

DATE: April 25, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-08816

DECISION OF ADMINISTRATIVE JUDGE

CAROL G. RICCIARDELLO

APPEARANCES

FOR GOVERNMENT

Rita O'Brien, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is 51 years old and has been employed by the same defense contractor for over twenty years. Applicant has held a security clearance since 1980. Applicant used marijuana from 1970 to 1972. During a stressful time in his life, Applicant resumed using marijuana from 1976 to 1979. At age 48, during a stressful time in his life, Applicant used cocaine on several occasions in a two week period. Applicant had a 1997 arrest for domestic violence that he failed to list on his security clearance questionnaire. Applicant believed because he entered and completed a diversion program and the charges were dismissed he could honestly answer no to the question. Applicant successfully mitigated the security concerns regarding Guideline E, personal conduct, but failed to mitigate the security concerns regarding Guideline H, drug abuse. Clearance is denied.

STATEMENT OF CASE

On October 25, 2004, the Defense Office of Hearings and Appeals (DOHA) issued to Applicant a Statement of Reasons (SOR) stating they were unable to find that it is clearly consistent with the national interest to grant or continue a security clearance.⁽¹⁾ The SOR, which is in essence the administrative complaint, alleges security concerns under Guideline H, drug involvement, and Guideline E, personal conduct.

In a sworn statement, dated December 9, 2004, Applicant responded to the SOR allegations, and requested a hearing. In his SOR response, Applicant admitted the allegations in subparagraphs 1.a, 1.b, and 1.c contained in the SOR, and denied the allegations in subparagraph 2.a.

The case was assigned to me on February 16, 2005. A notice of hearing was issued on March 9, 2005, scheduling the hearing for March 31, 2005. The hearing was conducted as scheduled. The government submitted six exhibits that were marked as Government Exhibits (GE) 1-6, and admitted into the record. The Applicant testified on his own behalf, and one exhibit was marked as Applicant's Exhibit (AE) A. This exhibit was a continuance request from Applicant that had been denied. The transcript was received on April 12, 2005.

FINDINGS OF FACT

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

Applicant is 51 years old, and has been employed as a program management specialist with a defense contractor since 1980. Applicant has held a secret security since 1981. Applicant was married three times and divorced twice. He is presently remarried to his second wife with whom he has one child.

Applicant started using marijuana around 1971. From 1971 through 1972 Applicant used marijuana on a weekly basis. Applicant enlisted in the Marines in 1972 and served two years on active duty. During that time Applicant did not use marijuana.

Applicant resumed using marijuana in approximately 1976 until approximately 1979. He used it on a monthly basis. Applicant married his first wife in 1976 and his marriage was not going well. He admitted feeling sorry for himself. He used marijuana for the recreational element with his friends and as a reaction to his marital problems. From 1979 until December 2001, Applicant did not use any illegal drugs.

From December 2001 to January 2002, during the Christmas-New Years holiday period, Applicant used cocaine no more than six times on three occasions. Applicant attended parties during this period where cocaine was being used. Applicant was drinking alcohol at the time and was depressed because he thought he and his ex-wife had agreed to remarry and she was backing off of the agreement. Applicant stated he did not feel good and felt like he didn't care anymore. Applicant decided that maybe the cocaine would make him feel better.

Applicant has not used any illegal drugs since January 2002, and has decided not to use any illegal drugs again. Applicant is embarrassed and ashamed of his drug use. Applicant's family, friends and co-workers do not know of his drugs use, and he does not want anyone to know about it. Applicant's wife does know about his drug use. Applicant did not report his drug use to his security officer. Applicant held a security clearance at the time he used cocaine.

On January 28, 1997, while divorced from his wife (whom he subsequently remarried in 2004) Applicant was arrested and charged with assault, domestic violence and malicious mischief in the 3rd degree. Applicant received an 18 month deferred judgment with a stipulated order of continuance. Applicant was awarded probation, ordered to have no law violations, and to pay a victim's restitution fee and court costs. On March 18, 1998, the charges were dismissed. Applicant completed an anger management course and believes it helped him greatly with his emotional stability. Applicant did not report his arrest and deferred judgment disposition to his security manager.

Applicant answered "no" to Question 26 (*Your police record-other offenses: In the last 7 years, have you been arrested for, charged with, or convicted of any offense(s) not listed in modules 21, 22, 23, 24, or 25?*) On his security clearance application (SF 86) Applicant failed to list the 1997 arrest and deferred judgment. Applicant claimed that he believed that the arrest was totally expunged from his record and it was like it never happened. He thought that if he successfully completed the diversion program he would have a clean record and it would not be reflected in a criminal record. He believed because the charges were dismissed, and his record expunged, he could honestly answer "no" to the question. Applicant admitted he was embarrassed and ashamed by his actions and wanted to distance himself from the event. Applicant admitted he should have read the question more carefully, but his failure to do so was not intentional.

POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines to be considered in evaluating a person's eligibility to hold a security clearance. Included in the guidelines are disqualifying conditions (DC) and mitigating conditions (MC) applicable to each specific guideline. Considering the evidence as a whole, Guideline H, pertaining to drug involvement, and Guideline E, pertaining to personal conduct, with their respective DC and MC, apply in this case. Additionally, each security clearance decision must be a fair and impartial commonsense decision based on the relevant and material facts and circumstances, the whole-person concept, along with the factors listed in the Directive. Specifically these are: (1) the nature and seriousness of the conduct and surrounding circumstances; (2) the frequency and recency of the conduct; (3) the age of the applicant; (4) the motivation of the applicant, and the extent to which the conduct was negligent,

willful, voluntary, or undertaken with knowledge of the consequences; (5) the absence or presence of rehabilitation; and (6) the probability that the circumstances or conduct will continue or recur in the future. 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.

The sole purpose of a security clearance determination is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof is something less than a preponderance of evidence.⁽⁴⁾ 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.⁽⁵⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁶⁾

No one has a right to a security clearance⁽⁷⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽⁸⁾ Any reasonable doubt about whether an applicant should be allowed access to sensitive information must be resolved in favor of protecting such sensitive information.⁽⁹⁾ The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of an applicant.⁽¹⁰⁾ 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 clearance.

Based upon consideration of the evidence, I find the following adjudicative guidelines most pertinent to the evaluation of the facts in this case.

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

Guideline H-Drug Involvement is a 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.

Conditions that could raise a security concern and may be disqualifying, as well as those which would mitigate security concerns, pertaining to the adjudicative guidelines are set forth and discussed in the conclusions below.

CONCLUSIONS

I have carefully considered all the facts in evidence and the legal standards. The government has established a *prima facie* case for disqualification under both Guideline H and Guideline E.

Considering all the evidence, Drug Involvement Disqualifying Condition (DI DC) E2.A8.1.2.1 (*Any drug abuse*),⁽¹¹⁾ applies in this case. Applicant began using drugs (marijuana) in 1971 and continued through 1972. He stopped using drugs when he joined the Marines in 1972. In 1976, during a stressful time in his life when he was having marital problems, Applicant resumed using drugs (marijuana). Thirty years from his first drug use, during another stressful time in his life, Applicant again used drugs, this time cocaine, a more addictive drug.

I have considered all the mitigating conditions and especially considered 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 MC E2.A8.1.3.3 (*A demonstrated intent not to abuse any drugs in the future*), and conclude they do not apply. Applicant's drug history spans thirty years. Although Applicant demonstrated that he can refrain from using drugs for a long period of time, he also demonstrated that during stressful times he resorted to drug use. Applicant's most recent drug use was cocaine in 2002. A period of three years has passed since then, and Applicant claims he has not used drugs during this time. I conclude his last drug use is not recent. However, I also conclude that Applicant's use over thirty years was not isolated or an aberrational event. Applicant's use of drugs in the early seventies can certainly be attributed to youthful

indiscretion. However, using drugs later on in his life and then resuming drug use at age 48, during a stressful time of his life, causes great concern. Also of great concern is Applicant's attitude regarding ensuring family and friends do not find out about his past indiscretions. That fact is a security concern and Applicant's failure to advise his security manager of reportable incidents highlights the problem.

Applicant's claim that he will not abuse any drugs in the future must be discounted based on his past uses and the time intervals between them. Applicant's behavior is too unpredictable to ensure he can follow through on his claim. In addition, aggravating factors include Applicant's resumption of drug use after abstinence, using drugs when he held a security clearance, and graduating from marijuana to a more addictive drug, cocaine. Applicant demonstrated that during stressful times he resorted to drug use. Applicant failed to mitigate the security concerns regarding his drug involvement.

Based on all the evidence, 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*) does not apply in this case. Although Applicant failed to list his 1997 arrest on his SF 86, his omission was not deliberate.

I have considered all the mitigating conditions and especially considered Personal Conduct Mitigating Condition (PC MC) E2.A5.1.3.2 (*The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily*) and conclude it applies in this case. Applicant credibly testified that he believed his 1997 arrest was totally expunged from his record and it was like it had never happened. He credibly testified that he would not have intentionally lied about his arrest, but thought because he was in a diversion program and had been advised that if he successfully completed the program he would have a clean record, the incident would not be reflected in a criminal record. Therefore, Applicant believed he could honestly answer "no" to the question. This was the reason Applicant never brought it up when he was interviewed. Applicant admitted he should have read the question more carefully, but his failure to do so was not intentional. I find Applicant's testimony was reasonable and credible, and the omission or falsification was not deliberate. Accordingly, Applicant has successfully mitigated the personal conduct security concern.

I have considered all the evidence in this case, including Applicant's credibility and demeanor. I have also considered the "whole person" concept in evaluating Applicant's risk and vulnerability in protecting our national interests. 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. Applicant has successfully mitigated the security concern caused by the personal conduct considerations, but failed to mitigate the security concerns caused by the drug involvement concerns. Accordingly, Guideline H is decided against Applicant, and Guideline E is decided for Applicant.

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. 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) FOR THE APPLICANT

Subparagraph 2.a. 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.

Carol G. Ricciardello

Administrative Judge

1. This action was taken under Executive Order 10865, dated February 20, 1960, as amended, and DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive).
2. ISCR Case No. 96-0277 (July 11, 1997) at p. 2.
3. ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, ¶ E3.1.14.
4. *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).
5. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, ¶ E3.1.15.
6. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, ¶ E3.1.15.
7. *Egan*, 484 U.S. at 531.
8. *Id.*
9. *Id.*; Directive, Enclosure 2, ¶ E2.2.2.
10. Executive Order 10865 § 7.
11. E2.A8.1.1.2.1. Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.