



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-13203
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

April 15, 2008

Decision

HARVEY, Mark W., Administrative Judge:

Applicant failed to mitigate security concerns arising under Guidelines H (drug involvement) and E (Personal Conduct). Clearance is denied.

Statement of the Case

On November 29, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him,¹ pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised.² The SOR alleges security concerns under

¹Item 1 (Statement of Reasons (SOR), dated Nov. 29, 2007). Item I is the source for the facts in the remainder of this paragraph unless stated otherwise.

²On Aug. 30, 2006, the Under Secretary of Defense (Intelligence) published a memorandum directing application of revised Adjudicative Guideline to all adjudications and other determinations made

Guidelines H (Drug Involvement) and E (Personal Conduct). The SOR detailed reasons why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue his security clearance, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

Applicant responded to the SOR allegations on December 29, 2007, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated January 17, 2008, was provided to him on January 30, 2008, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation.³ Applicant's response was due on March 2, 2008. Applicant did not respond to the FORM. The case was assigned to me on April 7, 2008.

Findings of Fact⁴

Applicant admitted in his response to the SOR all of the SOR's allegations. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 30-year-old accountant.⁵ In 1999 he received a bachelors degree and in May 2002 he received a Masters Degree in Professional Accountancy and a Masters Degree in Business Administration. He has no military service. He has never married. He was employed from 1995 to 2002 as a cheerleading instructor and coach and after 2002 he has been employed as an accountant.

Drug Involvement (Guideline H)

On his March 8, 2007, security clearance application, Applicant admitted using marijuana 25 times between March 1999 and March 8, 2007 (Item 6). He also admitted using ecstasy or MDMA an estimated 45 times from 1999 to 2005. From March 1999 to May 2002 he used ecstasy once a month, and from May 2002 to July 2005 he used ecstasy once a year (Item 7 at 5-6). He used marijuana from March 1999 until June

under the Directive and Department of Defense (DoD) Regulation 5200.2-R, *Personnel Security Program* (Regulation), dated Jan. 1987, as amended, in which the SOR was issued on or after Sep. 1, 2006. The revised Adjudicative Guidelines are applicable to Applicant's case.

³Defense Office of Hearings and Appeals (DOHA) transmittal letter, is dated Jan. 22, 2008; however, Applicant's receipt is signed and dated January 30, 2008. The DOHA transmittal letter informed Applicant that he had 30 days after Applicant's receipt to submit information.

⁴ Item 3, Applicant's SOR response, notarized Dec. 29, 2007, is the source for the facts in this section unless stated otherwise. There are minor inconsistencies in Applicant's descriptions of the frequency of his drug use. *Compare* Item 3 and Item 7 at 5-6.

⁵Item 4 (Electronic Questionnaire for Investigations Processing (e-QIP), dated Mar. 8, 2007, will be referred to as a security clearance application in this decision) is the source for the facts in this paragraph, unless otherwise stated.

2007 (Item 3, Item 7 at 3, 6). He stopped using marijuana in June 2007 because an investigator told him he had to stop using marijuana to be granted a clearance (Item 3, Item 7 at 6).

Applicant purchased, sold and transported ecstasy with varying frequency from March 1999 until at least April 2003. He continues to associate with individuals who use marijuana in his presence (Item 3, Item 7 at 6).

Personal Conduct (Guideline E)

In April 2006, Applicant was arrested for driving under the influence of alcohol (DUI) (Item 6 at 25-26, Item 3). On December 6, 2006, he was convicted of DUI and sentenced to 30 days in jail, with 30 days suspended, and ordered to attend alcohol awareness classes and Alcoholics Anonymous meetings. His driver's license was suspended for one year, until approximately December 5, 2007.

Policies

When evaluating an Applicant's suitability for a security clearance, the Administrative Judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an Applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The Administrative Judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The Administrative Judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to classified information will be resolved in favor of national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

In the decision-making process, the Government has the initial burden of establishing controverted facts alleged in the SOR by "substantial evidence,"⁶

⁶ See Directive ¶ E3.1.14. "Substantial evidence [is] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the record." ISCR Case No. 04-11463 at 2 (App. Bd. Aug. 4, 2006) (citing Directive ¶ E3.1.32.1). "This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent [a Judge's] finding from being supported by substantial evidence." *Consolo v.*

demonstrating, in accordance with the Directive, that it is not clearly consistent with the national interest to grant or continue an applicant's access to classified information. Once the Government has produced substantial evidence of a disqualifying condition, the burden shifts to Applicant to produce evidence "to rebut, explain, extenuate, or mitigate facts admitted by applicant or proven by Department Counsel, and [applicant] has the ultimate burden of persuasion as to obtaining a favorable clearance decision." Directive ¶ E3.1.15. The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).⁷

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. 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.

Section 7 of Executive Order 10865 provides that decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See also Executive Order 12968 (Aug. 2, 1995), Section 3.

Analysis

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, including those described briefly above, I conclude the following with respect to the allegations set forth in the SOR:

Drug Involvement (Guideline H)

AG ¶ 24 articulates the security concern concerning drug⁸ involvement:

Federal Maritime Comm'n, 383 U.S. 607, 620 (1966). "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).

⁷ "The Administrative Judge [considers] the record evidence as a whole, both favorable and unfavorable, evaluate[s] Applicant's past and current circumstances in light of pertinent provisions of the Directive, and decide[s] whether Applicant ha[s] met his burden of persuasion under Directive ¶ E3.1.15." ISCR Case No. 04-10340 at 2 (App. Bd. July 6, 2006).

⁸AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(1) 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), and (2) inhalants and other similar substances.

[u]se 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.

Two drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this case: "any drug abuse"⁹ and "illegal drug possession, including . . . purchase, sale or distribution [of illegal drugs]. . . ." AG ¶¶ 25(a) and 25(c). The other six disqualifying conditions listed in AG ¶ 25 are not applicable. These two disqualifying conditions apply because Applicant used and possessed marijuana and/or ecstasy from 1999 to June 2007. He used marijuana at least once after applying for a security clearance, but did not use marijuana after receiving a clearance.

The Government produced substantial evidence of these three disqualifying conditions, and the burden shifted to Applicant to produce evidence and prove mitigation. AG ¶ 26 provides for potentially applicable drug involvement mitigating conditions:

- (a) 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;
- (b) 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.
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana and ecstasy or 3,4 methylenedioxymethamphetamine are Schedule I controlled substances. See Sch. I (c)(9) and I(c)(10), respectively. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8th Cir. 2006) (ecstasy).

⁹ AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

(d) 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.

Security concerns can be mitigated based on AG ¶ 26(a) by showing that the drug offenses happened so long ago, were so infrequent, or happened under such circumstances that they are unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment. 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 record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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."¹⁰

AG ¶ 26(a) does not fully apply because Applicant's last illegal drug use was in June 2007, which is still sufficiently recent to remain a concern. His overall illegal drug use lasted approximately eight years, and involved numerous uses of marijuana, and ecstasy.¹¹ Moreover, he did not provide any corroboration that his drug use ended.¹²

¹⁰ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the Administrative Judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The Administrative Judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an Administrative Judge stating:

The Administrative Judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

¹¹ In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the Administrative Judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

His failure to present corroboration about his rehabilitation from medical and/or psychiatric personnel, co-workers, neighbors, family or friends is a factor in this decision.¹³ Based on all the facts and circumstances, he has not met his burden of establishing that his drug use will not recur. Because he may again use illegal drugs, his current reliability, trustworthiness and good judgment is not completely restored.

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. Although he has abstained from drug abuse since June 2007, he did not provide “a signed statement of intent with automatic revocation of clearance for any violation.” Guideline ¶ 26(b) is not applicable.

AG ¶ 26(c) is not applicable because his abuse of marijuana and Ecstasy did not follow an illness, and these illegal drugs were never prescribed for him. AG ¶ 26(d) is not applicable because he has not completed a prescribed drug treatment program, and there has not been a favorable prognosis by a duly qualified medical professional.

I find For Applicant on SOR ¶ 1.d because the same marijuana use is alleged in SOR ¶¶ 1.a and 1.d. Drug use after completing a security clearance application is not a disqualifying condition. As such, SOR ¶ 1.d is an unwarranted duplication. I also find For Applicant on SOR ¶ 1.e because association with drug users is not a disqualifying condition.

In conclusion, Applicant ended his drug abuse in June 2007. Although the motivations to stop using drugs are evident,¹⁴ he did not disclose any internal motivation aside from wanting a security clearance to refrain from drug abuse. He has not shown or demonstrated a sufficient track record of no drug abuse.

¹² See whole person analysis, *infra*. See ISCR Case No. 04-07360 at 2, 3 (App. Bd. Sep. 26, 2006) (indicating when a mitigating condition cannot be fully applied, “some credit” is still available under that same mitigating condition).

¹³Administrative judges “must look at the record for corroboration of Applicant’s testimony.” ISCR Case 02-03186 at 3 (App. Bd. Feb. 16, 2006). Moreover, a judge may consider “Applicant’s failure to present documentary evidence in corroboration of his denials and explanations.” ISCR Case 01-20579 at 5 (App. Bd. Apr. 14, 2004) (holding Applicant’s failure to provide reasonably available corroborative evidence may be used in common-sense evaluation to determine whether Applicant’s claims are established). In ISCR Case 01-02677 at 7 (App. Bd. Oct. 17, 2002), the Appeal Board explained:

While lack of corroboration can be a factor in evaluating the reliability or weight of evidence, lack of corroboration does not automatically render a piece of evidence suspect, unreliable, or incredible. . . . Evidence that lacks corroboration must be evaluated in terms of its intrinsic believability and in light of all the other evidence of record, including evidence that tends to support it as well as evidence that tends to detract from it.

¹⁴Retention of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

Personal Conduct (Guideline E)

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

With respect to his possession and use of illegal drugs, and his DUI arrest, conviction, and sentence, including suspension of his driver's license, AG ¶¶ 16(d)(1), 16(d)(3), and 16(e)(1) are the three pertinent disqualifying conditions:

(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: (1) untrustworthy or unreliable behavior . . . ; [and] (3) a pattern of . . . rule violations; [and]

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

AG ¶¶ 16(d)(1) and 16(d)(3) do not apply because his drug abuse and DUI are explicitly covered under Guidelines J (Criminal Conduct), G (Alcohol Consumption) and/or H (Drug Involvement). As such, the recapitulation of his drug offenses and DUI under Guideline E is unwarranted.

Certainly possession and use of illegal drugs and DUI violates important civil and criminal rules in our society, and his lengthy history of involvement with illegal drugs is conduct a person might wish to conceal as it adversely affects a person's professional and community standing. The mitigating condition outlined in AG ¶ 17(e) applies with respect to his drug possession and use, as well as his DUI. Applicant's supervisor and security officials are well aware of this misconduct. He has taken the positive step of disclosure, eliminating his vulnerability to exploitation, manipulation or duress. I do not believe he would compromise national security to avoid public disclosure of this misconduct. The personal conduct security concerns, pertaining to his drug possession and use, as well as his DUI, are mitigated, and I find For Applicant on SOR ¶¶ 2.a and 2.b.

AG ¶ 16(g) indicates “association with persons involved in criminal activity,” is a disqualifying condition. Applicant admits he has continued his association with marijuana users, and therefore AG ¶ 16(g) applies to this conduct. None of the mitigating conditions under Guideline E apply to his continuing association with drug users. Accordingly, I find Against Applicant on SOR ¶ 2.c.

Whole Person Concept¹⁵

Under the whole person concept, the 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. The 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) 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.

Applicant has earned advanced degrees. He was employed from 1995 to 2002 as a cheerleading instructor and coach, and after 2002 he has been employed as an accountant without evidence of any at work disciplinary problems. There is no evidence of disloyalty or that he would intentionally violate national security. This shows some responsibility, rehabilitation and mitigation.

The evidence against approval of Applicant’s clearance is more substantial. He used marijuana 25 times between March 1999 and June 2007. He also used ecstasy an estimated 45 times from 1999 to 2005. His marijuana use continued after he filled out his security clearance application, and did not end until an investigator told him his continued marijuana use would jeopardize his security clearance. He continues to associate with individuals who use marijuana in his presence. In April 2006, Applicant was arrested for DUI. On December 6, 2006, he was convicted and sentenced for the April 2006 DUI. His drug use and DUI were knowledgeable, voluntary, and not isolated. He is sufficiently mature to be fully responsible for his conduct. Drug use and DUI are not prudent or responsible. He did not receive counseling or therapy, and may not have a clear understanding about how to avoid problematic situations and why he engaged in

¹⁵ Although I find For Applicant with respect to SOR ¶¶ 1.d, 1.e, 2.a and 2.b in the decretal section of this decision, consideration of all established SOR conduct is required under the “whole person” concept.

the misconduct. I have persistent and serious doubts about his judgment, reliability, and trustworthiness.

Applicant's misconduct calls into question his current ability or willingness to comply with laws, rules and regulations. After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to drug involvement and personal conduct.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"¹⁶ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. Applicant has not mitigated or overcome the government's case. For the reasons stated, I conclude he is not eligible for access to classified information.

Formal Findings

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraphs 1.a to 1.c:	Against Applicant
Subparagraphs 1.d and 1.e:	For Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	For Applicant
Subparagraph 2.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

Mark W. Harvey
Administrative Judge

¹⁶See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).