



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-16370
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Fahryn Hoffman, Esq., Department Counsel  
For Applicant: *Pro se*

February 23, 2010

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

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

**Statement of the Case**

Applicant submitted a security clearance application on February 10, 2006. On July 27, 2009, 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 and E. 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 received the SOR on July 29, 2009; answered it on August 13, 2009; and requested a hearing before an administrative judge. DOHA received the request on August 25, 2009. Department Counsel was ready to proceed on October 16, 2009, and the case was assigned to me on October 20, 2009. DOHA issued a notice of hearing on October 27, 2009, scheduling the hearing for November 18, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through C, which were admitted without objection. I kept the record open until December 4, 2009 to enable Applicant to submit additional evidence. He timely submitted AX D through G. DOHA received the transcript (Tr.) on November 30, 2009.

### **Findings of Fact**

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a, 1.b, 1.d, 2.a, 2.b, and 3.a. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 28-year-old electronic maintenance technician employed by a defense contractor since February 2004. His father worked for the U.S. government for 26 years and married a foreign national while assigned overseas. Applicant was born and raised overseas.

Applicant began using marijuana occasionally while he was in high school, about once every two months (Tr. 55). He stopped using marijuana in January 2000, when he enlisted in the U.S. Navy (Tr. 58). He received a security clearance in January 2001, but it was revoked in 2002. He believes his clearance was revoked because he was born and raised in a foreign country, his mother is a dual national, and he was briefly married to a foreign national (Tr. 36, 40-42). His wife returned to her native country in 2002, and they are now divorced (Tr. 37).

Applicant became disenchanted with the Navy because he could not work as an electronics technician without a clearance. He did not use any illegal substances until October 2003, when he absented himself without authority for about three weeks to visit his girlfriend, who was addicted to cocaine (Tr. 61-62). He used cocaine three or four times during his last week with his girlfriend (Tr. 66-67).

In October 2003, Applicant tested positive for cocaine in a urinalysis conducted after he returned from his unauthorized absence (GX 7 at 9; Tr. 47). In October 2003, he received nonjudicial punishment for unauthorized absence (GX 7 at 4). In November 2003, he received nonjudicial punishment for wrongful use of a controlled substance (as a result of the urinalysis) and assault (GX 7 at 5). The assault occurred during a confrontation with a first class petty officer (Tr. 52). In December 2003, he was discharged from the Navy under other than honorable conditions (GX 7 at 1, 6-8).

In February 2004, about two months after he was discharged from the Navy, he was hired by his current employer (Tr. 65). He used ecstasy for the first time at a party in March or April 2004 (Tr. 70), and he continued to use it once or twice a month until he was arrested in October 2004 (Tr. 72). During the same period, he occasionally used crystal methamphetamine as a stimulant in the morning (GX 5 at 7; Tr. 80).

On September 29, 2004, Applicant sold 45 ecstasy pills to an undercover police detective for \$640. On October 19, 2004, he sold 100 ecstasy pills to the same detective for \$1,650. On October 29, 2004, he met the same detective to consummate a sale of 300 ecstasy pills for \$3,300. Applicant was arrested after delivering the pills to the detective. Written statements from the detective reflect that Applicant was willing to sell cocaine, crystal methamphetamine, pharmaceuticals, and mushrooms. Applicant's residence was searched and several plastic bags of ecstasy pills and crystal methamphetamine were seized (GX 5 at 1-13).

In December 2004, Applicant was indicted for possession of a controlled substance with intent to distribute. He testified he was selling ecstasy to generate funds to pay his girlfriend's medical bills and to buy drugs. He denied selling methamphetamine but admitted he possessed it at the time of his arrest (Tr. 75). He pleaded guilty in June 2005. In September 2005, he was sentenced to incarceration for 15 years and fines totaling \$3,000, with all but nine months of the incarceration and all but \$1,000 of the fines suspended. The suspensions were conditioned on good behavior for 10 years and supervised probation to begin upon release from incarceration and to continue until released by his probation officer. His driver's license was restricted, and he was ordered to serve the nine-month unsuspended sentence on work release (GX 4 at 1; GX 5 at 14-15).

While on work release, Applicant worked as an informant for the police and drug enforcement authorities. He and his girlfriend broke up while he was on work release (Tr. 70). He was able to continue working for his current employer while on work release (Tr. 82). He testified his supervisors were aware of his prior drug involvement and were very supportive. He was released from supervised probation on January 14, 2008 (AX E).

Applicant testified he did not undergo any drug treatment (Tr. 91). There is no evidence that he was addicted to any illegal substances. He testified he has not used illegal drugs since his arrest in October 2004 (Tr. 89). He does not associate with drug users (Tr. 91-92). He has a new girlfriend, the daughter of a pastor (Tr. 92).

Applicant testified his family knows about his discharge from the Navy and his criminal record. They were not pleased, but they have been supportive. Applicant testified that he has "really good" parents (Tr. 64).

Applicant's annual performance evaluation for the year ending on December 1, 2005, rated him as "satisfactory" in eight categories; somewhat deficient in orderliness; and "exceptional" in quantity, accuracy, appearance, courtesy, cooperation, and

attendance (AX C). His performance appraisal for the period ending in December 2006 rated him as “satisfactory” in seven categories; “exceptional” in knowledge, quantity, appearance, courtesy, and attendance; and “clearly outstanding” in cooperation (AX B). His performance appraisal for the period ending in December 2007 rated him as “satisfactory” in nine categories and “exceptional” in knowledge, accuracy, appearance, courtesy, cooperation, and stability (AX A). His appraisal for the period ending in November 2008 used a different format and rated him on specific job tasks. He received an overall rating of “commendable,” one level below the highest rating on a five-level scale (AX D). His appraisal for the period ending in December 2009 awarded him a numerical rating of 48 on a 60-point scale, between “exceptional” (45 points) and “clearly outstanding” (60 points) (AX G).

Applicant’s supervisor submitted a letter stating that Applicant has “overcome great odds from his past poor judgment” and become a person of integrity and resilience and a very valuable member of the organization (AX F). The same supervisor also testified at the hearing. He holds a top secret clearance and has worked for the same company for 13 years. He has known Applicant since 2004 and been his supervisor for two years. Applicant showed him the SOR. Before reading the SOR, Applicant’s supervisor was aware that Applicant had “some issues” in the Navy, but he did not know the details. He has met Applicant’s parents, had dinner with them, and traveled with Applicant on company business. He testified that Applicant is not the person described in the SOR. Instead, he has been a good worker who tends to go beyond what is required and a dependable person (Tr. 103-111).

### **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 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 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 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 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

### Guideline H, Drug Involvement

The SOR alleges Applicant tested positive for cocaine in a urinalysis on or about October 20, 2003 (SOR ¶ 1.a); used cocaine on at least four occasions from October 5, 2003, through October 29, 2004 (SOR ¶ 1.b); used marijuana from the age of 15 through at least October 2004 (SOR ¶ 1.c); and used ecstasy up to three times during 2004 (SOR ¶ 1.d). The SOR also cross-alleges the criminal conduct in SOR ¶¶ 2.a and 2.b (SOR ¶ 1.e).

The following disqualifying conditions are raised by the evidence:

AG ¶ 25(a): any drug abuse, which is 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”;

AG ¶ 25(b): testing positive for illegal drug use; and

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

AG ¶ 25(g) (any illegal drug use after being granted a security clearance) is not raised because Applicant's marijuana use occurred before he received a clearance in January 2001, and his use of other illegal substances occurred after his clearance was revoked in 2002.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (b), 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 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). Applicant's drug involvement was frequent and did not happen under such circumstances that make recurrence unlikely. Thus, the analysis turns on the first prong of ¶ 26(a) ("happened so long ago"), which 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.*

Applicant's last drug involvement was in October 2004, more than five years ago. Even though his sentence for drug-trafficking included an indefinite period of supervised probation, his supervised probation was terminated in January 2008, more than two years ago. The requirement for good behavior for ten years, condition for his suspended sentence to imprisonment, will not be fully satisfied for four more years.

With the exception of his experimentation with marijuana at age 15, all of his drug involvement and military misconduct occurred during a short period while he was involved with a cocaine-addicted girlfriend. Applicant terminated his relationship with this girlfriend, found a new girlfriend, continued to perform well at his place of employment, and voluntarily used his after-work confinement time to encourage young inmates to find a new drug-free lifestyle. He has gained the respect of his colleagues and supervisors. His sincerity and remorse were obvious during the hearing. I am satisfied that he is rehabilitated. Accordingly, I conclude that AG ¶ 26(a) is 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). Applicant has established AG ¶ 26(b)(1) and (3).

## **Guideline J, Criminal Conduct**

The SOR alleges Applicant received nonjudicial punishment for wrongful use of a controlled substance in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a, and assault in violation of Article 134, UCMJ, 10 U.S.C. § 934 (SOR ¶ 2.a). It also alleges he was convicted of three counts of a violation of state law by possessing, selling, and distributing a controlled substance (SOR ¶ 2.b).

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.” 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). Applicant's record of nonjudicial punishment in the Navy and violation of state law after his discharge from the Navy are sufficient to 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). For the reasons set out above in my discussion of AG ¶ 26(a) under Guideline H, I conclude this mitigating condition is established.

Security concerns based on criminal conduct may be mitigated if “the person was pressured or coerced into committing the act and those pressures are no longer present in the person's life.” AG ¶ 32(b). Applicant was not pressured or coerced in the usual sense of threats or illegal inducements, but his misguided devotion to his girlfriend motivated him to use illegal drugs and to sell drugs to finance her medical treatment and buy more drugs. He terminated their relationship while he was serving his term of work release, and he is now involved in a more wholesome romantic relationship. I conclude AG ¶ 32(b) is established.

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 above in my discussion of AG ¶¶ 26(a) and (b), I conclude this mitigating condition is established.

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

The SOR alleges Applicant was discharged from the Navy under other than honorable conditions due to misconduct and drug use (SOR ¶ 3.a). It also cross-alleges the criminal conduct in SOR ¶¶ 2.a and 2.b as personal conduct (SOR ¶ 3.b). The concern under this guideline is that “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.” AG ¶ 15.

SOR ¶ 3.a, alleging Applicant’s discharge from the Navy, does not allege an independent basis for security concerns. Instead, it alleges only the consequences of Applicant’s misconduct in the Navy. Unlike a dishonorable discharge or dismissal from the service, which are punitive separations from the service that be imposed only by a court-martial, and which trigger a specific disqualification under Guideline J, an other than honorable discharge is an administrative separation and does not establish an enumerated disqualifying condition.

The following disqualifying conditions under this guideline are raised by the criminal conduct alleged in SOR ¶ 2.a and 2.b and cross-alleged under this guideline in SOR ¶ 3.a:

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;

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; and

AG 16(g): association with persons involved in criminal activity.

Applicant's association with persons involved in criminal activity, i.e., his drug-using girlfriend, and the drug sellers and drug buyers he dealt with, was not specifically alleged in the SOR. I have considered this conduct for the limited purpose of deciding which adjudicative guidelines are applicable; to evaluate evidence of extenuation, mitigation, or changed circumstances; to consider whether Applicant has demonstrated successful rehabilitation; and as part of my whole-person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (citations omitted).

Security concerns based on 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). For the reasons set out above in my discussions of AG ¶ 26(a) under Guideline H and AG ¶ 32(a) under Guideline J, I conclude this mitigating condition is 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 acknowledged his behavior. He has not obtained counseling, but he has eliminated the circumstances that motivated his behavior by terminating his relationship with his cocaine-addicted girlfriend.

Security concerns 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 made full disclosure of his drug-related problems to his supervisors and his family.

Finally, security concerns may be mitigated if "association with persons involved in criminal activity has ceased." AG ¶ 17(g). This mitigating condition is established because Applicant broken contact with his former girlfriend and he has not been involved in using, buying, or selling drugs since October 2004.

### **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, J, and E 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 now a mature adult. He is blessed with a supportive family and an understanding and supportive employer. His temporary lapse into a drug-involved lifestyle was prompted by his unwise involvement with a cocaine-addicted girlfriend. That relationship and lifestyle are behind him. He was fortunate to have been arrested before he fell deeper into a drug-centered lifestyle. There is no evidence that he became addicted to any illegal substances. He has evolved into a trusted and dependable employee who enjoys the respect of his supervisors.

After weighing the disqualifying and mitigating conditions under Guidelines H, J, and E, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve doubtful cases in favor of national security, I conclude Applicant has mitigated the security concerns based on drug involvement, criminal conduct, and personal conduct. Accordingly, I conclude he has 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.e:	For Applicant
Paragraph 2, Guideline J (Criminal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Paragraph 3, Guideline E (Personal Conduct):

FOR APPLICANT

Subparagraphs 3.a-3.b:

For Applicant

**Conclusion**

In light of all of the circumstances, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge