



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



In the matter of:)
)
-----) ISCR Case No. 08-09232
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Ray T. Blank Jr., Esq., Department Counsel
For Applicant: Fulton S. Hamilton, Esq.

June 14, 2010

Decision

LEONARD, Michael H., Administrative Judge:

Applicant contests the Defense Department's intent to deny or revoke his eligibility for a security clearance to work in the defense industry. The record evidence shows Applicant has a history of drug abuse (cocaine) from about 2001 through about January 2008. He then completed outpatient and inpatient treatment where he received a primary diagnosis of cocaine dependence and a secondary diagnosis of alcohol dependence, although it appears alcohol was never a serious problem for Applicant. He has abstained from cocaine since approximately February 2008, obtained full-time employment, and has a support system in place. He did not give full, frank, and candid answers to questions about his cocaine use in May 2008, when he completed a security clearance application. Likewise, his hearing testimony made in an effort to justify his answers was not credible. His lack of credibility undermines his evidence of reform and rehabilitation. Accordingly, as explained in further detail below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on September 17, 2009, the Defense Office of Hearings and Appeals (the Agency) issued a statement of reasons (SOR) explaining it was unable to find it is clearly consistent with the national interest to grant Applicant access to classified information. The SOR is similar to a complaint, and it detailed the factual basis for the action under the security guidelines known as Guideline H for drug involvement and Guideline G for alcohol consumption. The SOR also recommended that the case be submitted to an administrative judge to decide whether to deny or revoke Applicant's security clearance.

Applicant answered the SOR in a timely fashion and requested a hearing. The case was assigned to me November 17, 2009. The hearing took place February 2, 2010. The hearing transcript (Tr.) was received February 12, 2010.

The record was kept open until February 17, 2010, to allow Applicant to submit additional documentary evidence. He did so in a timely manner, and the petition and series of court orders are admitted without objections.²

Findings of Fact

Based on the record evidence as a whole, the following facts are established by substantial evidence.

Applicant is a 40-year-old employee of a federal contractor. He married in 2007, and he and his spouse have two children, a son born in 2006 and a daughter born in 2007. He has been employed as an integration technician since May 2008. His job involves refurbishing shelters used by our Armed Forces when they are deployed. He received a "meets expectations" performance review for his initial annual performance review.³ Before this job, Applicant was self-employed during 1996 to 2008, when he owned and operated a tree trimming business. He is seeking to obtain a security clearance for the first time.

¹ This case is adjudicated under Executive Order 10865, *Safeguarding Classified Information within Industry*, signed by President Eisenhower on February 20, 1960, as amended, as well as DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program*, dated January 2, 1992, as amended (Directive). In addition, the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), effective within the Defense Department on September 1, 2006, apply to this case. The AG were published in the Federal Register and codified in 32 C.F.R. § 154, Appendix H (2006). The AG replace the guidelines in Enclosure 2 to the Directive.

² Exhibit G.

³ Exhibit E.

Applicant has a history of drug abuse (cocaine) from about 2001 through about January 2008.⁴ His drug abuse came to the attention of local authorities after the birth of his son in December 2006, when drug testing indicated prenatal cocaine use by the mother, and both the child and mother tested positive for cocaine at the child's birth.⁵ Their daughter was born in December 2007 with the same problem. As a result, Applicant and his wife lost legal custody of both children. They regained legal custody in October 2008, after going through a phased or transition process determined by the juvenile court in a series of court orders.

To cite one example, in its December 2007 order,⁶ the court stated that Applicant and his spouse tested positive for cocaine and both acknowledged recent use of cocaine. The court found Applicant in contempt of court for using cocaine. Also, the court ordered Applicant (and his wife) to enroll in and begin participation in a drug-treatment program. That was not the only instance of Applicant testing positive. He tested positive for cocaine in January 2007, twice in November 2007, three times in December 2007, and three times in January 2008.⁷

Applicant began the court-ordered drug-treatment program as an outpatient in early December 2007.⁸ By mid-January 2008, Applicant admitted he was not processing his relapses, he acknowledged everyday use of cocaine, and he expressed a strong desire for inpatient treatment.⁹

Applicant began an inpatient program for the treatment of chemical dependency on January 28, 2008, which he completed on February 25, 2008.¹⁰ After completing the program, he returned to the outpatient program the same evening. He then attended sessions on a regular basis, and he completed the outpatient program in early May 2008,¹¹ approximately when he began his current employment.

⁴ Exhibits 1–4.

⁵ Exhibit G.

⁶ Exhibit G.

⁷ Exhibit A.

⁸ Exhibit 3.

⁹ Exhibit 3 at 5.

¹⁰ Exhibit 4.

¹¹ Exhibit 3.

It was during February 2008 that he began testing negative for cocaine, and he thereafter tested negative until testing ended in September 2008.¹² In addition, he tested negative during pre-employment drug testing in April 2008.¹³

At the end of May 2008, Applicant completed a security clearance application for his employment.¹⁴ In response to Question 24a, which asked about illegal drug use in the last seven years, Applicant answered in the affirmative by indicating he had used cocaine about 50 times during the period April 2002 (estimated) to June 2007. He also explained that in January 2008 he had admitted himself to the inpatient rehabilitation program, and he stated that “I was not taking when I entered and had been clean for about 3 months.”¹⁵

Applicant deliberately understated both the duration and frequency of his cocaine use on his security clearance application.¹⁶ In addition, his efforts in his hearing testimony to reconcile his answers on his security clearance application with the evidence of his drug use were not credible.¹⁷ His testimony, that he provided an estimate for both the duration and frequency of his cocaine use, was not persuasive or credible. I make these findings in light of (1) the December 2007 contempt finding due to Applicant’s testing positive for cocaine, and (2) that Applicant tested positive for cocaine multiple times in November 2007, December 2007, and January 2008. These circumstances took place several months before Applicant completed the security clearance application, in which he stated a June 2007 end date for his cocaine use.

Applicant’s substance abuse counselor, father, and brother all testified on Applicant’s behalf. Their testimony was credible and worthy of belief.

The substance abuse counselor considers Applicant a success story due to his attitude in addressing his drug abuse.¹⁸ In the counselor’s opinion, Applicant turned around completely and has an excellent prognosis.¹⁹ To that end, Applicant submitted a

¹² Exhibit A.

¹³ Exhibit B.

¹⁴ Exhibit 1.

¹⁵ Exhibit 1 at 24 of 27.

¹⁶ Although these matters were not alleged in the SOR, I considered them for the limited purpose of assessing Applicant’s credibility and for assessing his evidence of reform and rehabilitation. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (describing five examples when it is proper to consider conduct not alleged in an SOR) (citations omitted).

¹⁷ Tr. 101–111.

¹⁸ Tr. 56–57.

¹⁹ Tr. 37, 40.

statement of intent agreeing to remain drug-free and agreeing to automatic revocation of a security clearance if he violated his pledge to remain drug-free.²⁰ Of note, the counselor viewed the drug abuse as the major issue for Applicant, as alcohol was not a major concern.²¹

Both the father and brother have observed the turnaround made by Applicant, with one describing the changes as like “night and day.”²² Both gentlemen, who have regular contact with Applicant and are wholly supportive of Applicant and his wife, have seen no indications or signs that Applicant has relapsed since completing the inpatient program in early 2008.

Policies

This section sets forth the general principles of law and policies that apply to an industrial security clearance case. The only purpose of a clearance decision is to decide if an applicant is suitable for access to classified information. Moreover, the Department of Defense takes the handling and safeguarding of classified information seriously because it affects our national security, the lives of our servicemembers, and our operations abroad.

It is well-established law that no one has a right to a security clearance.²³ As noted by the Supreme Court in the case of *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”²⁴ Under *Egan*, Executive Order 10865, and the Directive, any doubt about whether an applicant should be allowed access to classified information will be resolved in favor of protecting national security.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.²⁵ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.²⁶

²⁰ Exhibit F.

²¹ Tr. 35, 53–54.

²² Tr. 60.

²³ *Department of Navy v. Egan*, 484 U.S. 518, 528 (1988) (“it should be obvious that no one has a ‘right’ to a security clearance”); *Duane v. Department of Defense*, 275 F.3d 988, 994 (10th Cir. 2002) (no right to a security clearance).

²⁴ 484 U.S. at 531.

²⁵ Directive, ¶ 3.2.

²⁶ Directive, ¶ 3.2.

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.²⁷ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.²⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.²⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.³⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.³¹ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.³²

The Adjudicative Guidelines set forth the relevant standards to consider when evaluating a person's security clearance eligibility, including disqualifying conditions and mitigating conditions for each guideline. In addition, each clearance decision must be a commonsense decision based upon consideration of all the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

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 those persons to whom it grants access to classified information. The decision to deny a person a security clearance is not a determination of an applicant's loyalty.³³ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

Analysis

The allegations under Guideline G³⁴ for alcohol consumption are addressed summarily. Although the SOR alleges security concerns due to Applicant's past use of cocaine and alcohol, the evidence established that the overriding problem or issue for Applicant was his cocaine use. He did receive a secondary diagnosis of alcohol dependence, and the evidence shows he has abstained from alcohol since at least February 2008, a period of two years when the record closed. Applicant has mitigated

²⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

²⁸ Directive, Enclosure 3, ¶ E3.1.14.

²⁹ Directive, Enclosure 3, ¶ E3.1.15.

³⁰ Directive, Enclosure 3, ¶ E3.1.15.

³¹ *Egan*, 484 U.S. at 531.

³² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

³³ Executive Order 10865, § 7.

³⁴ AG ¶¶ 21, 22, and 23 (setting forth the security concern and the disqualifying and mitigating conditions).

the security concerns under Guideline G through a combination of inpatient and outpatient treatment, family involvement, and a good employment record. Accordingly, Guideline G is decided for Applicant.

The gravamen of the SOR is the allegations under Guideline H³⁵ for drug involvement. Under the guideline, the overall security concern is that:

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.³⁶

The guideline contains a number of conditions that could raise a security concern and may be disqualifying. Several apply in this case as follows: (1) Applicant's use of cocaine, which constitutes drug abuse, for a multiple-year period ending in about January 2008;³⁷ (2) Applicant tested positive multiple times for illegal drug use;³⁸ and (3) Applicant received a diagnosis or evaluation or both of cocaine dependence.³⁹ Of note, Applicant tested positive for cocaine while under the supervision of a juvenile court handling the custody case, and he was found in contempt of court for doing so. Taken together, these circumstances raise serious concerns about Applicant's fitness or suitability for access to classified information.

The guideline contains a number of conditions that could mitigate security concerns. Applicant receives credit in mitigation based on (1) his demonstrated intent not to abuse drugs in the future, and (2) his successful completion of the inpatient and outpatient programs in 2008.⁴⁰ To his credit, and his family's credit for their sustained support and involvement, Applicant has abstained from cocaine use since approximately February 2008. After completing the inpatient and outpatient programs, Applicant found gainful employment, which appears to be his first full-time job in many years. He and his wife were successful in persuading the juvenile court to return custody of their children to them, and he appears to be actively engaged with both his job and his family.

At this point, the signs or indicators are positive, but for one notable exception—Applicant's deliberate understatement of both the duration and frequency of his cocaine

³⁵ AG ¶¶ 24, 25, and 26 (setting forth the security concern and the disqualifying and mitigating conditions).

³⁶ AG ¶ 24.

³⁷ AG ¶ 25(a).

³⁸ AG ¶ 25(b).

³⁹ AG ¶¶ 25(d) and 25(e).

⁴⁰ AG ¶¶ 26(b) and 26(d).

use on his security clearance application as well as his hearing testimony in which he attempted to justify or rationalize his answers. His failure to give full, frank, and candid answers about his cocaine use and his lack of credibility in his hearing testimony undermine his evidence of reform and rehabilitation. It does so because honesty and willingness to self-report are key factors or considerations in this regard. An individual, like Applicant, who is dishonest with himself or others about the full extent of his drug abuse is not a rehabilitation success. Given these circumstances, a longer period of abstinence from cocaine use is prudent and sensible before a safe predictive judgment can be made about Applicant's suitability or fitness to hold a security clearance. Accordingly, Guideline H is decided against Applicant.

To conclude, the facts and circumstances surrounding Applicant's history of cocaine use justify current doubts about his judgment, reliability, and trustworthiness. Following *Egan* and the clearly-consistent standard, these doubts are resolved in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept⁴¹ and Applicant's favorable evidence. Nevertheless, Applicant did not meet his ultimate burden of persuasion to obtain a favorable clearance decision. This case is decided against Applicant.

Formal Findings

The formal findings on the SOR allegations are as follows:

Paragraph 1, Guideline H:	Against Applicant
Subparagraphs 1.a–1.e:	Against Applicant
Paragraph 2, Guideline G:	For Applicant
Subparagraphs 2.a–2.c:	For Applicant

Conclusion

In light of the record as a whole, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Michael H. Leonard
Administrative Judge

⁴¹ AG ¶ 2(a)(1) – (9).