



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



In the matter of:)	
)	
)	ISCR Case No. 09-05844
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Pamela Benson, Esq., Department Counsel
For Applicant: *Pro se*

November 8, 2010

Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the security concerns that arise from his use of cocaine and his arrest and conviction for driving while under the influence of alcohol when he served in the Navy and possessed a security clearance in 2007. Clearance is denied.

On May 14, 2010, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges security concerns under Guidelines H (drug involvement) and E (personal conduct). Applicant submitted a response to the SOR that was received by DOHA on June 17, 2009. He admitted all SOR allegations and requested a hearing.

The case was assigned to me on August 4, 2010. A notice of hearing was issued on September 13, 2010, scheduling the hearing for September 29, 2010. The hearing was

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and the adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

conducted as scheduled. The government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6, and admitted into the record without objection. Applicant testified, called one witness to testify on his behalf, and he submitted nine documentary exhibits that were marked as Applicant Exhibits (AE) 1-9, and admitted into the record without objection. The transcript was received on October 7, 2010.

Procedural Issues

The notice of hearing was issued 16 days before the hearing date. Department Counsel stated on the record that she had provided the Applicant an e-mail copy of the notice and spoke with on the phone concerning the hearing date 15 days before the hearing date. Applicant stated he was prepared to proceed on the hearing date and waived any further 15-day notice requirement he was entitled to under the terms of the Directive. (Tr. 14-15)

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is 28 years old. He has been employed as an aircraft worker by successive defense contractors since January 2009. He submitted the testimony of his supervisor and letters of recommendation from co-workers that establish they consider him to be trustworthy, reliable, possessed of sound judgment and good character, and an excellent employee.

Applicant graduated from high school in June 2001. He entered on active duty with the Navy in September 2001, and he served continuously on active duty until August 2007. The highest rank Applicant achieved was petty officer second class. He was discharged as a petty officer third class with an Other Than Honorable Discharge due to a pattern of misconduct.

Applicant was married in October 2003. That marriage ended in divorce in December 2007. No children were born of the marriage. Applicant has a six-month-old child with his current girlfriend.

Applicant was arrested and charged with drunk driving in September 2006. His blood alcohol concentration (BAC) was 0.11 when he was arrested. Applicant was convicted of drunk driving (over .08) in February 2007, and he was sentenced to perform four days community service, attend an alcohol awareness class, and ordered to pay fines and court costs totaling approximately \$1,700.²

² Applicant was obviously also placed on probation because a petition seeking to violate his probation was filed subsequent to his conviction. However, the record does not establish the length or any other terms of the probation.

Applicant's driving privileges were suspended for 30 days following his arrest for drunk driving. On the 31st day after his arrest he was charged with driving on a suspended license as he attempted to drive onto a military base. The suspended license charge was apparently consolidated with the drunk driving charge and dismissed when he was convicted in February 2007.

Applicant failed to pay the fines and court costs that were assessed in the drunk driving case in a timely fashion, and a violation of probation (VOP) petition was filed, and a bench warrant was issued. Applicant paid the outstanding balance on the fine and court costs and the VOP was set aside and the warrant was recalled in December 2009.

Following the July 4, 2007 holiday, Applicant was administered a urinalysis by the Navy which tested positive for the presence of cocaine. He was found to have violated Article 112a of the Uniform Code of Military Justice (UCMJ), wrongful use of a controlled substance (cocaine), at a Captain's Mast and he was awarded reduction in rank to petty officer third class, forfeiture of seven days pay, 14 days restriction, 14 days extra duty, and removal of his Enlisted Aviation Warfare Designation. Appellant was thereafter administratively separated from the Navy on August 31, 2007, and awarded an Other Than Honorable Discharge due to a pattern of misconduct.

Applicant denied at the Captain's Mast, during a June 2009 interview conducted in connection with his current application for a security clearance, and at the personal appearance that he knowingly ingested cocaine. Instead, he has repeatedly claimed that he was at a bar with friends and someone must have placed cocaine in his beer without his knowledge. He bases this on his assertion that after drinking a couple of beers at the bar he began to black out and had to be taken home by one of his companions. He does not know who placed the cocaine in his beer and he cannot provide an explanation for why someone would have placed cocaine in his beer. Although he claims he was feeling funny and weird and that he blacked out after only consuming a couple of beers, he did not seek medical attention but instead just had someone drive him home.

Applicant was employed as a fabricator from March 2008 to April 2008. He was fired from that job after he was involved in a verbal argument with the owner of the company. He was employed by a temporary agency from August to September 2008. He was fired from that job for attendance issues. He testified his termination from this job was unjustified and that he was awarded unemployment benefits because the state unemployment department agreed with his claim.

Applicant was granted a secret security clearance in January 2003. His security clearance investigation and adjudication history (AE 3) indicates that an incident report was filed at some time, apparently as a result of the Captain's Mast for the wrongful use of a controlled substance. However, that same document indicates that his security clearance eligibility was terminated on February 7, 2008, based on a loss of jurisdiction.

Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying

conditions and mitigating conditions for each applicable guideline. Each clearance decision must be a fair and impartial decision based upon the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶¶ 6.3.1 through ¶¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guidelines H (drug involvement) and E (personal conduct) with their disqualifying and mitigating conditions are most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.³ The government has the burden of proving controverted facts.⁴ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁵ although the government is required to present substantial evidence to meet its burden of proof.⁶ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁷ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁸ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

No one has a right to a security clearance¹⁰ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹²

³ ISCR Case No. 96-0277 (July 11, 1997) at 2.

⁴ ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

⁵ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

⁷ ISCR Case No. 98-0761 (December 27, 1999) at 2.

⁸ ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

⁹ ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

¹⁰ *Egan*, 484 U.S. at 528, 531.

¹¹ *Id.* at 531.

¹² *Egan*, Executive Order 10865, and the Directive.

Analysis

Guideline H, Drug Involvement

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. (Adjudicative Guideline [AG] 24)

Applicant tested positive for cocaine following a urinalysis administered by the Navy in July 2007. He possessed a secret security clearance when he tested positive for cocaine. Applicant was found to have committed the offense of wrongful use of a controlled substance (cocaine) based on the positive urinalysis at a Captain's Mast that same month and he was awarded various punishments including a reduction in rank. He was administratively discharged from the Navy on August 31, 2007, and he was awarded an Other Than Honorable Discharge due to a pattern of misconduct. Disqualifying Conditions (DC) 25(a): *any drug abuse*; DC 25(b): *testing positive for illegal drug use*; and DC 25(g): *any illegal drug use after being granted a security clearance* all apply.

It has been over three years since Applicant was found to have abused a controlled substance, and there is no evidence he abused a controlled substance on any other occasion. However, Applicant was charged with drunk driving just ten months before he was found to have used cocaine. He was convicted of the drunk driving and sentenced for that offense just five months before he used cocaine. A VOP petition was filed and a bench warrant issued when he failed to pay the fines that were ordered for the drunk driving conviction. The bench warrant was not recalled until December 2009, when Applicant finally paid the fines. Accordingly, it is clear that Applicant was on probation for the drunk driving conviction when he used cocaine.

Applicant's explanation for how cocaine came to be in his system was not believed by the officer who presided over the Captain's Mast. I also find his explanation to not be credible. It strains credibility to believe that for no apparent reason someone unknown to Applicant would dump cocaine into his beer and that he would have a reaction of blacking out from what is known to be a stimulating drug. Equally unbelievable is that he would not have sought medical attention if he truly experienced the effects that he claims.

I have considered Mitigating Condition (MC) 26(a): *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* and conclude it does not apply. Applicant's abuse of a controlled substance while in possession of a security clearance and his repeated denial of that abuse at the Captain's Mast, during an interview in connection with his security clearance application, and at the hearing, combine to severely cast doubt on his current reliability, trustworthiness, and good judgment. The remaining mitigating conditions have no applicability to the facts of this case.

Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or willingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness, and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process. (AG 15)

Applicant abused cocaine, was found to have abused cocaine at a Captain's Mast, and received an Other Than Honorable Discharge from the Navy, in part, based on the cocaine abuse, all in 2007. He was charged with drunk driving in September 2006, and he was convicted of drunk driving (over .08) in February 2007. He drove on a suspended license in October 2006, following his arrest for drunk driving. He was fired from one job in March 2008, because he got into a verbal argument with the owner of the company that employed him, and from a second job in September 2008, due to attendance issues. Although not alleged in the SOR, it is noteworthy that a bench warrant was issued for his arrest that was not recalled until December 2009, when he finally paid the fines that were assessed against him in February 2007.

DC 16(d): *credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgement, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of: . . . (3) a pattern of dishonesty or rule violations applies.*

Accepting as true Applicant's claim that his job termination in September 2008 was unjustified, he still has displayed a pattern of violating laws and court orders that began in September 2006 and continued until December 2009. Accordingly, I have considered MC 17(c): *the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment, and I conclude it does not apply.*

Considering all relevant and material facts and circumstances present in this case, the whole person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, the applicable disqualifying and mitigating conditions, and the strong letters of support that Applicant submitted from his current supervisors and co-workers, I find Applicant failed to mitigate the drug involvement, and personal conduct security concerns. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not clearly consistent with the national interest to grant Applicant a security clearance. Guidelines H and E are decided against Applicant.

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:	Against APPLICANT
Subparagraphs 1.a & b:	Against Applicant
Subparagraph 1.c:	For Applicant
Paragraph 2, Guideline E:	Against APPLICANT
Subparagraphs 2.a-e:	Against Applicant
Subparagraph 2.f:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

Henry Lazzaro
Administrative Judge

