



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



In the matter of:)
)
-----) ISCR Case No. 06-16083
SSN: -----)
)
Applicant for Security Clearance)

Appearances

For Government: Gina L. Marine, Esq., Department Counsel
For Applicant: *Pro se*

January 30, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted his security clearance application on January 23, 2006. On July 27, 2006, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline H. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The revised adjudicative guidelines promulgated by the President on December 29, 2005, do not apply because the SOR was issued before September 1, 2006, the date they became effective within the Department of Defense.

Applicant received the SOR on August 1, 2006; and answered it in an undated document; and requested determination on the record without a hearing by an administrative judge. DOHA received his response on August 21, 2006. Department Counsel submitted the government's written case on January 29, 2007. On the same day, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the government's evidence. Applicant received the FORM on April 5, 2007, and he did not respond. The case was assigned to me on January 21, 2009.

Findings of Fact

Applicant admitted all the factual allegations in the SOR. His admissions are incorporated in my findings of fact.

Applicant is a 26-year-old employee of a defense contractor. He graduated from high school in May 2000. He attended a community college and received an associate's degree in business management in December 2001. He completed his college education and received a bachelor's degree in business management in August 2003. He has worked for his current employer since January 2006. He has never held a security clearance.

Applicant began experimenting with drugs and alcohol while attending the community college. In his answer to the SOR, he admitted he used marijuana with varying frequency from about July 2000 to March 2005, cocaine with varying frequency from February 2001 to June 2004 and once in June 2005, ecstasy with varying frequency from June 2000 to June 2004 and once in August 2005, gamma hydroxybutyrate (GHB) with varying frequency from July 2001 to March 2003 and once in February 2005, and lysergic acid diethylamide (LSD) once between June 2001 and November 2001. He also admitted illegally using prescription drugs (Xanax, Lortab, and Valium¹) with varying frequency from May 2001 to June 2004 and once in June 2005. In his answer (submitted in August 2006), he declared that he has matured and has not used any illegal substances or abused prescription drugs for over a year.

Applicant submitted a letter from his manager, who described him as honest, trustworthy, ethical, hard-working, and dedicated. The letter does not indicate whether his manager was aware of his history of drug involvement.

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 have 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

¹ Xanax is misspelled as "Xantax" and Lortab is misspelled as "Loritab" in the SOR.

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 the adjudicative guidelines. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s overarching adjudicative goal is a fair, impartial and common sense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. 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.

Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is not necessarily a determination as to the loyalty of the applicant. 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 that may disqualify the applicant from being eligible for access to classified information. The government has the burden of establishing controverted facts alleged in the SOR. 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. 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.

Analysis

Guideline H, Drug Involvement

The SOR alleges Applicant used the following drugs with varying frequency: marijuana from July 2000 to March 2005 (SOR ¶ 1.a); cocaine from February 2001 to June 2005 (SOR ¶ 1.b); ecstasy from June 2000 to August 2005 (SOR ¶ 1.c); and gamma hydroxybutyrate (GHB) from July 2001 to February 2005 (SOR ¶ 1.d). It alleges he used lysergic acid diethylamide (LSD) once between June 2001 and November 2001 (SOR ¶ 1.e). It also alleges he illegally used prescription drugs (Xanax, Lortab, and Valium) with varying frequency from May 2001 to June 2005 (SOR ¶ 1.f).

Under Guideline H, improper or illegal involvement with drugs raises questions regarding an applicant's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information. Directive ¶ E2.A8.1.1. Any illegal use of a controlled substance can raise a security concern and may be a disqualifying condition (DC 1). Directive ¶ E2.A8.2.1. Illegal drug possession also is a disqualifying condition (DC 2). Directive ¶ E2.A8.2.2. Applicant's admitted use of illegal drugs and abuse of prescription drugs raises DC 1 and DC 2, shifting the burden to him to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15.

Security concerns based on possession and use of illegal drugs or illegal use of controlled substances can be mitigated by showing that it was not recent. (MC 1) Directive ¶ E2.A8.1.3.1. 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.*

Applicant's last admitted drug abuse was in August 2005, about four months before submitting his security clearance application. In August 2006, he responded to the SOR and asserted that he had abstained from drugs for about a year at that time. Since he did not respond to the FORM, there is no evidence in the record to support a finding of continued abstinence. In the context of five years of regular drug abuse, a one year period of abstinence is not sufficient to establish MC 1.

Security concerns under this guideline also may be mitigated by showing the drug involvement was "an isolated or aberrational event." (MC 2) Directive ¶ E2.A8.1.3.2. This mitigating condition is not established because of Applicant's repeated abuses of multiple drugs during a five-year period.

Security concerns may be mitigated by "a demonstrated intent not to abuse any drugs in the future." (MC 3) Directive ¶ E2.A8.1.3.3. Applicant has changed his environment by gaining employment with a defense contractor, but there is no evidence

showing whether he continues to associate with drug users and no evidence of abstinence after August 2006. Thus, I conclude MC 3 is not established.

Finally, security concerns may be mitigated by “satisfactory completion of a drug program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.” (MC 4) Directive ¶ E2.A8.1.3.4. This mitigating condition is not established because there is no evidence Applicant has sought or obtained treatment for drug abuse.

Whole Person Analysis

Under the whole person concept, an 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. An administrative judge should consider the nine adjudicative process factors listed in Directive ¶ E2.2.1:

- (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) the voluntariness of participation;
- (6) the presence or absence of rehabilitation and other pertinent 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 Directive ¶ E2.2.3, 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 have incorporated my comments under Guideline H in my whole person analysis. Some of the factors in Directive ¶ E2.2.1 were addressed under that guideline, but some warrant additional comment.

Applicant’s drug abuse began shortly after he graduated from high school and continued for two years after he graduated from college. His last admitted drug abuse was only four months before he began his current employment. Although he asserted in his answer to the SOR that he was a changed person, the record is silent regarding his life after August 2006, primarily because he did not respond to the FORM.

After weighing the disqualifying and mitigating conditions under Guideline H, 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. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information.

