



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-16944
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Allison O'Connell, Esquire, Department Counsel  
For Applicant: *Pro Se*

July 28, 2008

**Decision**

ABLARD, Charles D., Administrative Judge:

Applicant failed to mitigate security concerns regarding Guidelines H. Clearance is denied.

**Statement of the Case**

On June 6, 2007, Applicant submitted an Electronic Questionnaires For Investigations Processing (e-QIP) also known as Security Clearance Application (SF 86). On March 12, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, 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. The SOR alleges security concerns under Guidelines H.

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 a security clearance for him, 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 in a sworn statement signed on March 30, 2008, and elected to have his case decided on the written record in lieu of a hearing. Documents were attached to the answer with explanatory information. A complete copy of the file of relevant material (FORM), dated May 1, 2008, was provided to him, and he was afforded an opportunity to file objections and submit material in refutation, extenuation, or mitigation. Applicant provided an additional statement dated June 1, 2008. The case was assigned to me on June 16, 2008.

### **Findings of Fact**

Applicant admitted all three of the allegations in his answer to the SOR, and offered explanations. After a complete and thorough review of the evidence of record, I make the following findings of fact:

Applicant is 51 years old. He has been an employee of a defense contractor since May 2007 working as a senior software engineer. He was unemployed for six months before obtaining his present job. He holds a B.S. degree in electrical engineering from a prominent engineering school on the east coast. He has never been married.

Applicant admitted use of marijuana with varying frequency for 30 years from 1977 when he was a sophomore in college until March 2007 when he was employed in his present position. He stopped using marijuana when he was preparing to file an application for a security clearance. He also has purchased marijuana at various times during his use. His use of marijuana declined after 1987 to once a month on weekends or when attending concerts (Exh. 6). All of the evidence proving the allegations was provided by Applicant in his interrogatory in an effort to be forthcoming in connection with his SF 86.

Applicant is pleased that he no longer uses marijuana and has had no difficulty in ceasing its use. He has no intention of using the drug in the future and it has had no impact on his work or health. He still associates with the friends with whom he used marijuana, but only one of them continues to use it. His family and co-workers are aware of his past use.

### **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," 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).

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 *a/so* 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 that the following Adjudicative Guidelines provide the standard for resolution of the allegations set forth in the SOR.

## Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern pertaining to drug involvement:

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.

(a) Drugs are defined as mood and behavior altering substances, and include:

(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).

(b) 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 ¶ 25 describes several conditions that could be applicable to this matter, raise a security concern, and may be disqualifying:

(a) any drug abuse (see above definition);

(b) testing positive for illegal drug use;

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

(d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;

(f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;

(g) any illegal drug use after being granted a security clearance; and,

(h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

AG ¶ 26 provides conditions that could mitigate security concerns:

(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,

(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.

While Applicant provided candid responses in his answer and to the interrogatories, his admission of regular drug use over such an extended period of time raises serious questions as to his judgment. The period of time of abstention is insufficient to justify application of the abstinence criteria. While he continues contacts with his friends with whom he used marijuana, only one continues to use it. This is problematic as to whether this condition provides mitigation. Other MCs are inapplicable. He continued to use marijuana for thirty years into adulthood and well after completing college. There is insufficient evidence of rehabilitation to apply the mitigating conditions. It is premature to grant a security clearance

### **Whole Person Concept**

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 did not provide sufficient evidence to mitigate the disqualifying conditions previously discussed through application of the whole person concept. 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 allegations. He has made some progress in changing his conduct, but the conduct alleged occurred well into adulthood so it cannot be attributed to youthful indiscretions. He has been totally abstinent for only 16 months.

I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), a careful consideration of the whole person factors and supporting evidence, application of the pertinent factors under the adjudicative process, and 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 For 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

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Clearance is denied.

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Charles D. Ablard  
Administrative Judge