

DATE: October 24, 2007

In re:

SSN: -----

Applicant for Security Clearance

ISCR Case No. 07-03657

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

APPEARANCES

FOR GOVERNMENT

Melvin A. Howry, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant began abusing drugs when he was about 12 years old, and he continues to use marijuana. He has not mitigated the security concerns based on drug involvement, and he is ineligible for a clearance under 10 U.S.C. 986(c)(2). Clearance is denied.

STATEMENT OF THE CASE

On May 29, 2007, 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 (AG). The SOR alleged security concerns raised under Guideline H (Drug Involvement). Applicant answered the SOR in writing on June 26, 2007, admitted 10 of the 13 allegations, 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 July 26, 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 August 4, 2007, but did not respond. The case was assigned to me on October 5, 2007.

PROCEDURAL RULING

Two allegations in the SOR are lettered as subparagraph 1.d. On my own motion, I have made pen changes to correct the lettering of one of those subparagraphs and all following subparagraphs. I also have amended the last subparagraph in the SOR to conform to the evidence by adding an allegation that Applicant's conduct alleged in subparagraphs 1.i (as corrected) disqualifies him from holding a clearance under 10 U.S.C. § 986, as amended.

FINDINGS OF FACT

Applicant's admissions in his answer to the SOR and at the hearing are incorporated into my findings of fact. He admitted all the allegations of drug involvement, except the purchase of cocaine alleged in SOR ¶ 1.d and the purchase of crystal methamphetamine alleged in SOR ¶ 1.h. He did not answer the allegation that his drug involvement makes him ineligible for a security clearance under 10 U.S.C. § 986, as amended. I make the following findings:

Applicant is a 29-year-old research associate for a defense contractor. He graduated from high school in June 1996, and graduated from college in December 2001. He began working for his current employer in May 2004. He has never held a security clearance.

Applicant purchased marijuana from 1992 to January 2007. He used it from 1989, when he was about 12 years old, until at least January 22, 2007. He was arrested in 1993 for possession of marijuana, attempted to grow marijuana plants in 1995, and sold it to friends while he was in high school. In a written statement to a security investigator in May 2002 (GX 5 at 2-3), he declared, "I plan to continue smoking marijuana, but if for some reason it will affect my employment with [a federal contractor], I will quit using it." He admitted his continuing marijuana use in his answer to the SOR on June 26, 2007.

Applicant purchased and used LSD about 20 times between 1992 and 1998, purchased and used crystal methamphetamine about three times between 1994 and 1996, and purchased and used cocaine about 25 times between 1995 and 2000.

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 AG ¶¶ 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* AG ¶ 2(b).

Absent a waiver from the Director, Defense Office of Hearings and Appeals, the Department of Defense may not grant a security clearance to any applicant who “is an unlawful user of, or is addicted to, a controlled substance.” 10 U.S.C. § 986(c)(2), as amended. Marijuana is a controlled substance as defined in the Controlled Substances Act, 21 U.S.C. § 802.

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.” AG ¶ 24. 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.” AG ¶¶ 25(a) and (c). Drug abuse is “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” AG ¶ 24(b). The evidence raises AG ¶¶ 25(a) and (c).

Since the government produced substantial evidence to raise AG ¶¶ 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). Applicant presented nothing to rebut, explain, or mitigate the facts. None of the enumerated mitigating conditions under this guideline are established.

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. AG ¶¶ 2(a)(1)-(9).

Applicant is a mature adult who has abused drugs since adolescence, and he has declared his intention to continue using marijuana. He has exhibited no concern that his conduct is illegal or unacceptable. Although he stated in May 2002 that he would quit using marijuana if it affected his employment by a federal contractor, he answered the SOR in June 2007 by admitting he intends to continue his marijuana, and he submitted nothing in response to the FORM. I conclude he will likely continue using marijuana and will remain vulnerable to pressure, coercion, exploitation, or duress.

After weighing the disqualifying conditions under Guideline H and the absence of mitigating evidence, 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.

Smith Amendment (10 U.S.C. § 986, as amended)

Applicant's continuing use of marijuana makes him ineligible for a clearance under 10 U.S.C. § 986(c)(2), as amended, unless a waiver is granted by the Director, DOHA. I would deny Applicant a clearance based on his long history of drug abuse, even if 10 U.S.C. § 986(c)(2) were not applicable to his case.

FORMAL FINDINGS

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

Paragraph 1. Guideline H (Drug Involvement): AGAINST APPLICANT

Subparagraphs 1.a-m: 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