer with several different companies between January 1998 and his present employment. Applicant received a bachelor of science degree in electrical engineering in June 1980.

Applicant was first married in May 1981, and that marriage ended in divorce in March 1994. He has two children from that marriage, a son 16 years of age and a daughter 20 years of age, for whom he provides support. Applicant remarried in July 1998, and has a 23-year-old stepson from that marriage.

An arrest warrant was issued on December 22, 1976 charging Applicant with the offense of felony Possession with Intent to Deliver a Controlled Substance. The facts surrounding issuance of the arrest warrant can be somewhat determined from the partial documents attached to the FORM as item 7.⁽⁶⁾ Basically, Applicant and a co-defendant were found to be in possession of three envelopes that had been mailed from Columbia, South America, each of which contained a number of packets of cocaine. One of the envelopes was addressed to Applicant, and the other two were addressed to other individuals. A search of Applicant's residence at the time uncovered six half kilo packages of marijuana and assorted narcotics paraphernalia. The marijuana was suppressed, but, based upon Applicant's plea to possession of cocaine, at least a portion of the cocaine was not suppressed.

Applicant provided a statement to a special agent from the Defense Security Service (DSS statement) on March 7, 2002 in which he asserted he was charged with Misdemeanor Possession of Cocaine as a result of the above incident. In the DSS statement Applicant also claimed he had unknowingly received only a small amount of cocaine in a Christmas card that had been mailed by a friend. However, he acknowledged pleading guilty to a misdemeanor and being sentenced to six months probation and required to pay court costs.

Applicant also acknowledged in the DSS statement that he had vacationed in Columbia, South America in the 1970s and had used cocaine several times while there. He also admitted to the recreational use of cocaine between 1976 and 1977 on an infrequent basis. He went on to claim that he did not use cocaine after the mid-1970s, until either February or March 1995 when he purchased from a friend \$250.00 worth of cocaine that he used with his wife. He also admits purchasing cocaine on two other occasions in 1995. His last admitted ingestion of cocaine occurred in January 2002 when he claims to have tasted a small amount of cocaine while visiting the residence of a friend who sells and uses cocaine. Applicant asserts his sole purpose in tasting the cocaine was to confirm that it was actually cocaine. Applicant provided the following information about his future intentions regarding the use of cocaine: "I'd like to say unequivocally that it will never happen again. However, due to the climate surrounding some of the individuals with whom I associate, it is possible that I may have a weak moment in the future and possibly use cocaine."⁽⁷⁾

Applicant admitted purchasing and smoking marijuana on a fairly regular basis while in his 20s, consuming four or five joints a week for a period of approximately two years. However, since his mid-20s he has only used marijuana approximately once a year, the last use occurring in about 2000.

Concerning his future intentions regarding marijuana use, Applicant stated: "I recognize that marijuana is illegal but have friends that use/sell the drug and have no issues with them over their decision. Because I view marijuana as no more harmful than alcohol, I cannot state that my future intentions are total abstinence from the occasional use of marijuana."⁽⁸⁾

Applicant submitted a security clearance application (SF 86) on June 26, 2002 and failed to disclose his arrest and conviction for a drug offense in response to question 24.⁽⁹⁾ and his recent use of controlled substances in response to question 27.⁽¹⁰⁾ In the DSS statement, Applicant claimed his failure to list the arrest and conviction was because he misread the question and thought he only had to list such information if it occurred within 7 years of filing the SF 86. The reason he gave for not listing the 2002 cocaine use was because he did not consider the tasting of cocaine to be usage. He admitted he intentionally did not list the marijuana use because he does not view marijuana as any more dangerous than alcohol.

Applicant used a company issued credit card, at least nominally intended only for use on company business, to purchase gifts for his wife in an amount somewhat less than \$200.00. However, based upon the information provided by Applicant in the DSS statement and an affidavit he submitted from his supervisor with his response to the FORM, these purchases were at least tacitly sanctioned by company officials.

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, Guidelines H, pertaining to drug involvement, and Guideline E, pertaining to personal conduct, with their respective DC and MC, are 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.⁽¹¹⁾ The government has the burden of proving controverted facts.⁽¹²⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁽¹³⁾ although the government is required to present substantial evidence to meet its burden of proof.⁽¹⁴⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽¹⁵⁾ 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.⁽¹⁶⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽¹⁷⁾

No one has a right to a security clearance⁽¹⁸⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁹⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽²⁰⁾

CONCLUSIONS

Under Guideline H, illegal drug involvement raises questions about an individual's willingness or ability to protect classified information. Involvement with or use of an illegal drug indicates unwillingness or inability to abide by the law. Cleared employees must respect regulations whether they agree with them or not. If they do not respect the rules on illegal substances, they may not respect the rules designed to protect classified information.

Applicant used cocaine in the mid-1970s, again in 1995, and once in 2002. He used marijuana on a regular basis when he was in his 20s and on an approximate once a year basis until 2000. Disqualifying Condition (DC) 1: *Any drug abuse* applies in this case.

Although Applicant has not used marijuana since 2000 and used cocaine in only the most limited fashion in 2002, he is unwilling to disavow the future possibility of drug use because of his friends and associates and his personal belief concerning the harmfulness of marijuana. Based on his inability to provide any assurance he will not use controlled substances in the future, no mitigating condition applies. Applicant has failed to mitigate the security concern that exists concerning his drug involvement.

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 failed to disclose his arrest and recent use of controlled substances as required in response to questions in the SF 86 he submitted. DC 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 applies in this case.

Applicant admitted he deliberately provided a false answer to the question concerning his use of marijuana. His explanations for not disclosing the felony arrest and use of cocaine in 2002 are not credible. Applicant's lack of candor in failing to disclose this information when he submitted the SF 86 severely undermines the ability to place trust and confidence in him at the present time. No mitigating condition applies to Applicant's personal conduct. His false answers raise significant security concerns which he has failed to mitigate.

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 mitigate the security concerns that arise from his drug involvement and personal conduct. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. Guideline H and E are decided against Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline H: Against the Applicant

Subparagraph a: Against the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

SOR ¶ 2-Guideline J: For the Applicant

Subparagraph a: For the Applicant

SOR ¶ 4-Guideline F: For the Applicant

Subparagraph a: For the Applicant

SOR ¶ 4-Guideline H: Against the Applicant

Subparagraph a: For the Applicant

Subparagraph b: Against the Applicant

Subparagraph c: Against the Applicant

Subparagraph d: For 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. Department of Defense Directive 5220.6, dated January 2, 1992, as amended (DODD 5220.6).
3. DODD 5220.6, Enclosure 3, Additional Procedural Guidance, E3.1.7.
4. DODD 5220.6, Enclosure 3, Additional Procedural Guidance, E3.1.7.
5. Applicant provided a statement to a special agent from the Defense Security Service on March 7, 2002 (DSS statement). In the various responses and pleadings he subsequently submitted he has denied most of the factual assertions contained in the DSS statement. Each page of the DSS statement was initialed by Applicant, and the statement was signed and sworn to by him. Considering the detail contained in the DSS statement, the

tenor of the subsequent responses, and the content of those responses, I have accepted the contents of the DSS statement as being the most factual.

6. Item 7, somewhat confusingly, includes an arrest warrant, the first two pages of a document entitled: *Memorandum in Support of Defendants' Motion to Suppress* that was most likely drafted by either Applicant's or his co-defendant's attorney, the last two pages of what appears to be a prosecuting attorney's answer to discovery, and an evidence destruction order.
7. DSS statement, page 4.
8. DSS statement, page 5.
9. Your Police Record - Alcohol/Drug Offenses - 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 (sic) expungement order under the authority of 21 U.S.C. 844 or 18 U.S.C. 3607.
10. Your Use of Illegal Drugs and Drug Activity - Illegal Use of Drugs - 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, methaqualone, tranquilizers, etc.), hallucinogenics (LSD, PCP, etc.), or prescription drugs.
11. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
12. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.
13. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
14. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
15. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
16. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
17. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
18. *Egan*, 484 U.S. at 528, 531.
19. *Id* at 531.
20. *Egan*, Executive Order 10865, and the Directive.