



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



In the matter of:)	
)	
-----)	ISCR Case No. 08-10378
SSN: -----)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esq., Department Counsel
For Applicant: Eric A. Eisen, Esq.

September 30, 2009

Decision

FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline H (Drug Involvement). Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application on May 15, 2006. On April 27, 2009, the Defense Office of Hearings and Appeals (DOHA) sent Applicant a Statement of Reasons (SOR) detailing the basis for its preliminary decision to deny his application, citing security concerns under Guidelines H and E. 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 adjudicative guidelines (AG) promulgated by the President on December 29, 2005.

Applicant received the SOR on or about May 13, 2009¹; answered it on June 17, 2009; and requested a hearing before an administrative judge. DOHA received the request on June 19, 2009. Department Counsel was ready to proceed on July 17, 2009, and the case was assigned to me on July 22, 2009. DOHA issued a notice of hearing on July 24, 2009, scheduling the hearing for August 27, 2009. I convened the hearing as scheduled.

At the hearing, Department Counsel announced that the government did not intend to pursue the allegations under Guideline E. Department Counsel requested that I either strike the portion of the SOR pertaining to Guideline E or find for the Applicant on all the allegations under that guideline. I informed the parties I would find for the Applicant on the Guideline E allegations (Tr. 13-14)².

Government Exhibits (GX) 1 through 6 were admitted in evidence without objection. Applicant testified, presented the testimony of one witness, and submitted Applicant's Exhibits (AX) A through D, which were admitted without objection. The record closed upon adjournment of the hearing. DOHA received the transcript (Tr.) on September 3, 2009.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.b, 1.c, and 1.d. His admissions in his answer and at the hearing are incorporated in my findings of fact.

Applicant is a 27-year-old security technician employed by a federal contractor. He is married and has two children, ages five and one. His wife testified she does not use drugs and would not have married Applicant if she thought he was a drug user (Tr. 34).

Applicant was raised by his mother. She spent much of her time helping endangered youth and single mothers who were drug addicts (Tr. 64-65). His natural father died when he was about 11 years old (Tr. 73). His step-father spent much of his time in prison (AX B at 3).

In 1996, while a sophomore in high school, he experimented with marijuana. He testified drugs were readily available and widely used at his high school, and he used marijuana three or four times because of peer pressure (Tr. 50). A witness who taught Applicant in the ninth grade and remained in contact with him through high school and

¹ Applicant did not date his receipt. This date is estimated, based on the date the receipt was received at DOHA.

² The SOR alleged that Applicant falsified security clearance applications in March 2001 and May 2006 by answering "no" to the question about drug involvement after the age of 16 or in the last seven years. The evidence showed that his marijuana use in high school occurred when he was 14 years old and that it preceded his May 2006 application by more than seven years.

his Navy service submitted a statement on his behalf. He described Applicant as a dedicated student, a hard worker, a supportive son and brother, and an attentive father and husband. He considers Applicant a person who is able to “self-correct” and who does not take his responsibilities lightly (AX B at 9).

Applicant enlisted in the U.S. Navy shortly after graduating from high school and served on active duty from June 2000 to June 2006. In May 2001, he received a security clearance and eligibility for access to Sensitive Compartmented Information (SCI). While in the Navy, he deposited money in an account for his mother every payday (Tr. 53).

Applicant decided to return to civilian life because deployments were hard on his family, and he was not being utilized in his field of expertise (Tr. 53). He was released from active duty under honorable conditions as a petty officer second class (pay grade E-5). Applicant and his wife grew up in unstable families, and they wanted to raise their children in a stable, family-oriented environment (Tr. 40, 68). Applicant remained in the U.S. Navy Reserve after his release from active duty and served in a paid drill position.

Applicant worked for a heating and air conditioning contractor after he left active duty. He took a substantial pay cut, and he found the work tedious and without career potential. He began working for his current employer in August 2006 (Tr. 54-55; AX A).

Applicant used marijuana twice in October 2007. In November 2007, he tested positive for marijuana during a random urinalysis conducted in connection with his duties in the Navy Reserve. At the time of his positive urinalysis, he still held a clearance and SCI eligibility.

Applicant was fired from his job because of the positive urinalysis. He used marijuana one more time in December 2007, right after he was notified that he was fired (Tr. 77; GX 3 at 3). His employer reconsidered, rehired him in late January 2008, and reinstated his clearance (Tr. 77, 86; AX A). The Navy Reserve separated him from his paid drill position in June 2008 (GX 6).

Applicant testified the triggering event for his marijuana use occurred when his mother visited him, his wife, and their newborn son. Applicant’s wife’s mother and grandmother were visiting at the same time. While his sister was using his computer, she found a picture of Applicant and his deceased father. Applicant had received the picture from an aunt. When his mother saw the picture, she accused Applicant of stealing it from her house. According to Applicant, his mother began screaming, cursing, and berating him. Applicant took her to his sister’s house, where she continued to berate him (Tr. 58-59).

Applicant testified the incident with his mother left him “discombobulated.” He testified: “The things that she put me through I suppressed deep inside and when she triggered that other person, she was . . . yelling and screaming at me for no reason, I

just, I guess it all came back and I was real hurt by that.” He and his mother have been estranged since the incident (Tr. 59-60).

After the incident with his mother, Applicant decided he needed something to help him relax, and he obtained two marijuana cigarettes from an acquaintance. He consumed the cigarettes on two occasions in October and on one occasion in December 2007. He did not obtain any more marijuana (Tr. 63-64).

After he learned about his positive urinalysis, Applicant sought out a Navy chaplain and talked about his suppressed feelings. After his counseling session with the chaplain, he felt more able to deal with those feelings (Tr. 78).

Applicant’s on-site supervisor, a federal employee with 34 years of experience in law enforcement, is aware of his marijuana use, because Applicant told him about his positive urinalysis and described the extent of his use. This supervisor described Applicant as a dependable and meticulous worker who has made great contributions to the agency he supports. He trusts Applicant fully. He believes Applicant has learned from his mistake and will not repeat it (AX B at 1).

Applicant’s manager for the past two years describes him as a responsible person and an effective technician (AX B at 7). A co-worker describes him as very security conscious, very professional, a person of high integrity, and one who is eager to use his talents to promote efficiency (AX B at 5-6). A federal contract employee who served with Applicant and worked under his supervision in the Navy considers him very conscientious (AX B at 8).

In August 2009, Applicant began taking college courses, working on a two-year degree in technical management (Tr. 82; AX C). On August 26, 2009, he executed a notarized declaration of intent not to use illegal drugs or abuse legal drugs, he agreed that any illegal drug use or abuse will result in his security clearance being automatically revoked (AX D).

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 and modified.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the revised 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.

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 not necessarily a determination as to the loyalty of the applicant. 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 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 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 ¶ 24.³

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). Drug abuse is “the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.” AG ¶ 24(b).

Disqualifying conditions under this guideline include:

AG ¶ 25(a): “any drug abuse”;

AG ¶ 25(b): “testing positive for illegal drug use”;

AG ¶ 25(c): “illegal drug possession, including . . . purchase”; and

AG ¶ 25(g): “any illegal drug use after being granted a security clearance.”

Applicant’s drug involvement raises all these disqualifying conditions, shifting the burden to him 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).

Security concerns under this guideline may be mitigated if “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.” AG ¶ 26(a). 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 marijuana use in 1996, while an adolescent in high school, was the product of immaturity, peer pressure, and an environment where drug use was prevalent and accepted. It was not “recent” and happened under circumstances that are

³ Applicant held SCI eligibility in the Navy, but that eligibility is not at issue in this case. SCI eligibility is controlled by Intelligence Community Directive (ICD) 704 dated October 1, 2008; and Intelligence Community Policy Guidance (ICPG) Numbers 704.1 through and 704.5, all dated and effective on October 2, 2008. The adjudicative guidelines for SCI are set out in Annex A to ICPG 704.3, and they are virtually identical to the security clearance guidelines for cases involving Guideline H.

unlikely to recur. However, his earlier use of marijuana cannot be considered in a vacuum, and it must be considered in the context of all the evidence.

Applicant's marijuana use while holding a clearance and SCI eligibility was a serious breach of trust. He used marijuana on three separate occasions in 2007, including once after learning about his positive urinalysis. His third use of marijuana in December 2007 occurred after he was fired, a circumstance that could recur. On the other hand, his most recent use of marijuana was preceded by eleven years without drug involvement, including six years of honorable service in the Navy. He has abstained from drug involvement since December 2007. The triggering event, an angry outburst from his now-estranged mother that brought back unpleasant childhood memories and caused him to revert to his childhood mindset, is unlikely to recur. He is highly regarded by his supervisors, friends, and colleagues, who continue to trust him even after learning about his marijuana use. After considering all the evidence of Applicant's drug involvement, I conclude AG ¶ 26(a) is established.

Security concerns also may be mitigated by "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." AG ¶ 26(b). Applicant does not associate with other drug users, but he apparently still knows how to obtain marijuana. His family and work environment have not changed. He has, however, abstained from using marijuana for about 21 months. He has signed the statement of intent that effectively places him on self-imposed probation. I conclude AG ¶ 26(b)(3) and (4) are established.

Security concerns also may be mitigated by "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(d). This mitigating condition is not established, because Applicant has not sought or received any drug treatment. I have noted, however, that he sought out and consulted with a Navy chaplain after learning of his positive urinalysis, talked about his suppressed feelings, and found the consultation helpful.

Whole Person Concept

Under 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 the 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.

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.

Applicant successfully made a break from his turbulent and undisciplined childhood when he joined the Navy. He served honorably and successfully in the Navy for six years. He matured into a devoted husband and father and a valuable and reliable employee. His wife, to whom he is devoted, strongly disapproves of drug use. He relapsed into his old mindset when his mother angrily berated and embarrassed him during a family gathering that was intended to be a joyous event. He was sincere, candid, remorseful, and credible at the hearing. He made a serious mistake, but he has demonstrated his determination to not let it happen again. His declaration of intent places him on self-imposed probation and provides strong motivation to remain drug free.

After weighing the disqualifying and mitigating conditions under Guideline H, and evaluating all the evidence in the context of the whole person, I conclude Applicant has mitigated the security concerns based on his drug involvement. Accordingly, I conclude he has carried his burden of showing that it is clearly consistent with the national interest to continue his 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.d:	For Applicant
Paragraph 2, Guideline E (Personal Conduct):	FOR APPLICANT
Subparagraphs 2.a-2.b:	For Applicant

Conclusion

In light of all of the circumstances, it is clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is granted.

LeRoy F. Foreman
Administrative Judge