



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



In the matter of:)
)
-----) ISCR Case No. 11-07517
)
Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: Lindsey R. Selinger, Esq.

12/30/2012

Decision

HARVEY, Mark, Administrative Judge:

Applicant disclosed his use of numerous illegal drugs from 2000 to 2008. On February 28, 2008, Applicant ceased his illegal drug involvement. In 2008, there were significant changes in his personal life. He has been extensively involved in Narcotics Anonymous (NA) for almost five years. Drug involvement concerns are mitigated. Eligibility for access to classified information is granted.

Statement of the Case

On March 17, 2011, Applicant submitted an Electronic Questionnaires for Investigations Processing (e-QIP) version of a security clearance application (SF 86). (GE 1) On July 18, 2012, the Defense Office of Hearings and Appeals (DOHA) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) the President promulgated on December 29, 2005.

The SOR alleged security concerns under Guideline H (drug involvement). (Hearing Exhibit (HE) 2) The SOR detailed reasons why DOHA was unable to find that it is clearly consistent with the national interest to grant or continue a security clearance

for Applicant, and it recommended that his case be submitted to an administrative judge for a determination whether his clearance should be granted, continued, denied, or revoked.

On August 23, 2012, Applicant responded to the SOR. (HE 3) On November 8, 2012, Department Counsel indicated he was ready to proceed on Applicant's case. On November 19, 2012, DOHA assigned Applicant's case to me. On November 27, 2012, DOHA issued a hearing notice, setting the hearing for December 18, 2012. (HE 1) Applicant's hearing was held as scheduled. Department Counsel offered two exhibits, and Applicant offered 20 exhibits. (Tr. 12-13; GE 1-2; AE A-T) There were no objections, and I admitted GE 1-2 and AE A-T. (Tr. 13-14) Additionally, I admitted the hearing notice, SOR, and Applicant's response to the SOR. (HE 1-3) On December 28, 2012, I received the transcript. There were no post-hearing exhibits.

Findings of Fact¹

Applicant's SOR response admitted the allegations in SOR ¶¶ 1.a to 1.c, and 1.g to 1.j. For the SOR allegations in ¶¶ 1.d to 1.f, he admitted using psilocybin (mushrooms), amphetamines, and opiates until January 2005, rather than February 2008, as alleged in the SOR. (HE 3) He also provided mitigating information. (HE 3) His admissions are accepted as factual findings.

Applicant is a 27-year-old employee of a major defense contractor. (Tr. 15-16) In 2003, he graduated from high school. (AE A) He has not attended college or served in the military. (GE 1) He has worked for the major defense contractor as a mechanic for two years. (Tr. 16) He has never married. (GE 1) Since July 2008, he has had sole custody of his two children, who are now eight years old and six years old. (Tr. 16) He has never been arrested or charged with a criminal offense. (GE 1)

Drug involvement

Applicant consistently disclosed his illegal drug involvement on his SF 86, Office of Personnel Management (OPM) interview, responses to DOHA interrogatories, SOR response, and at his hearing. (Tr. 28-29; GE 2; SOR response)

Applicant's father was a heavy marijuana user, and began providing marijuana to Applicant when Applicant was 15 years old. (Tr. 18-20) His father was involved in the sale of marijuana, and from about September 2000 to September 2002, Applicant referred about 15 of his friends to Applicant's father so that they could purchase marijuana from him. (Tr. 20-21; SOR ¶ 1.g) From 2002 to 2006, Applicant was a courier in his father's drug distribution business. (Tr. 21; SOR response to SOR ¶ 1.h)

In 2011, Applicant told his father that he would not be permitted to have a role in Applicant's life and the lives of Applicant's children unless he ended his illegal drug

¹Some details have been excluded in order to protect Applicant's right to privacy. Specific information is available in the cited exhibits.

involvement. (Tr. 31-33) His father will be on probation for committing a marijuana-related felony for five years. (Tr. 26, 43) On June 20, 2011, Applicant's father ended his marijuana use. (Tr. 26, 42) His father is required to and does attend NA meetings with Applicant. (Tr. 26)

From September 2000 to February 2008, Applicant used marijuana with varying frequency (SOR ¶ 1.a), cocaine on four occasions (SOR ¶ 1.b), and lysergic acid diethylamide (LSD) on three occasions (SOR ¶ 1.c). (Tr. 18; SOR response) For several years, he used marijuana on a daily basis; however, he stopped using marijuana from May 2006 until June 2007. (Tr. 18) From September 2000 to January 2005, he used psilocybin mushrooms on three occasions (SOR ¶ 1.d), amphetamines on at least 20 occasions (SOR ¶ 1.e), and opiate painkillers on 20 occasions (SOR ¶ 1.f). (Tr. 46; SOR response)

In May 2005, Applicant's newborn son tested positive for marijuana, and Applicant agreed to enroll in a drug treatment program. (SOR response to SOR ¶ 1.i) His girlfriend was using marijuana while she was pregnant. (Tr. 40) Applicant stopped using illegal drugs and successfully completed a drug treatment program, which involved attendance at two NA meetings a week for four months. (Tr. 21, 41, 65) The records from the drug treatment have been destroyed. (Tr. 62) He was not diagnosed with drug abuse or dependency. (Tr. 43)

In June 2007, Applicant caught the mother of his two children engaged in sexual activity with another NA participant. (Tr. 22, 42) Applicant resumed his marijuana use from June 2007 until February 28, 2008. (Tr. 22, 42; SOR response to SOR ¶ 1.j)

On February 28, 2008, Applicant recognized that his life was terrible, and he wanted to improve his situation. (Tr. 36) He ended his relationship with the mother of his two children, sought sole custody of their two children, and ended his illegal drug use. (Tr. 22) Applicant's children do not have a relationship with their mother. (Tr. 47) According to the family court's custody order, she is supposed to pay child support to Applicant; however, she does not do so. (Tr. 48; AE D) On February 28, 2008, Applicant was 23 years old. (Tr. 19)

Applicant shows self-discipline and diligence on a daily basis in his care for his children and work schedule. He gets up in the morning at 3:00 am, takes his children to his parents' home at 4:00 am, works from 6:00 am to 2:30 pm, picks up his children after work, goes to Rite of Christian Initiation of Adults (RCIA) classes (on Tuesday nights) or takes the children to soccer, cooks supper, helps his children with their homework, ensures they take baths, and then in a few short hours, his next workday starts all over again. (Tr. 23-24, 30; AE T) On Friday nights, he attends NA meetings with his children, and on Saturday nights, he attends NA meetings with his father. (Tr. 24, 44) This is his fifth year of NA attendance. (Tr. 25) His sponsor and two NA colleagues provided affidavits corroborating Applicant's NA attendance, sincerity, and commitment to remaining drug free. (Tr. 25; AE E, F, G) Applicant has been an NA sponsor. (Tr. 44) From February 28, 2008 to June 21, 2009, Applicant consumed

alcohol on one occasion. (Tr. 45) On June 21, 2009, Applicant ceased his alcohol consumption. (Tr. 44)

On October 8, 2012, and November 15, 2012, Dr. C, a clinical psychologist, evaluated Applicant using psychological tests, an extensive clinical interview of Applicant, two collateral interviews, information in the SOR, and unscheduled urine and hair drug tests. (Tr. 49-51, 59, 61-62; AE R, S) The drug tests were negative for evidence of illegal drug use. (Tr. 51) Dr. C concluded that Applicant had ended his friendships with other drug users, attended religious services, gained maturity, attended numerous NA meetings, and realized the importance of his employment and relationships with his children. (Tr. 56-60) He did not believe Applicant met the diagnostic criteria for drug abuse or dependence. Dr. C opined that Applicant has not used illegal drugs for almost five years, and Dr. C's prognosis for Applicant's continued sobriety is excellent and for a relapse is slim. (Tr. 55-59) Dr. C believes Applicant has been successfully rehabilitated. (Tr. 60)

Applicant provided a signed statement of intent not to be involved with illegal drugs with automatic revocation of his security clearance should he violate that commitment. (Tr. 31, 34-35; AE P) He does not associate with anyone who is currently involved with illegal drugs. (Tr. 31, 35) In June 2010, he completed a 408-hour mechanic-training program. (AE B) He has been promoted to team leader, and he enjoys making contributions to mission accomplishment. (Tr. 15, 17) Applicant's supervisors, coworkers, pastor, two brothers, one sister, and a school teacher, lauded his honesty, professionalism, leadership, and diligence. (Tr. 29; AE I-O, T) His employer promoted him and has never disciplined him. (Tr. 37) Applicant hopes to return to school and become an engineer. (Tr. 27) He is focused on his family, his career, and continuing to refrain from illegal drug use. (Tr. 26-27)

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 suggests that I have based this decision, in whole or in part, on any express or implied negative determination as to applicant’s allegiance, loyalty, or patriotism. It 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. 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

The relevant security concerns are under Guideline H (drug involvement) with respect to the allegations set forth in the SOR.

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

Eight drug involvement disqualifying conditions in AG ¶ 25 could raise a security concern and may be disqualifying in this case:

- (a) any drug abuse;²
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (d) diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;
- (e) evaluation of drug abuse or drug dependence by a licensed clinical social worker who, is a staff member of a recognized drug treatment program;
- (f) failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional;
- (g) any illegal drug use after being granted a security clearance; and
- (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

AG ¶¶ 25(a) and 25(c) apply. Applicant used and possessed numerous drugs beginning at the age of 15 and continuing intermittently for eight years until February 28, 2008.³ He facilitated his father's marijuana distribution, acting as a courier. He introduced other children to marijuana use and assisted in their possession of marijuana. None of the other disqualifying conditions apply as there is no diagnosis of drug abuse or dependence, drug involvement after being granted a security clearance, testing positive on a drug test, or expression of an intention to continue drug use.

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."

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).

AG ¶ 26 provides for 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 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

⁴ ISCR 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

Applicant credibly states he has refrained from using illegal drugs and abuse of prescription drugs since February 28, 2008. There is no evidence to contradict Applicant's statement about ending his illegal drug use. AG ¶ 26(a) applies and mitigates his illegal-drug-related conduct.⁵

AG ¶ 26(b) applies. Applicant has not used or possessed illegal drugs or abused prescription drugs for more than four years, which is "an appropriate period of abstinence." He has broken his patterns of drug abuse, and he has changed his life with respect to illegal drug use. He ended his relationships with drug-using associates and contacts, changed the environment where drugs were used, and provided a signed statement of intent to refrain from drug involvement with automatic revocation of clearance for any violation.

AG ¶¶ 26(c) and 26(d) are not applicable because Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. He did not provide proof of satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional because the drug treatment program was not prescribed.

In conclusion, Applicant ended his drug abuse in February 28, 2008, more than four years ago. The motivations to stop using illegal drugs are evident. He now understands the adverse consequences from illegal drug 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.

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.

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.

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 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.

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.

There is some evidence supporting denial of Applicant's clearance. Applicant was 15 years old when his father introduced him to using illegal drugs. He acted as a marijuana courier for his father, who provided marijuana for the use of children. Applicant intermittently used marijuana, cocaine, methamphetamines, LSD, psilocybin mushrooms, and opiates for the next eight years. After attending NA meetings for four months, and ceasing all drug abuse from June 2007 to February 27, 2008, he resumed abuse of marijuana.

The factors supporting approval of Applicant's access to classified information outweigh the evidence weighing against approval of his security clearance. Applicant consistently disclosed his illegal drug involvement on his SF 86, OPM interview, responses to DOHA interrogatories, SOR response, and at his hearing. His life has undergone significant changes, which reinforce his decision to refrain from possession and use of illegal drugs. He completely ended his illegal drug use on February 28, 2008, more than four years ago. From February 28, 2008 to June 21, 2009, Applicant consumed alcohol on only one occasion. On June 21, 2009, Applicant ceased his alcohol consumption. He attended NA meetings for more than four years, and he has supported his father's abstinence from illegal drug use. He provided three statements from NA attendees corroborating his NA participation. He has broken his pattern of drug abuse, and he has changed his life. He ended his relationships with drug-using associates and provided a signed statement of intent to refrain from drug involvement with automatic revocation of clearance for any violation.

Applicant has excellent employment with a major defense contractor, and he is the sole custodian of his two children. He is dedicated to his children. He knows the

consequences of illegal drug possession and use. He is 27 years old, and I am confident that he has the ability and maturity to continue to abstain from future illegal drug use. There is no evidence of disloyalty or that he would intentionally violate national security. His character and work performance are important evidence of his responsibility, rehabilitation, and mitigation.

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 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

Subparagraphs 1.a to 1.j: For Applicant

Conclusion

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

Mark Harvey
Administrative Judge