



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-03974
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Francisco Mendez, Esq., Department Counsel
For Applicant: Greg D. McCormack, Esq.

November 24, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on August 19, 2006. On May 8, 2009, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct). 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 May 18, 2009; answered it on June 25, 2009; and requested a hearing before an administrative judge. DOHA received the request on July

23, 2009. On July 29, 2009, Department Counsel withdrew the allegations under Guideline E. Department Counsel was ready to proceed on July 31, 2009, and the case was assigned to me on the same day. DOHA issued a notice of hearing on August 6, 2009, scheduling the hearing for September 1, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 7 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through G, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 14, 2009.

Findings of Fact

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

Applicant is a 34-year-old employee of a defense contractor, working overseas as a network controller. He has worked for his current employer since May 2006. He received a clearance in September 1996 and has held it continuously until the present (Tr. 9).

Applicant began using marijuana in high school, using it at least once a week (GX 7 at 8). In 1994, after he graduated from high school, he started using marijuana one to three times a week, cocaine one to two times a year, methamphetamine two to four times a month, and he used lysergic acid diethylamide (LSD) about five times (GX 7 at 8; Tr. 30). In October 1994, he recognized he was "in a bad state," and he voluntarily entered and completed a two-week, inpatient treatment program (Tr. 31). He completed an outpatient aftercare program, consisting of group counseling, in February 1995.

Applicant served on active duty in the U.S. Army from April 1996 to August 1998, and was released from active duty as a sergeant (pay grade E-5). He received a Certificate of Achievement in March 1998 (AX B-8), and he was twice awarded the Army Achievement Medal (AX B-3; AX B-4). He was discharged early to accept an Army Reserve Officer Training Corps (ROTC) scholarship (AX B-9; AX B-10).

In 1999, while attending college, Applicant resumed his marijuana use. He estimated he used it 10 to 15 times at social occasions at parties and in connection with alcohol consumption (Tr. 33-34; GX 3 at 4-5). He dropped out of college after one semester and discontinued his participation in ROTC (Tr. 37). He was in the individual ready reserve (IRR) from the date of his release from active duty until he joined an active U.S. Army Reserve (USAR) unit in January 2003.

Applicant was charged with drunken driving in February 2004. He attended a two-day group counseling program for alcohol abuse, mandated as a result of the charge of drunken driving (GX 3 at 2).

Applicant's USAR evaluation report for the period from September 2004 through August 2005 rated him as "among the best" and recommended assignment to greater responsibilities (AX A-1). His evaluation report for the period from September 2005 to January 2006 rated him as "fully capable" and described him as mature and conscientious (AX A-2). He was awarded the Joint Service Achievement Medal in November 2005 (AX B-2). In March 2006, he received a Commanding General's Certificate of Appreciation (AX B-5). Later in the same month, he participated in an unannounced urinalysis administered by his USAR unit, and he tested positive for marijuana. An action to administratively discharge him for drug involvement was initiated but apparently never completed. He was held past his discharge date and eventually discharged from the USAR in January 2007 with a general discharge under honorable conditions (GX 7 at 9; AX F).

Applicant last used an illegal substance in March 2006, after returning from a deployment with his USAR unit (GX 3 at 4; Tr. 15). In June 2006, shortly after he began working for his current employer, he voluntarily enrolled in an outpatient substance abuse program. Upon entering the program, he was diagnosed as alcohol dependent and nicotine dependent (AX D-2). He completed the program in August 2007 (GX 3 at 2). Although he was advised to participate in Alcoholics Anonymous when he entered the program, he does not participate in Alcoholics Anonymous or any similar organization (GX 3 at 2). He testified he last consumed alcohol on December 31, 2008, when he had a single beer with his brother (Tr. 43). He intends to limit his alcohol consumption to a single beer or glass of wine on an occasional special event (Tr. 45).

Applicant's 2007 performance appraisal from his current employer rated him as consistently exceeding expectations in his quality of work. His overall rating described him as meeting and occasionally exceeding expectations (AX C-1). His 2008 performance appraisal rated him as meeting and occasionally exceeding expectations in all performance factors (AX C-2).

On December 8, 2008, Applicant obtained a follow-up assessment of his substance abuse. He was diagnosed as alcohol dependent in sustained full remission. The prognosis was "good given his current lifestyle." Neither his diagnosis in June 2006 nor his evaluation in December 2008 mentioned any drug dependence (AX D-1). At the hearing, he presented a signed statement of intent to refrain from future drug abuse, with provision for automatic revocation of his clearance for any future drug abuse. In his statement, he declared that he had not used marijuana since March 2006 and had not used any other illegal substances since 1994 (AX E).

Applicant now lives and works overseas, and he has made new friends from among his co-workers. He does not associate with heavy drinkers or drug-users (Tr. 42). He is in a serious relationship with a young woman, and they are awaiting the birth of their child in December 2009 (Tr. 42, 55).

Applicant's colleagues and supervisors uniformly hold him in high regard, commenting on his intelligence, dependability, honesty, loyalty, and integrity (AX G-1

through G-13). His site manager considers him a valuable asset (AX G-1). Another site manager commented on his trustworthiness and reliability (AX G-9). A colleague commented on his sound moral judgment (AX G-5). A friend mentioned his “rock-steady” sound judgment (AX G-8). One colleague described him as a model employee (AX G-11). His site manager and one of his colleagues believe he participates in Alcoholics Anonymous (AX G-1 and AX G-7), but this belief is contradicted by Applicant’s responses to DOHA interrogatories on August 1, 2008 (GX 3 at 2). His mother and brother describe him as a changed person who is now focused on the future (AX G-12 and G-13).

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 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).

The following disqualifying conditions are relevant:

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”;

AG ¶ 25(c): “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution”; and

AG ¶ 25(g): “any illegal drug use after being granted a security clearance.”

All these disqualifying conditions are raised by the evidence, 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).

Although Applicant was evaluated for substance abuse on several occasions and diagnosed as alcohol dependent, there is no evidence he was ever diagnosed as a drug abuser or drug dependent. Thus, AG ¶ 25(d) (“diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence”) and AG ¶ 25(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”) are not raised.

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 recency 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 most recent marijuana use was in March 2006, three and a half years ago. He voluntarily entered and completed a drug treatment program after he was discharged from the USAR and began his current employment. He found new friends, changed his environment, and demonstrated his intention to remain drug-free. He is well regarded by his colleagues, superiors, and friends. I conclude 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 all four indicia of “demonstrated intent” under this mitigating condition.

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). Applicant voluntarily entered substance abuse treatment programs in October 1994 and in June 2006. Neither was “prescribed” by a medical professional. He was diagnosed in October 1994 as alcohol dependent,

but neither program diagnosed him as suffering from drug dependence or drug abuse. He successfully completed both programs. His follow-up evaluation in December 2008 also diagnosed him as alcohol dependent in full remission, but made no mention of drug abuse or drug dependence. The favorable diagnosis in December 2008 referred only to his alcohol dependence, and it was made before he consumed alcohol on December 31, 2008. Applicant receives some credit under this mitigating condition, but it is not fully 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 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 Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant was sincere, candid, and remorseful at the hearing. He is a talented network controller, respected by his colleagues, supervisors, and friends. His drug and alcohol problems peaked shortly after he graduated from high school, but he recognized his problem and sought help in October 1994. After a successful tour of active duty in the Army, he started attending college, but he fell back into his pattern of substance abuse and dropped out of school. He last used marijuana in March 2006. When he was offered his current job, he voluntarily entered another outpatient treatment program. He does not participate in AA or any similar organization, but he has new friends, a job he finds rewarding, a serious romantic relationship, and a child soon to be born.

Applicant's alcohol dependence and alcohol-related misconduct was not alleged in the SOR, but his marijuana use frequently was in conjunction with alcohol consumption. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006) (Uncharged misconduct may be considered as part of whole-person analysis.). He has decided to consume alcohol infrequently and in moderation, thereby undermining the premise of his recent diagnosis as alcohol dependent in full remission. Nevertheless, he has clearly

demonstrated his intent to leave his hard-drinking, drug-using lifestyle behind. By submitting his statement of intent, he has agreed to self-imposed probation, putting his job and his future on the line if he uses any illegal substances in the future.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on drug involvement. Accordingly, I conclude he has 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 on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement): FOR APPLICANT

Subparagraphs 1.a-1.e: For Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge