



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



In the matter of:	)	
	)	
-----	)	ISCR Case No. 09-02029
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Robert E. Coacher, Esq., Department Counsel  
For Applicant: Greg D. McCormack, Esq.

December 31, 2009

**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 November 10, 2008. On June 12, 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 June 17, 2009; answered it on June 29, 2009; and requested a hearing before an administrative judge. DOHA received the request on

July 6, 2009. Department Counsel was ready to proceed on September 8, 2009, and the case was assigned to me on September 10, 2009. DOHA issued a notice of hearing on October 5, 2009, scheduling the hearing for October 20, 2009. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through F, which were admitted without objection. DOHA received the transcript (Tr.) on October 28, 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 30-year-old systems engineer employed by a defense contractor. He was hired as an intern in June 2002 and became a full-time employee in August 2002 (Tr. 17, 26). He received a security clearance in September 2002, and he is seeking to continue it (Tr. 6).

Applicant graduated from college in June 2001 with a bachelor's degree in electrical engineering. He did not disclose any drug involvement when he applied for and received a clearance in 2002 (Tr. 60). When he submitted his application to continue his security clearance in November 2008, he disclosed that he used marijuana two or three times between 1997 and 2002, while he was in college, and three times after receiving his security clearance (GX 1 at 42-43; Tr. 32). He repeated his disclosures during a security interview in December 2008 (GX 2 at 7), and in response to DOHA interrogatories in May 2009 (GX 2 at 2-3). In his response to DOHA interrogatories, he stated that he decided to stop using marijuana because he was approaching his 30<sup>th</sup> birthday and thinking of his future, and he realized that his marijuana use was foolish and immature (GX 2 at 2).

Applicant is unmarried and has no children. He has been in a committed relationship with his girlfriend for three years, but they are not formally engaged to be married (Tr. 24). His girlfriend describes him as loyal and dedicated to his loved ones, a perfectionist, and a person of high integrity and trustworthiness (AX F-7).

At the hearing, Applicant submitted a notarized statement declaring that his last marijuana use was in September 2008, promising that he will not use marijuana in the future, and agreeing that any further "drug-related incident" will result in revocation of his security clearance (AX A). He testified he does not associate with current marijuana users, except for one friend that he has known since he graduated from high school. He sees his friend once or twice a month (Tr. 44). He has informed his friend that he does not intend to use marijuana again and that he will leave the area if it is used in his presence (Tr. 35). He testified his last use of marijuana was with this friend and his current girlfriend (Tr. 48).

Applicant's girlfriend also stopped using marijuana in September 2008. He testified that his girlfriend understands that his career makes marijuana use unacceptable (Tr. 49-50). He testified that if he found out his girlfriend was still smoking marijuana, he would ask her to stop and to dispose of any marijuana in her possession. When asked what he would do if his girlfriend refused to stop using marijuana, he declared that he would leave her if necessary (Tr. 52).

Applicant testified that he found his use of marijuana a pleasant experience, but it is no longer attractive to him because it is not consistent with his job (Tr. 52-56). He expressed remorse for his "stupid decisions" to use marijuana while holding a clearance (Tr. 42-43). He admitted he did not disclose his marijuana use when he applied for a clearance in 2002. He testified he decided to disclose his marijuana use on his most recent application because he knew that his past marijuana use made him vulnerable to blackmail (Tr. 58-61).

Applicant's performance evaluation for 2003 rated him as "competent" on a four-category scale (needs improvement, competent, commendable, and outstanding) (AX B-6). In February 2005, he was rated as "exceeds expectations" on a different four-category scale (needs improvement, meets expectations, exceeds expectations, and far exceeds expectations) (AX B-5). In March 2006, he received the top numerical rating ("4") (AX B-4). He received a "3" rating in March 2007 (AX B-3), and "4" ratings in March 2008 and February 2009 (AX B-1; AX B-2).

Applicant has received three cash awards for timely performance (AX C-1, AX C-3, and AX C-5). His division director has recognized him for being one of two nominees for employee of the quarter (AX C-2), he has been selected once as employee of the quarter (AX C-4), and he has been nominated for an annual award (AX C-6). He has received frequent pay raises, starting out at \$44,200 as an intern, beginning as a full-time employee at \$54,000, and currently earning \$94,683 (AX D).

Applicant's direct supervisor regards him as trustworthy, dependable and honest, with integrity beyond reproach (AX F-2). His program manager considers him the most knowledgeable systems engineer on the team, and she describes him as highly respected, dedicated, honest, and helpful (AX F-1). A former classmate and roommate considers him a person of high integrity and respect for the law (AX F-3). The friend with whom Applicant last used marijuana (a partner in a law firm) describes him as a man of great conviction who is passionate about his work (AX F-4). His parents both describe him as a person of great integrity, reliability and high ethics who loves and is dedicated to his family (AX F-5; AX F-6). His girlfriend considers him a person of high integrity who is loyal and dedicated to his loved ones (AX F-7).

### **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 approximately three times from September 1997 to 2002 (SOR ¶ 1.a), and he used marijuana approximately three times from 2002 until September 2008, while holding a security clearance (SOR ¶ 1.b). Applicant admitted both allegations. His disclosures in his security clearance application, responses to DOHA interrogatories, answer to the SOR, and testimony at the hearing are the only evidence of his marijuana use.

The concern under this guideline 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. Guideline H 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(g): any illegal drug use after being granted a security clearance.

Since the government produced substantial evidence to raise the disqualifying conditions in AG ¶¶ 25(a), (c), and (g), 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 used marijuana about six times in eleven years. Six occasions of use over an eleven-year period do not constitute “infrequent” use, but they demonstrate that Applicant’s one-year period of abstinence is not unusual by itself. His marijuana use did not occur under circumstances making it unlikely to recur. What is significant about Applicant’s decision to stop using marijuana in September 2008 is that it occurred shortly before he submitted his application to continue his clearance, in which he put his clearance and his job on the line by disclosing his marijuana use and his falsification of his earlier security clearance application. His decision to fully disclose his conduct, coupled with his statement of intent with provision for automatic revocation of any clearance (discussed below), demonstrate that he has changed his behavior, and he has decided that his job is more important and rewarding than his periodic use of marijuana. His disclosures in his most recent security clearance application, his candid responses to DOHA interrogatories, his answer to the SOR, and his testimony at the hearing demonstrate “conduct sufficient to warrant a finding of reform or rehabilitation.” I conclude 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). Applicant continues to associate with his marijuana-using friend, albeit infrequently. He is in a committed long-term relationship with his girlfriend, with whom he smoked marijuana. His environment is essentially unchanged from September 2008. I conclude that AG ¶ 26(b)(1) and (2) are not established, but AG ¶ 26(b)(3) and (4) are established.

### **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 an articulate, intelligent, well-educated young adult. He has held a clearance for more than seven years. He is highly regarded by his superiors. He presented himself as candid and sincere at the hearing. I have considered the possibility that he chose to give “correct” and self-serving responses to questions about his past marijuana use and future intentions, and I am satisfied that his stated intentions are sincere. There is no evidence of physical or psychological addiction. The evidence indicates that Applicant has decided that his job is more important than the pleasure of smoking a marijuana cigarette with friends. In November 2008, he was faced with a choice of continuing to conceal his marijuana use or disclosing it and putting his job at risk. But for his full disclosure, his discrete use of marijuana with his girlfriend and a long-time friend might well have gone undetected. By submitting his statement of intent, he placed himself on probation; and by disclosing his marijuana use, he has made himself subject to closer scrutiny.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his drug involvement. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):	FOR APPLICANT
Subparagraphs 1.a-1.b:	For Applicant

### **Conclusion**

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant’s security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman  
Administrative Judge