



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
)  
) ISCR Case No. 15-00874  
)  
Applicant for Security Clearance )

**Appearances**

For Government: Tara R. Karoian, Esq., Department Counsel  
For Applicant: *Pro se*

02/08/2017

**Decision**

TUIDER, Robert J., Administrative Judge:

Applicant mitigated security concerns pertaining to Guideline H (drug involvement). Clearance is granted.

**Statement of the Case**

On June 18, 2014, Applicant submitted a Questionnaire for National Security Positions (SF-86). On July 25, 2015, the Department of Defense (DOD) Consolidated Adjudications Facility (CAF) 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), which became effective on September 1, 2006.

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

On August 18, 2015, Applicant responded to the SOR. On September 30, 2015, Department Counsel was ready to proceed. On March 7, 2016, the Defense Office of Hearings and Appeals (DOHA) assigned Applicant's case to me. On May 26, 2016, DOHA issued a hearing notice, setting the hearing for June 20, 2016. Applicant's hearing was held as scheduled. At the hearing, Department Counsel offered Government Exhibits (GE) 1 and 2, which were received into evidence without objection. Applicant testified, called one witness, and offered Applicant Exhibits (AE) A through C, which were received into evidence without objection. On June 27, 2016, DOHA received the hearing transcript (Tr.).

### **Findings of Fact**

Applicant admitted both of the SOR allegations with explanations. Applicant's answers are incorporated as findings of fact. After a thorough review of the evidence, I make the following additional findings of fact.

### **Background Information**

Applicant is a 43-year-old mobile simulation technician employed by a defense contractor since October 2015. He seeks a security clearance as a condition of his continued employment. (GE 1; Tr. 16-19, 32-33)

Applicant graduated from high school in 1991. He was awarded an associate of science degree in 2002 in electronic engineering technology, and a bachelor of science degree in 2004 also in electronic engineering technology. He has never married and has no dependents. Applicant has not served in the U.S. armed forces. (GE 1; Tr. 19-22)

### **Drug Involvement**

Security concerns were identified under this concern following Applicant's self-disclosure for past drug use during his background investigation. (GE 1) Applicant used marijuana with varying frequency from 1993 to 2014. His marijuana use began when he was about 20 years old and decreased over time until he completely stopped in 2014. Applicant also used cocaine approximately four times between 1995 and 2012, the first time being when he was about 21 years old. He no longer associates with anyone who uses drugs. His testimony was consistent with his July 30, 2014, Office of Personnel Management Personal Subject Interview (OPM PSI). (GE 2; Tr. 35-45)

As Applicant matured and witnessed first-hand the adverse effects of drugs, he came to the realization that drug use was not compatible with his career or the direction he wanted to take in life. He made significant lifestyle changes to include stopping drinking, eating healthy, exercising, and losing weight. He is driven by his faith and the desire to lead a good and wholesome life. Applicant stated that he is involved in a relationship with a "wonderful woman that [he] hope[s] to keep." His

girlfriend is a Ph.D. candidate in media communications. She provides “constant support” for Applicant and supports his sobriety. He hopes to marry her and start a family. (Tr. 41. 45-52)

Applicant submitted a March 2016 drug and alcohol assessment that stated he is not chemically dependent and has a low probability of having a substance dependence disorder. (AE A) To further corroborate sobriety, Applicant submitted 14 negative drug tests taken over a two-year period from 2015 to 2016. (AE B) He also provided a statement of intent for automatic revocation of his security clearance for any violation of Guideline H. (SOR answer)

### **Character Evidence**

A work supervisor (WS) testified on Applicant’s behalf. WS has held a security clearance for 35 years and has known Applicant for 12 years professionally as well as personally. He provided persuasive testimony regarding Applicant’s good character, work ethic, and trustworthiness. He recommended Applicant for a security clearance. (Tr. 22-34)

Applicant submitted 12 reference letters from a range of individuals to include former employers, supervisors, co-workers, and long-time friends. The collective sense of these letters conveys that Applicant is an individual who is mature, reliable, trustworthy, and has great integrity. All reference letters strongly endorse Applicant for a security clearance. (AE A; Tr. 52-57)

### **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, “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 Applicant’s 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 the applicant 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 over-arching adjudicative goal is a fair, impartial and common sense 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.

Clearance decisions must be “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, in whole or in part, on any express or implied 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 (4<sup>th</sup> 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 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 pertaining to 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.

The Government established its case under Guideline H through the evidence presented. Applicant fully disclosed the circumstances surrounding his drug use in his SOR response, in his OPM PSI, and during his hearing.

A review of the evidence supports application of two drug involvement disqualifying conditions. AG ¶ 25(a): “any drug abuse (see above definition);”<sup>1</sup> AG ¶ 25(c) and “illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia.”

Considering the totality of the circumstances in this case, I find application of drug involvement mitigating conditions 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.”

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.”<sup>2</sup>

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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 medication direction.

<sup>2</sup> 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 change 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).

AG ¶ 26(a) applies. Applicant's last drug use was in May 2014, approximately 25 months before his hearing. His negative drug tests over the two-year period before his hearing support his assertions of abstinence. The absence of more recent or extensive drug use and his promise not to use illegal drugs in the future eliminates doubts about his current reliability, trustworthiness, or good judgment with respect to abstaining from illegal drug use.<sup>3</sup>

AG ¶ 26(b) lists four ways that an Applicant can demonstrate intent not to abuse illegal drugs in the future. Applicant has met all four. He has disassociated from drug-using associates, he avoids the environment where drugs were used, he has abstained from drug use for about 25 months and has had no difficulty in doing so, and he has signed statement of intent with automatic revocation of clearance for any drug violation.

Applicant's outstanding work performance shows his work behavior has not been indicative of his having a drug problem. He is viewed as a valuable employee, who is reliable, dependable, and professional. His value to the defense industry is supported by company officials, who know him personally and professionally, by his witness, and by his own credible testimony and evidence presented. At his hearing, Applicant acknowledged that drug abuse is incompatible with his future career. He expressed a steadfast commitment to continue lifestyle changes consistent with total abstinence of marijuana or any other illegal drugs.

### **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

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In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, considered 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.

<sup>3</sup>In 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.

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.

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). The discussion in the Analysis section under Guideline H is incorporated in this whole-person section. However, additional comments are warranted.

Applicant has been and is willing to maintain conduct expected of one entrusted with a security clearance. His employment history to date is indicative of stability and a strong work ethic. The support of his girlfriend, supervisor, and co-workers as well as his self-introspection should ensure his continued success. Applicant demonstrated the correct attitude and commitment to remaining drug-free. Considering his demeanor, testimony, and evidence presented, I believe Applicant has learned from his mistakes, and his questionable behavior is unlikely to recur. I find Applicant has presented sufficient evidence of rehabilitation.

In sum, Applicant presented sufficient evidence to explain, extenuate, or mitigate the security concerns raised. Applicant met his ultimate burden of persuasion to obtain a favorable clearance decision. I take this position based on the law, as set forth in *Department of Navy v. Egan*, 484 U.S. 518 (1988), my "careful consideration of the whole-person factors"<sup>4</sup> and supporting evidence, my application of the pertinent factors under the Adjudicative Process, and my interpretation of my responsibilities under the Guidelines. 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 J:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant

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<sup>4</sup>See ISCR Case No. 04-06242 at 2 (App. Bd. June 28, 2006).

## **Conclusion**

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

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Robert J. Tuidor  
Administrative Judge