KEYWORD: Drugs

DIGEST: Applicant used marijuana about 50 times between February 2000 and March 2005, purchased marijuana about 10 times during that period, and used opium twice in December 2002. He last used marijuana while he was employed by a defense contractor and awaiting a decision on his security clearance application. The security concerns raised by his drug involvement are not mitigated. Clearance is denied.

CASENO: 06-23307.h1

DATE: 06/14/2007

DATE: June 14, 2007

In re:	)	
	)	
----------	)	ISCR Case No. 06-23307
SSN: ----------	)	
	)	
Applicant for Security Clearance	)	

DECISION OF ADMINISTRATIVE JUDGE
LEROY F. FOREMAN

APPEARANCES

FOR GOVERNMENT
Daniel F. Crowley, Esq., Department Counsel

FOR APPLICANT
Pro Se

SYNOPSIS

Applicant used marijuana about 50 times between February 2000 and March 2005, purchased marijuana about 10 times during that period, and used opium twice in December 2002. He last used

marijuana while he was employed by a defense contractor and awaiting a decision on his security clearance application. The security concerns raised by his drug involvement are not mitigated. Clearance is denied.

STATEMENT OF THE CASE

On December 26, 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 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). Applicant answered the SOR in writing on February 12, 2007, and elected to have the case decided on the written record in lieu of a hearing. Department Counsel submitted the Government's written case on March 27, 2007. A complete copy of the file of relevant material (FORM) was provided to Applicant, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the disqualifying conditions. Applicant received the FORM on April 5, 2007 and responded on May 16, 2007. Applicant's response to the FORM was dated and mailed more than 30 days after his receipt of the FORM, but Department Counsel did not object to the untimely response. Accordingly, I have considered Applicant's response in making my decision. The case was assigned to me on May 29, 2007.

FINDINGS OF FACT

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

Applicant is a 25-year-old software engineer for a defense contractor. He received a bachelor of science degree in computer engineering in May 2005 and began working for his current employer immediately thereafter. He has never held a security clearance.

Applicant executed a security clearance application in July 2005, in which he disclosed using marijuana about 50 times between February 2000 and March 2005, and using opium twice in December 2002. In his answer to the SOR, he admitted this conduct (alleged in SOR ¶¶ 1.a and 1.d). He also admitted purchasing marijuana at least ten times (alleged in SOR ¶ 1.c), and using marijuana once during a college reunion in September 2005 (alleged in SOR ¶ 1.b).

In his response to the FORM, Applicant declared his willingness to undergo "continual and regular drug screenings" and "to enroll in a drug counseling program as deemed necessary by the Government of the United States." There is no evidence he has submitted to drug screening or sought drug counseling.

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. "The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is an acceptable security risk." Guidelines ¶ 2(a) 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. This guideline encompasses involvement with "[d]rugs, 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," and "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia." Guidelines ¶ 25(a) and (c). The evidence in this case establishes these two disqualifying conditions.

Since the government produced substantial evidence to raise ¶¶ 25(a) and (c), 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*.

Applicant's drug involvement occurred during his college years and continued during his current employment. When he executed his SF 86 in July 2005, he was on notice that drug involvement raised security concerns. Nevertheless, he succumbed to peer pressure during his college reunion in September 2005 and again used marijuana. While he apparently has not used drugs since September 2005, he has been living under a microscope since he received the SOR in December 2006. His abstinence from drugs for about 20 months is "a significant period," but it must be considered in the context of a five-year pattern of frequent and regular drug use that continued after he applied for a security clearance. I am not convinced Applicant has left behind his casual attitude about drug use. His drug use while his application was pending raises serious doubts about his judgment and his willingness to follow rules. I conclude Applicant has not carried his burden of establishing the mitigating condition in Guidelines ¶ 26(a).

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." Guidelines ¶ 26(b)(1)-(3). Applicant has declared his intent to abstain from drugs, but he has not demonstrated that intent. He readily succumbed to peer pressure in September 2005. He has produced no evidence of a lifestyle change, disassociation from drug users, counseling, or other support systems to reinforce abstinence from drugs. He has declared his willingness to under drug screening and enroll in a drug counseling program, but he has not undergone screening or sought counseling. His period of abstinence, standing alone, is insufficient to establish this mitigating condition, especially when considered in the context of his five-year history of frequent and regular drug use.

The Whole Person

In addition to considering the specific disqualifying and mitigating conditions under Guideline H, 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 are incorporated in the discussion of Guideline H, but some merit additional comment.

Applicant's illegal drug abuse was serious misconduct, in which he participated willingly and frequently. When he last used marijuana, he was a 23-year-old college graduate employed by a defense contractor and awaiting a decision on his application for a security clearance. The likelihood of recurrence once he is relieved from the pressure of qualifying for a clearance cannot be determined on the basis of this record.

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 his 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 a security clearance.

FORMAL FINDINGS

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

Paragraph 1. Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a- 1.d:	Against Applicant

DECISION

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

LeRoy F. Foreman
Administrative Judge