



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



In the matter of: )  
)  
) ISCR Case No. 10-05003  
)  
Applicant for Security Clearance )

**Appearances**

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

June 22, 2011

**Decision**

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana from 1993-1994 until January 2010. He used cocaine twice between 2003 and 2007. He illegally used drugs after he was granted access to classified information at the secret level in 2001. His behavior is recent and it continues to cast doubt on his reliability, judgment, and ability and willingness to comply with the law and follow rules. Clearance is denied.

**Statement of the Case**

Applicant submitted a security clearance application (SCA) on February 2, 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 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 December 6, 2010, 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).<sup>2</sup> Department Counsel amended the SOR on February 15, 2011, adding an additional Guideline H allegation.

Applicant responded to the SOR allegations on January 28, 2011, and to the amended allegation on March 7, 2011. He requested a hearing before an administrative judge. The case was assigned to me on March 2, 2011. DOHA issued a notice of hearing on March 3, 2011, convening a hearing on March 30, 2011. At the hearing, the Government offered two exhibits (GE 1 and 2). Applicant testified and presented four exhibits (AE 1 – 4). All exhibits were received without objection. DOHA received the transcript of the hearing (Tr.) on April 7, 2011.

### **Findings of Fact**

Applicant admitted the factual allegations under SOR ¶¶ 1.a, 1.b, 1.d, 2.a, and 2.b, with explanations. He denied SOR ¶ 1.c, because he believed that, as written, the allegation implied more use than just two times. At the hearing, Applicant admitted he used cocaine twice while holding a security clearance. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, his answers to the SOR and interrogatories, and his demeanor and testimony, I make the following additional findings of fact.

Applicant is a 34-year-old mechanical engineer working for a government contractor since 2001. Applicant is single and has no children. He attended college from 1995 until 1999, and received a bachelor's degree in mechanical engineering. He was granted access to classified information at the secret level in December 2001. There is no evidence to show that he has ever compromised or caused others to compromise classified or proprietary information.

Applicant's supervisors and co-workers consider him to be a reliable, trustworthy, and security conscious employee who follows the rules and regulations concerning the handling of classified information. His supervisors are impressed with Applicant's judgment, professionalism, technical knowledge, and the quality of his work. His work ethic is excellent, and his performance consistently ranks in the higher percentages of his team. Over the years, he has received several performance awards for his excellent work. In sum, he is considered to be an asset to his company. His references recommend he be granted access to classified information.

Applicant's security concerns arose out of his long-term illegal drug use, most of which occurred while he was holding a security clearance. He illegally used marijuana approximately 12 times during his junior year in high school (1993-1994). (Tr. 34) He also used marijuana approximately three times in 1995, while a freshman in college.

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

Thereafter, he got serious, concentrated on his studies and did not use marijuana again until 2003. (Tr. 30)

Applicant was required to undergo a urinalysis test, and to submit an SCA, as a condition of his employment in 2001. He did not disclose any illegal drug use in his 2001 SCA. He was made aware that his company has policies against the unlawful use of any drugs, including marijuana and cocaine.

Applicant illegally used marijuana about monthly from January 2003 until January 2009. He used cocaine twice between 2003 and 2007. From 2003 until 2006, he purchased marijuana for his personal use approximately four times. He never sold marijuana or used any other drugs than marijuana or cocaine. He used marijuana, approximately once every other month, from January 2009 until January 2010. Applicant's last use of marijuana was in January 2010, one month before he submitted the pending SCA. His use of illegal drugs occurred primarily during social settings, while at parties and with his friends. He felt compelled to participate in the use of illegal drugs because of peer pressure and his desire to belong to the group.

Applicant explained that during the summer of 2009, he developed chest pains and visited a doctor. He disclosed to the doctor his use of marijuana and he was provided literature about the health risks associated with the use of marijuana. He stopped using marijuana and started to exercise and to live a healthier life. Applicant testified he no longer associates with anyone who uses cocaine. He only associates socially with three of his marijuana-using friends. He believes that these three friends are no longer using marijuana because they are now married and have children. He still attends some concerts with his drug-using associates.

Applicant acknowledged that he always knew his use of marijuana and cocaine was illegal, and that his employer would "frown" at his use of marijuana. He believed that as long as his use of marijuana did not interfere with his professional life, it would be okay for him to use marijuana. He finally realized it was not smart for him to use illegal drugs. Applicant has never been diagnosed as a drug abuser, and he has not participated in any drug counseling or treatment.

In February 2010, Applicant submitted an SCA, asking for access to classified information at the top secret level, and disclosed that in the last seven years he illegally purchased, possessed, and used drugs while possessing a security clearance. During a subsequent security clearance interview, Applicant cooperated with the investigator and disclosed in detail his illegal drug use as described above.

Applicant testified that he is deeply sorry, remorseful, and regretful about his past questionable behavior. He understands that the use of illegal drugs is a serious offense. He testified he is fully committed to never using any illegal drugs again. He submitted a written statement of intent with automatic revocation of his security clearance for any violation. (AE 1) He did not submit a recent diagnosis and prognosis by a duly qualified medical professional concerning his substance abuse problem. Applicant believes that

his performance during the last 10 years, and his honesty in the 2010 SCA, and through the security clearance process, demonstrate his integrity and that he is trustworthy.

## 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 illegal marijuana use extending from around 1993-1994, when he was in high school, until January 2010. He also used cocaine twice between 2003 and 2007. He illegally used drugs after he was granted access to classified information at the secret level in December 2001. He knew that the illegal use of drugs constitutes a serious offense, and that his employer had a policy against the use of any illegal drugs.

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

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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.

AG ¶ 26 provides four potentially applicable drug involvement mitigating conditions. Considering the evidence as a whole, I find that none of the mitigating conditions fully apply. Applicant stopped using marijuana in January 2010. As such, his use is recent. His illegal use of marijuana spans a period of over 16 years, and it occurred under normal circumstances. AG ¶ 26(a) does not apply.

Applicant is well-educated, and has extensive experience working for a government contractor and dealing with the security clearance process. He was 24 years old in 2001, when he was granted access to classified information. He was almost 33 years old when he last used marijuana in January 2010. Applicant was well aware that using illegal drugs is a criminal offense and about the adverse job-related consequences of his actions. Notwithstanding, he elected to use marijuana and cocaine. He failed to disclose his past marijuana use in his 2001 SCA because he knew it would adversely impact on his ability to hold his job and a security clearance.

Applicant used illegal drugs for his personal enjoyment, because of peer pressure, and to socially fit in with his group of friends. He still associates with at least three of his drug-using friends. I note that he submitted a written statement of intent with automatic revocation of his security clearance for any violation. Notwithstanding, in light of his continued association with his drug-using friends, he failed to establish a clear commitment not to abuse drugs in the future, to disassociate from his drug-using friends, and to avoid environments where the use illegal drugs is possible. AG ¶ 26(b) partially applies, but does not fully mitigate the drug involvement security concerns.

Applicant's evidence is insufficient to show that the factors that triggered his illegal drug use are no longer present. He did not present evidence that he has satisfactorily completed a drug treatment program and received a favorable prognosis by a duly qualified medical professional. He also failed to establish that he does not have a current substance abuse problem. Considering the totality of the circumstances, without credible corroborating evidence, Applicant's assertions of abstinence, well-being, change of lifestyle, and promise to abstain from illegal drugs are insufficient to mitigate the present security concerns. AG ¶ 26(d) does not apply. AG ¶ 26(c) was not raised by the evidence in this case and does not apply.

Applicant's past questionable behavior still casts serious doubts on his reliability, judgment, and his ability and willingness to comply with the law. Applicant's favorable evidence, at this time, is not sufficient to mitigate the Guideline H security concerns.

### **Guideline E, Personal Conduct**

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

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.

Applicant illegally used drugs (as described under the Guideline H discussion, incorporated herein), after he was granted access to classified information at the secret level in December 2001. He knew that the illegal use of drugs constitutes a serious offense, and that his employer had a policy against the use of any illegal drugs. His behavior triggered the applicability of disqualifying conditions: AG ¶ 16(e): personal 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; and AG ¶ 16(g): association with persons involved in criminal activity.

After considering the seven mitigating conditions set out in AG ¶ 17, I find that, for the same reasons discussed under Guideline H (incorporated herein), none fully apply to the facts of this case. Applicant was involved in serious criminal behavior during approximately 15 years while holding a security clearance. He stopped his illegal drug use in January 2010, thus, his behavior is recent. His evidence failed to establish that his behavior happened under such unique circumstances that it is unlikely to recur, and it still casts doubt on Applicant's reliability, trustworthiness, and judgment. AG ¶ 17(c) does not apply.

Applicant acknowledged his misconduct and has taken some steps to change his lifestyle and to avoid the circumstances that led to his illegal drug use. Notwithstanding, his evidence is not sufficient to establish he has implemented significant and permanent lifestyle changes showing that his behavior is unlikely to recur. Applicant continues to associate with some of his drug-using friends. He presented no medical evidence to show that he currently does not have a drug problem, and he has not participated in any drug treatment or counseling. AG ¶¶ 17(d) and (g) do not apply.

By disclosing his illegal drug use in his 2009 SCA, to his supervisors, and cooperating in the security clearance process, Applicant has taken some steps to reduce or eliminate his vulnerability to exploitation, manipulation, and duress. AG ¶ 17(e) applies in part, but does not fully mitigate the personal conduct security concern. Not enough time has passed to establish that Applicant currently does not have a drug problem, that he has implemented permanent lifestyle changes, and he has the ability and willingness to comply with the law, rules, and regulations. The remaining mitigating conditions are not reasonably raised by the evidence in this case.

### **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 in my whole-person analysis my comments on the analysis of Guidelines H and E.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant is a well-educated and valuable employee. He receives credit for disclosing his illegal drug use in his 2010 SCA and for cooperating in the security clearance process. He expressed remorse, regret, and embarrassment for his questionable behavior, and promised to remain abstinent. This recent conduct shows responsibility, good judgment, and some mitigation.

Notwithstanding, the factors against granting his access to classified information are more compelling. Applicant illegally used marijuana for many years and while holding a security clearance. He broke the trust placed in him. At this time, his evidence is insufficient to show that the factors that triggered his illegal drug use are no longer present. He failed to establish that he does not have a current substance abuse problem, that he has implemented permanent lifestyle changes, and his ability and willingness to comply with the law, rules, and regulations. 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 – 1d:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 1a and 1b:	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