



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:)	
)	
)	ISCR Case No. 07-02754
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
Applicant: *Pro Se*

June 16, 2008

Decision

CREAN, Thomas M., Administrative Judge:

Applicant submitted his Security Clearance Application (SF 86), on September 21, 2006. On November 3, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns for drug involvement and personal conduct under Guidelines H and E. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006. Applicant acknowledged receipt of the SOR on November 19, 2007.

Applicant answered the SOR in writing on December 8, 2007. Applicant tested positive for cocaine in July 2006. He denied that he knowingly used cocaine. He admitted he was administratively discharged from the United States Navy Reserve with a General Discharge under Honorable Conditions based on the positive urinalysis test.

He requested a hearing before an Administrative Judge. Department Counsel was prepared to proceed with the case on January 31, 2008. The case was assigned to another Administrative Judge on February 1, 2008, and reassigned to me on February 21, 2008. DOHA issued a notice of hearing on March 18, 2008, for a hearing on April 29, 2008. I convened the hearing as scheduled. The government offered four exhibits, marked government exhibits (Gov. Ex.) 1 through 4, which were received without objection. Applicant submitted 37 documents, marked as Applicant Exhibits (App. Ex.) A-MM, which were received without objection. Applicant and one witness testified on his behalf. DOHA received the transcript (Tr.) of the hearing on May 9, 2008. The underlying basis for a security concern is the use of illegal drugs. The illegal drug use causes concern in two areas, the use of an illegal drug itself, and the resulting administrative board action of discharge from the Navy Reserve with a General Discharge under Honorable Conditions. Based upon a review of the case file, pleadings, and exhibits, eligibility for access to classified information is granted.

Procedural Issues

Department Counsel requested that I take administrative notice of SECNAV Instruction 1920.6B, Administrative Separation of Officers, admitted as Court Exhibit I. The Instruction sets forth the policies, standards, and procedures for the administrative separation of Navy and Marine Corps officers. I took administrative notice of Enclosure 3, paragraph 1b (2) of the instruction, which required mandatory processing for separations for unlawful drug involvement. I also take administrative notice of Enclosure 8 which provides procedures to be followed to review and evaluate commissioned officers to determine whether the officer should be required to show cause for retention on active duty. I also take administrative notice of the procedures in Enclosure 8 which provides for a Board of Inquiry to give the officer a full and impartial hearing to respond to, and rebut, allegations, as well as present favorable information on separation and characterization of service.

Findings of Fact

Applicant denied knowing use of cocaine under Guideline H, but admitted he was separated from the Navy Reserve with a General Discharge under Honorable Conditions for use of cocaine under Guidelines H and E. He provided additional information to support his request for eligibility for a security clearance. I thoroughly and carefully reviewed the case file and the pleadings. I make the following findings of fact.

Applicant is a 39-year-old senior business analyst for a defense contractor for over ten years. He served six years on active duty with the Navy, and six years in the Navy Reserve. He has both a bachelor's and master's degree. He has been married over eight years but has known his wife for over 18 years. He has two step-children from his wife's first marriage, and a child with his wife. Applicant has held a security clearance since 1987. (Tr. 20-22, 50-51; Gov. Ex. 1, security clearance application, dated September 21, 2006)

Applicant attended a housewarming party at the home of a fellow Navy Reservist on the night of July 6, 2006. He only knew a few people at the party. He stayed for about two hours and had two alcoholic drinks mixed by a bartender and smoked half a cigar offered to him by one of the party attendees. He left the party about 9:00 pm and arrived home about 15 minutes later. He went to bed and rose early the next morning to attend the normally scheduled Navy Reserve drill. (Tr. 46-47, 52-55, 58-63)

Applicant attended his Navy Reserve week-end drill on July 7, 2006. His division was directed to undergo a drug test urinalysis. Applicant was the division officer at the drill. He was informed of the test at 0830 and provided his sample at 0912. Applicant could have provided excuses not to take the test for any number of reasons. However, he voluntarily provided the sample required. Applicant tested positive for cocaine. He was using two prescription drugs at the time for a back injury but neither drug would have caused a positive test for cocaine. (Tr. 47-48)

Applicant has consistently denied knowing use of cocaine. (See, Gov. Ex. 2, Interrogatories, dated May 24, 2007; Gov. Ex. 3, Response to SOR, dated May 31, 2007; Gov. Ex. 4, Interrogatories, dated September 12, 2007) Applicant has signed a statement that if there is any indication of future drug use or misconduct, it would be grounds for immediate termination of his clearance. (App. Ex. KK, statement, dated April 29, 2008)

Applicant's wife credibly testified that she has known Applicant for over 18 years and they have been married for over eight years. Applicant is actively involved as a parent, attends church, and participates in golf and fishing. She has never seen or known him to use illegal drugs. He is a good family man who goes to work and comes home in the evening. He takes care of his children. She can count on him to watch their youngest child. She manages the family finances and their finances are sound. She has never seen Applicant make any unusual expenditure. (Tr. 20-30.

Applicant presented information that he received awards for his performance during the period immediately before he tested positive for cocaine in July 2006. He received two letters of commendation from an Army Major General for his performance and assistance to the Army command. (App. Ex. BB, Letters, dated May 12, 2006 and June 1, 2006) His performance evaluation for the period March 6, 2006 until March 6, 2007, shows excellent duty performance with no issues of misconduct. (App. Ex. MM, Performance Review, dated March 6, 2007) He was also inducted into his employer's organization for employees that have outstanding professional performance. (App. Ex. DD, Letter, dated June 21, 2006)

Applicant presented information that he is a good family man. (App. Exs. A-B, Pictures, undated) He presented information that his over five years of enlisted service, with over four years of sea service, was excellent. He was enlisted surface warfare qualified, and awarded the Navy Achievement Medal and Good Conduct Award among other decorations. He received an honorable discharge. (App. Exs. C-S, Enlisted Service Record, various dates) He entered college after his discharge and received a bachelor's and master's degree from the same university (App. Ex. V, transcripts, dated

December 13, 1997, and December 17, 2000) He applied for and received a commissioned in the Navy Reserve on August 23, 2004. (App. Ex. T, Memorandum, dated October 4, 2004)

Applicant presented various letters of recommendation at the Administrative Board in January 2007. These letters were from his Navy Reserve superiors in the rank of Captain and Lieutenant Commander. The individuals know of the positive drug test results for cocaine. They attest that his Navy Reserve performance was excellent and he made contributions to the unit's mission. They recommended his continued service in the Navy Reserve. (App. Exs. W-Y, Letters, dated January 2, 2007, December 29, 2006, and January 7, 2007). An active duty senior chief who has extensive contact with Applicant as a liaison with the Navy Reserve noted that Applicant is a solid professional who is a model for other sailors. He also recommended continued service in the Navy Reserve. (App. Ex. Z, Letter, dated January 5, 2007)

Applicant presented information from his civilian supervisor noting that he has good character traits and cares about his wife and children. Applicant is a valued employee who contributes to the mission and can always be counted on to be an excellent performer. (App. Ex. AA, Letter, dated January 2, 2007)

At the hearing, Applicant presented another letter from his Navy Reserve supervising Captain attesting to his good character and outstanding performance of duty. (App. Ex. EE, Letter, dated April 12, 2008) Applicant also presented information from Army employees that he supports through his employment attesting to his good character and excellent support to the Army. The authors of the letters do not note if they are aware of the positive test results for cocaine. (App. Exs. FF-JJ, Letters, various dates)

Navy regulations require that an officer testing positive for use of a controlled substance must be considered for separation from the Navy. Applicant went before an administrative board in January 2007. Applicant denied ever using cocaine but could not explain the positive test result for cocaine. He noted his activities at the housewarming the night before the test and as the only known time he could have been exposed to cocaine. Two board members voted to discharge Applicant and one voted to retain him. Two board members determined that Applicant used cocaine and that he should be separated from the Navy with a General Discharge under Honorable Conditions. The senior member voted that Applicant did not use cocaine and should be retained. (Tr. 55-57, Gov. Ex. 3, Board action, dated March 26, 2007, at 2)

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel. . . ." The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

Analysis

Guideline H, Drug Involvement

The use of an illegal drug or misuse of a prescription drug can raise questions about an individual's reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. Drugs are mood and behavior altering substances, and include those listed on the Controlled Substances Act of 1970. Drug

abuse is the illegal use of a drug or the use of a legal drug in a manner that deviates from approved medical direction. (AG ¶ 24)

The positive drug test for cocaine on July 7, 2006, and the Administrative Board determination of knowing drug use of January 7, 2007, are sufficient information to raise Drug Involvement Disqualifying Conditions (DI DC) ¶ 25(a) (any drug use), and DI DC ¶ 25(c) (illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution). The positive drug test and the administrative board findings, even though not unanimous, permit me, but do not require me, to conclude that Applicant knowingly used cocaine. Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a) and (c), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the illegal drug use. (Directive ¶ E3.1.15) An applicant has the burden to refute an established allegation or prove a mitigating condition, and the burden of disproving it never shifts to the government (See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Applicant has consistently and repeatedly denied that he knowingly used cocaine. He acknowledges that the urinalysis test was positive for cocaine, but he cannot explain how the illegal drug was ingested. He provided compelling information concerning his lifestyle and work ethic to establish that he is not the type of person who would use illegal drugs. The lifestyle information and his denial of illegal drug use coupled with the inability to explain how the illegal drug was ingested are not sufficient to meet his heavy burden of establishing that he did not knowingly use cocaine. Applicant has failed to refute the inference of knowing use of cocaine. However, he is still permitted to present information to mitigate the disqualifying conditions.

At best, Applicant used cocaine on a single occasion in July 2006. There is no information in the case file to indicate illegal drug use before or after that time. Applicant's denial of knowing cocaine use and lifestyle information that he is not the type of person to use illegal drugs raises Drug Involvement Mitigating Conditions (DI MC) ¶ 26(a) (the behavior happened so long ago, was so infrequent, or happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment); and DI MC ¶ 26(b) (a demonstrated intent not to abuse drugs in the future, such as; (1) disassociation from drug-using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation).

There is only one incident of drug use in July 2006. The use happened over two years ago and there is no indication that Applicant has used illegal drugs since that time. His nearly two years of abstinence from cocaine is an appropriate period to show the behavior happened long ago. The circumstance of the use is unusual since it is a one time use at a social event, even though Applicant has not met his heavy burden to refute knowing use. His wife established that he is a good husband and father who takes care of his family and does not exhibit any signs or symptoms of illegal drug use. His work performance is exceptional and he has received awards for the work he was performing during the same time frame as the established illegal drug use. The use in

July 2006 happened long ago, was infrequent, and under unusual circumstances. The available information shows that the use of cocaine is not likely to recur.

Applicant has also shown his intent not to use illegal drugs. He does not associate with drug users and he does not frequent places of drug use. He signed a statement of automatic revocation of clearance for any violation of illegal drug use. Applicant's failure to admit cocaine use in the face of his positive drug test might suggest that he has not demonstrated rehabilitation. In this case, Applicant has reasonable cause not to admit what he vehemently disputes. In any event, on this record, even believing Applicant knowingly used cocaine; it is extremely unlikely that he would do so again. Applicant has sufficiently demonstrated that he has no desire to abuse drugs in the future. He has mitigated security concerns based on the use of cocaine in July 2006.

Guideline E, Personal Conduct

A security concern is raised because conduct involving questionable judgment, untrustworthiness, unreliability, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. (AG ¶ 15) Personal conduct is always a security concern because it asks the central question does the person's past conduct justify confidence the person can be entrusted to properly safeguard classified information.

Applicant was administratively discharged with a General Discharge under Honorable Conditions from the Navy Reserve for use of an illegal drug. This information raises Personal Conduct Disqualifying Condition ¶ 16(e) (personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . .)

Applicant's denial of drug use and his letter of automatic revocation raises Personal Conduct Mitigating Conditions (PC MC) ¶ 17(e) (the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.) Assuming that Applicant used an illegal drug in July 2006, the evidence strongly supports that he does not use illegal drugs now. His wife, employer, and fellow workers know of the past allegation of illegal drug use as well as his discharge from the Navy Reserve with a General Discharge under Honorable Conditions. Since Appellant's discharge and illegal drug use is known, his vulnerability to exploitation, manipulation and duress have been reduce or eliminated. I find for Applicant as to Personal Conduct.

Whole Person Concept

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(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 individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent 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." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall common sense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. I considered that Applicant tested positive for cocaine use on one urinalysis in July 2006. I considered Applicant's present intent not to use drugs. I considered his wife's evaluation that he is a good family man and she sees no indication of illegal drug use. I considered the awards he received for his work, and the evaluations of his civilian and Navy supervisors and fellow workers. I considered that he has signed a letter of automatic revocation that if he should use illegal drugs in the future he would lose his security clearance. Overall, the record evidence leaves me with no questions and doubts that Applicant will not use illegal drugs in the future. I have no doubts or questions about his eligibility and suitability for a security clearance. For all these reasons, I conclude Applicant has mitigated the security concerns arising from his illegal drug use and personal conduct

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, Guideline H:	FOR APPLICANT
Subparagraph 1.a-1.b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

THOMAS M. CREAN
Administrative Judge