



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 09-08038
)
Applicant for Security Clearance)

Appearances

For Government: William T. O'Neil, Esq., Department Counsel
For Applicant: *Pro se*

June 16, 2011

Decision

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline H (drug involvement). Clearance is denied.

Statement of the Case

On May 27, 2009, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On November 8, 2010, the Defense Office of Hearings and Appeals (DOHA) issued Applicant 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*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) effective within the Department of Defense for SORs issued after September 1, 2006.

The SOR detailed reasons why DOHA 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 Applicant, and recommended referral to an

administrative judge to determine whether a clearance should be granted, continued, denied, or revoked. Applicant answered the SOR on November 30, 2010, 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 December 13, 2010, was provided to him by letter dated December 15, 2010. Applicant received the FORM on December 21, 2010. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. He did not submit any materials, comments, or objections in response the FORM. The case was assigned to me on February 16, 2011.

Findings of Fact

Applicant admitted all SOR factual allegations. His admissions are incorporated as findings of fact. After a thorough review of the evidence of record, I make the following additional findings of fact.

Background Information

Applicant is a 28-year-old associate consultant, who has been employed by a defense contractor since October 2007. He seeks a security clearance in conjunction with his employment. (Item 5.)¹ Applicant graduated from high school in June 2001. He was awarded a bachelor of arts degree in anthropology and history in May 2006, and a master's degree in April 2010. (Items 5 and 6.) He has never married and has no dependents. Applicant has not served in the military.

Drug Involvement

The drug use alleged in the SOR is not contested. In his application for a clearance, Applicant identified multiple instances of drug use to include marijuana use from 1997 to 2007, cocaine use from 2001 to 2008, and hallucinogenic mushrooms use on approximately four occasions from 1997 to 2005. (Item 5.) He also admitted using hashish overseas during the period from 2001 to 2003. In May 2007, Applicant claimed that he reached a decision to stop using all illegal drugs, but acknowledges one use of cocaine after that time. Applicant claims his last use of illegal drugs was during spring of 2008. Applicant further admits to buying marijuana, cocaine, hallucinogenic mushrooms, and hashish on a subset of those occasions when he used the drugs. (Items 4, 6 and 7.)

Applicant has not participated in drug counseling or rehabilitation, and has not been diagnosed with substance abuse. He presented no evidence of a recent diagnosis or prognosis concerning his use of illegal drugs. Applicant claims an intent not to use drugs in the future. The record does not include any evidence from third parties and those who know him well that support a claim of disassociation with drug using

¹ Item 5 is Applicant's May 2009 e-QIP and is the source for facts in this paragraph unless otherwise stated.

associates, change of environment, an appropriate period of abstinence, or a signed statement of intent with automatic revocation for any future violation.

In his SOR Answer, Applicant stated that his reliability, trustworthiness, and ability to protect classified information should not be judged on the inappropriate decisions he made in high school and college, but rather on the appropriate decisions he has made throughout his life and career. He further spoke of his honesty and integrity and that he is serving his country by trying to make a difference in the lives of individuals who are placed in harm's way. Without a clearance, he will be hindered from doing this. (Item 4.)

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." *Egan* at U.S 528.

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 unfavourable, 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 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, 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 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 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

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.”

Applicant has an extensive history of illegal drug use. He used marijuana from 1997 to 2007, used cocaine from 2001 to 2008, and used mushrooms to a lesser extent from 1997 to 2005. He also purchased various drugs at various times when he was using drugs. Applicant claimed he made the decision to stop using drugs in May 2007, but acknowledges using cocaine one time after reaching that decision. Notwithstanding, the sparse record evidence is not sufficient to show he has implemented permanent lifestyle changes to prevent his future drug use.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions apply in this particular case: AG ¶ 25(a) “any drug abuse”² and AG ¶ 25(c) “illegal drug possession.”

² 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 ¶ 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;
 - (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 consumed illegal drugs from 1997 to 2008. He has not participated in any counseling or aftercare treatment program. He presented no evidence of a recent diagnosis or prognosis concerning his illegal drug use. In light of Applicant's age, his history of illegal drug use, and the recency of his questionable behavior, Applicant's promise not to use illegal drugs without corroboration (e.g., clear evidence of lifestyle changes, statements from those who know him about his disassociation from his drug-using friends, or a competent medical diagnosis and prognosis) is not sufficient to show his questionable behavior is unlikely to recur.

The sparse record evidence is not sufficient to demonstrate Applicant's intent not to use drugs in the future. I find there has not been a sufficient period of abstinence. His past questionable behavior still casts doubts on his reliability, judgment, and willingness

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.

and ability to comply with the law. Applicant's favorable evidence, at this time, is not sufficient to fully 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).

The comments in the Analysis section are incorporated in my whole-person assessment. I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a college graduate and has earned a master's degree. He appears to find fulfillment in his job and desires to make a contribution. Applicant also referred to his honesty and integrity. His accomplishments and attributes reflect well on him. However, in the absence of documentary evidence submitted in response to his FORM to show that he has demonstrated an intent not to abuse drugs in the future, such as disassociation with drug users, avoiding the environment where drugs are used, and a signed statement of intent not to use drugs in the future with automatic revocation of his clearance for any violation, these concerns must be decided against him in evaluating his suitability for access to classified information. On balance, 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 1a – 1e:	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