



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



In the matter of: )  
 )  
 [Redacted] ) ISCR Case No. 11-01662  
 )  
 Applicant for Security Clearance )

**Appearances**

For Government: Julie R. Mendez, Esq., Department Counsel  
For Applicant: *Pro se*

September 30, 2011

**Decision**

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement). Eligibility for access to classified information is denied.

**Statement of the Case**

On April 25, 2011, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to revoke his security clearance, citing security concerns under Guideline H. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on April 29, 2011; answered it on May 13, 2011; and requested a decision on the record without a hearing before an administrative judge. DOHA received the request on May 17, 2011. On June 14, 2011, Department Counsel requested a hearing. Her request is attached to the record as Hearing Exhibit (HX) I.

She was ready to proceed on July 20, 2011, and the case was assigned to me on July 29, 2011. DOHA issued a notice of hearing on August 17, 2011, scheduling it for September 8, 2011. I convened the hearing as scheduled. Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified and presented the testimony of one witness.

I kept the record open until September 23, 2011, to enable both parties to submit additional evidence. Department Counsel timely submitted a memorandum and copies of publications on drug use from the National Highway Traffic Safety Administration; the Department of Justice; a state Department of Mines, Minerals, and Energy; and the National Institutes of Health. Her memorandum and supporting documentation are attached to the record as HX II. I have taken administrative notice of the relevant facts set out in her memorandum, and they are included below in my "Findings of Fact." Applicant's response to my invitation to present additional evidence is attached to the record as HX III. DOHA received the transcript (Tr.) on September 16, 2011.

### **Findings of Fact**

The SOR alleges that Applicant underwent a random drug test on September 28, 2010, and tested positive for marijuana (SOR ¶ 1.a). It also alleges that the same urine sample was tested again on October 7, 2010, and tested positive for marijuana (SOR ¶ 1.b). In his answer to the SOR, Applicant admitted that his urine sample twice tested positive for marijuana, but he denied using marijuana. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 47-year-old senior staff analyst employed by a federal contractor since December 2005. He married in October 1985 and has three children, ages 23, 19, and 9. He served in the U.S. Air Force from April 1984 to June 2005, retiring as a master sergeant (E-7).<sup>1</sup> He worked for another federal contractor from June to October 2005, when he was laid off. He was unemployed for a short time before starting his current job. (GX 3 at 4.) He held a security clearance during most of his military service and his subsequent employment by federal contractors.

Applicant was on temporary duty on September 19-25, 2010. He returned to his office on Monday, September 27, 2010, and was administered a random drug test at about 3:30 p.m. on Tuesday, September 28, 2010. On October 4, 2010, the laboratory that analyzed his urine sample informed him that it tested positive for the metabolite of marijuana. (GX 3 at 5; GX 5.) The Department of Defense cutoff for a positive result is 15 nanograms per milliliter (ng/ml). Applicant's specimen contained 30 ng/ml of the marijuana metabolite.

The laboratory asked Applicant if he wanted his sample retested. He responded in the affirmative and paid \$150 for the retest. He informed the laboratory that he was taking 100 milligrams of Ropinirole daily for "restless leg syndrome" and a medication

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<sup>1</sup> Applicant testified that he served in both the Army and the Air Force, but his security clearance application submitted in August 2006 listed only Air Force service. (Tr. 28; GX 2 at 24.)

for high blood pressure. (Tr. 32, 43; GX 3 at 5; GX 6 at 1.) He testified that he stopped taking Ropinirole after the random drug test, because he learned that it was known to cause audio and visual hallucinations. On October 4, 2010, the laboratory informed Applicant that the retest, conducted by gas chromatography mass spectrometry, confirmed the results of the first test. (GX 6.)

Applicant's coworker, who has known him for about six years, testified that he worked beside Applicant from about 8:00 a.m. until about 1:00 p.m. on September 28, 2011. They were involved in a detailed and complicated testing procedure. The witness testified that Applicant was functioning normally and did not show any signs of impairment. The witness also testified that the drug test was not really "random," because they had begun working on a new contract and everyone knew that there would be a drug test within two weeks after starting the new contract. (Tr. 50-58.)

Applicant testified that he called a staff member at the laboratory and asked how he could have a level of 30 ng/ml, and he was informed that he would have had to ingest it on the day of the urinalysis to test at that level. (Tr. 35.) He did not know the name or qualifications of person with whom he spoke. He testified that he also talked to the medical review officer and asked about a "false positive" and the possibility of cross-contamination. According to Applicant, the medical review officer responded that their laboratory "is infallible." Their conversation was interrupted when the telephone was disconnected, and Applicant was not able to contact the medical review officer again. (Tr. 44-47.)

I have taken administrative notice that the detection times for marijuana users vary substantially. The length of time between marijuana ingestion and the time it is metabolized to the point that it will not be detected depends on an individual's metabolism, the sensitivity of the testing procedure, the amount and frequency of use, body mass, age, overall health, drug tolerance, and degree of acidity or alkalinity (pH) of the individual's urine. A positive test result usually indicates use at some time within one to three days, but the drug detection window may be much longer, up to five weeks, for a heavy, chronic user. I have also taken administrative notice that the effects of smoking marijuana are felt within minutes, peaking in 10 to 30 minutes, with a "high" lasting about two hours. An individual may test positive for marijuana ingestion well past the time when there are signs of obvious impairment.

### **Policies**

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President 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." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants 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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching 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.

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 the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "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. Thus, a decision to deny a security clearance is merely an indication 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. 92-1106 at 3, 1993 WL 545051 at \*3 (App. Bd. Oct. 7, 1993).

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 burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[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

The concern under this guideline set out in AG ¶ 24: “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.” Guideline H encompasses “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).” AG ¶ 24(a)(1).

The evidence of Applicant's positive urinalysis raises the disqualifying conditions in AG ¶¶ 25(a) (“any drug abuse”) and 25(b) (“testing positive for illegal drug use”). “Drug abuse” is defined in AG ¶ 24(b) as “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” The evidence also raises AG ¶ 25(c) (“illegal drug possession”), because marijuana ordinarily cannot be ingested without possessing it; and AG ¶ 25(g) (“any illegal drug use after being granted a security clearance”), because Applicant held a security clearance at the time he ingested marijuana.

Although Applicant denied using marijuana, he presented no evidence showing that the laboratory testing of his urine specimen was improperly performed or otherwise unreliable. The testimony of his witness regarding the absence of signs of impairment does not refute the positive test result, because an individual may test positive for marijuana use well past the time when there are visible signs of impairment.

Security concerns under this guideline may be mitigated if “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.” AG ¶ 26(a). Applicant's positive urinalysis was recent, and there is no evidence of the frequency or circumstances of his marijuana use. His ingestion of marijuana while holding a security clearance was a serious breach of trust, and it casts doubt on his current reliability, trustworthiness, and good judgment. Thus, I conclude that AG ¶ 26(a) is not established.

Security concerns also may be mitigated by “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.” AG ¶ 26(b). Applicant declared in his response to the SOR and at the hearing that he does not use marijuana, implying that he will not use it in the future. Thus, he receives some credit under this mitigating condition. However, he did not produce any evidence to establish AG ¶ 26(b)(1), (2), or (4). AG ¶ 26(b)(3) is not applicable because his positive urinalysis was recent. No other enumerated mitigating conditions are applicable.

## Whole-Person Concept

Under the whole-person concept, an 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. An 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.

Under AG ¶ 2(c), 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. I have incorporated my comments under Guideline H in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a mature adult, with a long history of military and civilian service. He has held a clearance for many years, apparently without incident. At the hearing, he emphatically denied using marijuana. The evidence indicates the he knew, or should have known, that drug testing was imminent because the company had just begun a new contract. It is hard to understand why he would risk his career to use marijuana. Nevertheless, while drug testing laboratories are not infallible, Applicant has provided no reason to doubt the results in this case. Once a security concern arises, there is a strong presumption against granting or continuing a security clearance. ISCR Case No. 09-01652 at 3 (App. Bd. Aug 8, 2011), *citing Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9<sup>th</sup> Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). Applicant has not overcome that presumption.

After weighing the disqualifying and mitigating conditions under Guideline H, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve any doubts in favor of national security, I conclude Applicant has not mitigated the security concerns based on drug involvement. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

### **Formal Findings**

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline H (Drug Involvement):                   AGAINST APPLICANT

Subparagraphs 1.a-1.b:   Against Applicant

### **Conclusion**

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman  
Administrative Judge