

DATE: December 19, 2005

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 04-10850

DECISION OF ADMINISTRATIVE JUDGE

HENRY LAZZARO

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Kenneth M. Roberts, Esq.

SYNOPSIS

Applicant used cocaine for a relatively brief period of time in 1986-87, and then on four occasions between 1999 and 2002. He disclosed the latter use in a security clearance application he submitted in June 2003, but did not disclose the earlier use in statements he provided to an investigator. Applicant credibly explained the omission from the statements he provided. He has mitigated the security concerns that existed in this case. Clearance is granted.

STATEMENT OF THE CASE

On April 7, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was 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 J for criminal conduct, Guideline H for drug involvement, and Guideline E for personal conduct. Applicant submitted a sworn answer to the SOR that was received by DOHA on May 2, 2005, requested a hearing, and denied all SOR allegations.

This case was assigned to me on July 21, 2005. A notice of hearing was issued on September 9, 2005, scheduling the hearing for September 28, 2005. The hearing was conducted as scheduled. The government submitted nine documentary exhibits that were marked as Government Exhibits (GE) 1-9. GE 1-8 were admitted into the record without objection, and administrative notice was taken of the information contained in GE 9 without objection. Applicant testified, called two witnesses to testify on his behalf, and submitted one documentary exhibit consisting of numerous subparts that was marked as Applicant Exhibit (AE) 1, and admitted into the record without objection. The transcript was received on October 17, 2005.

PROCEDURAL MATTERS

Department Counsel moved to amend SOR subparagraph 1.a by striking the words *from at least* and *to at least*, and substituting therefore the words *during* and *and from July 1999 through* respectively. She moved to amend SOR subparagraph 2.a by inserting the word *caused* between the words *You* and *falsified*, by inserting the words *to be transmitted* between the words *facts* and *on*, by striking the words *executed by you on* and substituting therefore the word *dated*, and by striking the number *30*, and substituting therefore the number *27*. Applicant did not object to any of the amendments, and those amendments were made on the face of the SOR.

FINDINGS OF FACT

After a thorough review of the pleadings, exhibits, and testimony, I make the following findings of fact:

Applicant is 45 years old, has never been married, has no dependents, but has been engaged to be married for the past several years. He graduated from high school in 1979, and thereafter continued to work full-time until May 1997, for the same grocery store company that had employed him part-time while he was in high school. He began attending a community college in 1993, transferred at some point to a university, and obtained a bachelor's degree in computer information systems in May 1997. He graduated *summa cum laude*. He was employed in the information technology field from the time of his college graduation until he was laid off in March 2002. He was unemployed until May 2003, when he was hired by his current employer, a defense contractor, as a senior software engineer.

The testimony of Applicant's witnesses and the letters of reference he submitted indicate he has proven himself to be a valued employee to his present and past employers. He is considered to be a conscientious, trustworthy, and knowledgeable employee. He has earned a reputation for being honest, intelligent, and dependable. A number of persons, including security clearance holders, opine that Applicant can and should be entrusted with sensitive and classified information based upon their observations and with knowledge of his prior actions and conduct.

From approximately late 1986 until July 1987, Applicant used cocaine about once every two to three weeks. He used it again on four occasions between July 1999 and December 2002 with his girlfriend. His explanation for abusing cocaine after almost 12 years abstinence was because his girlfriend suggested she would like to try it. They both avouch they will never abuse the substance in the future. His girlfriend purchased the cocaine from one of her friends each time they used it.

Applicant submitted a security clearance application on June 5, 2003, in which he disclosed the cocaine use between 1999 and 2002 in response to a question asking for information about the use of illegal drugs in the preceding seven years. Applicant provided a statement about his illegal drug use to a contract investigator employed by the Defense Security Service on August 6, 2003. In that statement, Applicant wrote: "At the end of July 1999 I tried cocaine for the first time" and "I have never abused other drugs before or since."

On November 4, 2003, Applicant provided another statement to the same contract investigator in which he wrote: "These 4 occasions were the only times that (name omitted) used drugs and were the only times that I used drugs. . . ." Sometime after he obtained the November 2003 statement from Applicant, the contract investigator learned of Applicant's earlier cocaine use from psychiatric records he had obtained.

Applicant acknowledged his earlier drug use when he was confronted with the information obtained by the investigator on March 3, 2004. He provided the investigator another statement on that date and explained that in the two prior statements he had only been focusing on the seven-year time frame covered by the question on the security clearance application and believed he was providing truthful answers about his drug use.

Applicant elaborated on the failure to disclose the 1986-87 drug use in the statements he provided to the investigator in his SOR answer and during his testimony. He credibly testified and explained the interviews were long, covered many topics, were sometimes confused, and, as to the drug use, were focused on the drug abuse he disclosed in the security clearance application. He also credibly testified the answers he provided and the statements he wrote were in the context of the discussion he had with the investigator about the drug use disclosed in the security clearance application.

Applicant was treated by a psychiatrist for manic depressive illness from 1988 until December 1990. However, in a security clearance application he submitted in May 1997, he answered "No" in response to a question that asked if he had consulted with a mental health professional in the preceding seven years. He credibly testified he did not recall that the treatment, which ended six and one-half years before submission of the security clearance application, fell within the seven-year window being asked about.

In the 2003 security clearance application, Applicant disclosed an August 1990 felony criminal arrest and the resulting misdemeanor conviction, and an August 2002 traffic offense, conviction, and fine, in addition to his recent drug use. In the 1997 security clearance application, Applicant disclosed the August 1990 felony criminal arrest and misdemeanor conviction. In the August 2003 statement, Applicant provided extensive details not only about the arrest listed in the 2003 security clearance application, but also about several other arrests, all of which arose out of an obviously dysfunctional relationship he had with a woman at the time.

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 J, pertaining to criminal conduct, Guideline 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.⁽²⁾ The government has the burden of proving controverted facts.⁽³⁾ The burden of proof in a security clearance case is something less than a preponderance of evidence⁽⁴⁾, although the government is required to present substantial evidence to meet its burden of proof.⁽⁵⁾ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁽⁶⁾ 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.⁽⁷⁾ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁽⁸⁾

No one has a right to a security clearance⁽⁹⁾ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."⁽¹⁰⁾ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.⁽¹¹⁾

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 on a number of occasions in 1986-87, and four additional times between July 1999 and December 2002. Disqualifying Condition (DC) 1: *any drug abuse* applies. It has been three years since he last used cocaine, and he and his girlfriend credibly aver they will never use any controlled substance in the future. His work performance and the many recommendations of supervisors, co-workers, and friends who know him well and have had the opportunity to closely observe him vouch for his reliability, integrity, and honesty. Mitigating Conditions (MC) 1: *the drug involvement was not recent*; and MC 3: *a demonstrated intent to not abuse any drugs in the future* apply.

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. Criminal conduct under Guideline J is a security concern because a history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. Willingness to abide by rules is an essential qualification for eligibility for access to the nation's secrets. A history of illegal behavior indicates an individual may be inclined to break, disregard, or fail to comply with regulations, practices, or procedures concerning safeguarding and handling classified information.

In addition to his recent drug use, Applicant disclosed criminal and traffic offenses in the 2003 security clearance application, and extensive details about a number of alleged criminal offenses that resulted in his being arrested in the 2003 statements he provided to the investigator. He also freely disclosed his felony arrest in the 1997 security clearance application. His conduct in repeatedly disclosing adverse information about himself is inconsistent with the SOR allegations that he was deliberately attempting to conceal information about dated drug use, and mental health treatment that concluded six and one-half years prior to the 1997 submission of the security clearance application.

I have also considered his appearance and demeanor while testifying, along with the substance of his testimony, and the written information he submitted explaining the omissions. Having done so, I find Applicant's explanations for not disclosing the 1986-87 drug use in the statements he provided, and the mental health treatment in the 1997 security clearance application credible.

Applicant did not deliberately provide false information in either the 1997 security clearance application or the 2003 statements that he submitted. Because the criminal conduct SOR allegation is based solely upon the deliberate omission of that information, I also find he did not commit a criminal offense. Accordingly, no disqualifying condition applies under either Guideline E or Guideline J.

In all adjudications the protection of our national security is the paramount concern. The objective of the security clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be judged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis. Considering all relevant and material facts and circumstances present in this case, including Applicant's character references, 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 Applicant has overcome the case against him and satisfied his ultimate burden of persuasion. Guidelines H, E, and J are decided for Applicant.

FORMAL FINDINGS

SOR ¶ 1-Guideline H: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

SOR ¶ 2-Guideline E: For Applicant

Subparagraph a: For Applicant

Subparagraph b: For Applicant

Subparagraph c: For Applicant

SOR ¶ 3-Guideline J: For Applicant

Subparagraph a: For Applicant

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

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. 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, Item E3.1.14.
4. *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).
5. ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).
6. ISCR Case No. 98-0761 (December 27, 1999) at p. 2.
7. ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.
8. ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15
9. *Egan*, 484 U.S. at 528, 531.
10. *Id* at 531.
11. *Egan*; Executive Order 10865; and the Directive.