



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



In the matter of:)
)
XXXXXXXXXX, XXXXX) ISCR Case No. 11-04781
)
Applicant for Security Clearance)

Appearances

For Government: Richard A. Stevens, Esq., Department Counsel
For Applicant: *Pro se*

06/22/2012

Decision

TUIDER, Robert J., Administrative Judge:

Applicant has mitigated security concerns pertaining to drug involvement and personal conduct. Clearance is granted.

Statement of the Case

On January 19, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP). On January 11, 2012, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) detailing security concerns under Guidelines H (drug involvement) and E (personal conduct). The action was taken 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 revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant answered the SOR in writing in an undated response, which DOHA received on February 9, 2012. On March 2, 2012, Department Counsel was prepared to proceed. On March 28, 2012, the case was assigned to me. On April 10, 2012, DOHA

issued a notice of hearing scheduling the hearing for May 8, 2012. The hearing was held as scheduled.

At the hearing, Department Counsel offered Government Exhibits (GE) 1 through 3, which were received without objection. The Applicant testified, but did not offer any exhibits at his hearing. I held the record open until May 18, 2012, and later extended that deadline at Applicant's request to May 25, 2012, to afford the Applicant the opportunity to submit documents on his behalf. Applicant timely submitted Applicant's Exhibits (AE) AE A through H, which were received without objection. DOHA received the hearing transcript (Tr.) on May 16, 2012.

Findings of Fact

Applicant admitted all of the SOR allegations with explanations. His answers with explanations are accepted as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

Background Information

Applicant is a 28-year-old locksmith, who has worked for a defense contractor since October 2011. (SOR answer, Tr. 12.) He is a first-time applicant for a security clearance. Successfully vetting for a security clearance is a condition of Applicant's continued employment. (Tr. 11-12, 16.)

Applicant graduated from high school in May 2002, and did not pursue higher education. (GE 1) He has never married; however, he has a one-year-old daughter from a previous relationship. He informally pays his daughter's mother \$400 in monthly child support and miscellaneous expenses. (Tr. 22-24, AE E.) He has never served in the military. (GE 1.)

Drug Involvement

Applicant has an admitted history of drug use spanning a seven-year period from 2000 to 2007, when he was between the ages of 17 to 24. (SOR answer, GE 1, Tr. 12.) Applicant's drug of choice was marijuana that he used with varying frequency; however, he used cocaine at least once in 2000 or 2001. In 2000, while a minor, he was charged with misdemeanor possession of marijuana. He pled guilty, was fined, and expelled from school. In 2002, Applicant was charged with misdemeanor possession of marijuana; possession of drug objects; and furnishing, purchasing, and possessing alcoholic beverages. The charges were later combined to one charge of disorderly conduct. Applicant was found guilty of the reduced charge, fined \$500 plus court costs, and given 12 months probation. He purchased some of the marijuana he used. Applicant's parents had him drug tested in 2001 after he "got in trouble at (high) school." The test results were positive for marijuana. That was the only drug test he ever failed. (SOR ¶¶ 1.a – 1.g, SOR answer, Tr. 12-13, 36, 41-42.)

The SOR also alleged that Applicant continues to associate with individuals who use marijuana and that he stated he may use marijuana in the future. (SOR ¶ 1.g.) Applicant's SOR answer explained that the individuals he referred to are his cousins who he sees on a regular basis. He further added in his SOR answer that he reconsidered his statement regarding future drug use. Applicant stated in his SOR answer that he will not smoke marijuana or use any illegal drug in the future. He explained that any further drug use was incompatible with his career and new found responsibilities as a parent. (SOR answer, Tr. 50-51.)

Applicant testified that had he listened to his parents about drug use, he would not be in his current predicament. During his testimony, he emphasized again that he wished to retract his statement about future drug use and that his new found responsibilities as a parent have caused him to rethink his past conduct. (Tr. 15-17.) As a locksmith working on an Army post, he thoroughly enjoys his job and finds it particularly rewarding when he can help a soldier who is locked out of his or her room. He does not want to do anything to jeopardize his career. (Tr. 17.)

Applicant has been drug-free since 2007. He undergoes random drug testing at work and has never failed a drug test. Post-hearing, he submitted the negative results from a May 9, 2012 random drug test.¹ (Tr. 43-46, AE G.) Applicant submitted a statement of intent to remain drug-free with the understanding that his security clearance would automatically be revoked for any violation. He no longer associates with persons who use drugs and has made it clear to his family members that he will not tolerate drug use in his presence. (AE A.) Applicant provided a positive report from a drug and alcohol counselor. The counselor reported that he is not addicted to alcohol or drugs and provided an overall favorable prognosis. (AE H.)

Personal Conduct

SOR ¶ 2.a indicates that Section 22e of his January 15, 2011 e-QIP asked whether he had ever been charged with any offenses related to alcohol or drugs. Applicant replied, "No" to this question. However, he did disclose his marijuana use under Section 23a putting the Government on notice of his past drug use. During his February 2011 Office of Personnel Management (OPM) interview, he fully disclosed his 2000 marijuana charge as a minor and his 2002 drug and underage alcohol charges that were reduced to disorderly conduct. He was also forthcoming and candid about these charges at his hearing. (Tr. 24-42, GE 2.)

Applicant credibly testified that as a first-time applicant for a security clearance, he found the e-QIP confusing and that it took him five to six hours to complete. He was of the belief that he was not required to disclose his 2000 offense as a minor because the charge occurred beyond seven years and that his 2002 charge had been combined to a sole disorderly conduct charge and as such did not meet the e-QIP disclosure requirements. However, as previously indicated, Applicant put the Government on notice about his past drug use and he was forthright about his 2000 and 2002 charges

¹ This drug test was one day after his hearing.

one month later when interviewed by an OPM investigator and at his hearing. (SOR answer, Tr. 17-20, 55-57, GE 2.)

Character Evidence

Applicant submitted reference letters from his previous employer's human resource manager as well as from his current human resource manager. Both references were favorable and describe Applicant in a positive light. (SOR answer.) He also submitted three reference letters from coworkers, who have known Applicant since he began his employment as a locksmith. These coworkers were uniform in their support of Applicant and noted his honesty and dedication as a locksmith servicing the Army community. (AE B – AE D.)

Applicant's former girlfriend and mother of his daughter submitted a reference letter noting his commitment to their daughter, both financially and emotionally. His 2011 employee performance review documents his contribution as a defense contractor. (AE E – AE F.)

Policies

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). 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 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 and modified.

Eligibility for a security clearance is predicated upon meeting the criteria contained in the adjudicative guidelines (AG). These guidelines 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 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 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. Adverse clearance decisions are made "in terms of the national interest and

shall in no sense be a determination as to the loyalty of the [a]pplicant 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 on any express or implied determination as to applicant’s allegiance, loyalty, or patriotism. It is merely an indication the applicant has or 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

Drug Involvement

AG ¶ 24 articulates the security concern concerning 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.

Four drug involvement disqualifying conditions in AG ¶¶ 25(a), 25(b), 25(c), and 25(h) could raise a security concern and may be disqualifying in this case: “any drug abuse,”² “testing positive for illegal drug use,” “illegal drug possession,” and “expressed intent to continue illegal drug use.” These four disqualifying conditions apply because Applicant used and possessed marijuana from 2000 to 2007, used cocaine once in 2000 or 2001, tested positive for marijuana in 2001, associated with individuals who

²AG ¶ 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.”

used marijuana and stated he may use marijuana in the future.³ AG ¶¶ 25(a), 25(b), 25(c), and 25(h) apply.

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.

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). For example, the Appeal Board determined in ISCR Case No. 98-0608 (App. Bd. Aug. 28, 1997), that an applicant's last use of marijuana occurring approximately 17

³AG ¶ 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.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substance. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I).

months before the hearing was not recent. 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.”⁴

SOR ¶¶ 1.a through 1.g allege Applicant’s seven-year involvement with marijuana to include use, possession, and purchase while he was between the ages of 17 to 24. He also tried cocaine once in 2000 or 2001 and had two drug-related charges, the first having occurred when he was a minor and the second when he was 18 years old. Applicant also was alleged to associate with individuals who used marijuana and was ambivalent about his future marijuana use.

Applicant has abstained from marijuana or any drug use for five years. He recognized the adverse impact of drug use in connection with access to classified information. Applicant fully understands that drug use of any kind is incompatible with his responsibilities as a parent and would adversely affect his career. He also understands that marijuana use is illegal. Applicant has further disassociated himself from individuals who use drugs and has changed or avoids the environment where drugs are used, and has signed a statement of intent with automatic revocation of clearance for any violation. Applicant also received a very favorable prognosis from a drug and alcohol counselor. Lastly, I accept Applicant’s statement that he will continue

⁴ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge’s decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant’s last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR Case No. 01-02860 at 3 (App. Bd. May 7, 2002) (“The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant’s efforts at alcohol rehabilitation.”) (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, affirmed the administrative judge’s decision to revoke an applicant’s security clearance after considering the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

to abstain from drug possession and use. AG ¶¶ 26(a), 26(b) and 26(d) apply to his marijuana and drug-related conduct.⁵

AG ¶ 26(c) is not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. Marijuana was never lawfully prescribed for him under federal law.

In conclusion, Applicant ended his drug use in 2007, about five years ago. The motivations to stop using illegal drugs are evident. He understands the adverse consequences from marijuana use.⁶ He has shown or demonstrated a sufficient track record of no drug abuse to eliminate drug involvement as a bar to his access to classified information. Drug involvement concerns are mitigated.

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

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.

AG ¶ 16 describes several conditions that could raise a security concern and may be disqualifying in this case:

(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;

(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

⁵In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

⁶Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

properly safeguard protected information; and

(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:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information:

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations;

(4) evidence of significant misuse of Government or other employer's time or resources.

AG ¶¶ 16(a), 16(c), and 16(d) apply. Section 22e of his January 15, 2011 e-QIP asked whether he had ever been charged with any offenses related to alcohol or drugs. Applicant responded, "No" to this question. He failed to disclose his 2000 drug-related charge and his 2002 drug and alcohol-related charges. Inquiry about the applicability of mitigating conditions is required.

AG ¶ 17 provides seven conditions that could mitigate security concerns in this case:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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;

(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;

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

(f) the information was unsubstantiated or from a source of questionable reliability; and

(g) association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations.

AG ¶ 17(f) applies. Applicant disclosed his lengthy marijuana use. He provided notice to the Government that he had a drug abuse history. He failed to provide requested information related drug and alcohol charges because he was confused about whether he was required to list a nine-year old drug 2000 charge that occurred when he was a minor and was of the belief that his 2002 charge was ultimately charged as disorderly conduct.

Applicant did not intend to deceive the Government about his derogatory drug and alcohol charge information in February 2011. One month later, he discussed these charges in detail with an OPM investigator. He did so even though the OPM investigator had no record of his 2000 juvenile charge. When he was advised that he was required to list these charges, he acknowledged that the omission of the derogatory information was a mistake, and he regretted the error. The allegation of intentional falsification of his January 15, 2011 e-QIP is unsubstantiated because I do not believe he intended to deceive the Government. The cross allegation of drug involvement under this concern was addressed in the analysis above. AG ¶¶ 17(a), 17(d), 17(e), and 17(g) apply.

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 the 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 my comments under Guidelines H and E in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

There is evidence against mitigating Applicant's conduct, namely his seven-year involvement with drugs. However, for the past five years, Applicant has remained drug-free. His random work-related drug tests have been negative. A drug and alcohol counselor has evaluated him and provided a very favorable prognosis. A combination of maturity, his responsibilities as a parent, and the potential adverse impact drug use would have on his career have caused him to reevaluate his irresponsible and illegal conduct that began in his youth. Applicant has thoroughly gained the trust and confidence of his employer as a locksmith and approaches his job on an Army base with enthusiasm. There is no evidence at his current employment of any disciplinary problems. His character statements strongly support approval of his clearance. Lastly, I found Applicant to be forthright and honest and have concluded that this experience has left a lasting impression on him.

After weighing the disqualifying and mitigating conditions, and all the facts and circumstances in the context of the whole person, I conclude Applicant has mitigated financial considerations and personal conduct security concerns.

I have carefully applied the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), Exec. Or. 10865, the Directive, and the AGs, to the facts and circumstances in the context of the whole-person. I conclude drug involvement and personal conduct concerns are mitigated. For the reasons stated, I conclude he is eligible for access to classified information.

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 1.a. – 1.g.:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a. – 2.b.:	For Applicant

Conclusion

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

ROBERT J. TUIDER
Administrative Judge