

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant purchased and used marijuana with varying frequency from 1974 to 1985. He resumed his marijuana involvement from May 2004 to September 2004, after being granted a clearance. He was arrested in September 2004 while he was preparing to smoke marijuana. He was on his way to work in a classified facility when he was arrested. Security concerns based on drug involvement and personal conduct have not been mitigated. Clearance is denied.

CASENO: 05-03294.h1

DATE: 06/29/2007

DATE: June 29, 2007

_____)	
In re:)	
)	
-----)	ISCR Case No. 05-03294
SSN: -----)	
)	
Applicant for Security Clearance)	
_____)	

**DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN**

APPEARANCES

FOR GOVERNMENT

Stephanie Hess, Esq., Department Counsel

FOR APPLICANT

Tony Hernandez, III, Esq.

SYNOPSIS

Applicant purchased and used marijuana with varying frequency from 1974 to 1985. He resumed his marijuana involvement from May 2004 to September 2004, after being granted a

clearance. He was arrested in September 2004 while he was preparing to smoke marijuana. He was on his way to work in a classified facility when he was arrested. Security concerns based on drug involvement and personal conduct have not been mitigated. Clearance is denied.

STATEMENT OF THE CASE

On November 29, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny Applicant a security clearance. This action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified (Directive); and the revised adjudicative guidelines approved by the President on December 29, 2005, and implemented effective September 1, 2006 (Guidelines). The SOR alleged security concerns raised under Guideline H (Drug Involvement) and Guideline E (Personal Conduct).

Applicant answered the SOR in writing on February 16, 2007, and elected to have a hearing before an administrative judge. The case was assigned to me on May 9, 2007, and heard on May 30, 2007, as scheduled. DOHA received the hearing transcript (Tr.) on June 8, 2007.

PROCEDURAL RULING

Applicant introduced two pages from a background report of investigation (Applicant's Exhibit (AX) Q), to show favorable comments made by neighbors and coworkers about his suitability for a clearance. Department Counsel did not object to the lack of an authenticating witness required by the Directive ¶ E3.1.20, and I admitted the exhibit. After Applicant presented his case, Department Counsel offered the first page (Government Exhibit (GX) 6) of the same report of investigation to show the adverse circumstances under which Applicant was terminated from a previous job. Applicant objected to GX 6 as hearsay, and I raised the authentication requirement of Directive ¶ E3.1.20 on my own motion. After argument by both sides, I admitted GX 6 as rebuttal evidence, using Federal Rule of Evidence 106 as a guide. Rule 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." I ruled that Applicant's introduction of the favorable parts of the report of investigation entitled Department Counsel to introduce the adverse part of the same report.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. I make the following findings:

Applicant is a 46-year-old electronics technician for a defense contractor. He is married and has four children. He has worked for defense contractors since he was released from active duty in the U.S. Army in June 1992. He served two four-year enlistments in the Army, from November 1981 to November 1985, and from May 1988 to June 1992. He was awarded the Army Achievement Medal for his service as a satellite communications systems repairer in March 1990 (AX D). He has held a security clearance since October 1991.

Between his two Army enlistments, Applicant worked as a maintenance employee for an apartment complex. He was regarded as a dedicated, hard-working, honest, and trustworthy employee (AX N, O, and P). A former supervisor and a former neighbor were interviewed by security investigators and provided favorable comments regarding Applicant (AX Q).

Applicant was arrested for disorderly intoxication and battery in November 1978. He purchased and used marijuana with varying frequency from 1974 to 1985, and from May 2004 to September 2004, as alleged in SOR ¶¶ 1.a and 1.b. He used hashish 3-5 times between August and December 1983. While on active duty in the Army he received nonjudicial punishment under Article 15, Uniform Code of Military Justice, 10 U.S.C. § 815, in January 1984 (alleged in SOR ¶ 1.c), based on a positive urinalysis for cannabis. He was cited for consuming alcohol in public in March 1988, and for alcohol abuse in August 1988. He was arrested for driving under the influence in January 1997.

In July 2001, while deployed to Bosnia as a contractor employee, Applicant cashed a check at a military commissary that was dishonored for insufficient funds. Although his supervisor believed he knowingly cashed a worthless check, Applicant testified he believed the check would be honored (GX 6; Tr. 31-32, 57-58). He redeemed the dishonored check as soon as he learned about it (Tr. 58). His supervisor stated Applicant was fired for cashing the bad check, but Applicant testified he was “let go” because the site where he worked was closed (GX 6; Tr. 31, 56). Applicant’s termination for knowingly cashing a worthless check was alleged in SOR ¶ 2.b.

Applicant resumed his marijuana use in May 2004. He attributed his resumption of marijuana use to stress caused by his wife’s excessive alcohol consumption. He testified his wife was drinking heavily and she accused him of smoking marijuana, even though he had not yet resumed his marijuana use. He responded to his wife’s accusation by purchasing some marijuana and smoking it “just to get back at her in a juvenile way.” (GX 5 at 3.) Thereafter, he smoked marijuana three or four times with an acquaintance who performed car repairs for him, and he purchased marijuana from his acquaintance two times (Tr. 48-49).

On September 21, 2004, Applicant was driving to work at a cleared facility when he saw his marijuana-smoking acquaintance hitchhiking. He offered his acquaintance a ride part of the way, and while underway his acquaintance asked Applicant to help him financially by purchasing some marijuana from him. Applicant purchased two bags for \$20 (Tr. 35). After dropping off his acquaintance, he pulled into a parking lot and was preparing to “sample” the marijuana, using a device made from a soft drink can (Tr. 52). A police officer noticed that Applicant was parked across two parking spaces and approached the car, where he saw Applicant preparing the soft drink can. Applicant was arrested before he could smoke the marijuana. He was charged with possession of less than 20 grams of cannabis, possession of drug paraphernalia, and use or possession of paraphernalia with intent to use it. He pleaded nolo contendere to possession of drug paraphernalia, and adjudication of guilt was withheld. The remaining charges were nolle prossed. Applicant knows where his acquaintance lives but no longer associates with him (Tr. 33-34).

Applicant’s purchase and possession of marijuana while holding a clearance and while en route to work at a cleared facility was alleged in SOR ¶¶ 1.d, 1.e, and 1.f. SOR ¶ 1.f alleged that Applicant purchased and smoked marijuana, but the allegation of smoking marijuana was dismissed on motion of Department Counsel (Tr. 13-14).

On January 20, 2005, Applicant was interviewed by a security investigator. He admitted the conduct in alleged in SOR ¶¶ 1.d, 1.e, and 1.f as amended, and he provided a detailed account of the circumstances surrounding his conduct (GX 5; Tr. 38).

In April 2006, September 2006, March 2007, and May 2007, Applicant received commendations for outstanding performance (AX C, E, F, G). In March 2007, he voluntarily enrolled in a three-month drug treatment program. He testified he contacted his employee assistance program, seeking counseling for stress arising from his wife's drinking problems, and he was referred to a drug counseling program (Tr. 43-44). He attended weekly individual counseling sessions and submitted to weekly drug tests. He completed the program in May 2007 and was transferred to an aftercare program, which is ongoing (AX B, H-M). He testified that his wife's excessive drinking continues to be a source of stress, but his counseling has helped him to deal with it (Tr. 70).

On May 29, 2007, the date before the hearing, Applicant executed an affidavit agreeing to an automatic revocation of his clearance for any future drug abuse (AX A). He testified he is willing to submit to regular drug testing or any other conditions (Tr. 35).

POLICIES

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended and modified. Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the Guidelines. Each clearance decision must be a fair, impartial, and commonsense decision based on the relevant and material facts and circumstances, the whole person concept, the disqualifying conditions and mitigating conditions under each specific guideline, and the factors listed in the Guidelines ¶¶ 2(a)(1)-(9).

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 persons with access to classified information. However, the decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the government must establish, by substantial evidence, conditions in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The Guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; *see* Guidelines ¶ 2(b).

CONCLUSIONS

Guideline H (Drug Involvement)

The concern under this guideline is as follows: “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.” Guidelines ¶ 24. “Drugs” include “Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens). Guidelines ¶ 24(a)(1). Drug abuse is “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” Guidelines ¶ 24(b).

Disqualifying conditions under this guideline include “any drug abuse” (Guidelines ¶ 25(a)), “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia” (Guidelines ¶ 25(c)), and “any illegal drug use after being granted a security clearance” (Guidelines ¶ 25(g)). The evidence in this case establishes these three disqualifying conditions.

Since the government produced substantial evidence to raise ¶¶ 25(a), (c) and (g), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it is never shifted to the government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns raised by drug involvement may be mitigated by showing that “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.” Guidelines ¶ 26(a). The first clause of ¶ 26(a) (“happened so long ago”) focuses on the recency of drug involvement. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows “a significant period of time has passed without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” *Id.*

As of the date of the hearing, Applicant had not used marijuana for two years and eight months, a significant period of time. This period of time must be considered in the context of a

lifetime of intermittent substance abuse. There is no evidence of physical addiction. Each instance of substance abuse appears to have been the product of peer pressure or marital stress. Applicant knew after his interview with a security investigator in January 2005 that his security clearance was at risk as a result of his arrest in September 2004, and he has been under pressure to retain his clearance ever since his arrest. He is still undergoing aftercare treatment for his drug use. Under all the circumstances, I conclude that it is too soon to conclude that he is rehabilitated.

Applicant purchased and used marijuana on several occasions between April and September 2004. His use stopped only after he was arrested, placed in a diversion program, and interviewed by a security investigator. I conclude his use was not infrequent within the meaning of Guidelines ¶ 26(a).

Whether Applicant's marijuana use is likely to recur is difficult to assess. His record reflects high susceptibility to invitations to use marijuana. Although he testified that his counseling and other aftercare measures have helped him cope with the stress caused by his wife's alcohol abuse, her behavior continues to be a major source of stress. I conclude Applicant has not carried his burden of establishing this aspect of Guidelines ¶ 26(a).

Applicant obviously is highly skilled and hard working. However, his repeated use of marijuana between April and September 2004, while holding a clearance, and his attempt to use marijuana on his way to work in a classified environment raises serious doubt about his reliability, trustworthiness, and good judgment. After considering all the above circumstances, I conclude the mitigating conditions set out in Guidelines ¶ 26(a) are not established.

Security concerns arising from drug involvement also may be mitigated by evidence of "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; [or] (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation." Guidelines ¶ 26(b)(1)-(4). Applicant has stopped associating with his source and fellow user of marijuana, thus establishing ¶ 26(b)(1). However, he still deals with the stressful marital environment that contributed to his previous drug use, and he has not abstained from marijuana for a sufficient period to demonstrate rehabilitation, as noted above. I conclude ¶ 26(b)(2) and (3) are not established. His signed statement of intent (AX A) establishes ¶ 26(b)(4).

Security concerns also may be mitigated by "satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional." Guidelines ¶ 26(d). The mitigating is only partly established. Applicant completed the first part of his rehabilitation program and received a favorable prognosis from a licensed clinical social worker, but he has not completed the aftercare requirements.

Guideline E (Personal Conduct)

The concerns under this guideline include the following: "Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information." Guidelines ¶ 15. Conditions that could raise a security concern and may be

disqualifying include: “credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, 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.” Guidelines ¶ 16(c).

A security concern also may be raised by “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 judgment, 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.” Guidelines ¶ 16(d). This disqualifying condition includes but is not limited to consideration of “a pattern of dishonesty or rule violations.” Guidelines ¶ 16(d)(3).

A security concern under this guideline may be raised by “personal conduct, or concealment of information about one’s conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person’s personal, professional, or community standing.” Guidelines ¶ 16(e).

The SOR ¶ 2.b alleged that Applicant knowingly cashed a worthless check. Based on all the evidence, I am satisfied that Applicant may have been negligent, but he did not knowingly or fraudulently cash the check. Furthermore, it was an isolated incident six years ago, and Applicant promptly redeemed the check. I conclude this incident does not raise any independent security concerns, and I resolve SOR ¶ 2.b in Applicant’s favor.

Applicant’s drug involvement alleged in SOR ¶¶ 1.a-f was cross-alleged in SOR ¶ 2.a. The evidence is sufficient to raise security concerns under Guidelines ¶ 16(c), (d), and (e).

A security concern also may be raised by “association with persons involved in criminal activity.” Guidelines ¶ 16(g). Applicant’s association with a known drug user and seller for several months establishes this disqualifying condition.

Since the government produced substantial evidence to raise the disqualifying conditions in Guidelines ¶¶ 16(c), (d), (e), and (g), the burden shifted to Applicant to produce evidence to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. Security concerns under this guideline may be mitigated by showing “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.” Guidelines ¶ 17(c). Applicant’s drug involvement was not minor. None of the other elements of this mitigating condition are established, for the reasons discussed above under Guideline H.

Security concerns also may be mitigated by showing that an applicant “acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.” Guidelines ¶ 17(d). Applicant has acknowledged

his behavior and obtained counseling, but I conclude this mitigating condition is not established for the reasons discussed above concerning Guidelines ¶¶ 26(a), (b), and (d).

Security concerns under this guideline also may be mitigated by showing an applicant “has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” Guidelines ¶ 17(e). This mitigating condition is established by Applicant’s full disclosure of his drug involvement and voluntary entry into a drug rehabilitation program.

Finally, security concerns may be mitigated by showing “association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual’s reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.” Guidelines ¶ 17(g). This mitigating condition is established by Applicant’s termination of all contact with his former supplier and fellow marijuana user.

Whole Person Analysis

In addition to considering the specific disqualifying and mitigating conditions under each guideline, I have also considered: (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 applicant’s age and maturity at the time of the conduct; (5) the 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. Guidelines ¶¶ 2(a)(1)-(9). Several of these factors were addressed above, but some merit additional comment.

Applicant’s illegal drug use was a serious breach of trust. Although he abstained from drugs for about nine years, his reasons for resuming marijuana use are troubling. He apparently resumed marijuana use as “payback” for his wife’s false accusations of marijuana use, and then he readily purchased and used marijuana with a casual acquaintance while holding a clearance. His willingness to smoke marijuana while en route to a classified area raises grave doubts about his trustworthiness and good judgment. He is a 46-year-old father of four from whom a high degree of maturity is expected. The timing of his entry into counseling, after he received the SOR, raises a question whether he was motivated by desire to get his life in order or merely to save his clearance. His signed statement of intent, executed the day before the hearing, raises similar doubts.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has not mitigated the security concerns based on drug involvement and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his security clearance.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline H:

AGAINST APPLICANT

Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	Against Applicant
Subparagraph 1.f:	Against Applicant

Paragraph 2. Guideline E:	AGAINST APPLICANT
---------------------------	-------------------

Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

DECISION

In light of all of the circumstances in this case, it is not clearly consistent with the national interest to continue Applicant's security clearance. Clearance is denied.

LeRoy F. Foreman
Administrative Judge