



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



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

Appearances

For Government: Robert E. Coacher, Esq., Department Counsel
For Applicant: *Pro se*

January 30, 2009

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 denied.

Statement of the Case

Applicant submitted a security clearance application on April 27, 2007. On August 12, 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 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 September 30, 2008; answered it on October 15, 2008; and requested a hearing before an administrative judge. DOHA received the request on October 20, 2008. Department Counsel was ready to proceed on November 5, 2008, and the case was assigned to me on the same day. DOHA issued a notice of hearing on November 17, 2008, scheduling the hearing for December 9, 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. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on December 18, 2008.

Findings of Fact

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

Applicant is a 21-year-old apprentice electrician employed by a defense contractor (Tr. 27). He is in a leadership position where he supervises three or four other workers (Tr. 28). He has worked for his current employer since October 3, 2005. He has a high school education, was married in October 2007, and has a 16-month-old daughter (Tr. 28-29). He has never held a security clearance.

Applicant overdosed on an over-the-counter antihistamine in September 2004. He was diagnosed as suffering from depression and received treatment and counseling from October through December 2004. His doctor prescribed an antidepressant that appeared to be effective, but he stopped taking it in February 2005, because he was feeling better and his father was opposed to him taking medications to improve his mood (GX 3 at 4; Tr. 38).

Applicant used marijuana about ten times between September 2004 and January 2005, while he was in high school. He testified he first used it because of peer pressure, but he continued to use it because it relieved his depression (Tr. 42-43).

In June 18, 2007, after Applicant had submitted his security clearance application, he and his three associates were stopped by police because his car windows were tinted too darkly. The police searched his car and found a small quantity of marijuana. At the hearing, he admitted smoking one marijuana cigarette on that date (Tr. 30-31). On July 10, 2007, he was sentenced as a first offender and fined about \$160, placed on supervised probation for six months, and ordered to perform 24 hours of community service. His driver's license was restricted for six months. His probation ended in December 2007. When interviewed by a security investigator in January 2008, he told the investigator only his friends who were with him on June 18, 2007 knew about his marijuana use (GX 3 at 5).

In response to DOHA interrogatories on May 27, 2008, Applicant answered "yes" to the question, "Do you intend to use narcotics, dangerous drugs, psychoactive or controlled substances, to include marijuana or hashish in the future?" He testified that

he probably misread the question and that he does not intend to use marijuana in the future (Tr. 32).

At the hearing, Applicant testified he used marijuana on June 18, 2007, to relieve stress, because his then-fiancée's parents were upset that she was pregnant (Tr. 34). He testified he had not used marijuana since his arrest in June 2007 and he does not intend to use it again (Tr. 32). He believes he can now handle the stress in his life because he is in a happy marriage and has resumed taking a prescription antidepressant (Tr. 36). He believes he would be fired from his job if he used marijuana again (Tr. 44).

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

Guideline H (Drug Involvement)

The SOR alleges Applicant used marijuana from September 2004 to “at least” July 2007 (¶ 1.a); was charged in June 2007 with possession of marijuana and was convicted (¶ 1.b); used marijuana in July 2007 after submitting his security clearance application (¶ 1.c); intends to continue to use drugs, including marijuana in the future (¶ 1.d); and is disqualified from holding a security clearance under 50 U.S.C. § 435c because he is a current drug user (¶ 1.e).

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 behavior involving “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). Marijuana is a Schedule I controlled substance.

The relevant disqualifying conditions under this guideline are AG ¶¶ 25(a), (c), (g), and (h). AG ¶ 25(a) is raised by “any drug abuse.” AG 25(c) is raised by “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution.” AG ¶ 25(g) is raised by “any illegal drug use after being granted a security clearance.” AG ¶ 25(h) is raised by an “expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.” Applicant’s use of marijuana in high school and again in June 2007 raises AG ¶¶ 25(a) and (c). AG ¶ 25(g) is not raised because he did not have a clearance when he used marijuana. AG ¶ 25(h)

was raised by Applicant's response to DOHA interrogatories in May 2008 indicating his intent to continue using marijuana.

SOR ¶ 1.c, alleging Applicant's use of marijuana after applying for a security clearance, does not raise any enumerated disqualifying conditions other than those raised by SOR ¶ 1.b, which is cross-alleged in SOR ¶ 2.a. To avoid duplicative allegations, I have resolved SOR ¶ 1.c in Applicant's favor and resolved the underlying security concerns under Guideline E.

An applicant "who is an unlawful user of a controlled substance or an addict" is disqualified from holding or receiving a clearance. 50 U.S.C. § 435c. The allegation in SOR ¶ 1.e was based on Applicant's affirmative response to the DOHA interrogatory in May 2008, asking if he intended to use drugs in the future. He repudiated that response at the hearing, testifying that he probably misread the question. I found his repudiation implausible and unconvincing. I believe it more likely that Applicant was still ambivalent about using marijuana when he responded to the DOHA interrogatories in May 2008.

When Applicant received the SOR in August 2008, he realized that his security clearance and his job were in jeopardy. Shortly thereafter, he resumed use of antidepressants, and he no longer relied on marijuana to relieve his depression. He testified at the hearing he had not used marijuana since June 2007, and there is no evidence of use after that date. He believes he would be fired if he was found to have used marijuana again. Notwithstanding Applicant's response to DOHA interrogatories in May 2008, I conclude he is not a current user of marijuana. Therefore, I conclude he has refuted the allegation in SOR ¶ 1.e and is not statutorily disqualified from being granted a clearance.

Even though Applicant is not statutorily disqualified, the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a) and (c), shifting the burden 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). 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.*

At the time of the hearing, Applicant had abstained from using marijuana for about 18 months and had been off probation for about a year. However, I am satisfied he did not decide to stop using marijuana until sometime between May 2008 (the date of the DOHA interrogatories) and the hearing. In light of his history of substance abuse starting with his abuse of an over-the-counter antihistamine in September 2004, his regular use of marijuana until January 2005, his use of marijuana in June 2007 in response to a bout of depression, and his ambivalent response to DOHA interrogatories in May 2008, I conclude that insufficient time has passed to demonstrate his rehabilitation. Thus, I conclude the first prong of AG ¶ 26(a) is not established.

The second prong (“so infrequent”) also is not established because of his repeated use of marijuana. The third prong (“under such circumstances that it is unlikely to recur”) is not established because Applicant continues to require medication to control his depression and he has an erratic record of compliance with medical advice regarding use of prescription medications to control it. The final prong is not established because doubts remain about his current reliability and trustworthiness.

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). The first of these indicia is not established because there is no evidence he has stopped associating with his drug-using friends. The second is established, because he is no longer living at home, is married, has an infant daughter, and now works for a defense contractor. The third is not established because, as noted above, he has not abstained from using marijuana for a sufficient time to demonstrate rehabilitation. The fourth is not established because he did not submit a signed statement of intent. I conclude there is insufficient evidence “demonstrated intent” to fully establish AG ¶ 26(b).

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). Applicant received counseling and treatment after his abuse of an over-the-counter antihistamine, but he continued to abuse drugs, and there is no evidence of a favorable prognosis. Thus, I conclude AG ¶ 26(d) is not established.

Guideline E, Personal Conduct

SOR ¶ 2.a cross-alleges SOR ¶ 1.c (Applicant’s marijuana use after applying for a security clearance). 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.”

The relevant disqualifying conditions arising under this guideline for Applicant's drug involvement are AG ¶¶ 16(c), (d), (e), and (g).

AG ¶ 16(c) is raised by:

[C]redible 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) is raised by:

[C]redible 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.

AG 16(e) is raised by "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." Finally, AG ¶ 16(g) is raised by "association with persons involved in criminal activity."

Applicant's repeated use of marijuana, association with marijuana users, and illegal conduct that could affect his personal, professional, and community standing raise AG ¶¶ 16(c), (d), (e), and (g).

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). While Applicant's last marijuana use was arguably "minor" and was treated as such by the court, the remaining elements of this mitigating condition are not established by the evidence. As noted above under Guideline H, insufficient time has passed to determine whether his drug use will recur. His use of marijuana after applying for a security clearance casts 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 acknowledged his marijuana use. He has obtained medical assistance and resumed his use of prescription antidepressants instead of relying on marijuana to relieve his depression. However, it is too soon to determine whether his marijuana use will recur. Thus, AG ¶ 17(d) is not fully established.

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). The record does not reflect whether Applicant’s supervisors are aware of his marijuana use. During his security interview in January 2008, he told the investigator only his friends with whom he used marijuana in June 2007 are aware of his use of marijuana. I conclude AG ¶ 17(e) is not established. Even if his supervisors were aware of his previous drug use, security concerns would not be mitigated because of the applicability of AG ¶¶ 16(c), (d), and (g).

Finally, security concerns may be mitigated if “association with persons involved in criminal activity has ceased.” AG ¶ 17(g). There is no evidence in the record to support this mitigating condition.

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 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 a young man whose high school years were troubled by depression and use of marijuana. His use of marijuana while his security clearance application was

pending demonstrated bad judgment and immaturity. Since October 2007, he has worked in a job he enjoys. He appears happily married and willing to assume the responsibilities of a husband and father. He has resumed taking his medications regularly. He presented himself at the hearing as sincere. He may well have turned his life around, but it is too soon to determine if his checkered past is behind him.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, 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 and personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him eligibility for access to classified information. Future reconsideration may be warranted if he continues on his current path of abstinence from use of illegal drugs. See Directive ¶¶ E3.1.37 through E3.1.41 (reconsideration authorized after one year).

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
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	For Applicant
Subparagraph 1.d:	Against Applicant
Subparagraph 1.e:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge