



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



In the matter of:)
)
) ISCR Case No. 10-04815
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

February 6, 2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has a long history of illegal drug use (albeit intermittent) spanning 26 years. His most recent use of an illegal drug (marijuana) was in September 2009. Notwithstanding, he maintains daily association with illegal drug-using friends. His overall behavior shows a lack of judgment and unwillingness to obey laws, rules, and regulations. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 12, 2010. 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 finding¹ that it is clearly consistent with the national interest to grant Applicant's 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 revised.

On August 29, 2011, DOHA issued Applicant a statement of reasons (SOR) alleging security concerns under Guidelines H (Drug Involvement) and E (Personal Conduct) of the adjudicative guidelines (AG).² Applicant responded to the SOR allegations on September 27, 2011, and requested a hearing before an administrative judge. The case was assigned to me on October 28, 2011. DOHA issued a notice of hearing on November 8, 2011, convening a hearing on December 1, 2011. The Government offered exhibits (GE) 1 through 3, which were admitted without objection. Applicant testified, but presented no exhibits. DOHA received the transcript of the hearing (Tr.) on December 8, 2011.

Findings of Fact

Applicant admitted all the SOR allegations. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, and having observed Applicant's demeanor and considered his testimony, I make the following findings of fact.

Applicant is a 39-year-old business analyst working with a government contractor. After graduating from high school in 1990, he attended college from 1990 until 1993, but he did not complete a degree. After he quit college, Applicant worked numerous odd jobs. He returned to college in 2000, and received his bachelor's degree in history in 2003. After graduating from college, Applicant worked for 10 employers in different capacities. He was hired by his current employer, a government contractor, in March 2010. He has never been married and has no children.

Applicant submitted his first SCA on March 12, 2010. Section 23 of the SCA asked Applicant whether in the last seven years he had used any controlled substances, including marijuana. Applicant answered "Yes," and disclosed that he illegally used marijuana twice in 2009. His background investigation addressed his illegal use of drugs.

Applicant started using illegal drugs around 1983. At 13 years old, he used crystal methamphetamine with his older brother and friends. (Tr. 28-29) He claimed he never used crystal methamphetamine again. Applicant estimated he used marijuana approximately 20 times in high school, between 1984 and 1990. (Tr. 30)

Applicant attended college between 1990 and 1993. Because of his immaturity and curiosity, he experimented with different illegal drugs. He purchased, possessed, and used LSD, mushrooms, and cocaine. He illegally used LSD five times, cocaine three times, and mushrooms a few times. He purchased, possessed, and used marijuana on a frequent basis. He purchased marijuana for his personal use. He sold marijuana twice. (Tr. 31-34; GE 3) Applicant claimed he did not use illegal drugs between 1994 and 1997.

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

Between 1997 and 2009, Applicant claimed he used marijuana three times. In 1997, he traveled to Amsterdam and used marijuana there with a friend. He averred he did not use marijuana again until 2009, when he returned to his current state of residence. In January 2009, he and a friend smoked marijuana in front of a hotel to celebrate his return. In September 2009, he smoked marijuana at a party celebrating his meeting with long-time friends. He estimated he used marijuana approximately 100 times between 1984 and 2009. Applicant claimed he has been abstinent of any illegal drugs since September 2009. (Tr. 41-43)

Applicant associates on a daily basis with his drug-using friends. His roommate is a daily user of marijuana and smokes marijuana in front of Applicant. Additionally, he and his roommate socialize frequently with six other close friends who also smoke marijuana in front of Applicant. Applicant averred that he is not bothered when other people smoke marijuana in front of him. He stated that he has matured and he does not need to partake in the use of marijuana. Applicant does not understand why the Government should be concerned about his association with illegal drug users when he stopped using marijuana in September 2009. (Tr. 41-44; 54-56)

Applicant's job is important to him. This is the first steady job he has held for a while. He believes he is doing well and would like to continue working for his employer. He promised never to use any illegal drugs in the future. Applicant expressed regret for his lapse in judgment. He understands that his use of marijuana was illegal. He explained that he never believed he would need a security clearance; otherwise, he would not have used marijuana. He claimed he used marijuana in September 2009, because he had forgotten how it feels to smoke marijuana and was again curious.

Applicant has not participated in any substance abuse counseling. He has not been diagnosed with drug abuse or drug dependence. He presented no documentary evidence of a recent diagnosis or prognosis related to his illegal drug use.

Policies

The President of the United States 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 AG 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 about 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

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 illegally purchased, possessed, and used drugs, including crystal methamphetamine, LSD, cocaine, marijuana, and mushrooms, between 1983 and September 2009.

AG ¶ 25 describes two drug involvement disqualifying conditions that raise a security concern and are disqualifying in this particular case:

- (a) any drug abuse;³ and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of paraphernalia.

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,

³ 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.

without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the Guideline H mitigating conditions apply. Applicant's illegal use of drugs, although intermittent, spans a period of approximately 26 years. He started using illegal drugs in high school, and his use extended until September 2009 (age 37). He used illegal drugs socially, and not under extraordinary circumstances. Applicant knew that his use of drugs was illegal.

Applicant believes his questionable behavior is mitigated by the passage of time because he last used drugs in September 2009, and his abstinence since demonstrates his intent not to abuse drugs in the future. He also promised not to use any illegal drugs in the future. Applicant also believes that his honesty and candor during the security clearance process demonstrates he is reliable, dependable, and trustworthy.

Applicant's actions are not sufficient to mitigate drug involvement concerns. He knew that his drug use was illegal. In the past, he stopped his use of illegal drugs for a number of years, but due to peer pressure from his drug-using friends, he failed to abstain. He presented no documentary evidence to show he participated in any counseling or an aftercare treatment program. He presented no evidence of a recent diagnosis or prognosis concerning his illegal drug use. He continues to associate on a daily basis with his marijuana-using roommate and other close friends who use marijuana in his presence. Applicant does not appreciate understand what is required of him to be eligible for a security clearance. His behavior shows he lacks judgment and is unwilling to follow the law. Considering the evidence as a whole, Applicant's favorable evidence is not sufficient to mitigate the Guideline H security concerns.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

The two Guideline E SOR allegations are based on the same facts that raised concerns under Guideline H – Applicant's long-term, illegal drug-related misconduct and his association with illegal drug users. For the sake of brevity, the facts and analysis discussed under Guideline H is incorporated under Guideline E.

Applicant's drug-related behavior triggers the applicability of the following disqualifying condition under AG ¶ 16:

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing, or (2) while in another country, engaging in any activity that is illegal in that country or that is legal in that country but illegal in the United States and may serve as a basis for exploitation or pressure by the foreign security or intelligence service or other group.

AG ¶ 17 lists seven conditions that could potentially mitigate the personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

After considering the above mitigating conditions, I find that, for the same reasons discussed under Guideline H (incorporated herein), none of them apply to the facts of this case. Specifically, I consider Applicant's involvement with controlled

substances a serious offense. His questionable behavior is not mitigated by the passage of time because he currently associates on a daily basis with his drug-using friends, including his roommate. I find that his questionable behavior is likely to recur and it demonstrates Applicant lacks judgment and is unwilling to obey laws, rules, and regulations. Furthermore, it shows that Applicant is not taking steps to reduce or eliminate his vulnerability to exploitation, manipulation, or duress. Guideline E is decided against Applicant.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for being candid and forthcoming during the security clearance process. He appears to be doing well at work since his employer is sponsoring his clearance. He averred he stopped using illegal drugs in September 2009, and he promised never to use illegal drugs again. These factors show some responsibility and some mitigation.

Notwithstanding, in light of Applicant's age, his 26 years of illegal drug use (albeit intermittent), and his current, daily association with illegal drug users, his promise to not use illegal drugs in the future is not sufficient to show his questionable behavior is unlikely to recur. Applicant overall behavior shows he lacks judgment and the ability to obey the law, rules, and regulations.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	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 a security clearance for Applicant. Clearance denied.

JUAN J. RIVERA
Administrative Judge