



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



In the matter of:)
)
) ISCR Case No. 10-08099
)
Applicant for Security Clearance)

Appearances

For Government: Gregg A. Cervi, Esq., Department Counsel
For Applicant: *Pro se*

November 4, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used drugs from 2003 until April 2010. He used drugs after he was granted a security clearance in August 2005. I find not enough time has passed to establish that Applicant's use of drugs is unlikely to recur. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on June 30, 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 request for a security clearance.

On March 22, 2011, DOHA issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (Drug Involvement) of the adjudicative

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.

guidelines (AG).² Applicant answered the SOR on May 26, 2011, and he elected to have his case decided on the written record in lieu of a hearing. A copy of the file of relevant material (FORM), dated June 20, 2011, was provided to him by transmittal letter dated July 29, 2011. Applicant was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. DOHA received his response to the FORM on September 30, 2011. The case was assigned to me on October 13, 2011.

Procedural Issue

In the FORM, the Government moved to amend SOR ¶ 1.e by substituting the state where Applicant was arrested in 1999, to conform the SOR allegation to the evidence. Applicant did not object. I granted the amendment.

Findings of Fact

Applicant admitted all the factual allegations in the SOR, except for SOR ¶ 1.e, which he denied. In his answer to the FORM, Applicant admitted SOR ¶ 1.e, as amended. His admissions are incorporated herein as findings of fact. After a thorough review of the evidence of record, including his answer to the SOR and his response to the FORM, I make the following additional findings of fact.

Applicant is a 32-year-old systems engineer manager employed by a defense contractor. He attended college from 1999 until 2003, when he received his bachelor's degree. While in college, he worked part-time to finance his own education. He completed his master's degree in December 2009. Applicant has never been married, and he has no children.

Applicant started working for Government contractors in August 2004. He submitted his first SCA in September 2004, and was granted a security clearance at the secret level in March 2005. He was hired by his current employer, a Government contractor, in June 2009. In his current position, Applicant manages a staff of 17 engineers who serve under his supervision.

In his September 2004 SCA, Applicant disclosed that from August 1998 until December 2003, he illegally used marijuana approximately 30 times. He provided a sworn statement about his drug use to a Government investigator in January 2005. He also disclosed that in September 1998, he was convicted for being a minor in possession of alcohol. His driver's license was suspended and he was required to perform community service. In January 1999, he was charged with possession of marijuana. He indicated the charge was dismissed. However, the Federal Bureau of Investigation (FBI) criminal record shows he was convicted and sentenced to pay a \$1,000 fine (suspended), to serve one year probation, and 90 days confinement

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

(suspended). He failed to disclose that in November 1996, he was charged with possession of alcohol as a minor. Apparently, he was only required to attend counseling.

Applicant submitted the pending SCA in June 2010. He disclosed that he illegally used drugs from June 2003 until April 2010. He used cocaine approximately once a year at parties, concerts, or holiday celebrations. He bought cocaine twice from random, unknown people. The last time he used cocaine was in April 2010, at a party while on vacation. Applicant averred his use of cocaine was minimal. He did not like using cocaine because he did not feel in control of himself.

Applicant illegally used marijuana from June 2003 until December 2008. From 2004 until 2008, he used marijuana approximately once every two weeks at parties, concerts, or holiday celebrations. He bought marijuana approximately 10 times from random unknown people. From 2003 until 2004, he used marijuana "more occasionally at college parties." He claimed his last use of marijuana was in December 2008.

Applicant stated that he did not like the feeling he got from cocaine or marijuana and stopped using them. He expressed regret for his drug experimentation. He acknowledged that his use of drugs was illegal, and considered his decision to use drugs "stupid" and "immature." He tried to stop his illegal use of drugs in 2005, but continued using drugs despite his intentions. He promised not to use illegal drugs in the future, and to be more responsible. He currently is focusing on his career, and saving money to purchase a home. He believes he is now more mature and responsible as a result of his promotion to manager. He no longer places himself in circumstances where the use of illegal drugs is possible. He does not intend to use any illegal drugs in the future and is willing to submit himself to drug testing, as required, to show his commitment to abstain. He submitted a signed statement of intent not to use illegal drugs, with automatic revocation of clearance for any violation. (Answer to the FORM)

Applicant claimed that in January 2011, he attended a one-hour Narcotics Anonymous (NA) class at a church. He stated he is attending NA to increase his awareness about drug use, to reinforce his commitment to remain drug abstinent, and to equip himself to do so. He believes that being candid and forthcoming in his SCA and during his background interview demonstrates his honesty, reliability, and trustworthiness. Applicant presented no documentary evidence to show he has participated in drug counseling or rehabilitation. He presented no evidence of a recent diagnosis or prognosis concerning his use of illegal drugs.

Policies

The Secretary of Defense may 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of 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, a clearance decision is merely an indication that the Applicant has or 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 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 used drugs, with varying frequency, from 1998 (age 19) until April 2010 (age 31). He purchased and used cocaine from 2003 until April 2010. He purchased and used marijuana from August 1998 until December 2008. He used illegal drugs while working for Government contractors, and after he was granted a security clearance in March 2005.

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:

- (a) any drug abuse;³
- (c) illegal drug possession; and
- (d) any illegal drug use after being granted a security clearance.

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 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.

(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.

None of the Guideline H mitigating conditions fully apply. Applicant's use of illegal drugs, although with varying frequency, spanned a period of approximately 12 years, and his use was not infrequent. He started using drugs while he was in college (age 19), and his use extended until April 2010 (age 31). He illegally used drugs socially, and not under extraordinary circumstances. He knew that his use of drugs was illegal and that it would adversely affect his ability to hold his job and a security clearance. Notwithstanding, he illegally used drugs for many years while working for a Government contractor, and after he was granted a security clearance in March 2005.

Applicant believes his questionable behavior is mitigated by the passage of time because he last used cocaine in April 2010, and marijuana in December 2008, and his abstinence since demonstrates his intent not to abuse drugs in the future. He also claimed he participated in a one-hour substance abuse church class and that he is attending NA. He submitted a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation.

Applicant's actions are not sufficient to mitigate drug involvement concerns. He was convicted of possession of marijuana in 1999, and he learned nothing from that experience. He submitted his first SCA in September 2004, and was made aware of the Government's serious concerns about his past illegal drug use when he was interviewed by a Government investigator in January 2005. He then promised to remain drug abstinent and, even though he tried, he failed to do so.

Applicant presented no documentary evidence to show he 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, experience, the period he used drugs, his job responsibilities, his possession of a security clearance, and his recent history of illegal drug use, his promise not to use 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 use of drugs is unlikely to recur.

Considering the record evidence as a whole, I find there has not been a sufficient period of abstinence. Applicant's past questionable behavior still casts doubt on his reliability, judgment, and willingness and ability to comply with the law. His favorable evidence is not sufficient to mitigate the Guideline H security concerns.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c). Applicant receives credit for being truthful and forthcoming during the security clearance process. He stopped using illegal drugs in April 2010, because he wants to develop a career. He has done well working for Government contractors and earned a promotion to a management position. He seems to be on the correct path to accomplish his rehabilitation.

Notwithstanding, in light of Applicant's age, his 12 years of illegal drug use, and the recency of his last drug use, his promise to not use illegal drugs in the future without corroboration is not sufficient to show his questionable behavior is unlikely to recur. At this time, 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 eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge