



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



In the matter of:)	
)	
XXXXXXXXXX, XXXXX)	ISCR Case No. 09-00110
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: *Pro Se*

October 30, 2009

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate Guideline H (Drug Involvement) security concerns. Clearance is denied.

Statement of the Case

On August 11, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP).¹ On May 11, 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to him, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified; and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended, modified and revised. The SOR alleges security concerns under Guideline H (Drug Involvement). The SOR detailed reasons why DOHA

¹ Item 3.

could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for him, and recommended referral to an administrative judge to determine whether a clearance should be granted, continued, denied, or revoked.

On June 12, 2009, Applicant responded to the SOR allegations, and elected to have his case decided on the written record in lieu of a hearing. A complete copy of the file of relevant material (FORM), dated July 15, 2009, was provided to him by letter dated July 16, 2009. Applicant received the FORM on July 21, 2009. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant did not submit any additional information within the time period of 30 days after receipt of the copy of the FORM. The case was assigned to me on October 9, 2009.

Findings of Fact

Applicant admitted all the SOR allegations. He also provided an explanation for his past drug use to include that he had not used drugs in over a year, that he no longer associates with the persons using drugs, that he has been living in a “drug free” area for over a year, and that he would submit to drug testing. After a complete and thorough review of the evidence of record, I make the following findings of fact.

Applicant is a 30-year-old software developer.² He attended college from August 1997 to December 2003, and estimates that he was awarded a Bachelor of Science Degree in Computer Science in June 2004.

Applicant has never married, and disclosed no dependents. He did not serve in the military. He disclosed no police record; and no alcohol-related problems, counseling or treatment. He has worked for the same employer, a defense contractor, since June 2008. Applicant seeks a security clearance in conjunction with her employment.

Drug Involvement

The facts are not in dispute. Applicant admittedly used marijuana over 100 times from June 1997 through at least April 2008.³ Applicant’s marijuana use began during his senior year in high school, and continued throughout his college years, and ended approximately one year ago when he was 29 years old.⁴ From about 2004 through April 2008, Applicant used marijuana approximately weekly.⁵ Applicant described his drug

² Item 4 (August 2008 e-QIP) is the source for the facts in this paragraph unless otherwise stated.

³ Item 3; Item 4 at 32; Item 6 at 32; and Item 7 at 4.

⁴ *Id.*

⁵ Item 6 at 3-4 and Item 7 at 4.

use as social use and states that he felt relaxed and at ease around people after using marijuana.⁶ Applicant also tested positive for marijuana on a pre-employment drug screening in May 2008,⁷ resulting in loss of employment with a Department of Defense contractor.⁸ Finally, Applicant admitted that he purchased marijuana as well.⁹

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 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 “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. 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,

⁶ Item 6 at 3-4 and Item 7 at 4.

⁷ Item 3 and Item 5.

⁸ Item 6 at 4 and Item 7 at 4.

⁹ Item 7 at 3.

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 Guideline H (Drug Involvement).

AG ¶ 24 articulates the security concern relations to 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.

AG ¶ 25 provides three Drug Involvement Disqualifying Conditions that could raise a security concern and may be disqualifying in this case: “(a) any drug abuse;” “(b) testing positive for illegal drug use;” and “(c) illegal drug possession including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.” Applicant’s consistent and habitual use of marijuana over 11 years, his purchase of marijuana, and his failing a drug test fulfill disqualifying conditions under Guideline H. The government established these three disqualifying conditions requiring additional inquiry about the possible applicability of mitigating conditions.

Considering the totality of the circumstances in this case, I find two Drug Involvement Mitigating Conditions potentially applicable: 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.”¹⁰

¹⁰ 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.

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.

AG ¶ 26(a) does not apply as the behavior did not happen so long ago. Applicant admittedly used marijuana until approximately one year ago. Considering his 11 years of use, this short passage of time cannot qualify as “so long ago.” In addition, his use was frequent under AG ¶ 26(a) as he admits to over 100 uses and use on a weekly basis from 2004 through 2008. The circumstances of his use also do not indicate that future use is unlikely under AG ¶ 26(a) because as noted *supra*, Applicant used marijuana for years well into adulthood. Such continued marijuana use demonstrates a disregard for law and the seriousness of the conduct involved. These circumstances undercut any claim that his use does not cast doubt on his reliability and judgment under AG ¶ 26(a).

AG ¶ 26(b) does not apply. This mitigating condition requires a demonstrated intent not to abuse drugs in the future. While Applicant states that he will not use illegal drugs, he has demonstrated only a short period of abstinence. Applicant’s decision to stop using drugs did not occur under circumstances involving a life changing event. Rather, he stopped using marijuana around the time he applied for a job in the defense industry where he is required to have a security clearance and where he was fired from a defense contractor for testing positive for marijuana. The evidence does not support application of the remaining mitigating conditions contained in ¶¶ 26(c) and 26(d).

Applicant’s 11-year history of consistent drug involvement and lack of favorable evidence preclude a finding that he has established a track record of abstinence and a commitment to comply with laws, rules, and regulations. Based on the available evidence, his drug involvement is relatively recent and not isolated. He has not carried his burden of mitigating the Drug Involvement concerns identified. His past conduct casts doubt on his current reliability, trustworthiness, and good judgment.

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.

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. AG ¶ 2(c).

Applicant's record of employment working for a government contractor weighs in his favor. Aside from his admitted drug involvement, he appears to be a law-abiding citizen. These factors show some responsibility and mitigation.

The evidence against mitigating Applicant's conduct is more substantial. He has a significant history of drug involvement that was ongoing for 11 years. Applicant submitted no documentation from a qualified medical professional demonstrating a current or future favorable prognosis. For these reasons and reasons discussed *supra*, further time is needed and additional evidence is necessary before Applicant would be eligible for a security clearance.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances, in the context of the whole person, I conclude he has not mitigated the security concerns pertaining to Drug Involvement.

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. to 1.c.:	Against 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 eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

ROBERT J. TUIDER
Administrative Judge