



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 08-08222
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: John B. Glendon, Esq., Department Counsel
For Applicant: *Pro se*

August 19, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to drug involvement and personal conduct. Clearance is granted.

Statement of the Case

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP), on February 13, 2008. On March 5, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Applicant answered the SOR in writing on March 31, 2009. DOHA received the response on April 3, 2009, and Department Counsel was prepared to proceed on May

11, 2009. On May 13, 2009, the case was assigned to me. On May 14, 2009, DOHA issued a notice of hearing scheduling the hearing for June 5, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 and 2, which were received without objection. Applicant did not offer any exhibits at his hearing, but did testify on his own behalf. I held the record open until June 19, 2009 to afford the Applicant the opportunity to submit additional evidence. Applicant timely submitted AE A through C, which were received without objection. DOHA received the hearing transcript (Tr.) on June 18, 2009.

Findings of Fact

Applicant admitted all of the SOR allegations. His admissions are accepted as findings of fact. Applicant testified on his own behalf and I found his testimony to be credible.

Applicant is a 45-year-old senior secure systems engineer, who has been employed by a defense contractor since August 2008. His current employer acquired the intellectual property and staff of his previous employer where he had been employed since August 2001. GE 1, Tr. 20-21. He is pursuing a security clearance to enhance his flexibility to work on different projects within his company, and to "contribute and serve my country." Tr. 12, 21-26.

Applicant graduated from a prestigious high school in June 1981, and went on to attend an equally prestigious university for one semester in the fall of 1981. He did not pursue formal education beyond his one semester of college and described himself as "essentially self-educated." Tr. 16-17. He learned his trade by "exploring the system and the functionality and learning about it by practicing." Tr. 17. He also worked as a research associate for seven years in the computer science department of the university he attended for one semester. Tr. 17.

Applicant is not married, but has been involved in an ongoing 22-year relationship with the same woman, who is the mother of their two-year-old daughter. He describes this woman as his "partner," who is a university anthropology professor. Tr. 15-16, 18.

Applicant has never been charged with any felony, firearms, or explosives offense. He has not been charged with any minor or misdemeanor-type, non-traffic-related offenses in the last seven years. In the last seven years, he has not had any debts delinquent over 180 days, bankruptcy petitions, unpaid judgments, or unpaid liens. GE 1.

Drug Involvement

The underlying basis of Applicant's past drug involvement is derived from his self-disclosure and is not disputed. Summarized, his past drug use consists of: (1) from

February 2001 to December 2007, he used marijuana approximately 20 to 30 times; (2) in August 2001, he used ecstasy once; (3) until approximately August 1992, he used LSD five times; (4) and until approximately July 1997, he used mushrooms approximately four times. (SOR ¶¶ 1.a. through 1.d.) Applicant's use of drugs essentially ended in the mid-1990s except for his most recent use of marijuana in December 2007. Tr. 27-29. He credibly and fully disclosed the surrounding circumstances of past drug use.

Except for one occasion since his partner became pregnant with their daughter, Applicant has not used any form of drugs, "although opportunities have presented themselves in the 18 months since that event." Tr. 28-29. Even before Applicant's partner became pregnant, his interest in using drugs diminished:

And, as I have grown older, it's not something that is appealing or interesting for me as it was when I was younger. And, in the last three years, essentially, since the impending birth of my daughter, I would say that I, you know, certainly during the period that my partner was pregnant, you know, I also – and she was, you know, taking off from drinking, and smoking, and things like that, as well, I followed. And, at that point, more or less, you know, the illegal drug usage which, at that point, was just marijuana, was also something that I essentially, no longer did. Tr. 29-30.

Additionally, to comply with the requirements of a holding a security clearance, Applicant stated he does not now use drugs nor does he intend to use drugs in the future. Tr. 31-32. Since December 2007, he has declined all opportunities to smoke marijuana or use illegal drugs, and "ha[s] no trouble doing so." Tr. 32.

After his hearing, Applicant submitted a signed, sworn statement of intent, dated June 5, 2009, to continue abstaining from any drug abuse or other illegal use of drugs both presently and in the future, with the understanding that any drug violation will result in the automatic revocation of clearance. AE A.

Personal Conduct

The SOR cross-alleged his past drug use under Guideline E (personal conduct). (SOR ¶ 2.a.) SOR ¶ 2.b. alleged that Applicant intentionally failed to register for the Selective Service. Applicant stated his 18th birthday was in December 1981, and it was around that time he stopped attending his university. He added:

And, it was a fairly emotional time for me. The college experience had not gone well. And, I was not sure what direction I wanted to take with my life. At the time, I was also unhappy with the direction that the United States Government was going in. I was a much younger and, I would say, more naïve individual 27 years ago than I am now.

It was a choice that I made not to register, based on my feelings at the time. As I mentioned in my response, from most of my friends from high

school and college, the decision to register or not register was the one where, quite effectively, if they didn't, they would not be eligible for any financial aid as students. As I was no longer a formal student, that was not an issue that came up for me.

And, as a result, I would say that, you know, after having made this choice at age of 18, it was something that I didn't even think about or reflect upon at all after the age of 19, as my life continued. It wasn't something that I really thought about.

As I got older and, you know, my opinions on perhaps what the appropriate choice would have been, you know, it reached the – I reached an age, I believe at 25, where they won't even accept your registration any more, as you're no longer eligible, within the eligible age. So, there was really no opportunity or possibility of rectifying that.

In some ways, I would say that, to some small degree, the process of applying for the security clearance is some way, you know, for me, personally, it doesn't, as I said, provide a significant and meaningful benefit, but it does increase my ability to serve my country. And so, in some way, were I to be approved for a security clearance, that would allow me to, in some way, rectify that choice that I made as a young man. Tr. 37-38.

Applicant's employer, co-workers, and partner are aware of the underlying basis of the security concerns in the SOR. Tr. 47-48.

Character Evidence

Applicant's mother is deceased, and his father is suffering from Alzheimer's disease and is living in an assisted living facility. Tr. 45. In addition to his full-time job, and his responsibilities to his family, Applicant also assists his brother in managing the ownership of a family-owned building in a major metropolitan area. Tr. 45-46.

A close friend of Applicant's father, who has known Applicant since 1997, submitted a reference letter on his behalf. She observed him "grow and evolve into the capable and mature man he is now." She noted that she along with Applicant and his brother are caring for his father. She also stated Applicant is a very trustworthy and responsible person, and recommended him for a security clearance. AE B.

Two work-related employees of Applicant's company submitted reference letters. The first was a senior secure systems engineer, and the second was a principle secure systems engineer. They collectively noted Applicant's diligence as an employee and his future potential in the defense industry. They spoke very highly of him as an employee and of his moral character. They strongly recommend him for a security clearance. AE C, AE D.

Policies

The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security emphasizing, “no 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 an applicant 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 “in terms of the national interest and shall in no sense be a determination as to the loyalty of the [A]pplicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, nothing in this decision should be construed to suggest that I have based this decision, in whole or in part, on any express or implied determination as to Applicant’s allegiance, loyalty, or patriotism. 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). 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). “[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

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions, I conclude the relevant security concerns are under Guidelines H (drug involvement) and E (personal conduct) with respect to the allegations set forth in the SOR.

Drug Involvement

AG ¶ 24 articulates the security concern concerning 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.

The government established its case under Guideline H through Applicant’s admissions and the evidence presented. He fully disclosed his drug abuse in his Response to SOR and at his hearing.

A review of the evidence supports application of two drug involvement disqualifying conditions. AG ¶ 25(a): “any drug abuse (see above definition);”¹ and AG ¶ 25(c) “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.”

Considering the totality of the circumstances in this case, I find application of drug involvement mitigating conditions AG ¶ 26(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;” and AG ¶ 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.”

¹ AG ¶ 24(b) defines drug abuse as the illegal use of a drug or use of a legal drug in a manner that deviates from approved medication direction.

Concerning AG ¶ 26(a), 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 record within the parameters set by the Directive.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17 months before the hearing was not recent. 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.”²

AG ¶ 26(a) applies. Applicant's last drug use was December 2007, about 18 months before his hearing. His overall illegal drug use occurred primarily in his early years and tapered off as he matured, and ceased altogether when he became a father. The absence of evidence of more recent or extensive drug use, and his promise not to use illegal drugs in the future eliminates doubts about his current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.³

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. With maturity and new found responsibilities of fatherhood, he has broken or reduced the prevalence of his patterns of drug abuse, and he has

² ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle change and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

³In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

changed his own life with respect to illegal drug use. He has abstained from drug abuse for about 18 months and has no problem in doing so. AG ¶ 26(b) partially applies.

His reference letters and statements from senior company representatives show Applicant's work behavior has not been indicative of his having a drug problem. He is viewed as a valuable employee, who is reliable, dependable, and professional. His value to the defense industry is supported by senior company officials, who know him personally and professionally, and by his own credible testimony and evidence presented. At his hearing, Applicant acknowledged that future drug abuse is incompatible with his future career and family plans, and manifested a steadfast commitment to continue lifestyle changes consistent with total abstinence of marijuana or any other drugs.

Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

With respect to the personal conduct concerns involving Applicant's past drug abuse and failure to register for the Selective Service, the pertinent disqualifying conditions are AG ¶ 16(d)(3), a pattern of rule violations and AG ¶ 16(e)(1), which states, "personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing." Certainly, past drug abuse and failure to register for the Selective Service violated the law in our society, and is conduct a person might wish to conceal, as it adversely affects a person's professional and community standing.

The mitigating condition outlined in AG ¶ 17(e), "the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress" applies to Applicant's past drug abuse and failure to register for the Selective Service. Applicant's employer, government representatives, friends and family are well aware of his past. Applicant has taken the positive step of disclosure, eliminating any vulnerability to exploitation, manipulation or duress. I do not believe Applicant would compromise national security to avoid public disclosure of these past missteps. Any personal conduct security concerns, pertaining to past drug abuse and failure to register for the Selective Service, are mitigated.

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) 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.

Applicant has been and is willing to maintain conduct expected of one entrusted with a security clearance. His employer, friends, and family support him. He has a history of stable employment and a strong work ethic. This support and self-introspection should ensure his continued success. Applicant demonstrated the correct attitude and commitment to remaining drug free. Considering his demeanor and testimony, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. In sum, I find Applicant has presented sufficient evidence of rehabilitation.

In short, Applicant is living a lifestyle consistent with someone who wishes to remain drug free. He remains committed to his life partner and is embracing the responsibilities and joy of fatherhood, and is a responsible and contributing member of society.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole person factors"⁴ and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. For the reasons stated, I conclude he is eligible for access to classified information.

⁴See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

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 – 1.d:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 2.a. – 2.b.	For Applicant

Decision

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 eligibility for a security clearance for Applicant. Clearance is granted.

ROBERT J. TUIDER
Administrative Judge