



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



In the matter of:)
)
) ISCR Case No. 10-08257
)
Applicant for Security Clearance)

Appearances

For Government: Raashid Williams, Esq. and John Bayard Glendon, Esq.,
Department Counsel
For Applicant: Alan V. Edmunds, Esq.

August 25, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s 1999 use of marijuana is mitigated by the passage of time. Considering the evidence as a whole, he did not falsify his security clearance applications or make a false statement to a Government investigator. His performance and overall behavior demonstrates his reliability, judgment, and ability and willingness to comply with the law and follow rules. Clearance is granted.

Statement of the Case

Applicant submitted security clearance applications (SCAs) on March 7, 2006; May 6, 2008; June 26, 2010; and October 18, 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.

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 April 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 May 16, 2011, and requested a hearing before an administrative judge. The case was assigned to me on June 15, 2011. DOHA issued a notice of hearing on July 5, 2011, convening a hearing on July 26, 2011. At the hearing, the Government offered six exhibits (GE 1 through 6). Applicant testified, presented the testimony of two witnesses, and offered one exhibit (AE 1) with 12 tabs (Tabs A through L). All exhibits were received without objection. DOHA received the transcript of the hearing (Tr.) on August 2, 2011.

Findings of Fact

In his answer to the SOR, Applicant denied the single allegation under SOR ¶ 1.a. He admitted the factual allegations under SOR ¶¶ 2.a through 2.e. At his hearing, however, Applicant denied all the Guideline E falsification allegations and that he made a false statement to an investigator in March 2008. After a thorough review of the evidence of record, his answers to the SOR and interrogatories, and having closely observed his demeanor while testifying, I make the following additional findings of fact.

Applicant is a 26-year-old master electrician working for a Government contractor since December 2003. Applicant has never been married, but he has three daughters, ages 10, 7, and 1. He fathered his oldest daughter while attending high school at age 16. During school, he worked part time for a construction company. During school vacations, he worked full time for the same employer, and part time for a large retailer. He graduated from high school in 2003. The court granted Applicant custody of his daughter in June 2004 (AE 1, K), and he has taken care of her after receiving custody. Applicant has been living with his fiancée during the last eight years. They have two daughters, ages 7 and 1. He purchased a home in August 2005 for himself and his family.

Applicant was hired as an electrician apprentice by his current employer in December 2003. He apprenticed for five years, underwent extensive on-the-job training, and became a master electrician in May 2010. He submitted favorable reference letters from office managers and supervisors, most of whom have known and supervised Applicant on a daily basis since 2003-2004. Applicant is considered to be a dedicated and loyal employee. He is one of the company's best service technicians and continuously exceeds his supervisors' performance expectations. He receives excellent feedback from customers about his good behavior, work ethic, and technical expertise. He is an extremely responsible employee. He is trusted by his supervisors and relied upon to accomplish his mission. In sum, he is considered to be a valuable asset to his company.

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

Applicant illegally experimented with marijuana in 1999, when he was 14 years old. He submitted his first SCA in March 2006. In response to SCA section 24, asking “since the age of 16 or in the last seven year, whichever is shorter, have you illegally used any controlled substance, for example marijuana,” Applicant answered “No.” Applicant was 21 years old when he submitted his 2006 SCA.

In March 2008, Applicant participated on a follow-up background interview with a Government investigator. He was asked again whether “since the age of 16 or in the last seven year, whichever is shorter,[he had] illegally used any controlled substance,” and he again answered “No.” The investigator then asked Applicant whether he had ever used any illegal drugs. Applicant volunteered that he illegally experimented with marijuana in 1999, when he was 14 years old and smoked marijuana through a can with one of his friends.³ Applicant denied any further use of marijuana or of any other illegal substances. (GE 2)

Applicant submitted a National Security Questionnaire (SCA) to another Government agency on May 6, 2008, in which he listed no illegal drug use in the last seven years. The May 2008 SCA was not included in the record evidence. On August 21, 2008, the other Government agency denied Applicant's request for a security clearance. The reason for the denial was that during a May 21, 2008 polygraph-assisted interview, Applicant reported that he used marijuana approximately 16 times since 2004, with his most recent use being on May 15, 2008. (GE 3) The results of the interview or the summary of that interview was not included in the record evidence.

On June 23, 2010, and October 18, 2010, Applicant submitted additional SCAs. Section 23 of both SCAs asked him whether in the last seven years he had used any controlled substances. Applicant answered “No” to the questions on both SCAs.

Applicant credibly testified that he has only used an illegal substance, marijuana, once in his life. He admitted he experimented with marijuana once in 1999, but he repeatedly stated he has never again used any illegal substance. Applicant explained that he was scared and wanted to terminate the interview, but he was told that if he did not cooperate and participate in the interview he would not receive a security clearance. He repeatedly told the Government investigator that he had only used marijuana once in his life. However, the investigator continued to pressure Applicant, telling him that the investigator knew Applicant was lying and that he used marijuana on other occasions. After a long questioning process, Applicant wanted to terminate the interview and to do so, he lied to the investigator. He made up for the investigator a number of dates during which Applicant admitted additional use of marijuana. (Tr. 60) At his hearing, Applicant admitted using marijuana in 1999, but credibly denied using marijuana ever again.

Applicant testified that after his older daughter was born, he started working part-time jobs after school and full-time jobs during school vacations. He stopped associating

³ The investigator stated that “Subject (Applicant) volunteered that when he was 14 years old in approximately 1999, he tried marijuana.”

with the friend he experimented with marijuana when he was 14 years old, or with anyone who uses illegal drugs. Applicant credibly testified he has dedicated himself to taking care of his older daughter since he was granted custody of her in high school. He is now dedicated to his fiancée and their three daughters. He knows the use of marijuana is illegal, and that his employer would frown at his use of marijuana. He has been working too hard to now risk his job, his home, and the welfare of his family by using illegal drugs.

Applicant is deeply sorry, remorseful, and regretful about having lied to the investigator about using marijuana when in fact he had not. He is fully committed to never using any illegal drugs again. He is dedicated to his family and his job. He understands that the use of illegal drugs would adversely impact his ability to hold a security clearance and his job. He is not willing to compromise his family's future and their well-being by using controlled substances. Applicant believes that his performance since 2003 demonstrates his integrity, dedication, reliability, and his trustworthiness.

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.

The SOR alleged Applicant used marijuana from 1999 until May 2008. The allegation is based on another Government agency's one-page decision denying Applicant's request for a security clearance. The reason for the denial was that during a May 2008 polygraph-assisted interview, Applicant stated that he used marijuana approximately 16 times from 2004 until May 2009, and that he failed to disclose such use in his May 2008 SCA.

Applicant admitted he illegally used marijuana once in 1999. He credibly denied any further use of marijuana or any other illegal drugs. Considering the evidence as a

whole and having closely observed Applicant's demeanor while testifying, I find Applicant's explanations and testimony credible. Applicant was scared and wanted to terminate the interview, but he was told that if he did not cooperate and participate in the interview he would not receive a security clearance. He mistakenly gave in to the well-intentioned efforts of the Government investigator and lied about his additional use of marijuana.

Applicant illegally used marijuana in 1999, when he was 14 years old. 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,"⁴ and AG ¶ 25(c) "illegal drug possession."

AG ¶ 26 provides four applicable drug involvement mitigating conditions. Considering the evidence as a whole, and having observed Applicant's demeanor while testifying, I am convinced Applicant only experimented with marijuana once in 1999. I find his illegal use of marijuana temporally remote and infrequent. His use of marijuana is not likely to recur, and it does not cast doubt on Applicant's current reliability, trustworthiness, and judgment. I also find Applicant disassociated himself from his drug-using friend. AG ¶¶ 26(a) and (b) apply. The remaining mitigating conditions are not raised by the facts in this case and do not apply.

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 marijuana in 1999 (as described under the Guideline H discussion, incorporated herein). 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.

⁴ 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.

After considering the seven personal conduct mitigating conditions set out in AG ¶ 17, I find that mitigating conditions ¶¶ 17(c), (d), (f), and (g) apply. Applicant's illegal use of marijuana is temporally remote and infrequent. He acknowledged his behavior was improper; he is now a mature man, responsible for a home, and taking care of his family; he no longer associates with illegal drug-users, and his disclosure of his marijuana use substantially reduced his vulnerability to possible exploitation or duress. His 1999 use of marijuana is not likely to recur and it does not cast doubt on Applicant's current reliability, trustworthiness, and judgment.

The SOR alleged that Applicant falsified his March 2006, May 2008, June 2010, and October 2010 SCAs because he failed to disclose in those applications that he illegally used marijuana from 1999 until 2008. It further alleged Applicant made a false statement during a March 2008 interview with a Government investigator. Deliberate falsifications and making a false statement to a Government investigator would trigger the applicability of two disqualifying conditions under AG ¶ 16:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; and

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

For the reasons described, and my findings under the Guideline H discussion (incorporated herein), I find that Applicant did not falsify the alleged SCAs or made a false statement to a Government investigator. Considering the evidence as a whole, and having observed Applicant's demeanor while testifying, I am convinced Applicant only experimented with marijuana once in 1999. Personal conduct mitigating condition AG ¶ 17(f): "the information was unsubstantiated," applies to this case and mitigates the 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 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 fathered a child while in high school. He dedicated himself to his daughter by working part time during school and full time during his school vacations. He was granted custody of his daughter in 1999, and has been taking care of her since. He has been living with his fiancée during the last eight years and they have two daughters together. He purchased a home in 2005 for him and his family.

Applicant started working for his current employer in 2003, and through his performance and behavior has demonstrated maturity, responsibility, and trustworthiness. He is considered to be a dedicated and loyal employee. He apprenticed during five years and became a master electrician. He is one of the company's best service technicians and continuously exceeds his supervisors' performance expectations. He receives excellent feedback from customers about his good behavior, work ethic, and technical expertise. He is trusted by his supervisors and relied upon to accomplish his mission. In sum, he is considered to be a valuable asset to his company.

Applicant expressed sincere remorse and regret about lying to the investigator about using marijuana when in fact he had not. He is fully committed to never using any illegal drugs again. He is dedicated to his family and his job. He understands that the use of illegal drugs would adversely impact on his ability to hold a security clearance and his job. He is not willing to compromise his family's future and wellbeing by using controlled substances.

Considering the evidence as a whole, I find Applicant does not have a current substance abuse problem, he has implemented permanent lifestyle changes, and he demonstrated his ability and willingness to comply with the law, rules, and regulations. On balance, the record evidence convinces 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:	FOR APPLICANT
Subparagraph 1a:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraphs 1a – 1e:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is granted.

JUAN J. RIVERA
Administrative Judge