



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



In the matter of:)
)
) ISCR Case No. 09-00765
)
)
Applicant for Security Clearance)

Appearances

For Government: Francisco Mendez, Esquire, Department Counsel
For Applicant: *Pro se*

October 20, 2010

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s lengthy history of substance abuse, treatment, and relapses, raise serious doubts about his rehabilitation and whether he has made permanent behavioral changes. His past behavior shows he does not have the ability or willingness to comply with the law, rules, and regulations. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application on August 20, 2008. After reviewing the results of the ensuing background investigation, on December 4, 2009, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant’s request for a security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DOD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as **Error! Main Document Only**.revised.

On September 1, 2006, DOHA issued Applicant a Statement of Reasons (SOR), which specified the basis for its decision - security concerns addressed in the Directive under Guideline H (Drug Involvement) of the Adjudicative Guidelines (AG).²

On December 21, 2009, Applicant responded to the SOR allegations and requested a hearing before an administrative judge. The case was assigned to me on May 6, 2010, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on May 21, 2010. The hearing was convened as scheduled on June 11, 2010. The Government offered Exhibits (GE) 1 through 17, which were admitted without objection. Applicant and one witness testified. Post-hearing, he submitted Exhibit (AE) 1, which was admitted without objection. DOHA received the transcript of the hearing (Tr.) on June 18, 2010.

Procedural Issue

The Government conceded, and the evidence shows, that SOR ¶¶ 1.b, 1.e, and 1.f are related to the same course of conduct. (Tr. 40) The misconduct alleged in SOR ¶ 1.b resulted in the administrative and rehabilitative actions in SOR ¶¶ 1.e and 1.f. Thus, these allegations will be merged into one allegation under SOR ¶ 1.b. Favorable findings will be entered with respect to SOR ¶¶ 1.e and 1.f.

Findings of Fact

Applicant admitted the factual allegations under SOR ¶¶ 1.a, 1.c, 1.d, and 1.f, with explanations. He denied SOR ¶¶ 1.b and 1.e. His admissions are incorporated as findings of fact. After a thorough review of the evidence of record, and having considered Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 56-year-old senior field technician (information technology). He has worked for the same government contractor since April 1999, and requires a security clearance to continue his job. He completed an associate's degree in the mid-1980s. Applicant married his wife in 1980, and they have three grown children of this marriage, ages 36, 27, and 26.

Applicant served in the U.S. Navy from 1978 until his retirement in 1998. His service was characterized as honorable. His Veterans Administration disability rating is 70%, because he suffered a work-related back injury. He possessed secret and top secret security clearances during most of his Navy career. After his Navy retirement, Applicant's access to classified information was continued until the day of his hearing, because of his job with a government contractor.

² Adjudication of this case is controlled by the AGs, implemented by the DOD on September 1, 2006.

Applicant started consuming alcohol and marijuana at age 20. He illegally smoked marijuana daily from 1974 until 1987.³ In January 1987, he took 30 days leave and while on leave, he attended a party hosted by his sister. At the party, he was drinking heavily and smoked marijuana. (GE 7) Upon his return to his unit, he tested positive for marijuana during a random drug test. At the time of his illegal use of marijuana, he was serving in the Navy on active duty, held the grade of E-6, and possessed a top secret security clearance with access to sensitive compartmented information (SCI). In February 1987, Applicant received non-judicial punishment under Article 15, UCMJ, for his illegal use of marijuana. His punishment included forfeiture of \$576 pay per month for two months, reduction to the grade of E-5, and 45 days extra duties. (GE 3) Because of his alcohol and marijuana use, in July 1987, he was required to attend a Navy Level II drug and alcohol treatment program. Because of his use of marijuana, in May 1988, the Naval Security Group denied Applicant access to SCI, and he was reclassified to another rate. (GE 4)

In January 1988, Applicant resumed his alcohol consumption. Under pressure from his wife, in May-June 1988, he underwent a six week, state-sponsored Level III alcohol program (impatient detoxification). He attended Alcoholic Anonymous (AA) for six months as part of his aftercare treatment. In August 1989, Applicant resumed his alcohol consumption. In November 1992, Applicant received non-judicial punishment because he reported for duty while intoxicated. He was required to attend a second six week Level III alcohol recovery program in a Navy medical facility. During the alcohol rehabilitation program, Applicant was diagnosed with "ALCOHOL DEPENDENCE IN REMISSION AND CANNABIS DEPENDENCE IN REMISSION BY HISTORY." (GE 6) During his alcohol treatment, Applicant admitted that he illegally smoked marijuana daily from 1974 until 1987. (GE 6)⁴ Upon his discharge, Applicant's progress in the program was considered "good," and he was discharged to full duty. He was instructed to abstain from the use of alcohol and drugs, to attend AA four times a week for one year, and to participate in a supervised aftercare program. (*Id.*)

In 1995, the Department of the Navy Central Adjudication Facility (DON CAF) issued Applicant a statement of reasons indicating its intent to revoke his security clearance. In November 1995, the DON CAF conditionally granted Applicant access to classified information on the condition that he continue to abstain from alcohol and illegal drugs, and continue to participate in AA. (GE 8-11)

In 1995-1996, Applicant resumed his consumption of alcohol. In December 2000, he became depressed over his inability to stop consuming alcohol and cough syrup and

³ GE 6, p. 1-2. In his answer to the SOR and at his hearing, Applicant claimed he used marijuana only once in 1974, 1987, and 2008. Considering his statements to medical personnel, his history of failing to disclose material information in several security clearance applications, and his demeanor, I find his claims and testimony lack credibility

⁴ In his October 1993 sworn statement (re-sworn in April 1994) to a government investigator, Applicant claimed his use of drug was sporadic. He averred he used marijuana once in 1974; speed and morphine once each in 1977; and marijuana once in 1986.

attempted suicide. (GE 14) He voluntarily attended outpatient addictions treatment at an Air Force's Intensive Addictions Service from April 2001 to May 2001. He was diagnosed with SUBSTANCE DEPENDENCE.

In December 2001, Applicant relapsed again, drove while intoxicated, and was convicted of driving while intoxicated (DWI). He continued to participate in substance abuse aftercare treatment until February 2002. At the time of his discharge from the program, he was considered to be doing well and abstinent. At his hearing, Applicant claimed he has been abstinent from alcohol since 2001.

In his November 2002 security clearance application, Applicant answered "NO" to questions that asked him whether he was ever charged with a felony offense, whether he had ever been charged with or convicted of any offense related to alcohol or drugs, and whether he ever had illegally used drugs while possessing a security clearance. He disclosed he received alcohol-related treatment in 2000, and his 2001 DWI. Applicant failed to disclose; however, that he used marijuana daily from 1974 until 1987, his February 1987 non-judicial punishment for illegal use of marijuana, and his 1992 non-judicial punishment for being drunk on duty.⁵

In his August 2008 security clearance application, and at his hearing, Applicant admitted he used marijuana one time in August 2008. He claimed he used marijuana with a stranger to whom he gave a ride home.⁶ He had seen the stranger numerous times while riding the bus, but claimed he was not a friend of the stranger and did not know him. During the ride, Applicant was commenting about his back pain and the stranger offered him a marijuana cigarette to relieve the pain. Applicant illegally smoked the marijuana with the stranger to alleviate his back pain. Additionally, Applicant disclosed his 2001 DWI and subsequent alcohol treatment, his 1992 non-judicial punishment for being drunk on duty, and his 1987 non-judicial punishment for use of marijuana.

⁵ The SOR did not allege security concerns under the guidelines for criminal conduct, personal conduct, and alcohol consumption. As such, disqualifying information under those guidelines cannot be used to deny Applicant's security clearance. Notwithstanding, I can consider any behavior not alleged in the SOR to: assess his credibility; evaluate his evidence of extenuation, mitigation, or changed circumstances; assess his possible rehabilitation; determine the applicability of the AGs; and conduct the whole-person analysis. I have limited my consideration of non-SOR misconduct in accordance with ISCR Case No. 03-20327 (App. Bd. Oct. 26, 2006).

⁶ Applicant admitted his August 2008 use of marijuana, but gave conflicting versions of the circumstances. He told a government investigator in October 2008 that he pulled a back muscle in August 2008, while cutting wood. Two young men, visiting his neighbor, offered him a marijuana cigarette. Applicant stated he was in so much pain he took two puffs of the marijuana cigarette. (GE 17) In his response to DOHA interrogatories, and at his hearing, Applicant denied he made the above statements. He claimed the marijuana he smoked in August 2008 was provided to him by the stranger to whom he gave a ride home.(*Id.*)

Applicant's doctor submitted a statement on his behalf indicating that "to the best of my ability, my patient (Applicant), has no condition that could impair his judgment or reliability in the context of safeguarding classified information." (GE 18)

At his hearing, Applicant averred he only used marijuana three times over a period of 34 years, the last two times while possessing a security clearance. He noted that the only reason the government was aware of his August 2008 use of marijuana was because he was truthful and disclose it in his August 2008 security clearance application. He disclosed his use of marijuana because he believes it is important for him to tell the truth, and to avoid any possible basis for blackmail. He testified he told his supervisor about his August 2008 use of marijuana approximately 18 months ago.

Applicant testified he is an active member of Narcotics Anonymous (NA) and AA. He said he attends two to three meetings every week to help him abstain from the use of any drugs and alcohol. He claimed he has abstained from the use of any illegal drugs since August 2008, and that he has abstained from alcohol since 2001. After his hearing, Applicant submitted a signed statement of intent with automatic revocation of clearance for any "abuse of drugs or alcohol." (AE 1)

Applicant acknowledged he has an addictive personality, that he is alcohol dependent, and that he has a lifelong struggle to continue his abstinence. This knowledge has made him more determined to continue with his NA and AA aftercare treatment. He averred that he has made lifestyle changes to control his alcohol dependence because he wants to provide a good example for his children.

At his hearing, Applicant presented the testimony of one character witness, a co-worker who is a consulting engineer. He retired from the Navy after 30 years of service. He has held access to classified information during most of his life and understands the importance of protecting the nation's secrets. He considers Applicant to be a dedicated family man and a loyal American. As a whole, Applicant's character reference lauded his competence and his service to the United States. He would trust Applicant with his life.

Policies

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense to grant 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. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that "no one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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 to reach his decision.

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 that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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 expressed or implied determination as to Applicant's allegiance, loyalty, or patriotism. It is merely an indication that 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 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 or her] 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

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about 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 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Four drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a): "any drug abuse;"⁷ AG ¶ 25(b): "testing positive for illegal drug use;" AG ¶ 25(d): "diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;" and AG ¶ 25(g): "any illegal drug use after being granted a security clearance."

Applicant illegally used marijuana daily from 1974 until 1987. He tested positive for marijuana after a random drug test in 1987. He again used marijuana in 2008. He has possessed a security clearance since around 1978 to present. Applicant has been diagnosed as suffering from "alcohol dependence and cannabis dependence in remission by history."

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions:

(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;

(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;

⁷ 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 medical direction."

AG ¶ 24(a) defines "drugs" as substances that alter mood and behavior, including:

(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.

(3) an appropriate period of abstinence; and

(4) a signed statement of intent with automatic revocation of clearance for any violation.

(c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; and

(d) 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.

I find that none of the Guideline H mitigating conditions fully apply. Applicant's illegal use of marijuana spans a lengthy period of time – from 1974, until at least August 2008. Considering the totality of the circumstances I find his use of marijuana is recent. Applicant has an addictive personality. He used marijuana in a daily basis from 1974 until 1987. He received non-judicial punishment in 1987, for his use of marijuana when he was on active duty in the Navy, and while holding a security clearance. His access to SCI was terminated in 1988 because of his drug use. In 1995, he was given access to classified information conditioned on his abstinence from alcohol and drugs. He again used marijuana in 2008.

Applicant failed to disclose his drug use when he enlisted and he failed to disclose the full extent of his drug use and alcohol-related behavior until 2008. Applicant knew from the beginning of his Navy career that his illegal drug use and alcohol-related behavior would adversely impact his ability to enlist and later to serve in the Navy. Applicant participated in numerous substance abuse rehabilitation programs and was diagnosed with alcohol dependence and cannabis dependence in remission by history. During his treatment, Applicant promised to abstain from alcohol and drugs. After his mandatory treatment ran its course, Applicant started using alcohol again and continued his alcohol-related misconduct. Moreover, he used marijuana again in 2008, knowing full well about the Government's security concerns regarding his use of drugs and the serious potential consequences of his actions with respect to his continued access to classified information.

AG ¶ 26(b) partially applies because he submitted a signed statement of intent with automatic revocation of clearance for any "abuse of drugs or alcohol." It applies in part, and does not fully mitigate the security concerns, because, considering the record as a whole, his drug use is recent and sufficient time has not passed for Applicant to establish his ability and willingness to stop using illegal drugs. Applicant has a history of relapsing after undergoing extensive counseling and rehabilitation treatment. Not enough time has passes for Applicant to establish his reliability, trustworthiness, and his ability and willingness to comply with laws and regulations. Applicant's favorable evidence, at this time, is not sufficient to mitigate the Guideline H security concerns.

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 relevant 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). 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.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant served honorably in the Navy, retired with disability, and has worked for a government contractor since 1999. He is a good husband and dedicated father. He held access to classified information at different levels, for most of his 33 years of government service. There is no evidence that he has ever compromised or caused others to compromise classified information. Applicant's character reference recommended without reservation that his access to classified information be granted. These factors show some responsibility, good judgment, and mitigation.

On the other hand, the factors against granting Applicant's security clearance are more substantial. Applicant's lengthy history of substance abuse, treatment, and relapses, creates serious doubts on his rehabilitation and whether he has made permanent behavioral changes. Moreover, his reliability and trustworthiness is in question because he failed to disclose the full extent of his drug and alcohol related problems in several security clearance applications. Applicant made inconsistent statements about his marijuana consumption, and I did not find his statements at his hearing to be credible. His past behavior shows he does not have the ability or willingness to comply with the law, rules, and regulations. Overall, the record evidence fails to convince me of Applicant's eligibility and suitability for 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 - 1.d:	Against Applicant
Subparagraphs 1.e and 1.f:	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 eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge