



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



In the matter of:)	
)	
-----)	ISCR Case No. 07-14937
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: David P. Price, Esq.

November 25, 2008

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 (SF 86) on May 7, 2005, and was granted a secret clearance in January 2006 and an interim top secret clearance in March 2006. He submitted an electronic application (e-QIP) on March 3, 2006, seeking a final top secret clearance. On July 16, 2008, 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 Guidelines H, E, and J. The action was taken 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) promulgated by the President on December 29, 2005.

Applicant acknowledged receipt of the SOR on July 29, 2008; answered it on August 15, 2008; and requested a hearing before an administrative judge. DOHA received the request on August 22, 2008. Department Counsel was ready to proceed on September 17, 2008, and the case was assigned to me on September 22, 2008. DOHA issued a notice of hearing on September 29, 2008, scheduling the hearing for October 21, 2008. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 4 were admitted in evidence without objection. Applicant testified on his own behalf, and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. Each of Applicant's exhibits consists of multiple documents which are numbered. Thus, for example, AX A consists of AX A(1) through AX A(8). The record closed upon adjournment of the hearing on October 21, 2008. DOHA received the transcript (Tr.) on October 30, 2008.

Findings of Fact

In his answer to the SOR, Applicant admitted all the factual allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 25-year-old electrical design engineer employed by a government contractor. In high school, he was an accomplished varsity wrestler (AX C(15)-(18)) and an Eagle Scout (AX C(11)-(14)). He graduated from college in May 2005 (AX C(4)) and has worked for his current employer since June 2005. He received a master's degree in electrical engineering in May 2008 (AX C(2)-(3)).

After graduating from college, Applicant returned to his hometown to accept his current job. He testified his first days of work were "a bit of a shock," in that he was expected to get up early and work regular hours every day (Tr. 35). His first mentor for about three months was an older man who was physically and verbally abusive (Tr. 35). After Applicant complained to his supervisor, his mentor was replaced (Tr. 36).

Applicant was required to take a drug test as a condition of employment, and he was aware that his employer had a drug-free workplace policy (Tr. 66). In August 2005, he began smoking marijuana about once a week with hometown friends who had not attended college, whose career expectations were lower than his, and who used marijuana on a regular basis (Tr. 37). His first use occurred when a pipe was passed around at a party. He was a non-smoker and his first use was unpleasant, but he continued using because he enjoyed its effects (Tr. 64-65). Once or twice a month, he would purchase small quantities (\$20 to \$40 worth) of marijuana from known dealers, for group use (Tr. 56-57).

On March 3, 2006, Applicant filed out the e-QIP after he was told he needed a top secret clearance (Tr. 38). He answered "no" to question 24a asking, "Since the age of 16 or in the last 7 years, whichever is shorter, have you illegally used any controlled substance, for example, marijuana, cocaine, crack cocaine, hashish, narcotics . . . ?" He did not disclose that he used marijuana beginning in August 2005 and was still using

it at the time he submitted the e-QIP. He also answered “no” to question 24b asking, “Have you ever illegally used a controlled substance while employed as a law enforcement officer, prosecutor, or courtroom official; while possessing a security clearance; or while in a position directly and immediately affecting the public safety?” He did not disclose that he used marijuana after receiving a security clearance in January 2006.

Applicant was arrested and charged with possession of marijuana and drug paraphernalia in December 2006 (GX 3 at 3-4). He was granted a conditional discharge, fined, and placed on probation for six months (GX 3 at 10). He has not used marijuana since his arrest.

In February 2007, Applicant was interviewed by a security investigator about his e-QIP. When the investigator asked him if there were any changes in his police record, Applicant disclosed his marijuana use (Tr. 41).

In response to DOHA interrogatories on February 20, 2008, Applicant admitted his answers to questions 24a and 24b on his e-QIP were false. He explained that he feared losing his job if he truthfully answered the questions (GX 4 at 3).

After his arrest, Applicant stopped associating with his marijuana-smoking friends (Tr. 42). He testified he will never use illegal drugs again (Tr. 50). He has made new friends among his coworkers, and he is engaged to a young woman he has known since May 2006 (Tr. 43-44; (AX A(8))).

Applicant disclosed his marijuana use and falsification of his e-QIP to his supervisors, several coworkers, friends, family members, and his fiancée. Several have written letters supporting his efforts to keep his clearance.

A senior supervisor who hired Applicant recognizes he had made “two serious mistakes,” but supports Applicant’s efforts to retain his clearance (AX A(7)). His immediate supervisor, who has daily contact with him, describes him as hardworking, motivated, dedicated, honest, reliable, and trustworthy (AX A(4)). Two coworkers, one of whom is also a personal friend, describe him as honest, reliable, and trustworthy (AX A(3) and A(5)).

A long-time friend and former college classmate considers Applicant reliable, responsible, and a person with good judgment (AX A(1)). Two high school classmates describe him as honest, reliable, and trustworthy (AX A(2) and A(6)). His fiancée, a registered nurse who has known him since May 2006, considers him responsible, dedicated, hard working, a great role model, and a prudent, careful financial manager (AX A(8)).

Applicant participated in fielding a new demonstration payload for a modernized global positioning system, and has received numerous certificates of achievement for enhancing his technical skills (AX C(5)-(9)). He has received four merit pay increases

(AX B(1)-(4)), has an excellent credit score (AX B(5)), and contributes regularly to his retirement account (AX B(5)-(7)).

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 and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised adjudicative guidelines (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 over-arching 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; see AG ¶ 2(b).

Analysis

The SOR alleges Applicant used marijuana with varying frequency from August 2005 to “at least” December 29, 2006 (SOR ¶ 1.a); he used marijuana after submitting a security clearance application in May 2005 (SOR ¶ 1.b); he continued to use marijuana after receiving a security clearance (SOR ¶ 1.c); and he was arrested on December 29, 2006 for possession of marijuana and drug paraphernalia (SOR ¶ 1.d).

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. This guideline encompasses use or misuse of “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). AG ¶ 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.” AG ¶ 24(b).

Disqualifying conditions under this guideline include “any drug abuse” (AG ¶ 25(a); “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution” (AG ¶ 25(c)); and “any illegal drug use after being granted a security clearance” (AG ¶ 25(g)). Applicant’s admissions raise these three disqualifying conditions, shifting the burden 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 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.” AG ¶ 26(a). The first prong of ¶ 26(a) (“happened so long ago”) focuses on the recentness 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.*

Almost two years have passed since Applicant’s last drug involvement. Since that time, he has stopped associating with his marijuana-smoking friends, become engaged, and continued to perform well at work. There is no evidence of physical or psychological addiction. On the other hand, his marijuana use began within two months of being hired, having taken a drug test as a condition of employment. His marijuana use continued after he was granted a clearance, and he compounded his problems by falsifying his e-QIP. His conduct reflects immaturity, susceptibility to peer pressure, and willingness to lie to protect his job. He used marijuana weekly for more than a year, from August 2005 until the end of December 2006. He did not terminate his marijuana use voluntarily and would likely have continued it for a while had he not been arrested. Since his arrest, he has been under pressure to retain his clearance. I am not convinced that sufficient time has elapsed for him to demonstrate rehabilitation. Thus, I conclude that his drug abuse is not “so long ago” within the meaning of AG 46(a). See ISCR Case No. 06-18270, 2007 WL 4379282 (App. Bd. Nov. 7, 2007) (drug use after pre-employment drug test and applying for a clearance “undercuts” a finding of rehabilitation).

The second prong of AG ¶ 26(a) (“so infrequent”) also is not established in light of Applicant’s weekly use of marijuana from August 2005 until the end of December 2006. The third prong (“under circumstances that it is unlikely to recur”) is not established because his marijuana use occurred in ordinary social situations, not unusual circumstances. Finally, the fourth prong (“does not cast doubt”) is not established because his multiple breaches of trust, by regularly using marijuana while holding a clearance and attempting to conceal his marijuana use to protect himself, cast doubt on his current reliability, trustworthiness, and good judgment. I conclude AG ¶ 26(a) is not established.

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; (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b)(1)-(4). Applicant has stopped associating with marijuana-using associates and has changed his recreational environment, but he has not established an appropriate period of abstinence or submitted a signed statement of intent. Furthermore, his declared statement to refrain from future drug use is undercut by his breaches of trust discussed above under AG ¶ 26(a). I conclude AG ¶ 26(b) is not established.

Finally, security concerns also may be mitigated by “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.” AG ¶ 26(d). This mitigating condition is not established because Applicant has not sought any counseling or treatment.

Guideline E, Personal Conduct

The SOR cross-alleged Applicant's drug abuse under this guideline (SOR ¶ 2.a) and alleges he falsified his e-QIP by answering "no" to questions 24a and 24b and intentionally failing to disclose his marijuana use (SOR ¶¶ 2,b-2,c).

The concern under this guideline is set out in AG ¶ 15 as follows:

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 conditions arising under this guideline for Applicant's drug involvement are "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" (AG ¶ 16(d)); "violation of a written or recorded commitment made by the individual to the employer as a condition of employment" (AG ¶ 16(f)); and "association with persons involved in criminal activity" (AG ¶ 16(g)). Applicant's repeated use of marijuana, association with marijuana users and marijuana dealers, violation of his company's drug policy, and illegal conduct that could affect his personal, professional, and community standing raise AG ¶¶ 16(d), (f), and (g).

The relevant disqualifying condition for SOR ¶¶ 2.b and 2.c is "deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities." AG ¶ 16(a). This disqualifying condition is raised by Applicant's admission that he deliberately omitted information about his marijuana use because he was afraid he would lose his job if he disclosed it.

Security concerns raised by false or misleading answers on a security clearance application 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). Applicant admitted his drug involvement to a security investigator in February 2007, about 11 months after submitting his falsified application. There is no evidence contradicting Applicant's testimony that he disclosed his drug involvement in response to any open-ended question whether he had anything to add to his application. The record does not reflect whether he was confronted with evidence of his arrest. Applicant receives some credit for disclosing his drug involvement to the investigator, but his efforts to correct the omission were not prompt. I conclude AG ¶ 17(b) is not fully established.

Security concerns based on personal conduct may be mitigated by showing “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). Applicant's falsifications were recent and not “minor,” as discussed below under Guideline J. His two false answers on his e-QIP arguably are infrequent, but they occurred in the context of Applicant “living a lie” by seeking to upgrade his clearance while regularly using marijuana. His falsifications did not occur under unique circumstances, and they cast doubt on his reliability, trustworthiness, and good judgment. I conclude AG ¶ 17(c) is not established.

Security concerns based on personal conduct also 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 not sought counseling, but he has acknowledged his behavior, stopped associating with his fellow marijuana users, and concentrated on using his off-duty time more productively. As noted under Guideline H, it is too soon to determine whether his behavior is unlikely to recur. Thus, I conclude this mitigating condition is not fully established.

Security concerns also 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 fully disclosed his behavior to his supervisors, coworkers, friends, and his fiancée.

Finally, security concerns under this guideline may be mitigated if “association with persons involved in criminal activity has ceased.” AG ¶ 17(g). This condition is established because Applicant no longer associates with his marijuana-smoking companions.

Guideline J, Criminal Conduct

The SOR cross-alleges Applicant's falsification of his e-QIP and arrest for possession of marijuana and drug paraphernalia under this guideline. The concern raised by criminal conduct is set out in AG ¶ 30 as follows: “Criminal conduct 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.” AG ¶ 30. Conditions that could raise a security concern and may be disqualifying include “a single serious crime or multiple lesser offenses” and “allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted, or convicted.” AG ¶¶ 31(a) and (c).

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 false answers on his e-QIP and his arrest for possession of marijuana and drug paraphernalia raise the disqualifying conditions in AG ¶ 31(a) and (c).

Security concerns under this guideline may be mitigated by evidence that "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). They 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 above concerning AG ¶ 26(a) under Guideline H, I conclude neither of these mitigating conditions is established.

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 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 common sense 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 grew up as a clean-cut, conscientious young man—an Eagle Scout and a varsity athlete. He was a good student in college. He presented himself at the hearing as articulate, intelligent, sincere, and contrite. He started his current job immediately after he graduated from college, and he received a clearance six months later. He had some problems transitioning from college life to the demands of the workplace. Two months after being hired, he began smoking marijuana regularly and

frequently, even though he knew drug use violated his company's policy. While he is a talented engineer, he appears to have lacked maturity and appreciation for the responsibilities of adulthood and a security clearance. He enjoyed and actively participated in the camaraderie of his marijuana-smoking friends, demonstrating a lack of appreciation for the trust and confidence implicit in the granting of a security clearance. He further demonstrated his immaturity when he lied on his application for a higher level of clearance. He needs to establish a track record of maturity, reliability, and good judgment to overcome the doubts his marijuana use and lack of candor have raised.

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 not mitigated the security concerns based on drug involvement, personal conduct, and criminal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings for or against Applicant on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

Paragraph 1, Guideline H (Drug Involvement):	AGAINST APPLICANT
Subparagraphs 1.a-1.d:	Against Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraphs 2.a-2.c:	Against Applicant
Paragraph 3, Guideline J (Criminal Conduct):	AGAINST APPLICANT
Subparagraphs 3.a-3.b:	Against Applicant

Conclusion

In light of all of the circumstances, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge