



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



In the matter of: )  
 )  
----- ) ISCR Case No. 07-09380  
SSN: ----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Ray T. Blank, Jr., Esq., Department Counsel  
For Applicant: *Pro se*

September 30, 2010

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement), E (Personal Conduct), and J (Criminal Conduct). Eligibility for access to classified information is denied.

**Statement of the Case**

Applicant submitted a security clearance application on January 20, 2007. On April 13, 2010, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H, E, and J. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on April 15, 2010; answered it on May 6, 2010; and requested a hearing before an administrative judge. DOHA received the request on May 10, 2010. Department Counsel was ready to proceed on July 14, 2010, and the case was assigned to me on July 20, 2010. DOHA issued a notice of hearing on July 30, 2010, scheduling it for August 18, 2010. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified, presented the testimony of two witnesses, and submitted Applicant's Exhibit (AX) A, which was admitted without objection. DOHA received the transcript (Tr.) on August 26, 2010.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a-1.d, 2.b, and 3.a. He stated that he admitted SOR ¶¶ 2.a and 3.b, alleging falsification of a security clearance application, but his answer made it clear that he admitted providing incorrect information but denied intentional falsification. I have treated his answers to SOR ¶¶ 2.a and 3.b as denials. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 24-year-old designer employed by a defense contractor since September 2006. He began working for his current employer shortly after receiving an associate's degree from college. He is unmarried and has no children. He has never held a security clearance.

When Applicant submitted his security clearance application in January 2007 (GX 1), he provided detailed information about previous residences, persons who knew him at each residence, his educational background, his foreign travel, and his employment record. He disclosed that he was fired from his job in a grocery store for eating store food. He answered "No" to question 24, asking if he had illegally used any controlled substance since the age of 16 or during the last seven years. He wrote, "Thank you for your time," in the space for additional comments at the end of the application.

In February 2007, Applicant was arrested and charged with permitting, establishing or maintaining a common nuisance; possession of cocaine; and possession of marijuana with intent to distribute. At the time, Applicant was living with two male roommates. Based on an anonymous complaint about noise, the smell of marijuana, and the number of people coming and going from the home, the police searched the home pursuant to a "common nuisance" warrant. They seized marijuana, cocaine residue, baggies, a scale, and drug paraphernalia. The scale and baggies were found in Applicant's room. One of Applicant's roommates admitted that the cocaine was his and not Applicant's. (GX 2 at 6.)

Applicant notified his security officer of his arrest. (Tr. 43.) He pleaded guilty to the nuisance offense, not guilty to possession of cocaine, and guilty to possession of marijuana with intent to distribute. For the nuisance offense, he was sentenced to 12

months in jail (suspended), a \$250 fine, and probation for 12 months. For the marijuana possession, he was sentence to 12 months in jail (suspended) and a \$2,500 fine. (GX 3; GX 4.)

In May 2007, Applicant was interviewed by a security investigator about his arrest. Even though a scale and baggies were seized from his room and he pleaded guilty to possessing marijuana with intent to distribute, he denied selling marijuana and told the investigator that he used the scale to weigh his own purchases. During the course of the interview, Applicant disclosed that he used marijuana 10 to 15 times over a four-month period before his arrest. (GX 2 at 8.) There is nothing in the record suggesting that the investigator knew about Applicant's prior use of marijuana before the interview.

In September 2007, Applicant was interviewed by a security investigator about his failure to disclose his marijuana use on his security clearance application. He told the investigator he thought the question about illegal drug use applied only to arrests or charges of illegal drug use. (GX 2 at 5-6.) At the hearing, he testified that he hurriedly completed his application and did not carefully read the questions. (Tr. 40)

Applicant now has his own home and recently purchased a new car. He no longer associates with his former drug-using friends. At the hearing, he was enthusiastic about his job. He is taking college courses with a view toward obtaining a bachelor's degree in nuclear engineering. (Tr. 33-34.) He has not received any drug treatment or counseling, but he has not used illegal drugs since his arrest in February 2007.

A lifelong friend of Applicant, who is also employed by a defense contractor and holds a security clearance, testified that Applicant has always been a good friend. The witness had no first-hand knowledge of Applicant's drug use. The witness testified that Applicant is "hard headed" and sometimes "just needs something to rattle his cage a little bit." The witness testified that Applicant has become more responsible since his arrest. (Tr. 50-52.)

Applicant's live-in girlfriend for the past two years testified that she would not live with him if he were still using drugs. She considers him to be responsible, hard working and trustworthy. (Tr. 54-56.)

A friend and coworker who has known Applicant for four years submitted a letter describing him as "dependable, reliable, trustworthy, caring, courteous, and genuine." At work, Applicant "displays professionalism, leadership, willingness to help others, and always goes above and beyond his work assignments and work ethics." (AX A.)

### **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 consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. 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 commonsense 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made “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 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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; see AG ¶ 2(b).

## Analysis

### Guideline H, Drug Involvement

The SOR alleges Applicant used marijuana from at least 2006 to at least February 2007 (SOR ¶ 1.a) and purchased marijuana (SOR ¶ 1.b). It also alleges that he was arrested in February 2007 for maintaining a common nuisance, possession of a controlled substance, and possession of marijuana with intent to distribute; that he was convicted, pursuant to his pleas of guilty, of the nuisance offense and possession of marijuana with intent to distribute; and that he was sentenced to suspended jail time, fines, and probation (SOR ¶ 1.c). Finally, it alleges that Applicant used marijuana after submitting a security clearance questionnaire (SOR ¶ 1.d).

The concern under this guideline is set out in AG ¶ 24: “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(a)(1) explains that Guideline H encompasses “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).”

The evidence raises the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction”; and

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Since the Government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a) and (c), the burden shifted to Applicant 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 never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

Security concerns under this guideline may be mitigated if “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.” AG ¶ 26(a). The first prong of AG ¶ 26(a) (“happened so long ago”) focuses on whether the drug involvement was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the evidence. 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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

More than three years have passed since Applicant’s arrest. He used marijuana for about four months, a relatively short period. The cocaine found during the search belonged to one of Applicant’s roommates, and there is no evidence Applicant used cocaine. Since his arrest, he has moved away from his fellow drug-users, matured, become seriously involved with a young woman who will not tolerate drug use, worked hard, continued his education, and gained a reputation for dependability and trustworthiness. I conclude AG ¶ 26(a) is established.

Security concerns also may be mitigated by “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 (4) a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b). The evidence establishes the first three prongs of this mitigating condition. No other enumerated mitigating conditions are applicable.

#### **Guideline E, Personal Conduct**

The SOR alleges that Applicant falsified material facts on his security clearance application by answering “No” to question 24, asking if he had ever illegally used any controlled substance, such as marijuana, since the age of 16 or in the last seven years, and by failing to disclose his marijuana use from 2006 to at least January 2007 (SOR ¶ 2.a). It also cross-alleges SOR ¶ 1.d, his use of marijuana after submitting his security clearance application (SOR ¶ 2.b). The concern under this guideline is set out in AG ¶ 15:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The relevant disqualifying condition pertaining to Applicant’s security clearance application is AG ¶ 16(a): “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire.” When a falsification allegation is controverted, as in this case, the Government has the burden of proving it. An omission, standing alone, does not prove falsification. An administrative judge must consider the record evidence as a whole to determine an applicant’s state of mind at the time of the omission. See ISCR Case No. 03-09483 at 4 (App. Bd. Nov. 17, 2004). An applicant’s level of education and business experience are relevant in determining whether a failure to disclose relevant information on a security clearance application was deliberate. ISCR Case No. 08-05637 (App. Bd. Sep. 9, 2010).

When Applicant submitted his security clearance application, he had no record of drug offenses. It was only after his arrest that the identity of his fellow drug-users was known. Applicant had considerable work experience and he had earned an associate's degree. He presented himself at the hearing as intelligent and articulate. I find his explanation for answering "No" to question 24 implausible and not credible. His explanation that he hurriedly completed the form is belied by the detailed information he presented throughout the form and the fact that he took the time to add the comment, "Thank your for your time," in the space for additional comments at the end of the form. His intent to conceal the extent of his drug involvement was illustrated during the May 2007 interview when he denied selling marijuana, even though a scale and baggies were seized from his room and he pleaded guilty to possession of marijuana with intent to distribute. I conclude AG ¶ 16(a) is raised.

Security concerns raised by false or misleading answers on a security clearance application or during a security interview may be mitigated by showing that "the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts." AG ¶ 17(a). The security interview in May 2007 was triggered by Applicant's arrest. There is no evidence that the investigator was aware of Applicant's prior marijuana use until Applicant disclosed it. Thus, it does not appear that he was "confronted" with evidence of his prior marijuana use. On the other hand, Applicant did not initiate the interview, nor did he initiate any other efforts to correct his response to question 24. He receives some credit for voluntarily disclosing his prior marijuana use, but his lack of effort to correct his response to question 24 on his own initiative precludes full application of this mitigating condition.

Applicant's use of marijuana after submitting his security clearance application raises questions about his judgment and willingness to comply with rules and regulations, and it was likely to adversely affect his professional reputation among his neighbors, associates, and coworkers. Thus, his conduct raises the following disqualifying conditions:

AG ¶ 16(c): 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;

AG ¶ 16(d): 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. This includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): 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.

Security concerns raised by personal conduct may be mitigated if “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.” AG ¶ 17(c). This mitigating condition is not established for Applicant's falsification of his security clearance application, because it was a serious offense undermining the integrity of the security clearance process and a felony, as discussed below. Although significant time has passed since Applicant falsified his application, he perpetuated his falsification in his security interview in September 2007, his response to the SOR, and his testimony at the hearing. I conclude that AG ¶ 17(c) is not established for the falsification.

Applicant's attempt to conceal the extent of his drug involvement in the May 2007 interview, and his false explanation for his answer to question 24 that he offered in the September 2007 interview, his response to the SOR, and his hearing testimony are not alleged in the SOR. Conduct not alleged in the SOR may be considered to assess an applicant's credibility; to decide whether a particular adjudicative guideline is applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether an applicant has demonstrated successful rehabilitation; or as part of a whole-person analysis. ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted). I have considered his lack of candor in the May 2007 and September 2007 interviews, his response to the SOR, and his hearing testimony for these limited purposes.

Applicant has not used marijuana since his arrest in February 2007. For the reasons set out in the above discussion of AG ¶ 26(a), I conclude that AG ¶ 17(c) is established for Applicant's marijuana use after submitting his security clearance application.

Security concerns raised by personal conduct may be mitigated if “the individual has 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.” AG ¶ 17(d). Applicant has acknowledged his illegal use of marijuana, found new friends, become involved in a serious relationship with a young woman who will not tolerate drug use, and has devoted his energies to his work. However, he has not acknowledged his lack of candor on his security clearance application or during



follow-up interviews. I conclude that AG ¶ 17(d) is established for his use of marijuana after submitting his security clearance application, but it is not established for his falsification of his security clearance application.

Finally, security concerns under this guideline may be mitigated if “the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.” AG ¶ 17(e). This mitigating condition is established because Applicant has belatedly disclosed the full extent of his drug involvement, stopped using illegal drugs, and terminated his contact with drug-users.

## **Guideline J, Criminal Conduct**

SOR ¶ 3.a cross-alleges the drug-related conduct in SOR ¶ 1.c, and SOR ¶ 3.b cross-alleges the falsification of his security clearance application alleged in SOR ¶ 2.a. The concern raised by criminal conduct is set out in AG ¶ 30: “Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations.” The relevant disqualifying conditions are AG ¶ 32(a) (“a single serious crime or multiple lesser offenses”) and AG ¶ 31(c) (“allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted”).

It is a felony, punishable by a fine or imprisonment for not more than five years, or both, to knowingly and willfully make any materially false, fictitious, or fraudulent statement or representation in any matter within the jurisdiction of the executive branch of the Government of the United States. 18 U.S.C. § 1001. Security clearances are matters within the jurisdiction of the executive branch of the Government of the United States. A deliberately false answer on a security clearance application is a serious crime within the meaning of Guideline J. Applicant's arrest and conviction of drug-related offenses in February 2007 and his deliberately false answer on his security clearance application raise AG ¶¶ 31(a) and (c).

Security concerns under this guideline may be mitigated if “so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment.” AG ¶ 32(a). Security concerns also may be mitigated if “there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement.” AG ¶ 32(d). For the reasons set out in the above discussion of AG ¶¶ 17(c) and 26(a). I conclude that AG ¶¶ 32(a) and (d) are established for Applicant's drug-related arrest and conviction in February 2007, but they are not established for his falsification of his security clearance application.

## **Whole-Person Concept**

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 relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

(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 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.

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. I have incorporated my comments under Guidelines H, E, and J in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment.

Applicant is a young adult, relatively new to the workplace and the responsibilities inherent in a security clearance. He appears to have left his irresponsible collegiate lifestyle behind him. However, his lack of candor on his security clearance application and in subsequent proceedings raises serious concerns about his trustworthiness and reliability.

After weighing the disqualifying and mitigating conditions under Guidelines H, E, and J, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns raised by his drug involvement, but he has not mitigated the security concerns raised by his lack of candor. 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.

## **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):                      FOR APPLICANT

Subparagraphs 1.a-1.d:    For Applicant

Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
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Subparagraph 2.a:	Against Applicant
Subparagraph 2.b:	For Applicant

Paragraph 3, Guideline J: (Criminal Conduct):	AGAINST APPLICANT
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Subparagraph 3.a:	For Applicant
Subparagraph 3.b:	Against Applicant

### **Conclusion**

In light of all of the circumstances, 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.

LeRoy F. Foreman  
Administrative Judge