

DATE: February 20, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 06-01753

DECISION OF ADMINISTRATIVE JUDGE

LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT

Rita C. O'Brien, Esq., Department Counsel

FOR APPLICANT

Leonid J. Tasheiko, Esq.

SYNOPSIS

After holding a security clearance for many years, Applicant became addicted to cocaine during an eight-month period. He disclosed his addiction to his facility security officer, and he voluntarily entered and completed a drug abuse treatment program. His treatment team gave him a good prognosis for remaining drug-free. He has mitigated the security concern based on drug involvement. Clearance is granted.

STATEMENT OF THE CASE

On July 31, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive). The SOR alleged security concerns raised under Guideline H (Drug Involvement) of the Directive. It alleges Applicant used cocaine with varying frequency from August 2002 until at least May 2003, while he held a top secret clearance (SOR ¶ 1.a), and that he attended outpatient treatment and was diagnosed as cocaine dependent (SOR ¶ 1.b).

Applicant's counsel answered the SOR in writing on September 14, 2006, on Applicant's behalf. Applicant admitted the allegations in SOR ¶ 1.a and denied the allegation in SOR ¶ 1.b. He elected to have a hearing before an administrative judge. The case was assigned to me on November 14, 2006, and heard on January 18, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on January 25, 2007.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is the 35-year-old owner and chief operating officer of a small company providing information technology services to various defense agencies (Tr. 111). His business depends heavily on defense contracts. He served in the U.S. Air Force from January 1991 to January 1995, and he held a security clearance while on active duty (Tr. 123). After leaving active duty, he worked for defense contractors for about two years and then formed his own company in 1997 (Tr. 125). He has held a security clearance since March 1999 (Tr. 125).

Applicant has a bachelor of science degree in mathematics. He was married in January 1994 and divorced in July 1995. He has a 13-year-old daughter from his first marriage. He underwent counseling after his divorce, because it followed a very hostile marital relationship that harmed his relationship with his daughter (Tr. 124). He remarried in 2002 and was divorced in September 2004 (Tr. 114, 123).

Applicant executed a security clearance application in July 2002 for periodic reinvestigation of his suitability for a clearance (GX 1). In August or September 2002, he responded to intense business pressure and marital strife by drinking heavily and experimenting with cocaine. He testified that his social drinking led to heavy drinking and then to use of cocaine (Tr. 128). His use of cocaine increased until he was using cocaine daily, sometimes in the morning but usually in the afternoons at work (Tr. 133-34). In early March 2003, his wife confronted him about his drug use.

On March 4, 2003, Applicant informed his facility security officer and his Defense Security Service (DSS) representative that he had a substance abuse problem, and that he had voluntarily entered a drug rehabilitation program (GX 4; Tr. 108). The facility security officer is Applicant's mother (Tr. 110).

When Applicant entered the treatment program, he reported to the intake staff that he was using cocaine daily and using two "eightballs" a week (Tr. 63). An "eightball" is three and a half grams of cocaine (Tr. 60). He obtained his cocaine from a person who mowed the grass at his office building (Tr. 129). He also reported using ecstasy and alcohol. He stated that he became hostile, erratic, abusive, unpredictable, and had memory problems when using cocaine (Tr. 65). He was diagnosed as cocaine dependent by a team including a psychiatrist and a medical professional licensed as a counselor and certified as a drug and alcohol counselor. The staff determined, however, that the severity of his drug addiction did not require inpatient treatment (Tr. 29).

Applicant was enrolled in a five-week outpatient program providing for meetings four days a week, each meeting lasting three and a half hours (Tr. 29). He underwent drug testing upon enrollment and was randomly tested once a week (Tr. 51). He completed the program in April 2003, and he entered an aftercare program providing for "self-help" meetings, a one-hour continuing care meeting each week, and participation in an Alcoholics Anonymous or Narcotics Anonymous 12-step program with a sponsor. He did well in the aftercare program, and he became a mentor and leader for other participants (Tr. 38). When he was discharged from the program, his prognosis was "good," and his addiction was in remission (Tr. 50, AX C at 2). His global assessment of functioning (GAF) score was 58 out of a possible 100 at discharge (AX C at 2; Diagnostic and Statistical Manual of Mental Disorders, 4th ed (DSM-IV-TR), attached to the record as Hearing Exhibit I, at 34). As of the date of the hearing, his counselor opined his GAF score had risen to about 95 (Tr. 49).

Applicant relapsed and used cocaine twice in late May 2003. The relapses were about two weeks apart, and each involved a single use of cocaine in the evening (Tr. 107). They occurred before he completed the aftercare program and before he established a relationship with a sponsor. He attributed his relapses to not attending enough aftercare meetings, putting himself in dangerous situations, and failing to contact his sponsor when he felt a desire to use cocaine (GX 3 at 2).

Applicant's counselor testified there is an 85 percent success rate for cocaine addicts in remission, if they continue to attend meetings, participate in the 12-step program, and work with a sponsor (Tr. 66). Based on her knowledge of Applicant, she believes he is in the "85 percent category" (Tr. 75).

Applicant had infrequent contact with his first sponsor (Tr. 138). After his first sponsor died, Applicant found his current sponsor, who has worked with him for the past two and a half years. For the first 90 days of their relationship, his second sponsor talked with him almost daily (Tr. 81). After the first 90 days, they talked about twice a week for about five weeks (Tr. 90). They now have contact at least every two weeks at a minimum (Tr. 81-82). Applicant's

sponsor testified he believes Applicant has overcome his addiction (Tr. 83). He believes Applicant has been very honest and forthright and realizes how much he stands to lose if he fails (Tr. 85).

Applicant's pastor for the past five years counseled him both on his divorce and his cocaine addiction (Tr. 98, 103). His pastor also is president of a real estate company and consulted with Applicant regarding the company's computer security (Tr. 95). He testified that Applicant has become very active in the church and is very committed to his daughter and to his disabled grandparents (Tr. 98).

Applicant no longer drinks heavily. He now drinks infrequently at social occasions, limiting himself to a couple of beers or a mixed drink (Tr. 128). He knows people who use cocaine, but he avoids being in situations where cocaine use is likely, because part of his treatment taught him to avoid those situations (Tr. 129). He testified he went through a very stressful divorce in September 2003, after he completed the drug treatment program, but he did not relapse (Tr. 113-14). He realizes that losing his clearance would affect him as well as his employees (Tr. 112). He knows that his business depends to a large extent on his ability to interact with military agencies in a classified environment. He testified he is strongly committed to avoiding a relapse because he has too much at stake (Tr. 115).

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The Directive sets forth adjudicative guidelines for determining eligibility for access to classified information, and it lists the disqualifying conditions (DC) and mitigating conditions (MC) for each guideline. Each clearance decision must be a fair, impartial, and 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.

A person granted access to classified information enters into a special relationship with the government. The government must be able to have a high degree of trust and confidence in persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication 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 establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). "[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." ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996) (quoting DISCR Case No. 92-1106 (App. Bd. Oct. 7, 1993)).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. ISCR Case No. 01-20700 at 3; *see* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* Directive ¶ E2.2.2.

CONCLUSIONS

Under Guideline H, improper or illegal involvement with drugs raises questions regarding an applicant'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. Directive ¶ E2.A8.1.1. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.2.1. Illegal drug possession also is a disqualifying condition (DC 2). Directive ¶ E2.A8.2.2. Applicant's cocaine possession and use raise DC 1 and DC 2.

A disqualifying condition (DC 3) also may arise from a "[d]iagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence. Directive ¶ E2.A8.1.2.3. Applicant's diagnosis of cocaine dependence by a treatment team including a psychiatrist raises DC 3.

Since the government produced substantial evidence to establish DC 1, DC 2, and DC 3, the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns based on possession and use of cocaine can be mitigated by showing that it was not recent (MC 1). Directive ¶ E2.A8.1.3.1. There are no "bright line" rules for determining when conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation." *Id.*

Applicant's last use of cocaine was in late May 2003, more than three years and eight months ago. He terminated his use voluntarily, disclosed his cocaine use to his facility security officer (who was also his mother), voluntarily entered and completed a treatment program, completed the aftercare program, dissociated himself from his former cocaine-using friends, and maintained close contact with his drug addiction sponsor for the past two and a half years. I conclude MC 1 is established by the passage of time and Applicant's changes of circumstances and conduct.

Drug abuse also can be mitigated (MC 2) by evidence that it was "an isolated or aberrational event." Directive ¶ E2.A8.1.3.2. Although Applicant's drug use was limited to an eight-month period, it was not isolated. To the contrary, it was sustained and repeated. For eight months, it was his normal behavior, not aberrational. I conclude MC 2 is not established.

A mitigating condition (MC 3) may apply if there is "[a] demonstrated intent not to abuse any drugs in the future." Directive ¶ E2.A.1.3.3. Applicant has repeatedly asserted his intent to stay away from drugs, and he has demonstrated his intent by his substantial period of abstinence and behavioral changes.

Finally, the security concern arising from drug abuse can be mitigated (MC 4) by evidence of "[s]atisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional. I conclude MC 4 is established by his completion of the substance abuse program, one year of aftercare, continuation in aftercare and contact with his sponsor, and the favorable prognosis reflected on his discharge summary from the treatment program and the favorable testimony of one of his drug abuse counselors.

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered the general adjudicative guidelines in the Directive ¶ E2.2.1. I have considered: (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 or recurrence. Directive ¶¶ E2.2.1.1 through E2.2.1.9. Many of these factors are discussed in the above discussion of the specific disqualifying and mitigating conditions, but some merit additional comment.

Applicant's entire professional life has involved national defense, in the Air Force, as a contractor employee, and finally as the owner and CEO of a small company dependent on defense contracts. He is a mature adult. He was very candid and sincere during the hearing. His eight-month foray into drug abuse was not an isolated or aberrational event within the meaning of MC 2, discussed above, but it was not typical of his lifestyle before or after his involvement with drugs. However, his reaction to his drug addition was typical of his lifestyle: he recognized his problem, sought a solution, and aggressively worked to solve the problem.

Applicant was not arrested or ordered to seek treatment. He voluntarily sought out and completed his outpatient treatment and aftercare. In spite of his bad judgment exhibited by drug abuse and his breach of trust by using drugs while holding a security clearance, he retained enough good judgment and sense of personal responsibility to disclose his drug addiction to his facility security officer, who was his mother, and his DSS representative. The Directive ¶ E2.2.5 specifically takes cognizance of situations where a person who holds a clearance voluntarily reports adverse information, makes a complete and truthful disclosure, seeks assistance and follows professional guidance, has resolved the security concern, and has demonstrated positive changes in behavior.

Applicant is motivated by his realization of how destructive his drug involvement was and could have been. He realizes that another relapse may destroy everything he has worked for and cares about. He knows that his professional future and his relationship with his daughter, mother, and grandparents depend on his willingness and ability to remain drug free. His disclosure of his drug addition has minimized the potential for pressure, coercion, exploitation, or duress. He has surrounded himself with a strong support structure and has assiduously maintained his relationship with his sponsor. To the extent that human conduct can be predicted, I believe the likelihood that his drug abuse will recur is minimal.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on based on his drug involvement. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his security clearance.

FORMAL FINDINGS

The following are my conclusions for each allegation in the SOR:

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph 1.a: For Applicant

Subparagraph 1.b: For Applicant

DECISION

In light of all of the circumstances in this case, it is clearly consistent with the national interest to continue Applicant's security clearance. Clearance is granted.

LeRoy F. Foreman

Administrative Judge