



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
 )  
----- ) ISCR Case No. 08-11287  
SSN:----- )  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Alison O'Connell, Esq., Department Counsel  
For Applicant: *Pro se*

January 22, 2010

**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 February 27, 2008. On August 10, 2009, the Defense Office of Hearings and Appeals (DOHA) sent him a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guideline H. 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 August 23, 2009; answered it on August 28, 2009; and requested a hearing before an administrative judge. DOHA received the

request on August 31, 2009. Department Counsel was ready to proceed on September 21, 2009, and the case was assigned to me on September 28, 2009. DOHA issued a notice of hearing on October 5, 2009, scheduling the hearing for October 28, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 5 were admitted in evidence without objection. Applicant testified but presented no documentary evidence. DOHA received the transcript (Tr.) on November 4, 2009.

### **Findings of Fact**

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

Applicant is a 40-year-old account executive for a defense contractor. He has worked for his current employer since November 2007. He was married in July 2004. He has a 4-year-old son and a son born two weeks before the hearing (Tr. 30). He has never held a security clearance.

Applicant began consuming alcohol at age 15 (GX 2 at 6). He was arrested for possession of marijuana at age 17, while he was in high school. He continued to use alcohol and marijuana through high school and college. Between 1987 and 1993, while he was in college, he used marijuana three to four days a week (Tr. 33). He used lysergic acid diethylamide (LSD), ecstasy, and psychedelic mushrooms ten to fifteen times, cocaine five or six times (GX 2 at 8-9), and nitrous oxide twice (GX 4 at 26; Tr. 34-35). After graduating from college, he continued to purchase and use marijuana three or four times a week until June 2000 (Tr. 37)

Applicant was arrested for driving under the influence (DUI) in 1988 and 1991 (GX 5 at 1-2). In March 2000, while he was pursuing a master's degree, he sought treatment because he was concerned about his pattern of heavy drinking. He was arrested for his third DUI in June 2000 (GX 5 at 3; Tr. 27). His doctor, a psychiatrist specializing in addiction treatment (Tr. 39), prescribed medications for anxiety (GX 2 at 5), and recommended that Applicant enter a residential alcohol and drug rehabilitation center (Tr. 39-40).

Applicant voluntarily entered a residential alcohol and drug rehabilitation center in June 2000. At the time, he was consuming 16 to 24 beers and smoking one or two marijuana cigarettes daily (GX 4 at 6). He was evaluated by a social worker and a medical doctor (GX 4 at 9), and he was diagnosed with alcohol dependence and cannabis dependence. He dropped out of graduate school in order to complete the rehabilitation program (Tr. 28). He completed the program in November 2000 and received a good prognosis, contingent on complying with the aftercare plan, which included regular attendance at Alcoholics Anonymous (AA) meetings (GX 4 at 4). He completed his graduate studies and received a master's degree in information technology in August 2001 (GX 1 at 6; Tr. 28-29). He continued to see his psychiatrist twice a week until January 2002, when he moved to another state (Tr. 42).

Applicant stopped consuming alcohol and using marijuana when he entered the rehabilitation program in June 2000. He attended AA meetings regularly until around 2005 (GX 2 at 8). He and his wife, also a recovering alcoholic, now attend AA meetings less frequently, but they have a core group of friends in recovery and they support each other (GX 3 at 8; Tr. 29). Applicant currently is a sponsor for another AA member (Tr. 43). He regularly reads the “Big Book” published by AA (Tr. 51).

Applicant resumed his marijuana use in November 2005. He is an avid mountain biker, and he purchased and used small amounts of marijuana while mountain biking with friends. He stopped using marijuana in December 2007, when he learned his employer wanted him to obtain a security clearance (GX 2 at 8). He estimated he used marijuana 35 to 40 times between November 2005 and December 2007 (Tr. 29).

Applicant testified that his wife expressed concerns about his marijuana use. In December 2007, he realized his marijuana use “wasn’t worth it.” He was concerned about the impact of his marijuana use on his family, and he knew his marijuana use was going in a direction that could get worse (Tr. 49). He continues to see the mountain bikers with whom he used marijuana, but he no longer rides with them (Tr. 48). He testified that marijuana use is not a part of his life and it will never be a part of his life again (Tr. 30).

Applicant disclosed his DUI convictions, treatment for alcoholism, and drug use on his security clearance application (GX 1 at 22-27, 29). During an interview with a security investigator in April 2008, Applicant told the investigator that he enjoyed using marijuana, and that it helped him to relieve stress. He also told the investigator that he is not ashamed of his illegal drug use, but he believes that it is not socially acceptable (GX 2 at 9).

Applicant is not currently receiving any counseling for anxiety, but he continues to take anxiety medications that are prescribed and monitored by his physician (GX 2 at 9). He visits with his physician, a general practitioner, every six months (Tr. 54).

### **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 SOR alleges Applicant used marijuana from 1987 to June 2000 and from November 2005 to December 2007 (SOR ¶ 1.a); he purchased marijuana (SOR ¶ 1.b), he used LSD, ecstasy, cocaine, and mushrooms between 1988 and 1993 (SOR ¶¶ 1.c-1.f); he used nitrous oxide in 1992-1993 (SOR ¶ 1.g); and he was arrested and charged

with possession of marijuana in 1987 (SOR ¶ 1.i). It also alleges he was treated from June to November 2000 for cannabis dependence (SOR ¶ 1.i).

The SOR does not allege any disqualifying conditions under Guideline J (Alcohol Consumption). I have considered the evidence of Applicant's alcohol dependence and alcohol abuse for the limited purposes of assessing his credibility; deciding which adjudicative guidelines are applicable; evaluating the evidence of extenuation, mitigation, and changed circumstances; considering whether he has demonstrated successful rehabilitation; and as part of my whole-person analysis. See ISCR Case No. 03-20327 at 4 (App. Bd. Oct. 26, 2006).

The concern under Guideline H 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 "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 evidence raises the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, 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(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

AG ¶ 25(d): diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (c), and (d), the burden shifted 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).

Security concerns under this guideline may be mitigated if "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 AG ¶ 26(a) ("happened so long ago") focuses on whether the drug involvement was recent. 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. 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.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant last used marijuana in December 2007, more than two years ago. Two years is “a significant period of time” within the meaning of this mitigating condition. Several factors tend to negate application of this mitigating condition. Applicant previously abstained from marijuana use for more than five years and then relapsed in November 2005, which tends to show that a two-year period of abstinence is not sufficient to demonstrate rehabilitation. His decision to stop using marijuana was motivated in part by his desire to obtain a security clearance, and not because of any legal, moral, or ethical considerations.

On the other hand, Applicant’s decision to stop using marijuana in December 2007 was also motivated by his wife’s disapproval, his increased family responsibilities, concern about the impact of his marijuana use on his family, and his realization that he was going down a path of substance abuse similar to what he previously experienced. He is more mature, self-aware, and committed to his professional career than he was in December 2007. He has twice experienced the downward slide of his lifestyle caused by substance abuse, and he does not desire to repeat that experience. In addition to his two-year period of abstinence from marijuana use, he has abstained from alcohol for more than nine years. After weighing all the evidence, I conclude that AG ¶ 26(a) is established.

Security concerns also may be mitigated by “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; and (4) a signed statement of intent with automatic revocation of clearance for any violation.” AG ¶ 26(b). The evidence establishes AG ¶ 26(b)(3), but not AG ¶ 26(b)(1), (2), or (4).

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). This mitigating condition is not fully established. Applicant satisfactorily completed an extensive and intense drug and alcohol rehabilitation program. It was recommended by his psychiatrist, but not “prescribed.” He complied with the aftercare requirements. He received a favorable prognosis in November 2000, but he has since relapsed. He has not received any drug treatment or prognosis since his relapse.

## 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 is a mature, well-educated adult. He presented himself at the hearing as intelligent, articulate, candid, and sincere. He fully disclosed his record of substance abuse in his security clearance application. His disclosures in his application and during subsequent security interviews and DOHA interrogatories are the only evidence supporting the allegations in the SOR. His candor and sincerity during the security clearance process are strong indicators that he is trustworthy and reliable.

Applicant has suffered from anxiety for many years, and his substance abuse was due in large part to his efforts to self-medicate his anxiety. He has learned to control his anxiety through prescribed medication and counseling.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person and my obligation to decide doubtful cases in favor of national security, 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 grant him eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations set forth in the SOR, as required by Directive ¶ E3.1.25:

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

Subparagraphs 1.a-1.i:   For Applicant

### **Conclusion**

In light of all of the circumstances, I conclude that it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge