



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



In the matter of:)
)
) ISCR Case No. 10-05697
)
Applicant for Security Clearance)

Appearances

For Government: Caroline H. Jeffreys, Esq., Department Counsel
For Applicant: *Pro se*

May 25, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant, 28, has a ten-year history of illegal drug use, primarily marijuana. His most recent use of marijuana was in June 2009. He is commended for disclosing his illegal drug use in his security clearance application (SCA). Notwithstanding, he has not participated in substance abuse counseling or treatment. He presented no evidence of a recent diagnosis with a favorable prognosis. In light of his age, his many years of using illegal drugs, and the little corroborating evidence about a permanent lifestyle change and disassociation from his drug-using friends, I find that the passage of time alone is insufficient to mitigate the Guideline H security concerns. Clearance is denied.

Statement of the Case

Applicant submitted a SCA on February 4, 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

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.

clearly consistent with the national interest to grant Applicant's request for a security clearance.

On December 13, 2010, DOHA issued Applicant a statement of reasons (SOR), which specified the basis for its decision – security concerns under Guideline H (Drug Involvement) of the adjudicative guidelines (AG).²

Applicant responded to the SOR allegations on January 3, 2011, and requested a hearing before an administrative judge. The case was assigned to me on February 1, 2011, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on February 15, 2011, convening a hearing for March 1, 2011. At the hearing, the Government offered exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified and submitted exhibits (AE) 1 and 2, which were admitted without objection. AE 2 was received post-hearing. DOHA received the transcript of the hearing (Tr.) on March 8, 2011.

Findings of Fact

Applicant admitted all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. After a thorough review of all the evidence, including Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 28-year-old associate consultant working for a government contractor. He graduated from high school in June 2001, and attended college from August 2001 until June 2006. He received his bachelor's degree in International Development Studies. He is single and he has no children. He has been working for his employer since August 2009. Applicant submitted a public trust application in August 2009, that was denied. He believes it was denied because he disclosed his illegal drug use history. He submitted the pending SCA on February 2010, and again disclosed his history of illegal drug use.

Applicant started using marijuana illegally at age 16. He continued his use of illegal drugs during college and after he graduated from college. He was 23 years old in May 2005, when he graduated from college. He estimated he smoked marijuana approximately 150 times total. From 1999 to 2001, he used marijuana every three to four months. From 2001 to around 2006 (while in college) he smoked marijuana every two weeks. From 2007 until 2009, he smoked marijuana once every two months. He also purchased marijuana approximately 10 times (every six months) from his college friends. He testified that his last illegal drug use (marijuana) took place in August 2009.

Applicant estimated he used cocaine eight times from October 2004 until March 2009. He used hallucinogenic mushrooms five times from September 2001 to March

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

2008. He used Aderall, without a prescription, from October 2001 until May 2006, as a "study aid" to help him focus during his college exams. He illegally used Vicodin three times from June 2003 until March 2006, to help him relax and sleep. He obtained the above illegal drugs from his friends and used them during social settings.

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. At his hearing, he claimed that he no longer associates socially with his drug-using friends from high school and college. However, he testified that he still has a friendly relationship with his drug-using friends from high school and college. He currently maintains periodic telephone, email, and personal contact with his drug-using friends. (Tr. 43-44, 53, 56) He averred that the last time he was in a place where drugs were being used was in the summer of 2009. Applicant stated that his father and one of his supervisors are aware he used marijuana, and that he cannot be blackmailed based on that information.

Applicant testified he has abstained from using any illegal drugs since August 2009, and that he has no intention of using marijuana or any illegal drugs ever again. After his hearing, he submitted a written statement of intent promising to never use any illegal drugs, or to associate with drug users, with the understanding that any violation of his promise would result in the automatic revocation of his clearance. (AE 2). He is willing to participate in any type of drug testing to show that he has been abstinent. He believes that being candid and forthcoming in his SCA, during his background interview, and at his hearing demonstrates his honesty, reliability, and trustworthiness.

Since high school, Applicant has known that the use of marijuana, cocaine, mushrooms, and legal drugs without a prescription was illegal. He initially experimented with the illegal drugs, and then continued to use them socially because of peer pressure. He testified that he stopped using illegal drugs because, as he got older, he became concerned about his health and his career. He understands that the illegal use of drugs would be detrimental to both. He considers himself a dedicated employee and his job is very important to him. He values the work he does for the U.S. Government, and it is his desire to serve his country in a full capacity. He no longer has any desire to use illegal drugs because he does not enjoy using them, or the way they make him feel.

Applicant's supervisor and mentor considers him to be a hard worker, dedicated, and trustworthy employee. He has known Applicant both personally and professionally, and strongly recommends Applicant for a security clearance because of his demonstrated dedication and high qualifications.

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 (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 has an extensive history of illegal drug use. He started using marijuana at age 16, and he used marijuana with varying frequency, from August 1999 until August 2009. Additionally, Applicant used cocaine eight times from October 2004 until March 2009; he used hallucinogenic mushrooms five times from September 2001 to March 2008; he used Aderall, without a prescription, from October 2001 until May 2006; and he used Vicodin three times from June 2003 until March 2006.

Applicant stopped using drugs because he wants to pursue a career and is concerned about his health. He knows that his use of drugs was illegal, and his continued use of drugs would affect his ability to pursue a career. He promised to never use illegal drugs again.

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”³ and AG ¶ 25(c) “illegal drug possession including cultivation, processing, manufacture, purchase.”

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.

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. AG ¶ 26(b)(4) partially applies because Applicant submitted a signed statement of intent with automatic revocation of clearance for any violation. Notwithstanding, for the reasons outlined in the following paragraphs, this mitigating condition does not fully mitigate the security concerns raised by his long-time illegal drug use. Applicant's abuse of drugs spans a lengthy period. His favorable evidence is not sufficient to show he has implemented permanent lifestyle changes to prevent his future use of illegal drugs. He continues to associate with his high school and college drug-using friends. 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 August 2009. 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.

Considering the ten year period of illegal drug use, the type of drugs he used, and his continued association with his long-time drug-using friends, the record evidence is not sufficient to demonstrate his 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 Applicant's reliability, judgment, and willingness 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).

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for being truthful and forthcoming during the security clearance process. He stopped using illegal drugs in August 2009, because he wants to develop a career and is concerned about his health. He has an outstanding endorsement from his supervisor. He is considered to be a truthful, highly competent, and dependable worker. These factors show responsibility, good judgment, and some mitigation.

In light of Applicant's age and lengthy period using illegal drugs, his promise to not use illegal drugs without corroboration 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.f:	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.

JUAN J. RIVERA
Administrative Judge