



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



In the matter of:)	
)	
)	ISCR Case No. 08-08812
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Thomas Coale, Esquire, Department Counsel
For Applicant: *Pro Se*

May 26, 2009

Remand Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the security concerns caused by his recent abuse of controlled substances. He also failed to mitigate the security concern caused by his failure to disclose in his security clearance application that he used a controlled substance while he possessed a top secret security clearance.

On December 31, 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 Guidelines H (drug involvement) and E (personal conduct). Applicant submitted a response to the SOR that was received by DOHA on

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.

January 29, 2009. He admitted all SOR allegations except those alleged in subparagraphs 2.d and 2. e, and requested a decision based on the written record without a hearing.²

Department Counsel prepared a File of Relevant Material (FORM) on February 18, 2009, which was mailed to Applicant on February 19, 2009. Applicant was notified he had 30 days from receipt of the FORM to submit his objections thereto or any additional information he wanted considered. Applicant acknowledged receipt of the FORM on March 2, 2009. He submitted one undated letter of recommendation in response to the FORM. On March 11, 2009, Department Counsel indicated he did not object to the admissibility of the material submitted by Applicant. The case was assigned to me on March 16, 2009.

Procedural Matters

On April 10, 2009, I issued an unfavorable decision in this case. On April 13, 2009, I received an e-mail from Department Counsel stating that he had received additional documents from Applicant that had inadvertently not been included in the file when it was forwarded to the hearing office for issuance of a decision. An expedited appeal thereafter ensued and the case was remanded to me for issuance of a new decision. I have marked the two documents and cover letter from Applicant as Applicant's Exhibits (AE) 1-3 and made them a part of the record in this case. The e-mail from Department Counsel has been marked as Appellate Exhibit (App. Ex.) I and is included in the file.

Findings of Fact

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

Applicant is a 22-year-old single man who has been employed as an electrician by a defense contractor since January 2008. He graduated from high school in May 2005, and was attending college at the time he submitted an Electronic Questionnaire for Investigations Processing (e-QIP) in January 2008. He held a number of jobs during and after his high school years, most notably as an electrician working for a company that was contracted to do work by a U. S. Government department in a foreign country.

Applicant was granted a top secret security clearance during his employment in the foreign country. He worked in that country from January 2007 to October 2007. While working in the foreign country, Applicant purchased hashish from a co-worker and used it on a daily basis from July to October 2007. His use and purchase of the hashish was discovered and he was fired from his job as a result. Applicant also admits he used marijuana about 100 times between 2005 and February 2008.

In the e-QIP he submitted in January 2008, Applicant answered "Yes" to a question asking if he had illegally used any controlled substance in the preceding seven years.

² Applicant wrote "I Admit" in response to the allegations contained in SOR subparagraphs 2.d and 2.e, but then went on to indicate he did not deliberately falsify the security clearance application he submitted in January 2008, but instead misunderstood the questions that were being asked.

However, in response to the follow-up question that asked him to provide details of his illegal use of controlled substances he only disclosed the 2007 use of hashish in the foreign country. He failed to disclose his previous and continuing use of marijuana. Applicant possessed a security clearance when he used hashish. However, in the 2008 e-QIP he submitted, he answered “No” to a question asking if he had ever illegally used a controlled substance while possessing a security clearance.

As noted previously, Applicant claimed he did not deliberately falsify the e-QIP, but rather misunderstood the questions that were being asked. Specifically, he claims he somehow misunderstood the question asking about illegal drug use in the preceding seven years to be only inquiring about his use of hashish in the foreign country and that he was confused by the punctuation in the question asking about his illegal use of a controlled substance while in possession of a security clearance and thought the question was only asking about drug abuse by police, prosecutors and court officials. In the same SOR response he went on to state: “While filling out the Equip [sic] I was just scared to admit my past drug use. . . . and I felt that I would not have gotten my clearance had I told the whole truth. I was being stupid and thought I could work around the system.”

Applicant appears to attribute his falsification of the e-QIP to youthful indiscretion. He asserts he has matured significantly as the result of a serious motorcycle accident that left him disabled for about seven months, that he is a changed person, and that he plans to get married. He does not comment about why he continued to illegally use a controlled substance either after he lost his job in October 2007, or after he submitted the e-QIP in January 2008.

Applicant submitted three letters of recommendation. One letter is from a National Guard Command Sergeant Major who has known Applicant for over seven years. He attests to Applicant’s professionalism and positive attitude toward his employers and employees. He asserts that Applicant is able to make sound judgments without supervision and that he sets an excellent example for his peers.

The other two letters of recommendation are from the vice president of operations at Applicant’s current place of employment and the project manager on the job to which Applicant is currently assigned. Both individuals are aware of the reason Applicant’s application for a security clearance was denied. They express their opinions that Applicant has matured significantly. They believe he has proven himself to be a dependable and hard working member of their team and that he has become a valuable asset to their company and the project to which he is assigned.

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, Guidelines H (drug involvement) and E (personal conduct), with their disqualifying and mitigating conditions, are 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.³ The Government has the burden of proving controverted facts.⁴ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁵ although the Government is required to present substantial evidence to meet its burden of proof.⁶ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁷ 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.⁸ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

No one has a right to a security clearance¹⁰ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹¹ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹²

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

³ ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

⁴ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁵ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁷ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁸ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁹ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

¹⁰ *Egan*, 484 U.S. at 528, 531.

¹¹ *Id* at 531.

¹² *Egan*, Executive Order 10865, and the Directive.

because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations.

Applicant illegally purchased and used hashish on a regular basis between July and October 2007. He possessed a top secret security clearance and was working in a foreign country under a contract with a U.S. Government department while using the hashish. He also abused marijuana about 100 times between 2005 and February 2008, including after he submitted an e-QIP in connection with his current employment. Disqualifying Conditions (DC) 25(a): *any drug abuse*; DC 25(c): *illegal drug possession, including . . . purchase, sale, or distribution*; and DC 25(g): *any illegal drug use after being granted a security clearance* apply.

At best, it has been only slightly more than a year since Applicant last illegally used a controlled substance. His abuse of controlled substances occurred while he possessed a security clearance; while he was working under a contract with a department of the U.S. Government; while he was working in a foreign country; and after he submitted an e-QIP in connection with his current employment. I have considered all mitigating conditions, and the above factors preclude finding that any mitigating condition applies.

Guideline E, Personal Conduct

Personal conduct is always a concern because 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 failure to cooperate with the security clearance process.

Applicant's explanation for not listing his extensive marijuana use between 2005 and February 2008 in the e-QIP he submitted is not credible. It is impossible to understand how he could have misread the applicable question to only be asking about his abuse of a controlled substance while he was in the foreign country. His explanation is also completely contradicted by his later acknowledgment in his SOR response that he was afraid admitting his drug abuse would jeopardize his chance of obtaining a security clearance. DC 16(a): *deliberate omission, concealment, or falsification of relevant facts from any personal security questionnaire, personal history statement, of similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities* applies.

Applicant's use of hashish while possessing a security clearance and working in a foreign country for a U.S. Government department and his termination from that employment as a consequence of his drug abuse create independent security concerns under DC 16(e): *personal 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, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.*

In the e-QIP, Applicant disclosed his employment in the foreign country, the application he submitted for a security clearance in connection with that employment, and that the employment was terminated as a consequence of his use of hashish in that foreign country. Thus, his explanation for failing to disclose his use of a controlled substance while possessing a security clearance is corroborated by the information he did disclose in the e-QIP and does not create a separate security concern.

I have considered all relevant and material facts and circumstances present in this case, including Applicant's age, the period of time that has elapsed since his last reported use of a controlled substance, the letters of recommendation he submitted, the whole person concept, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying conditions. Applicant has failed to mitigate the security concerns caused by his abuse of controlled substances and the related personal conduct issues that arise therefrom. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. It is not 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:	AGAINST APPLICANT
Subparagraphs 1.a - e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - d:	Against Applicant
Subparagraphs 2.e:	For 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 a security clearance for Applicant. Clearance is denied.

Henry Lazzaro
Administrative Judge

