



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



In the matter of:	)	
	)	
XXXXXXXXXX, XXXXX	)	ISCR Case No. 08-11877
SSN: XXX-XX-XXXX	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Robert E. Coacher, Esq., Department Counsel  
For Applicant: William F. Savarino, Esq.

November 12, 2009

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns under to Guideline H (Drug Involvement). Clearance is granted.

**Statement of the Case**

Applicant submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on September 29, 2008. On April 23, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing security concerns under Guideline H (drug involvement). 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 in an undated response, which DOHA received on May 12, 2009. Department Counsel was prepared to proceed on July 14,

2009. On July 16, 2009, the case was assigned to me. On July 28, 2009, DOHA issued a notice of hearing, scheduling the hearing for August 25, 2009. The hearing was held as scheduled.

The government offered Government Exhibits (GE) 1 and 2, which were received without objection. Applicant offered Applicant Exhibits (AE) A through C, which were received without objection. I held the record open until September 14, 2009, to afford the Applicant the opportunity to submit additional evidence. Applicant timely submitted AE D, which was received without objection. DOHA received the hearing transcript (Tr.) on September 7, 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.

### **Background Information**

Applicant is a 24-year-old financial analyst associate, who has been employed by a defense contractor since June 2008. GE 1, Tr. 16. He initially began working as an intern for his employer following graduation from college, and after a brief time was offered a full-time position. Tr. 16, 39, 74-75. Applicant is a first-time applicant for a security clearance. Obtaining a security condition is a condition of Applicant's employment. Tr. 34.

Applicant graduated from high school in May 2004. Following high school, he pursued his education and graduated from a university in May 2008 with a Bachelor of Science in Finance. GE 1, Tr. 74-75. Applicant has never married and has no dependents. GE 1.

Applicant has never been charged with any felony, firearms, or explosives offenses. He has not been charged with any minor or misdemeanor-type, non-traffic-related offenses. He has not had any debts delinquent over 180 days, bankruptcy petitions, unpaid judgments, or unpaid liens. Apart from the Drug Involvement discussed *infra*, the case file contains no derogatory information about the Applicant. GE 1, GE 2.

### **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) he used cocaine six times from about October 2007 to July 2008; (2) he contributed \$40 towards the purchase of cocaine one time during this time frame; and (3) he used marijuana two times from about January 2008 to February 2008. (SOR ¶¶ 1.a. through 1.c.) Applicant's use of drugs was limited to a discreet period and only occurred when he was in the company of a former tennis team member, discussed *infra*. Response to SOR, GE 1, GE 2, Tr. 67-71.

From an early age, Applicant was an avid tennis player. He began playing varsity tennis in high school, which continued into college. AE B, Tr. 65-66. During his senior year in college, Applicant shared a townhouse with three other tennis team members. One of the tennis team members (friend) introduced him to cocaine in October 2007. Applicant used cocaine a total of six times. His friend also introduced him to marijuana in January 2008. Applicant used marijuana twice. His friend was the sole source of cocaine and marijuana and all uses occurred in the townhouse they shared. Tr. 65-71. In July 2008, Applicant's friend wanted to know if anyone in the townhouse wanted to contribute money towards cocaine and Applicant gave him \$40. Tr. 82-83. Applicant's drug use was limited to a 10-month period. Tr. 87

Applicant described his drug use as a "bad" and "stupid mistake." Tr. 78. He candidly discussed his drug use and accepted full responsibility for his actions. Since his last drug use in July 2008, he has disassociated himself from his friend and does not associate with anyone who uses drugs. Tr. 73-74, 81. Applicant credibly testified that he does not now use drugs and does not intend to use drugs in the future. Tr. 87-88.

Applicant voluntarily underwent a substance abuse assessment performed by a qualified and licensed professional counselor and certified addiction counselor on September 11, 2009. The counselor's evaluation included the use of Substance Abuse Subtle Screening Inventory (SASSI-3), Alcohol Use Profile (AUP), and Urinalysis (observed September 2, 2009 – Negative). The counselor concluded that the SASSI and AUP support and are congruent with Applicant's self-report of drug use, and noted Applicant does not have any indications of abuse or dependency issues. The counselor added his negative urinalysis lends evidence of no current illicit drug use as well. The counselor opined that after reviewing the SASSI, AUP, urinalysis results, and clinical interview, it was his professional opinion that Applicant "does not have an illicit drug problem." He concluded that Applicant's commitment to remain drug free is credible "due to his maturity, stable personality and emotional condition, his understanding that his use of illicit drugs was wrong, his 14 months of abstinence, and his strongly expressed desire to pursue a career with [his employer]". AE D.

Applicant submitted a signed, sworn statement of intent, dated August 24, 2009, that he will continue to refrain from engaging in any illegal drug activity, with the understanding that any drug violation will result in the automatic revocation of any security clearance held by him. AE C, Tr. 87-89. He stated that he will "never use drugs again." Tr. 87. He added that he has found a career that allows him to excel, and that the people in his workplace are mature and upstanding. Tr. 92-93.

### **Character Evidence**

Applicant's supervisor, co-worker, and father testified on his behalf. His supervisor and co-worker hold secret security clearances, are senior company employees, and observe Applicant on a daily basis. Their testimony confirmed that Applicant is an honest, trustworthy and reliable employee. Applicant is their "go-to person," who handles payroll for their 400-person division. They added that their company has no tolerance for drugs and are of the opinion that Applicant's past drug

use is behind him. Applicant's supervisor and co-worker both recommended that he be granted a security clearance. Tr. 15-48.

Applicant's father is an accomplished and successful attorney. He has been and continues to be involved with his son. Although they do not live near each other, they maintain daily contact by e-mail and telephone contact on the weekends. They have similar sporting interests, which include tennis and soccer. Applicant's father has discussed with Applicant the serious implications of drug involvement and made it clear to him that drug use is unacceptable and dangerous. His father described him as the "perfect" son, who never gave him any problems. He described how Applicant underwent a kidney transplant at age 18 and received a donor kidney from his mother. Applicant conveyed to his father that his drug mishap was an exercise of bad judgment and that will it not occur again. Tr. 48-63.

### **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 (4<sup>th</sup> 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 concern is under Guideline H (Drug Involvement) 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 the SOR and at his hearing. He admitted to use of marijuana and cocaine.

A review of the evidence supports application of two drug involvement disqualifying conditions. AG ¶ 25(a): “any drug abuse (see above definition);”<sup>1</sup> and AG ¶

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<sup>1</sup> AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including:

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.”

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.”<sup>2</sup>

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(1) 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), and (2) inhalants and other similar substances.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana and ecstasy or 3, 4 methylenedioxymethamphetamine are Schedule (Sch.) I controlled substances. See Sch. I(c)(9) and I(c)(10), respectively. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I); *United States v. Crawford*, 449 F.3d 860, 861 (8<sup>th</sup> Cir. 2006) (ecstasy). Cocaine is a Sch. II Controlled Substance. See Sch. II(a)(4) (cocaine).

<sup>2</sup> 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).

AG ¶ 26(a) fully applies. Applicant's last drug use was in July 2008, about 15 months before his hearing. His overall illegal drug use occurred during a 10-month period primarily during his senior year in college, and ceased altogether in July 2008. The absence of evidence of more recent or extensive drug use, his promise not to use illegal drugs in the future, and his favorable evaluation by a licensed professional counselor and certified addiction counselor eliminates doubts about his current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.<sup>3</sup>

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 his career, and complete disassociation from his former drug-using associate and former environment, his 15-month period of abstinence, and signed statement of intent with automatic revocation of clearance for any violation, he has broken his patterns of drug abuse, and he has changed his own life. He has abstained from drug abuse and has no problem in doing so. AG ¶ 26(b) fully applies.

His testimony and character evidence from senior company representatives show Applicant's work behavior has not been indicative of 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. His father's testimony demonstrated strong family support to avoid future drug use. At his hearing, Applicant acknowledged that future drug abuse is incompatible with his future career, and manifested a steadfast commitment to continue a lifestyle consistent with total abstinence of any drugs.

### **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):

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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.

<sup>3</sup>In 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.

(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 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.

To conclude, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns. 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"<sup>4</sup> 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.

### **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.c:	For Applicant

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



## **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.

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ROBERT J. TUIDER  
Administrative Judge