DATE: November 29, 2007

In Re:	)	
	)	
----------	)	ISCR Case No. 07-02079
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
JOHN GRATTAN METZ, JR

APPEARANCES

FOR GOVERNMENT
Emilio Jaksetic, Esquire, Department Counsel

FOR APPLICANT
Richard A. Bednar, Esquire

SYNOPSIS

Applicant's positive test for cocaine metabolite in October 2005 was mitigated by the circumstances and results of the test, and his demonstrated intent not to use any drugs in the future. The record did not establish that Applicant falsified his clearance application. Clearance granted.

STATEMENT OF THE CASE

Applicant challenges the 13 June 2007 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of illegal

drug use and personal conduct.[1] He answered the SOR 3 August 2007, and requested a hearing. DOHA assigned the case to me 6 September 2007, and I convened a hearing 1 November 2007. DOHA received the transcript (Tr.) 13 November 2007.

PROCEDURAL RULINGS

Applicant requested, and was granted for good cause, a continuance from the originally scheduled hearing date to 1 November 2007, to permit him time to obtain the laboratory litigation report supporting the positive test for cocaine metabolite (A.E. B), and obtain expert analysis of that supporting documentation (A.E. C). At hearing, I denied Department Counsel's Motion to Amend the SOR because the proposed amendment was unnecessary (Tr. 88).

FINDINGS OF FACT

Applicant admitted testing positive for cocaine use in October 2005 (SOR 1.b), being fined for minor consuming alcohol in 1993 (SOR 3.a.), and being given a suspended jail sentence, fined, and ordered to community service for a misdemeanor charge in 1996 (SOR 3.c.). He denied the remaining allegations of the SOR, specifically that he had ever used cocaine (SOR 1.a.), or falsified his clearance application (SOR 2). Accordingly, I incorporate the admissions as findings of fact.

Applicant—a 34-year-old systems analyst employed by a defense contractor since May 2006—seeks access to classified information. He appears to have held a clearance since 1997.

In October 2005, Applicant reportedly tested positive for cocaine metabolite on a pre-employment drug screen for a previous employer (A.E. A). The company had inadvertently started his employment before receiving the results of the drug screen (G.E. 9), and he was suspended from work while the sample was retested and the company decided what to do with Applicant if the retest confirmed the positive result. While the results of the retest were pending, the company discussed with Applicant re-assigning him to a sister company, where he would work on the same programs with the same supervisory personnel. He would not require a clearance, but would be required to pass a drug screen. When the sample retested positive for cocaine, Applicant resigned from that company (A.E. G), and was immediately hired by the sister company. He passed the entry drug screen. He worked for this company from October 2005 to February 2006 as a systems analyst.

In May 2006, Applicant went to work for his current employer, and he completed and executed an Electronic Questionnaires for Investigations Processing (E-QIP)(A.E. F) to begin his background investigation. He reported his current employment, a period of unemployment from February 2006 to May 2006, and his employment with the sister company from October 2005 to February 2006. He did not report the 22-day employment with the first company, nor did he report any illegal drug use. In his October 1997 clearance application (G.E. 1), he disclosed—and had a favorable adjudication of—a 1993 charge of minor consumption of alcohol, for which he was fined and given a military non-punitive letter of reprimand, and a 1996 misdemeanor conviction for

[1]Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended—most recently in August 2006 (Directive).

interfering with rights of others. This latter charge was resulted from a bar fight at a private home. Applicant was identified as part of the group that started the fight, although he himself did not participate. Applicant received a suspended jail sentence, a fine, and was ordered to perform community service—which he completed.

In July 2006, Applicant was requested to execute a Questionnaire for National Security Positions (QNSP)(SF 86)(G.E. 2), and he did so. However, he credibly stated that while he had looked over the document before signing it, he had not generated the entries therein as he had when he completed the E-QIP. Cursory comparison of the May 2006 E-QIP and the July 2006 QNSP reveal the QNSP to be both incomplete and incorrect. Although I accept Department Counsel's proffer that DOHA received only the QNSP and not the E-QIP (Tr. 22), Department Counsel neither proffered nor produced an explanation why this was so.

Applicant is alleged to have falsified the July 2006 QNSP by failing to disclose his inadvertent 22-day employment (SOR 2.a.), failing to disclose his termination from this employment because of his positive drug test (SOR 2.b.), and failing to report his illegal drug use (SOR 1.c.). The government also alleges that these falsifications violate federal law (SOR 3.d).

Applicant and his wife testified at hearing, and I found their testimony credible and I believe it. They have known each other for 18 years, have been together for 10 years after Applicant got out of the Army, have been married for five years, and have two children, ages one and two. Applicant is actively involved as a parent, attends church, and participates in sporting activity. His wife has never known him to use illegal drugs. He received the report of the positive drug screen at home, and immediately informed his wife and his employer. The employer's focus turned almost immediately to having Applicant re-assigned to the sister company, so Applicant never had any real thought that he was being terminated from the first company. He resigned from the first company to facilitate his re-assignment to the sister company.

Applicant's character references (A.E. E) consider him honest and trustworthy. However, none of them are aware of the issues raised in the SOR. The nanogram level of Applicant's positive test for cocaine metabolite (A.E. A, B) was 170, on a confirmatory test (radio immunoassay) accurate to 150. This level of metabolite, depending on circumstances, is consistent with innocent or unintentional ingestion of cocaine (A.E. C).

POLICIES AND BURDEN OF PROOF

The revised adjudicative guidelines specify factors to be considered when evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative guidelines should be followed whenever a case can be measured against them, as they represent policy guidance governing the grant or denial of access to classified information. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative

guidelines are Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their own. The "clearly consistent with the national interest" standard compels resolution of any reasonable doubt about an Applicant's suitability for access in favor of the government.[2]

CONCLUSIONS

The government established a potential case for disqualification under Guideline H, by demonstrating that Applicant tested positive for cocaine use in October 2005.[3] The positive drug test permits me, but does not require me, to conclude that Applicant knowingly used cocaine. Under the circumstances of this case, I conclude that Applicant did not knowingly use cocaine. However, examining the evidence most favorably to the government, Applicant mitigated the security concerns, by demonstrating that the use was infrequent, under circumstances unlikely to recur, and (as a single incident) does not cast doubt on the individual's current reliability, trustworthiness, or good judgment.[4] He further demonstrated intent to not abuse drugs in the future.[5] At best, Applicant used cocaine on a single occasion in October 2005, with no illegal drug use before or after. In the context of his drug abuse, that use is not recent, and his nearly two years of abstinence from cocaine use from December 2005 to November 2007—is an appropriate period of abstinence [§ 26.(b)]. Ordinarily, Applicant's failure to admit his cocaine use in the face of his positive drug test might suggest that he has not demonstrated rehabilitation. However, in this case Applicant has reasonable cause to not admit what he vehemently disputes. In any event, on this record, even if I believed Applicant use cocaine knowingly, it is extremely unlikely that he would return to illegal drug use. Accordingly, I resolve Guideline H. for Applicant.

---

[2]*See*, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

[3]Any drug abuse [§ 25.(a)]; Testing positive for illegal drug use [§ 25.(b)];

[4]The behavior happened so long ago, was so infrequent, **or** happened under such circumstances that it is unlikely to recur **or** does not cast doubt on the individual's current reliability, trustworthiness, or good judgment [§ 26.(a)][Emphasis supplied];

[5]A demonstrated intent not to abuse any drugs in the future, such as: . . . (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; . . . [§ 26.(b)].

The government failed to establish a case for disqualification under Guideline E. Applicant's May 2006 E-QIP disclosed his employment with the sister company, using employment dates that cover the entire 22-day inadvertent employment by the first company. The record evidence shows that the sister company utilized the same supervisory chain and worked on the same projects and contracts. On the facts of this case, I doubt Applicant even thought of this period of time as constituting two different employers. Similarly, I would not expect Applicant to think of the circumstances of his resignation from the first company as leaving under unfavorable circumstances. Nor would I expect him to admit to cocaine use based on the results of a drug test that he vehemently disputes (and that his employer apparently considered sufficiently unreliable that it sought alternate means to keep him as an employee). Thus I conclude that Applicant completed the May 2006 E-QIP (and I note that the E-QIP is the most current clearance application in use) completely and truthfully, and did not intend to mislead the government in any way. Having completed this application truthfully, I conclude Applicant could not have intended to mislead the government when he completed the July 2006 QNSP—a clearance application format last revised in September 1995—even though he signed it without noting the significant errors and omissions between it and the May 2006 E-QIP. Even accepting that DOHA did not have the E-QIP, and that Applicant's background investigation was conducted based on the QNSP, the government has produced no explanation how or why Applicant was given an outdated, incomplete form to sign two months after the more complete, more current application. Accordingly, I resolve Guideline E for Applicant.[6]

The government failed to establish a case for disqualification under Guideline J. The government failed to produce any evidence to support the charge of minor consumption of alcohol in 1994 (SOR 1.b.), and the 1993 charge of minor consumption of alcohol and the 1996 misdemeanor interference charge have even less security clearance significance now than they did in 1997, when they were first favorably adjudicated for Applicant. These two charges add nothing to this case standing together, or in conjunction with the felony allegation of SOR 1.d. SOR 1.d. is based on the three falsification allegations of paragraph 2 which I found for Applicant. Accordingly, I find Guideline J for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph a: For Applicant
Subparagraph b: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph a: For Applicant
Subparagraph b: For Applicant

[6]Applicant's conduct did not involve deliberate omission. . . [§ 16.(a)], deliberately providing false or misleading information . . . [§ 16.(b)], personal conduct . . . that creates a vulnerability . . . [§ 16.(e)], violation of a written or recorded commitment . . . [§ 16.(f)], or association with persons involved in criminal activity [§ 16.(g)].

Subparagraph c:	For Applicant
Paragraph 3. Guideline J:	FOR APPLICANT
Subparagraph a:	For Applicant
Subparagraph b:	For Applicant
Subparagraph c:	For Applicant
Subparagraph d:	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 granted.

John Grattan Metz, Jr.
Administrative Judge