

DATE: June 30, 2006

In Re:

SSN: -----

Applicant for Security Clearance

CR Case No. 05-10623

DECISION OF ADMINISTRATIVE JUDGE

THOMAS M. CREAN

APPEARANCES

FOR GOVERNMENT

Nichole Noel, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant is a 53-year-old field engineer for a defense contractor. From March 1999 to April 2000, Applicant admits using cocaine 12 times. In April 2000, he was arrested and convicted for distributing cocaine. He was placed in a pre-trial intervention program which he successfully completed. He has not used cocaine since April 2000, and demonstrated an intent not to abuse drugs in the future. Applicant has mitigated security concerns for drug abuse and criminal conduct. Clearance is granted.

STATEMENT OF THE CASE

On November 22, 2005, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its decision to deny a security clearance for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). Applicant acknowledged receipt of the SOR on November 28, 2005. The SOR alleges security concerns under Guideline H (Drug Involvement), and Guideline J (Criminal Conduct) of the Directive.

Applicant answered the SOR in writing on November 29, 2005. He admitted all of the allegations under Guidelines H and J. He requested a hearing before an administrative judge, and the request was received by DOHA on December 1, 2005. Department Counsel was prepared to proceed with the case on May 1, 2006, and the case was assigned to another administrative judge. The case was reassigned to me on May 18, 2006. A notice of hearing was issued on May 25, 2006, and the hearing convened on June 9, 2006. Applicant waived the 15 day notice requirement. ⁽¹⁾ Five government exhibits were received, marked as Government Exhibits 1-5, and admitted without objection. Four Applicant exhibits were received, marked as Applicant Exhibits 1-4, and admitted without objection. Applicant testified on his own behalf. DOHA received the transcript (Tr.) on June 20, 2006.

FINDINGS OF FACT

After a thorough review of the pleadings, transcript, and exhibits, I make the following essential findings of fact.

Applicant is a single 53-year-old field engineer for a defense contractor. He started working for a defense contractor, not his present employer, in September 1996 and held a security clearance. He remained employed by this defense contractor from March 1999 to April 2000.⁽²⁾ In 2004, he began working for his present employer.

In March 1999, Applicant started using cocaine with the son of a former girlfriend. Applicant considered himself a father figure to the young man, and a substitute for the boy's father. The young man was into drugs and convinced Applicant to use cocaine. Applicant was 47 years old at the time. From March 1999 to April 2000, Applicant used cocaine approximately 12 times. Applicant knew that purchasing and using cocaine was illegal. He did not believe he had a drug problem, since he only used the drug socially and did not believe he was not addicted. Applicant purchased his drugs only from the young man and mostly used it with him. On about two occasions, he used cocaine by himself in the privacy of his home.⁽³⁾

In April 24, 2000, Applicant was apprehended by undercover police for use of cocaine, possession with intent to distribute, and possession of cocaine near a school zone with intent to distribute.⁽⁴⁾ Applicant had accompanied the young man to a trailer near the young man's house, and close to a school. He met other individuals in the house, and used cocaine in the house at this time. He had to use the bathroom because of an upset stomach. When he returned from the bathroom, there was a transaction for the purchase of cocaine under way. Shortly after the transaction was completed, one of the participants left and the police arrived. The person that departed was an undercover police officer. All of the people in the trailer were arrested. Applicant was charged with distribution of cocaine, and distribution within the proximity of a school.⁽⁵⁾

Applicant was placed in a pre-trial intervention program. As part of the intervention program, Applicant completed drug and alcohol counseling and was tested periodically for drug use. All tests were negative.⁽⁶⁾ Since April 2000, Applicant has not used drugs. He was tested during the intervention program and when he started working for his present employer over two years ago. His present employer has a random drug testing program, but he has not been called for testing.⁽⁷⁾ Applicant's arrest for drug distribution was a significant event in his life. He stated he realized he let his guard down and participated in something he should have avoided. He realizes how one mistake can have lifelong negative ramifications. He has not used drugs since his arrest and has not associated with his former acquaintances who introduced him to drugs.⁽⁸⁾

Applicant stated concerning his use of cocaine:

"I haven't been involved in anything like this, this is the worst mistake I've ever made in my life. And I don't know of anything can ever come ever come up that would have me put myself in this position again. I have made that mistake and I'm here to be accountable for that mistake. ... I don't know of any possible circumstance can ever present itself to me again that would have me have this lapse of judgment, ever. And regardless of the outcome of clearance there is not judge or jury that could ever be harder on me than I have been on myself."⁽⁹⁾

After his arrest, Applicant worked for a government contractor performing work for a government agency and held a security clearance. From March 2003 to March 2004, he was unemployed. He has worked for his present defense contractor since March 2004 and has held a security clearance while working for them. His present security clearance application was to upgrade his clearance from secret to top secret. His performance of duty for his present employer has been excellent.⁽¹⁰⁾

POLICIES

The President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information."⁽¹¹⁾ Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive.⁽¹²⁾

The Directive sets out the adjudicative guidelines for making decisions on security clearances. Enclosure 2 of the Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions and mitigating conditions for each guideline. Each clearance decision must be fair, impartial, and a commonsense decision based on the relevant and material facts and circumstances, the whole person concept, and the factors listed in the Directive ¶ 6.3.1 through ¶ 6.3.6.

The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. An administrative judge must apply the "whole person concept," and consider and carefully weigh the available, reliable information about the person.⁽¹³⁾ An administrative judge should consider: (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 applicant's age and maturity at the time of the conduct; (5) the voluntariness of 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 of recurrence.⁽¹⁴⁾

A person granted access to classified information enters into a special relationship with the government. The government must be able to repose a high degree of trust and confidence in those individuals to whom it grants access to classified information. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant.⁽¹⁵⁾ 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.

Initially, the Government must present evidence to establish controverted facts in the SOR that disqualify or may disqualify the Applicant from being eligible for access to classified information.⁽¹⁶⁾ Thereafter, Applicant is responsible for presenting evidence to rebut, explain, extenuate, or mitigate facts. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance."⁽¹⁷⁾ The government is under no duty to present evidence to disprove any Adjudicative Guideline mitigating condition, and an Administrative Judge cannot assume or infer that any particular mitigating condition is applicable merely because the government does not present evidence to disprove that particular mitigating condition.⁽¹⁸⁾ "[T]he Directive presumes there is a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability."⁽¹⁹⁾ "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security."⁽²⁰⁾

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

Guideline H - Improper or illegal involvement in drugs, raises questions regarding an individuals 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 J: A history or pattern of criminal activity creates doubt about a person's judgment, reliability, and trustworthiness.

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 section below.

CONCLUSIONS

I have carefully considered all of the facts in evidence and the legal standards discussed above. I have reached the following conclusions regarding the allegations in the SOR.

The information presented by the government of Applicant's arrest and conviction for distribution of cocaine, and Applicant's admission to using cocaine 12 times between March 1999 and April 2000 raises Drug Involvement Disqualifying Conditions Directive ¶ E2.A8.1.2.1 (*any drug abuse*); and ¶ E2.A8.1.2.2 (*illegal drug possession*,

including cultivation, processing, manufacture, purchase, sale, or distribution). Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction. Cocaine is a mood or behavior altering substance that is banned under the Controlled Substance Act of 1970.

The Drug Involvement Mitigating Conditions to consider in Applicant's case are Directive ¶ E2.A8.1.3.1 (*the drug involvement was not recent*); ¶ E2.A8.1.3.2 (*the drug involvement was an isolated or aberrational event*); and ¶ E2.A8.1.3.3 (*a demonstrated intent not to abuse any drugs in the future*). Applicant admitted to being an active user of cocaine, and admitted using cocaine 12 times in a year. He made a conscious decision to use cocaine during this time. His use is not isolated or aberrational. His last involvement with drugs was in April 2000 when he was arrested. His drug involvement is not recent. After his arrest, Applicant was placed in a pre-trial intervention program. He successfully completed that program participating in all of the program activities. Applicant credibly testified he stopped using drugs after his arrest. He was tested for drug use during the intervention program with all tests negative. He is subject to random testing with his present employer. He credibly testified that he has terminated his relationship with the people involved in drug use. He credibly testified his use of drugs was a mistake and that he realized the harm it has done to his life. He has demonstrated an intent not to abuse drugs in the future and has fulfilled that intent for over six years.

The SOR alleges, as a security concern under Guideline H, that Applicant used cocaine while holding a security clearance. While such conduct is not listed as a disqualifying condition, it is a security concern. However, he has mitigated that concern for the same reasons noted under both the drug involvement guideline above and the criminal conduct guideline noted below. I conclude Applicant has mitigated security concerns for his Drug Involvement.

The use of cocaine is also a crime and a history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. The security concerns, as well as the disqualifying conditions and mitigating conditions, for drug involvement and criminal conduct are similar for granting or revoking a security clearance. Applicant's distribution and use of cocaine is a criminal act since it involves the distribution and use of an illegal substance. Applicant's conviction for distribution of cocaine and his admitted use of cocaine raises Criminal Conduct Disqualifying Conditions Directive ¶ E2.A10.1.2.1 (*allegations or admissions of criminal conduct, regardless of whether the person was formally charged*); and ¶ E2.A10.1.2.2 (*a single serious crime or multiple lesser offenses*). Applicant admitted his criminal conduct of using cocaine 12 times. His arrest and conviction for distribution of cocaine is a serious crime.

Applicant has raised Criminal Conduct Mitigating Conditions Directive ¶ E2.A10.1.3.1 (*the criminal behavior was not recent*), ¶ E2.A10.1.3.2 (*the crime was an isolated incident*), and ¶ E2.A10.1.3.6 (*there is clear evidence of successful rehabilitation*). Applicant used cocaine 12 times, so his use is not isolated. His last use was over six years ago, so the use is not recent. Applicant successfully completed the pre-trial intervention program. Subsequent random testing for drug use were negative. Applicant's credible testimony shows his remorse for his mistake in conduct and his intent not to use drugs in the future. He has demonstrated an intent not to abuse drugs in the future, and there is clear evidence he is successfully rehabilitated. Applicant has meet his heavy burden and mitigated the security concerns for both drug involvement and criminal conduct.

I have considered Applicant's conduct under the "whole person" concept as required by section E2.2 of the Directive. At the time of his drug use, he knew better and had the ability to resist. He voluntarily used drugs. However, he states he does not intent to use drugs again, and he has abstained from drug abuse for six years. There is no potential for pressure, coercion, or exploitation since his prior use and conviction are known, and his demonstrated abstinence not used cocaine in over six years. There is a minimal likelihood he will use drugs in the future. His job performance shows his dedication to work and bolsters his intent not to use drugs in the future. Applicant has shown his prior use of cocaine is not a security concern

FORMAL FINDINGS

Formal findings for or against Applicant on the allegations in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H: FOR APPLICANT

Subparagraph 1.a.: For Applicant

Subparagraph 1.b.: For Applicant

Subparagraph 1.c.: For Applicant

Subparagraph 1.d.: For Applicant

Paragraph 2, Guideline J: FOR APPLICANT

Subparagraph 2.a.: For Applicant

DECISION

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

Thomas M. Crean

Administrative Judge

1. Court Exhibit 1 (Statement, dated May 30, 2006).
2. Tr. 15; *See*, Applicant Exhibit A (Applicant's Resume, undated).
3. Tr. 15-21.
4. Government Exhibit 3 (Newspaper article, undated); Government Exhibit 5 (Facility Security Officer's report, dated Apr. 26, 2000).
5. Tr. 22-25.
6. Tr. 29-30; Government Exhibit 5 (Pre-Trial Intervention Documents, dated Apr. 2000 thru Sep. 2001).
7. Tr. 32-33.
8. Tr. 28-31.
9. Tr. 13.
10. Applicant Exhibit B (Employee Performance Review, Sep. 30, 2004); Applicant Exhibit C (Employee Performance Review, dated Mar. 10, 2005); Applicant Exhibit D (Employee Performance Review, dated Mar. 27, 2006).
11. *Department of the Navy v. Egan*, 484 U.S. 518 (1988).
12. Directive ¶ E2.2.1.
13. *Id.*
14. Directive ¶¶ E2.2.1.1 through E2.2.1.9.
15. *See* Exec. Or. 10865 § 7.
16. Directive ¶ E3.1.14.
17. ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002); *see* Directive ¶ E3.1.15.

18. ISCR Case No. 99-0597 (App. Bd. Dec 13, 2000).

19. ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993))

20. *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.