



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



In the matter of: )  
)  
) ISCR Case No. 10-02930  
)  
Applicant for Security Clearance )

**Appearances**

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

March 30, 2011

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant, 27, has a 10-year history of alcohol and illegal drug use, highlighted by one brush with the law for a drug offense. He presented no evidence of a recent diagnosis with a favorable prognosis. He is not participating in substance-abuse treatment. In light of his age, his many years of using alcohol and multiple illegal drugs, and the lack of evidence about a change of lifestyle, Applicant’s behavior continues to cast doubt about his reliability, judgment, and ability and willingness to comply with the law. Clearance is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on November 19, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding<sup>1</sup> that it is clearly consistent with the national interest to grant Applicant’s request for a security clearance.

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<sup>1</sup> 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 revised.

On October 14, 2010, DOHA issued Applicant a statement of reasons (SOR), which specified the basis for its decision – security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) of the adjudicative guidelines (AG).<sup>2</sup>

Applicant responded to the SOR allegations on November 2, 2010, and elected to have his case decided without a hearing. A complete copy of the file of relevant material (FORM), dated December 7, 2010, was provided to him. Applicant received his copy of the FORM on December 17, 2010. He was given 30 days from the date he received the FORM to submit any objections and information in mitigation or extenuation. He did not respond, and the case was assigned to me on February 1, 2011, to determine whether a clearance should be granted or denied.

### **Procedural Issue**

2) The Government withdrew the Guideline E allegation from the SOR. (FORM, p. 2)

### **Findings of Fact**

Applicant admitted all the factual allegations under SOR ¶ 1, except for SOR ¶ 1.c, which he denied. He denied that he sold marijuana on various occasions. His admissions are incorporated here as findings of fact. After a thorough review of the evidence of record, including Applicant's SCA, his answer to DOHA interrogatories, and his statement to a government investigator, I make the following additional findings of fact.

Applicant is a 27-year-old director of human resources working for a government contractor. He graduated from high school in 2001. He attended college from August 2001 until August 2006, when he received his bachelor's degree in political science. He has never been married and has no children.

Applicant started using marijuana illegally at age 16, around November 1999. While in high school, he used marijuana approximately twice a month at social settings. His marijuana consumption increased while he was in college. From the fall of 2001 until mid 2004, he illegally used marijuana every weekend.

Around June 2002, Applicant was observed smoking marijuana with some friends while he was driving his car. He was arrested, cited, and convicted of illegal possession of marijuana (a misdemeanor offense). He was fined \$200, placed on unsupervised probation for one year, and performed 30 hours of community service. After he completed his probation, his arrest and conviction record were expunged. Applicant also attended eight one-hour drug counseling sessions. He stopped using

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<sup>2</sup> Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

marijuana while he was pending prosecution. He continued consuming marijuana after his trial.

From mid-2004 until August 2006, Applicant illegally consumed marijuana. During this period, he smoked one or two bowls of marijuana daily. He purchased approximately one ounce of marijuana every four weeks from friends or acquaintances. He occasionally sold marijuana to his friends, but not for profit. He sold small amounts of marijuana to cover his expenses. Additionally, Applicant illegally used ecstasy three times between 2003 and 2004, LSD one time in 2008, and psychedelic mushrooms three times between 2003 and 2005.

Applicant claimed he stopped using marijuana in October 2009, just before he submitted his November 2009 SCA. He stated he has been abstinent from any illegal drugs since October 2009, and that he has no intention of ever using any illegal drugs again. Applicant stated he stopped using marijuana, because he decided it was time to grow up and to move on from that activity. After the eight-week drug counseling he underwent in 2002 (following his conviction for possession of marijuana), Applicant has participated in no additional drug counseling. He presented no evidence of a recent diagnosis or prognosis concerning his use of illegal drugs. Applicant consumes one or two alcoholic beverages a week. However, since 2006, he consumes alcohol to the point of intoxication about one weekend a month.

In his free time, Applicant enjoys playing in a band. Between 2003 and 2006, he played with one band. In 2007, he started another band and he has been playing in this second band at least until the day of his background interview in February 2010. He reiterated his intention never to use illegal drugs again. However, Applicant continues his associations and to live the same lifestyle that led to his use of numerous illegal drugs for a lengthy period.

### **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 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 (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 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.

Applicant has an extensive history of using multiple illegal drugs with varying frequency. He started using marijuana at age 16, and he used marijuana with varying frequency, sometimes on a daily basis, until around October 2009. He used, purchased, and sold marijuana. He also used ecstasy, LSD, and psychedelic mushrooms.

As a result of his illegal use of drugs, Applicant was charged once with illegal possession of marijuana. Although his record has been expunged, that does not diminish the seriousness of Applicant's drug-related behavior. Applicant was required to attend outpatient substance abuse counseling programs after his drug offense conviction. After Applicant's trial ended, he resumed his consumption of marijuana, smoking a bowl of marijuana daily from mid-2004 until August 2006.

Applicant claimed he stopped using all other illegal drugs, except marijuana, because he no longer had the desire to experiment with the effects of those drugs, and he did not like their effects. He stopped using marijuana in October 2009, because he wants to pursue a career. He knew that his use of drugs was illegal, and his continued use of marijuana would affect his ability to pursue a career. He also promised to never use illegal drugs again. Applicant's evidence is not sufficient to show he stopped his associations with drug-users and that he has changed the lifestyle that led to his use of numerous illegal drugs for a lengthy period.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Two drug involvement disqualifying conditions raise a security concern and are disqualifying in this particular case: AG ¶ 25(a) "any drug abuse"<sup>3</sup> and AG ¶ 25(c) "illegal drug possession . . . purchase, sale, or distribution."

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;

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<sup>3</sup> 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.

- (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's abuse of drugs spans a lengthy period of time. Not enough time has passed for me to conclude that his questionable behavior is unlikely to recur. His behavior still cast doubts on Applicant's reliability and judgment. AG ¶ 26(a) does not apply.

Applicant consumed illegal drugs from 1999 until at least October 2009. He consumed alcohol, at times to the point of intoxication from 1999 until at least February 2010. In 2002, he participated in substance abuse counseling after he was convicted for possession of marijuana. As soon as his trial was over, he continued to consume a bowl of marijuana a day until 2006.

After 2002, Applicant 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 and his history of using alcohol and multiple illegal drugs, and the recency of his questionable behavior, Applicant's promise not to use illegal drugs without corroboration and ongoing therapy or counseling is not sufficient to show it is unlikely his questionable behavior will recur.

Applicant continues to play in a band. It appears he continues to associate with his drug-using associates and visits places where he used drugs in the past, or drugs are likely present. He did not demonstrate his intent not to use drugs in the future. Considering that Applicant has participated in one substance abuse counseling program and that he continued to use illegal drugs after the program, I find there has not been an appropriate period of abstinence. His past questionable behavior still casts serious doubts on Applicant's reliability and judgment. 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 considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant worked while attending college. Most of his questionable behavior occurred while he was attending college. He stopped using illegal drugs in 2009, because he wants a full-time job and to develop a career. These factors show responsibility, good judgment, and some mitigation.

Applicant has not continued to participate in substance abuse treatment. He presented no evidence of a recent diagnosis and a favorable prognosis. In light of Applicant's age and lengthy period using multiple illegal drugs, Applicant's promise to not use illegal drugs without corroboration and ongoing therapy or counseling is not sufficient to show it is unlikely his questionable behavior will recur. 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 1.a - 1.g:	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.

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JUAN J. RIVERA  
Administrative Judge