



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



In the matter of:	)	
	)	
	)	ISCR Case No. 11-00155
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Fahryn Hoffman, Esq., Department Counsel  
For Applicant: Christopher Graham, Esq.

06/08/2012

**Decision**

LAZZARO, Henry, Administrative Judge

Applicant last illegally used a controlled substance in 2007. He disclosed to his employer that he had illegally used controlled substances sometime between 2008 and 2010. In so doing, he effectively notified the Government that he had repeatedly falsified security clearance applications and provided false information during security clearance related interviews sometime between 2008 and 2010 without being confronted with the facts of his falsifications. Applicant has mitigated the security concerns that existed from his history of drug abuse and personal conduct. Clearance is granted.

On October 19, 2011, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.<sup>1</sup> The SOR alleges security concerns under Guideline H (drug involvement) and Guideline E (personal conduct). Applicant submitted a response to the SOR that was received by DOHA on November 17, 2011. He admitted all SOR allegations and requested a decision

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<sup>1</sup> This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended (Directive), and adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

based on the record without a hearing. Applicant's attorney entered an appearance on his behalf on December 23, 2011, and requested a hearing.

The case was assigned to me on March 8, 2012. A notice of hearing was issued on April 9, 2012, scheduling the hearing for May 17, 2012. The hearing was conducted as scheduled. The government submitted six documentary exhibits that were marked as Government Exhibits (GE) 1-6 and admitted into the record without objection. Applicant testified and submitted four documentary exhibits that were marked as Applicant Exhibits (AE) 1-4 and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. Three documents or groups of documents were timely received, marked as AE 5-7, and admitted into the record without objection. Department Counsel's forwarding memorandum of Applicant's post-hearing submissions was marked as Appellate Exhibit (App. Ex.) I and is included in the record. The transcript was received on May 23, 2012.

### **Findings of Fact**

Applicant's admissions to the SOR allegations are incorporated herein. In addition, after a thorough review of the pleadings, testimony, and exhibits, I make the following findings of fact:

Applicant is a 53-year-old man who has been employed as a software engineer by a defense contractor since June 1999. He quit high school during his sophomore year and he left home when he was 15 years old. He obtained a general educational development certificate when he was about 20 years old. He obtained a master's degree in electrical engineering in April 1996.

Applicant has been married since February 1980. He began living with his wife when he was 17 years old. They have three children, ages 25, 23, and 11.

Applicant abused a variety of controlled substances when he was young. His recollection is that from about 1973 until 1983 he used marijuana about 75 times, LSD twice, psilocybin five times, and cocaine five times. He both purchased and sold controlled substances on occasions between 1973 and 1983. Additionally, between 1988 and 2003 he used marijuana about nine times. Finally, he took one pill of hydrocodone that had been prescribed for a friend and given to him by that friend in May 2007.

Applicant explained he had injured himself while engaging in sporting activity and was experiencing pain in his ribs, which is why he accepted and ingested the hydrocodone pill. He used marijuana on four occasions between 1988 and 2003 in social settings, such as fishing and bowling, when a marijuana cigarette was passed to him. He claims he only took one or two puffs from the cigarette on those occasions. He also used marijuana about five times in 1993 while he was unemployed.

Applicant has two relatives he sees on rare occasions who, to his knowledge, still use marijuana. There is no evidence they have used marijuana in his presence since 2003. He has more recently attended parties where he has observed marijuana being used.

When he observed the use, he either distanced himself from those who were using the marijuana or left the party.

Applicant has not used marijuana or any other illegal controlled substance, except the hydrocodone, since 2003. He has not consumed alcohol since either 2007 or 2008. He avers that he will never consume alcohol or use an illegal controlled substance in the future. Applicant submitted a Statement of Intent Not to Abuse Any Drugs that provides for automatic revocation of his security for any violation of that statement of intent. (AE 1)

Applicant has possessed security clearances at various levels, ranging from confidential to top secret, since 1994. In response to applicable questions, Applicant deliberately and falsely denied he ever used controlled substances in security clearance applications he submitted in 1994, 1996, and 2004. Additionally, during a security clearance application interview conducted in September 2005, Applicant deliberately and falsely denied he had used marijuana in the preceding seven years or at anytime while in possession of a security clearance.

Without being confronted with any facts about his falsifications or illegal use of controlled substances, Applicant at some point between 2008 and 2010 notified his security manager that he had abused controlled substances. Applicant testified he believed he first notified the security manager via an e-mail in 2008, and that he submitted a security clearance application in 2008 that included information about his abuse of drugs. The record was held open to provide Applicant the opportunity to submit documentation in support of that testimony. In response to that opportunity, Applicant submitted a statement stating he was unable to obtain the 2008 information because the security manager is no longer employed by the company and the security office does not have the application he submitted in 2008. (AE 5) He did, however, submit a security clearance application he signed in May 2009, which includes information about his use of marijuana between 1988 and 2003, and his use of hydrocodone in 2007. The information about Applicant's abuse of controlled substances is handwritten in the application, as are several other additions and corrections, seemingly indicating the disclosure of the drug abuse occurred sometime after the application was initially prepared. Whatever date Applicant first voluntarily disclosed his illegal use of controlled substances, it is uncontroverted he did so without being confronted with facts about that use.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on October 12, 2010. In the e-QIP, Applicant disclosed his use of marijuana between 1988 and 2003, and his use of hydrocodone that had not been prescribed for him in May 2007. In his response to the SOR, Applicant asserted he disclosed the information so he would not be perceived as a risk to be coerced or blackmailed and to reduce any chance of vulnerability to the United States. Applicant testified he decided he needed to disclose information about his drug abuse because he was accessing higher classified material, he did not want to hide anything about himself, and he felt it best the Government know about his past. (Tr. 36)

## Policies

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Clearance decisions must be fair and impartial decisions based upon the relevant and material facts and circumstances, the whole-person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Guideline H (drug involvement) and Guideline E (personal conduct), with their disqualifying and mitigating conditions, are most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.<sup>2</sup> The Government has the burden of proving controverted facts.<sup>3</sup> The burden of proof in a security clearance case is something less than a preponderance of evidence,<sup>4</sup> although the Government is required to present substantial evidence to meet its burden of proof.<sup>5</sup> "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."<sup>6</sup> Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.<sup>7</sup> Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.<sup>8</sup>

No one has a right to a security clearance<sup>9</sup> and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>10</sup> Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.<sup>11</sup>

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<sup>2</sup> ISCR Case No. 96-0277 (July 11, 1997) at 2.

<sup>3</sup> ISCR Case No. 97-0016 (December 31, 1997) at 3; Directive, Enclosure 3, Item E3.1.14.

<sup>4</sup> *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

<sup>5</sup> ISCR Case No. 01-20700 (December 19, 2002) at 3 (citations omitted).

<sup>6</sup> ISCR Case No. 98-0761 (December 27, 1999) at 2.

<sup>7</sup> ISCR Case No. 94-1075 (August 10, 1995) at 3-4; Directive, Enclosure 3, Item E3.1.15.

<sup>8</sup> ISCR Case No. 93-1390 (January 27, 1995) at 7-8; Directive, Enclosure 3, Item E3.1.15.

<sup>9</sup> *Egan*, 484 U.S. at 528, 531.

<sup>10</sup> *Id.* at 531.

<sup>11</sup> *Egan*, Executive Order 10865, and the Directive.

## Analysis

### Guideline H, 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. (Adjudicative Guideline [AG] 24)

Applicant illegally used, purchased, and sold a variety of controlled substances when he was younger. He used marijuana about nine times between 1988 and 2003. He used hydrocodone that had not been prescribed for him once in May 2007. Applicant possessed a security clearance when he used marijuana between 1988 and 2003, and hydrocodone in 2007. Disqualifying Conditions (DC) 25(a); *any drug abuse*: DC 25(c): *illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*; and DC 25(g): *any illegal drug use after being granted a security clearance* apply.

It has been about nine years since Applicant last used marijuana. It has been about five years since his one-time use of hydrocodone that had not been prescribed for him. His use of hydrocodone was situational in response to pain he was experiencing as the result of a sports injury. He credibly testified he will never abuse controlled substances or take prescription medicine that has not been prescribed for him again. Applicant submitted a Statement of Intent Not to Abuse any Drugs that provides for automatic revocation of his security clearance for any violation of the statement of intent. Accordingly, the following Mitigating Conditions (MC) are applicable: MC 26(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*; MC 26(b): *a demonstrated intent not to abuse any drugs in the future, such as: (3) an appropriate period of abstinence; and (4) a signed statement of intent with automatic revocation of clearance for any violation.*

### Guideline E, Personal Conduct

Conduct involving questionable judgment, lack of candor, dishonesty, or willingness 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. (AG 15)

Applicant deliberately provided false answers in security clearance applications he submitted in 1994, 1996, and 2004. In 2005, he provided false information to an investigator during an interview in connection with his application for a security clearance application. DC 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 DC 16(b): *deliberately providing false or misleading information*

*concerning relevant facts to an employer, investigator, security official, competent medical authority, or other government representative apply.*

Applicant voluntarily disclosed his use of marijuana and hydrocodone sometime between 2008 and 2010, and most likely on a recurring basis. He did so without being confronted with any facts about that usage. Instead, as he testified, he disclosed his use of marijuana and hydrocodone in an effort to make sure that he could not be coerced or blackmailed and to minimize any risk to the United States. By disclosing his use of marijuana and hydrocodone, Applicant effectively notified the Government he had falsified the security clearance applications and statement he had previously submitted. MC 17(a): *the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*; and MC 17(e): *the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress* apply.

It is troubling that over the course of at least 11 years, Applicant repeatedly submitted false information to the Government about his use of controlled substances, undoubtedly in an effort to protect his employment. However, several years ago he voluntarily disclosed information about his illegal drug usage. But for his disclosures, it is unlikely the Government would have ever become aware that he had abused controlled substances. By disclosing his abuse of drugs, Applicant displayed that he has finally developed the integrity that is demanded of those who are granted access to classified information.

Security clearance determinations are not intended to be punitive and are not designed to punish applicants for past transgressions. Rather, they are solely designed to make a rational determination that it is presently clearly consistent with the national interest to grant an individual access to classified information. Although belatedly, Applicant has removed any possibility that he can be coerced or blackmailed because of his abuse of controlled substances and provision of false information to the Government. He voluntarily acknowledged his past offenses and disclosed his abuse of controlled substances to his employer's security officer without being confronted with adverse information. In so doing, he has provided adequate information about his present character to make an affirmative determination that it is clearly consistent with the interests of national security to grant him continued access to classified information.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, Applicant's demonstrated rehabilitation, the non-existent potential for coercion being exerted upon Applicant, the unlikelihood of recurrence, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying and mitigating conditions, I find Applicant mitigated the drug involvement and personal conduct security concerns. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is clearly consistent with the interests of national security to grant Applicant a security clearance. Guidelines H and E are decided for Applicant.

## **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

Subparagraphs 1.a and b: For Applicant

Paragraph 2, Guideline E: FOR APPLICANT

Subparagraphs 2.a - e: For Applicant

## **Conclusion**

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

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Henry Lazzaro  
Administrative Judge

