



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



In the matter of:)	
)	
)	ISCR Case No. 07-18823
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Daniel F. Crowley, Esquire, Department Counsel
For Applicant: *Pro Se*

October 7, 2008

Decision

LAZZARO, Henry, Administrative Judge

Applicant mitigated the security concern caused by his misuse of controlled substances while possessing a security clearance.

On July 8, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges security concerns under Guideline H (drug involvement). Applicant submitted a response to the SOR, dated July 26, 2008, admitted both SOR allegations and requested a decision based on the written record without a hearing.

Department Counsel prepared a File of Relevant Material (FORM) on August 20, 2008, that was received by Applicant on August 28, 2008. Applicant submitted a response to the FORM, dated September 17, consisting of a cover letter with five attachments.

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

Those documents were marked as Applicant Exhibits (AE) 1-6, and made part of the record without objection. The case was assigned to me on September 24, 2008.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings and exhibits, I make the following findings of fact:

Applicant is a 44-year-old man who has been employed as an electrical engineer by a defense contractor since July 1991. He has held a security clearance since about February 1996. He attended graduate school from January 1999 to December 2001, but did not complete the course work for award of the masters degree in English he had been pursuing. He submitted letters of recommendation from a co-worker, a friend and a minister attesting to his reputation as a patriotic, dependable, honest and trustworthy individual.

Applicant was married in June 1990. That marriage ended in divorce in October 1993. He has been remarried since October 2005. He has one child who was born in October 2007.

Applicant used marijuana on approximately four occasions between March and July 2006. Each use occurred while he was attending social functions at the homes of his wife's friends and consisted of his taking a couple of "hits" from a cigarette or pipe that was being passed around. He stopped using marijuana in July 2006 because he did not like it and it had little to no effect on him. Applicant's wife used marijuana on a fairly regular basis at the time, but she stopped using marijuana sometime between July and September 2006 because they wanted to start a family.

Applicant and his wife have changed residences since they last used marijuana and no longer remain in close contact with the persons with whom they previously shared marijuana. They have determined their household will remain drug free and they are determined to set a good example for their child. Applicant executed an affidavit entitled: *Statement of Intent with Automatic Revocation of Clearance for any Violation* on September 17, 2008. (AE 1) In it, he has agreed to submit to random drug testing and to an automatic revocation of his clearance for any violation of any policy contained in the Directive.

Applicant also used a prescription drug that had not been prescribed for him on at least six occasions between June 2005 and April 2006. In 2005, Applicant told his wife's sister-in-law that he had been experiencing chest pains as a result of stress at work and planning for his upcoming marriage. The sister-in-law provided him the unused tablets of a prescription medicine that had been prescribed for her for similar symptoms. He used the last of those pills in April 2006, and then saw his own physician who prescribed a different anti-stress medication for him. He took the medication that was prescribed for him for about a month but has been undergoing chiropractic therapy since. He asserts his change

of attitude, coupled with his willingness to seek continued medical assistance, has had a positive permanent affect on his physical and mental health.

Applicant disclosed his illegal use of both controlled substances in an Electronic Questionnaire for Investigations Processing (e-QIP) he submitted in or about August 2006. He also candidly discussed his use of the drugs when he was interviewed about them in January 2007, and in his responses to the SOR and the FORM.

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline H (drug involvement), with its disqualifying and mitigating conditions, is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.² The government has the burden of proving controverted facts.³ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁴ although the government is required to present substantial evidence to meet its burden of proof.⁵ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁶ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁷ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁸

² ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

³ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁴ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁵ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁶ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁷ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁸ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

No one has a right to a security clearance⁹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹⁰ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹¹

Analysis

Guideline H, 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.

Applicant used marijuana approximately four times and a prescription drug that had not been prescribed for him about six times in 2005-06. He possessed a security clearance at all times while abusing these drugs. Disqualifying Conditions (DC) 25(a): *any drug abuse*; and DC 25(g): *any illegal drug use after being granted a security clearance* apply.

The last time Applicant misused either drug was July 2006. There is nothing in the record to suggest he ever misused a controlled substance before or after the relatively brief period between June 2005 and July 2006. His use of marijuana was situational in that it occurred at social events he attended with his then new wife. It ended after a few experiments with the drug that he found he disliked and which had little to no effect on him. Applicant’s misuse of the prescription drug was likewise situational. The misused drug was replaced by properly prescribed medication and all pain/stress medication used by Applicant has now been replaced by chiropractic care.

Since Applicant misused the two controlled substances, he has become a father, he has averred his household will be drug free, he and his wife have determined they will not misuse controlled substances in the future, and he and his wife have minimal contact with the persons with whom they shared drugs in the past. It is extremely troubling that Applicant misused controlled substances while in possession of a security clearance. However, and to his credit, he freely disclosed the abuse in the e-QIP he submitted and during his follow-up interview and in his responses to the SOR and the FORM.

Considering the situational circumstances when and under which Applicant used marijuana and the prescription drug, the relatively short time period during which he used both drugs, the changes in his life since his last misuse of a controlled substance, including fatherhood, his minimal continuing contacts with the persons with whom he and his wife shared marijuana, and his commitment to and apparent relief from chiropractic care as a

⁹ *Egan*, 484 U.S. at 528, 531.

¹⁰ *Id* at 531.

¹¹ *Egan*, Executive Order 10865, and the Directive.

substitute for any medication, his and his wife's unequivocal assertion to remain drug free in the future, and his execution of the document entitled: *Statement of Intent with Automatic Revocation of Clearance for any Violation*, I find Mitigating Conditions (MC) 26(a): *the behavior happened so long ago . . . 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*; and MC 26(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; (4) a signed statement of intent with automatic revocation of clearance for any violation* apply.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, to include Applicant's letters of recommendation, his lengthy employment with a defense contractor, the number of years he has held a security clearance without any other reported violations, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, Applicant has mitigated the security concern caused by his drug involvement. He has overcome the case against him and satisfied his ultimate burden of persuasion. Guideline H is decided for Applicant. It is clearly consistent with the national interest to grant Applicant a security clearance.

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: FOR APPLICANT

Subparagraphs 1.a & b: For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

Henry Lazzaro
Administrative Judge

