



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



In the matter of:)
)
 [Redacted]) ISCR Case No. 11-02477
)
 Applicant for Security Clearance)

Appearances

For Government: Eric H. Borgstrom, Esq., Department Counsel
For Applicant: *Pro se*

10/31/2012

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guidelines H (Drug Involvement) and E (Personal Conduct). Security concerns under Guideline H are mitigated, but security concerns under Guideline E are not mitigated. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on September 30, 2010. On July 18, 2012, the Defense Office of Hearings and Appeals (DOHA) notified him that it was unable to find that it was clearly consistent with the national interest to grant him access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to grant or deny his application. DOHA set forth the basis for its action in a Statement of Reasons (SOR), citing security concerns under Guidelines H and E. 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 July 26, 2012; answered it on August 9, 2012; and requested a hearing before an administrative judge. DOHA received the request on August 13, 2012. Department Counsel was ready to proceed on September 1, 2012, and the case was assigned to me on September 7, 2012. DOHA issued a notice of hearing on September 20, 2012, scheduling it for October 10, 2012. I convened the hearing as scheduled. Government Exhibits (GX) 1 and 2 were admitted in evidence without objection. Applicant testified and submitted Applicant's Exhibits (AX) A through H, which were admitted without objection. I kept the record open for one week to enable Applicant to submit signed copies of AX C and D. He timely submitted signed copies, which were substituted for the unsigned copies submitted at the hearing. DOHA received the transcript (Tr.) on October 24, 2012.

Findings of Fact

In his answer to the SOR, Applicant admitted all the allegations in the SOR. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 24-year-old mechanical engineer employed by a defense contractor. He attended college from September 2006 to May 2010, and he began working for his current employer in August 2010. He has never held a security clearance.

Applicant is unmarried and lives with his mother. He has about \$25,500 in savings and checking accounts and about \$18,300 in his retirement account. (AX A; AX B.)

Applicant began using marijuana as a freshman in college, using it four to seven times a week. He occasionally bought marijuana from friends and shared it. During his freshman year, he supplied two classmates with a prescription medication that he had used in high school, in order to help them study for examinations. (GX 1 at 46-47; Tr. 24, 31-32.)

During Applicant's sophomore year, he reduced his marijuana use to two to five times a week, because his frequent marijuana use interfered with his academic performance. During his junior year, he reduced it further to one to three times a week, mostly on weekends. As a senior, he used marijuana no more than twice a week. During his senior year he purchased and experimented with psilocybin mushrooms twice, once in January 2010 and again in March or April 2010. He did not ingest mushrooms again because the effects of ingestion were unpleasant, and he was concerned about adverse health consequences. (GX 1 at 46-47; GX 2 at 4-5, 8; Tr. 24-25, 29.)

Applicant stopped using marijuana in June 2010, because it was inconsistent with his career aspirations. However, he continues to associate with friends who use marijuana at home, parties, and concerts. (Tr. 25-26.) In response to DOHA interrogatories, he stated that he often leaves the area where marijuana use is occurring. He also stated that he does not handle, use, or assist with the use of marijuana. (GX 2 at 12.) At the hearing, however, he admitted that there have been occasions where he has momentarily handled marijuana when it been handed to him and he has passed it to another person. (Tr. 35.) He is unwilling to harm his social life by cutting his ties with marijuana-using friends. (Tr. 50-51.)

Applicant has disclosed his previous drug use to his “close colleagues” and managers at work. (Tr. 30.) He has never received counseling or treatment for drug abuse. In his response to DOHA interrogatories, he stated, “I am not ashamed of this history [of drug use]. At the same time, I have no intention of returning to this behavior.” (GX 2 at 14.) Two of Applicant’s friends who have known him since 2006 submitted statements corroborating his use of drugs in college, his gradually decreasing use in college, and his abstinence since June 2010. (AX C; AX D.)

At the hearing, Applicant submitted a statement reciting the following:

I . . . have ceased all offending activities that I engaged in during my years [in college]. Specifically, I have ceased all illicit drug use, possession, and distribution and am working toward having no associations with drug users or environments where drugs are used.

I hereby agree that should I use illicit substances again, or commit any illegal act relating to drug use, possession, or distribution, I will voluntarily forfeit any security clearance levels I am trusted with.

(AX E.)

Applicant’s performance appraisals for 2010 and 2011 rated him as “on target” in all performance areas. (AX F; AX G.) His immediate supervisor provided input to Applicant’s appraisal for 2012, in which he stated that Applicant “takes on responsibi[lity], excels at tight deadline challenges and delivers on time with satisfactory results.” (AX H.)

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 that 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 SOR alleges that Applicant used and purchased marijuana from about November 2006 to “at least” June 2010 (SOR ¶¶ 1.a and 1.b) and used and purchased psilocybin mushrooms at least twice in 2010 (SOR ¶¶ 1.c and 1.d). It also alleges that he provided his prescribed medication to friends to help them study for college examinations in 2007 (SOR ¶ 1.e).

The concern under this guideline is as follows: “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.” AG ¶ 24. 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 raises the following disqualifying conditions under this guideline:

AG ¶ 25(a): any drug abuse, 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”; and

AG ¶ 25(c): illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

Two mitigating conditions under this guideline are relevant:

AG ¶ 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; and

AG ¶ 26(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.

The first prong of AG ¶ 26(a) (“happened so long ago”) focuses on whether the drug involvement was recent. There are no “bright line” rules for determining when conduct is “recent.” The determination must be based on a careful evaluation of the totality of the evidence. If the evidence shows “a significant period of time has passed

without any evidence of misconduct,” then an administrative judge must determine whether that period of time demonstrates “changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation.” ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004).

Applicant’s misuse of prescription drugs was an isolated incident in 2007, more than five years ago. His college drug use steadily decreased after his freshman year, and he has abstained from drug use for more than two years. He has submitted a statement of intent in accordance with AG ¶ 26(b)(4). He admitted that he has momentarily and inadvertently possessed marijuana since June 2010, when it has been passed to him and he has immediately passed it on rather than use it. These instances of “possession” have been inadvertent and not related to drug abuse on his part. His decision to place himself in situations resulting in inadvertent possession is more appropriately evaluated under Guideline E, discussed below. I conclude that AG ¶¶ 26(a), 26(b)(3), and 26(b)(4) are established, but AG ¶¶ 26(b)(1) and (2) are not established.

Guideline E, Personal Conduct

The SOR cross-alleges Applicant’s drug involvement under this guideline (SOR ¶ 2.a) and further alleges that he continues to visit environments where illegal drugs are used (SOR ¶ 2.b). The concern under this guideline is set out in AG ¶ 15 as follows: “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. . . .”

Applicant’s drug involvement alleged in SOR ¶ 1.a-1.e, his continuing practice of associating with drug users and frequenting places where illegal drugs are used, and his momentary possession of marijuana under these circumstances raise the following disqualifying conditions under this guideline:

AG ¶ 16(c): credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information;

AG ¶ 16(d): credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This

includes but is not limited to consideration of . . . a pattern of dishonesty or rule violations; and

AG ¶ 16(e): personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as . . . engaging in activities which, if known, may affect the person's personal, professional, or community standing.

The following mitigating conditions are relevant:

AG ¶ 17(c): the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

AG ¶ 17(d): the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

AG ¶ 17(e): the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress;

For the reasons set out in the above discussion of AG ¶ 26(a), I conclude that AG ¶ 17(c) is established for Applicant's drug use in college, but it is not established for his continuing association with persons and places associated with illegal drug activity and his occasional instances of momentary drug possession. This continuing conduct casts doubt on his good judgment and precludes application of AG ¶ 17(c).

Regarding AG ¶ 17(d), Applicant has acknowledged his prior drug abuse, but he has not taken steps to change his inappropriate association with drug users. He is unwilling to change this aspect of his social life, making recurrence likely. I conclude that AG ¶ 17(d) is not established.

Regarding, AG ¶ 17(e), Applicant has reduced his vulnerability to exploitation, manipulation, or duress based on his personal drug use, but he has not taken steps to reduce his vulnerability based on association with persons and places associated with illegal drug activity. I conclude that AG ¶ 17(e) is not established.

Whole-Person Concept

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. In applying 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.

I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under those guidelines, but some warrant additional comment. Applicant was sincere, candid, and credible at the hearing. He is young and inexperienced with the professional world in which he works. His motivation for abstaining from drug use is related to his professional aspirations, but he does not fully appreciate that his occasional handling of drugs at social occasions and continuing association with illegal drug users make him vulnerable to arrest, prosecution, exploitation, and pressure. His personal conduct raises serious questions about his good judgment.

After weighing the disqualifying and mitigating conditions under Guidelines H and E, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his previous drug use, but he has not mitigated the security concerns based on his personal conduct. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to grant him 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):	FOR APPLICANT
Subparagraphs 1.a-1.e:	For Applicant
Paragraph 2, (Personal Conduct):	AGAINST APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.b:	Against Applicant

Conclusion

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

LeRoy F. Foreman
Administrative Judge