



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



In the matter of:)
)
-----) ISCR Case No. 09-06401
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco J. Mendez Jr., Esq., Department Counsel
For Applicant: *Pro se*

November 30, 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. In 2007, while working as an employee of a DoD agency while holding a security clearance, Applicant was subject to random drug testing (by urinalysis) and tested positive for cocaine. As a result, he was terminated from federal employment several months later in 2008. In contesting the termination, he contended that he did not knowingly use cocaine and that the positive test result was due to an unknowing and innocent ingestion of cocaine. He has maintained that position in this proceeding. Although the evidence is not inconsistent with unknowing ingestion of cocaine, a mere possibility does not amount to a probability. Applicant did not meet his burden to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns raised by his positive drug test for cocaine while employed by a DoD agency. Accordingly, as explained below, this case is decided against Applicant.

Statement of the Case

Acting under the relevant Executive Order and DoD Directive,¹ on June 10, 2010, 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 guideline known as Guideline H for drug involvement and Guideline E for personal conduct. 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 September 7, 2010. The hearing took place October 15, 2010. The hearing transcript (Tr.) was received October 25, 2010.

Rulings on Procedure and Evidence

At hearing, Department Counsel withdrew the Guideline E personal conduct allegation in SOR ¶ 1.b concerning the results of a polygraph examination Applicant took in August 2008.² Accordingly, it is not at issue and will not be addressed here.

Applicant objected to admission of Exhibit 5, a polygraph examination report, contending it was irrelevant in light of the Government's withdrawal of SOR ¶ 1.b.³ The objection was overruled, but I noted that I would not consider any part of the report discussing results of the polygraph examination (e.g., the summary as well as paragraphs 16, 17, 18, 19, and 20 of the report). Based on further review and study of the exhibit, I have decided to exclude it in its totality and give it no consideration. I did so to eliminate any potential unfair prejudice to Applicant stemming from the results of the polygraph examination and because the other information in the report is largely cumulative evidence.

Findings of Fact

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

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 Tr. 17–18.

³ Tr. 37–41.

Applicant is a 42-year-old employee of a federal contractor. He is married and has two children, a 14-year-old daughter and a 6-year-old son. His wife is employed by the federal government as a staff officer.

Applicant has been employed as a program manager/client executive since November 2008. Previously, he was a federal employee of a DoD agency for about eight years. During that period, he was promoted to a managerial position. Before that, he worked as a systems administrator for a federal contractor at the same DoD agency he would later join.

In September 2008, Applicant was terminated from federal employment with the DoD agency based on testing positive for cocaine,⁴ an action consistent with federal law.⁵ Applicant was subject to random drug testing as a federal employee of a DoD agency. He underwent such testing in 2007, and the test's result was positive for cocaine, which is an illegal or controlled substance. From initial notification of the test's result until today, Applicant denies knowingly using cocaine. His explanation is set forth in a declaration submitted in contesting his termination from federal employment.⁶ In brief, it is his belief that he came into contact with cocaine a few days before the random drug test while attending a professional football game through an unknown source and he unknowingly ingested it. In his hearing testimony, Applicant provided additional details about the relevant time line, his activities on game day (to include drinking a fair amount of alcohol throughout the day), and with whom he associated while attending the game. He pointed out, for example, that as a management official he could have come up with an acceptable excuse or passable reason to avoid or delay the drug test if he had been a knowing user of cocaine. He did not, he asserts, because he believed the test result would be negative just as all previous test results were negative.

Applicant contested the termination action.⁷ In doing so, he submitted a declaration from an expert witness in the fields of toxicology and drug testing.⁸ That declaration points out a number of limitations on the scientific testing and the conclusions that may be drawn from the testing conducted and the result obtained in Applicant's case. Of note, the expert asserted that the test result in Applicant's case did

⁴ Exhibits 2, 3, 4, 6, 7, and 8.

⁵ In 1986, President Ronald Reagan issued Executive Order 12564, which established a drug-free workplace for the federal government. This Executive Order established, among other things, that: (1) federal employees are required to refrain from the use of illegal drugs; (2) the use of illegal drugs by federal employees, whether on duty or off duty, is contrary to the efficiency of the service; and (3) persons who use illegal drugs are not suitable for federal employment.

⁶ Exhibit 3.

⁷ *E.g.*, Exhibits 3, B, C, D, E, F.

⁸ Exhibit D.

not “support an inference that cocaine was knowingly ingested.”⁹ After considering all the information, to include the expert’s declaration, the relevant official, the chief of staff of the DoD agency, concluded that the matters offered to explain the positive drug test were unconvincing and terminated Applicant’s federal employment.¹⁰ Applicant appealed that decision, but the relevant official, the deputy director of the DoD agency, sustained the termination in early 2009.¹¹ There is no indication that Applicant contested the termination further by bringing a case with the Merits System Protection Board (MSPB) or other federal-employment litigation.

Applicant was placed on administrative leave with pay while the termination action was pending. After the termination, he was unemployed until about November 2008, when he began his current employment after passing a random drug test as a condition of employment. He also completed a security clearance application in conjunction with this employment.¹² Applicant candidly disclosed his past employment with the DoD agency and his termination from that job. In doing so, he explained relevant facts and circumstances surrounding the positive drug test and he continued to maintain that he did not knowingly use cocaine. Other than the positive drug test for cocaine in 2007, there is no other history of Applicant engaging in illegal drug abuse.

Law and 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. 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.¹³ As noted by the Supreme Court in *Department of Navy v. Egan*, “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁴ 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.

⁹ Exhibit D at 4, ¶ 5.t.

¹⁰ Exhibit 6.

¹¹ Exhibit 7.

¹² Exhibit 1.

¹³ *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).

¹⁴ 484 U.S. at 531.

A favorable clearance decision establishes eligibility of an applicant to be granted a security clearance for access to confidential, secret, or top-secret information.¹⁵ An unfavorable decision (1) denies any application, (2) revokes any existing security clearance, and (3) prevents access to classified information at any level.¹⁶

There is no presumption in favor of granting, renewing, or continuing eligibility for access to classified information.¹⁷ The Government has the burden of presenting evidence to establish facts alleged in the SOR that have been controverted.¹⁸ An applicant is responsible for presenting evidence to refute, explain, extenuate, or mitigate facts that have been admitted or proven.¹⁹ In addition, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.²⁰ In *Egan*, the Supreme Court stated that the burden of proof is less than a preponderance of the evidence.²¹ The DOHA Appeal Board has followed the Court's reasoning, and a judge's findings of fact are reviewed under the substantial-evidence standard.²²

The AG 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 the relevant and material information, the pertinent criteria and adjudication factors, and the whole-person concept.

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.²³ Instead, it is a determination that an applicant has not met the strict guidelines the President has established for granting eligibility for access.

¹⁵ Directive, ¶ 3.2.

¹⁶ Directive, ¶ 3.2.

¹⁷ ISCR Case No. 02-18663 (App. Bd. Mar. 23, 2004).

¹⁸ Directive, Enclosure 3, ¶ E3.1.14.

¹⁹ Directive, Enclosure 3, ¶ E3.1.15.

²⁰ Directive, Enclosure 3, ¶ E3.1.15.

²¹ *Egan*, 484 U.S. at 531.

²² ISCR Case No. 01-20700 (App. Bd. Dec. 19, 2002) (citations omitted).

²³ Executive Order 10865, § 7.

Analysis

Under Guideline H for drug involvement,²⁴ the suitability of an applicant may be questioned or put into doubt when an applicant has a history of drug abuse or other illegal drug involvement. The overall concern under Guideline H 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.²⁵

Drug abuse means "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."²⁶

In assessing the evidence, I considered the following disqualifying conditions under the guideline:²⁷

25(a) Any drug abuse;

25(b) Testing positive for illegal drug use; and

25(g) Any illegal drug use after being granted a security clearance.

Likewise, in assessing the evidence, I have considered the following mitigating circumstances under the guideline:²⁸

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

26(b) a demonstrated intent not to abuse any 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; and

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

²⁵ AG ¶ 24.

²⁶ AG ¶ 24(b).

²⁷ AG ¶ 25.

²⁸ AG ¶ 26.

(4) a signed statement of intent with automatic revocation of clearance for any violation.

My assessment of the evidence is consistent with an assessment by the DoD agency official who decided to remove Applicant from federal employment.²⁹ That official's assessment is not binding here, but it does inform my decision-making process. I agree that the matters offered by Applicant to explain the positive drug test are unconvincing and do not establish that Applicant unknowingly ingested cocaine. In cases such as this where matters of fact are in dispute one should keep in mind that everything is possible, just not so probable. It is possible that a person could attend an event at a public venue where many people are in attendance and unknowingly ingest cocaine. But this scenario is unlikely and not so probable. After all—cocaine costs money—and people who buy cocaine are not usually inclined to sprinkle it in food or drinks for others to unknowingly consume. In addition to the improbability of his explanation, the only evidence of Applicant's activities during and after the football game is his recollection of events. Applicant did not present a written statement or, better yet, the testimony of the person with whom he attended the game. That person may have shed light upon or confirmed Applicant's recollection of events and provided exculpatory evidence for Applicant. This missing evidence is yet another reason to be unpersuaded by Applicant's explanation. For all these reasons, Applicant did not meet his burden to present sufficient evidence to rebut, explain, extenuate, or mitigate the security concerns raised by his positive drug test for cocaine while employed by a DoD agency.

In presenting his case, Applicant requested I consider four decisions issued by other judges of this Agency.³⁰ I agreed to do so noting that those decisions are secondary, non-binding authority.³¹ I reviewed the cases and they are distinguishable on the facts. The cases involved relatively youthful applicants (ages 26, 30, 32, and 28) who engaged in drug abuse that they admitted and acknowledged, which is not the case here.

To conclude, Applicant's positive drug test for cocaine in 2007 followed by his termination from federal employment in 2008 raises questions or doubts about his ability or willingness to comply with laws, rules, and regulations. Following *Egan* and the clearly-consistent standard, I resolve these doubts in favor of protecting national security. In reaching this conclusion, I gave due consideration to the whole-person concept³² and Applicant's favorable evidence, to include his favorable character

²⁹ Exhibits 4 and 6.

³⁰ Appellate Exhibits I, II, III, and IV.

³¹ Tr. 54–55.

³² AG ¶ 2(a)(1) – (9).

evidence,³³ which was substantial. 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 E:	For Applicant
Subparagraph 1.a:	For Applicant ³⁴
Subparagraph 1.b:	Withdrawn
Paragraph 2, Guideline H:	Against Applicant
Subparagraph 2.a:	Against 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

³³ Exhibit I.

³⁴ The Guideline E allegation for personal conduct, as set for in SOR ¶ 1.a, is decided for Applicant because it duplicates the allegation in SOR ¶ 2.a, which is decided against Applicant. Beyond the duplication, I am satisfied that the security concerns stemming from Applicant's positive drug test for cocaine are fully addressed under Guideline H, which is the guideline for drug involvement.