



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



In the matter of: )  
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XXXXXXXXXX, XXXXX ) ISCR Case No. 11-14460  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Pamela Benson, Esq., Department Counsel  
For Applicant: *Pro se*

05/09/2013

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant failed to mitigate security concerns under Guideline H (drug involvement). Clearance is denied.

**Statement of the Case**

On August 11, 2011, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On November 28, 2012, the Department of Defense (DOD) issued a statement of reasons (SOR) to Applicant, pursuant to Executive Order 10865, *Safeguarding Classified Information within Industry*, dated February 20, 1960, as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended; and the adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

The SOR alleged security concerns under Guideline H. The SOR detailed reasons why DOD was unable to find that it is clearly consistent with the national interest to 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 continued or revoked.

Applicant answered the SOR on September 7, 2012, and elected to have his case decided on the written record in lieu of a hearing.

A complete copy of the file of relevant material (FORM), dated January 31, 2013, was provided to him by letter dated February 1, 2013. Applicant received the FORM on February 12, 2013. He was afforded a period of 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional material, which was received without objection. The case was assigned to me on March 30, 2013.

### **Findings of Fact**

Applicant admitted with explanations all of the allegations under Guideline H except for SOR ¶ 1b. For that allegation he excepted the end date of “February 2008” and substituted “January 2008.” Applicant’s admissions and explanations are incorporated as findings of fact. After a thorough review of the evidence of record, I make the following additional findings of fact.

### **Background Information**

Applicant is a 55-year-old truck driver, who has been employed by a defense contractor since January 1984. He graduated from high school in 1976, and attended college from September 1976 to November 1978, but did not earn a degree. Applicant’s e-QIP states that he is currently not married. However, he was married from June 1983 to November 1996, and that marriage ended by divorce. He has two adult children, ages 26 and 21. Applicant did not serve in the armed forces. He has held a secret security clearance since at least July 1996, with his most recent secret security clearance having been granted in February 2003.

### **Drug Involvement**

The facts of this case are relatively straightforward. In January 2008, at age 49, Applicant tested positive for cocaine and marijuana during a random company-sponsored drug test. After testing positive for drugs, Applicant participated in a mandatory company-sponsored drug rehabilitation program. He completed the program and complied with all recommended treatment. The company-sponsored treatment program spanned a three-year period and required participants to be drug tested at least six times a year in addition to random drug testing required of all employees. Applicant completed the program in March 2011.

During the ensuing background investigation, it was determined that Applicant used cocaine and marijuana, with varying frequency, from June 2007 through January 2008. He used these drugs while he held a secret security clearance. Applicant had previously disclosed in a January 1984 security clearance application that he had used

marijuana “at most 2 or 3 times a week probably less” while he was in college. He further advised at that time that he had given up drugs and no longer used them.

Applicant argues that his drug use and “six month mistake” was caused by the “remains of two failed relationships” and work-related problems. He admits that he took the “wrong path to try and get over them.” He pointed out that he successfully completed his company’s treatment program, that he has completed 29 years as a loyal and dedicated employee, and during those 29 years, “there has never been one instance where classified material was ever compromised while in my possession.” Applicant is grateful that his drug use was discovered as he had “hit bottom” and that his company has a program that provided him with the resources to overcome his drug use. (SOR response, FORM response.)

### **Policies**

The President of the United States 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. *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). The President has authorized the Secretary of Defense 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. 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.” *Egan* at U.S. 528.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs 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 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, to reach his decision.

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 of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “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. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that 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 (4<sup>th</sup> Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed 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:

[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.

AG ¶ 25 describes eight drug-involvement-related conditions that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions could raise a security concern and may be disqualifying in this particular case: “(a) any drug abuse,”<sup>1</sup> “(c) illegal drug possession or sale or distribution,” and “(g) any illegal drug use after being granted a security clearance.”

AG ¶¶ 25(a), 25(c) and 25(g) apply. These disqualifying conditions apply because Applicant used and possessed cocaine and marijuana.<sup>2</sup> He fully disclosed his

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<sup>1</sup>AG ¶ 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.”

<sup>2</sup>AG ¶ 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,

drug abuse in his SOR and FORM responses. Applicant held a security clearance at the time he used cocaine and marijuana. The other disqualifying conditions listed in AG ¶ 25 are not applicable.

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.

Concerning AG ¶ 26(a), 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 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." The record evidence is insufficient to make such a determination.

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depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

AG ¶ 26(a) partially applies. Applicant's last drug use was in January 2008, about five years prior to the FORM submission. However, reverting to drug use for approximately seven months at age 49 is troubling. It is also disconcerting that someone with his level of maturity and responsibility would not have chosen a more acceptable outlet to cope with whatever difficulties he was facing at the time. Lastly, his drug use did not end through his own volition, but ended when he was caught during a random drug test.<sup>1</sup>

AG ¶ 26(b) lists four ways Applicant can demonstrate his intent not to abuse illegal drugs in the future. The record does not address these examples except for his having stated that he completed an appropriate period of abstinence. The other examples may be applicable; however, my inquiry is limited to those facts contained in the record.

AG ¶ 26(c) is not applicable because Applicant did not abuse prescription drugs after being prescribed those drugs for an illness or injury. AG ¶ 26(d) is partially applicable. Applicant did satisfactorily complete a prescribed drug treatment program. However, he did not provide proof of a "favorable prognosis by a duly qualified medical professional" as required in AG ¶ 26(d).

In sum, Applicant violated the significant trust the Government and his employer placed in him. His use of cocaine and marijuana at a mature age while holding a security clearance is inexcusable. His drug use did not involve a youthful indiscretion or a one-time use out of character. Nor did his drug use end by his own volition. While Applicant is to be commended for having completed his drug treatment program and for having maintained a five-year period of sobriety, his conduct and choices leave me with doubts about his ability to comply with the behavior expected of those entrusted with a security clearance. Drug involvement security concerns are not mitigated.

### **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.

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). My comments in the Analysis section are incorporated in the whole-person discussion.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant receives credit for his years of Government service and for the successful completion of his company sponsored drug rehabilitation program. From all indicators, Applicant has a number of positive qualities.

Nonetheless, security concerns remain after Applicant's breach of trust that he violated while holding a security clearance and the choices he made while a mature adult when confronted with a challenging situation. The limited mitigating record evidence available in this FORM fails to convince me of Applicant's suitability for a security clearance. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his drug involvement.

### **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:	AGAINST APPLICANT
Subparagraphs 1.a – 1.d:	Against Applicant excepting "February" in subparagraph 1.b and substituting "January" in its place.

### **Conclusion**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

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ROBERT J. TUIDER  
Administrative Judge