



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



In the matter of:)
)
) ISCR Case No. 10-08569
)
Applicant for Security Clearance)

Appearances

For Government: Raashid S. Williams, Esq. and Richard Stevens, Esq.,
Department Counsel
For Applicant: Richard Paul Steinmann, Personal Representative

October 26, 2011

Decision

RIVERA, Juan J., Administrative Judge:

Applicant, 26, illegally used drugs from January 2001 until May 2010. He is commended for disclosing his illegal drug use in his security clearance application (SCA). Notwithstanding, in light of his age, the period he used drugs, the recency of his use, and the little corroborating evidence about a permanent lifestyle change and disassociation from his drug-using friends, I find that not enough time has passed to establish that Applicant’s use of drugs is unlikely to recur. His recent behavior casts doubt on his reliability and judgment. Clearance is denied.

Statement of the Case

Applicant submitted a SCA on June 24, 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 May 5, 2011, DOHA issued Applicant a statement of reasons (SOR), alleging security concerns under Guideline H (Drug Involvement) of the adjudicative guidelines (AG).² Applicant responded to the SOR allegations on May 24, 2011, and requested a hearing before an administrative judge. The case was assigned to me on July 5, 2011, to determine whether a clearance should be granted or denied. DOHA issued a notice of hearing on July 19, 2011, convening a hearing for August 17, 2011. At the hearing, the Government offered exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified and submitted exhibits (AE) 1 through 3, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on August 24, 2011.

Findings of Fact

Applicant admitted all the SOR factual allegations. 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 26-year-old information technology (IT) security employee working for a Government contractor. He has never been married and has no children. Applicant started illegally using marijuana with one of his childhood friends while he was in high school. He currently has social contact with his childhood friend whenever possible. He characterized their contact as infrequent because his childhood friend is serving in the U.S. Coast Guard and he is not around.

During high school, Applicant used marijuana approximately once every one to three months. He had truancy problems and attended four different high schools, including an alternative education center. He did not graduate from high school. He received his General Education Development (GED) certificate in 2002. After receipt of his GED, Applicant did not attend college. He worked for two years to make money to visit his then girlfriend who was living in another country. During this period, he continued to use marijuana at approximately the same frequency he used marijuana while in high school.

Between August 2005 and May 2010, Applicant attended two universities, and substantially increased his use of marijuana. During his sophomore and junior years of college, he used marijuana "a lot, sometimes more than once a day." (Tr. 35) Initially, he used part of his father's monthly allotment to purchase marijuana from friends. His then girlfriend (C) would contribute financially to the purchase of marijuana. He dated C for approximately three and one-half years. They are no longer dating, but they have social contact approximately once a month. (Tr. 60-61)

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

While in college, Applicant lived at home and cultivated marijuana in a closet. He grew marijuana for economic reasons (to satisfy his marijuana habit), and because he was embarrassed about using his father's allotment to purchase marijuana. He smoked marijuana at home, and with his girlfriend (C) at her apartment. He claimed he never sold marijuana, but shared his crop with his marijuana-using friends. He averred he last used marijuana in May 2010. He received a bachelor's degree in IT with concentration in security in May 2010. His college grade percentage average was 3.47.

Applicant also used other illegal drugs. He used cocaine once at a party in 2007, with his sister's then boyfriend. He used and cultivated psilocybin (mushrooms) in about 2007 or 2008. He used nitrous oxide approximately 10 times with a friend that he met online. He used vicodin (for other than its prescribed use, or prescribed to others), with varying frequency, from approximately 2008 to about early 2010. His girlfriend (C) participated with Applicant in the use of some of the above drugs.

Applicant claimed that he tapered off his use of marijuana during his senior year of college because he knew he was going into a field where his use of drugs would not be tolerated. He last used marijuana in May 2010, after he had accepted a position with his employer, but approximately one month before he started working.

Applicant submitted his first SCA in June 2010, and disclosed his illegal drug use. He wanted to be completely forthcoming with the Government at the start of his new career. He is passionate about information security and loves his job. Applicant claimed that he has changed his lifestyle and circumstances. He claimed he no longer associates with his drug-using friends, and that he no longer frequents the same environment that led to his use of drugs. He explained that while in college he did not have any responsibilities and that led to his experimentation with drugs. Now he has important job-related responsibilities, he wants to pursue a career, and his focus in life has changed.

Applicant testified he is now a high performing junior-level professional. Because of his excellent performance, he received an out of cycle promotion, and a higher than average market award that amounts to a 16 percent salary increase. His performance and integrity has earned him a position in his company's IT internal security operations center. He is proud of the recognition he received.

Applicant's references stated that he was a major contributing factor in the success of several of his company's projects. He is considered to be creative, deeply conscientious, professional, and a hard-working employee. He is one of the best cybersecurity analysts in his company. His integrity and character are beyond reproach. Both references highly recommend Applicant for a security clearance. However, Applicant's references are not aware of Applicant's long history of illegal drug-use.

Applicant 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. 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. Since high school, Applicant has known that the use of marijuana, mushrooms, cocaine, and the abuse of prescription medications was illegal.

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 illegally used marijuana, with varying frequency, from 2001 (age 17) until May 2010 (age 25). He also illegally used cocaine in 2007. He used and cultivated psilocybin (mushrooms) in about 2007 or 2008. He illegally used nitrous oxide and vicodin, with varying frequency, from approximately 2008 until about early 2010.

Applicant stopped using illegal drugs because he wants to pursue a career with a Government contractor. He knows that his use of the above drugs was illegal, and his continued use of drugs would affect his ability to obtain a security clearance and 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 security concerns in this particular case: AG ¶ 25(a) “any drug abuse”³

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,

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

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 apply. Applicant used illegal drugs from 2001 until May 2010. He used illegal drugs after he was hired by his current employer, but stopped one month before he started working. I find his illegal use is recent and frequent. Applicant’s prolonged use of drugs spans nine years. His favorable evidence is not sufficient to establish that he has implemented permanent lifestyle changes to prevent his future use of illegal drugs. He continues to have some association with his 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.

Applicant 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, the period he used drugs, and his recent history of illegal

as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

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 questionable behavior 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, 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 May 2010, because he wants to develop a career. He did well in college, and he seems to be in the correct path to accomplish his rehabilitation. He has outstanding endorsements from his character references. He is considered to be a truthful, highly competent, and dependable worker. These factors show responsibility, good judgment, and some mitigation.

Notwithstanding, in light of Applicant's age, his nine 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.h: | 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