



DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of: )  
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XXXXXXXXXX, XXXXX ) ISCR Case No. 14-03449  
 )  
Applicant for Security Clearance )

**Appearances**

For Government: Caroline E. Heintzelman, Esq., Department Counsel  
For Applicant: *Pro se*

02/10/2015

**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 March 7, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP). On August 15, 2014, the Department of Defense Consolidated Adjudications Facility (DOD 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 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 continued or revoked.

Applicant answered the SOR on September 10, 2014. He elected to have his case decided on the written record in lieu of a hearing. A complete copy of the Government's file of relevant material (FORM), dated October 15, 2014, was provided to him by letter dated October 17, 2014. Applicant received the FORM on October 27, 2014. He was given 30 days to file objections and submit material in refutation, extenuation, or mitigation. Applicant timely submitted additional information, and by separate memorandum dated December 4, 2014, Department Counsel did not object to the additional information. The case was assigned to me on December 15, 2014.

### **Findings of Fact**

Applicant admitted all seven of the allegations alleged in the SOR under Guideline H. After a thorough review of the record, I make the following findings of fact.

#### **Background Information**

Applicant is a 28-year-old case management team leader, who has worked for a defense contractor since October 2013. According to his job description, he is required to possess a top secret clearance or must be able to obtain a top secret clearance. (Item 5; Response to FORM.)

Applicant graduated from high school in May 2004. He was awarded a bachelor's degree in history and political science in December 2010. Applicant is not married; however, he has resided with a cohabitant since April 2013. He does not have any children. Applicant did not serve in the armed forces. (Items 5 and 6.)

#### **Drug Involvement**

The facts of this case are relatively straightforward. The un rebutted allegations describe Applicant's extensive and continued use of illegal drugs spanning a 16-year timeframe. His drug use began in 1998 when he "12 or 13 years old" when he smoked marijuana with his cousin while on summer vacation. Over time his drug use increased in variety and amounts to include using marijuana with varying frequency from 1998 to March 2014, using prescription medication Dexadrine without a prescription on various occasions from August 2010 to December 2010, using hallucinogenic mushrooms on various occasions between 2003 to 2004, using LSD in 2005, using cocaine in 2000, and using

hashish on multiple occasions from 2005 to 2009. Applicant also purchased marijuana with varying frequency from 1998 to 2014. (SOR ¶¶ 1.a – 1.g, Items 1, 4, 5, and 6.)

During Applicant's Enhanced Subject Interview (ESI) conducted on May 1, 2014, as part of a single-scope background investigation, he discussed his past drug use, among other things, in detail. His father was a long-time marijuana user and was on probation for a marijuana violation, and his uncle was in prison for a drug-related charge in the 1990s. During his ESI, Applicant claimed that he was uncertain whether his cohabitant, a past marijuana user, was still using marijuana. He further claimed that he asked her to stop using marijuana, which resulted in arguments between them. (Item 6.)

Applicant's marijuana use was infrequent until he began college. His college marijuana use started out as "once or twice a semester" until it became "regular" and remained so until July 2013 when he became unemployed. In approximately September 2013 when he started his current job, Applicant claimed that he stopped using marijuana altogether and also stopped associating with marijuana users. He denies that he has a physical addiction to marijuana. (Item 6.) After beginning his job in October 2013, he claims his next and last marijuana use occurred in March 2014 during his cousin's funeral memorial. Applicant did not inform his employer of this use because he was unsure how to proceed and also unsure of his security clearance status.<sup>1</sup> (Items 4 and 6.)

Applicant denied receiving drug and alcohol treatment or counseling adding that no one suggested that he needed any such treatment or counseling. (Item 6.) Applicant asserts that his marijuana use was due to immaturity and not thinking about his future or career. In his September 2014 SOR answer, Applicant claims that he convinced his cohabitant to stop using marijuana for the "the sake of my security clearance." Applicant submitted a signed statement of intent with automatic revocation of clearance for any drug violation. (Item 4.) He did not provide any evidence of having received a drug and alcohol assessment that would have provided corroboration that he is leading a drug-free life.

Applicant's post-FORM submission consisted of a personal statement and various documents submitted separately by his employer. Those company documents consist of: (1) a letter dated November 10, 2014, from his Human Resources Manager; (2) a signed company Drug Testing Acknowledgement Form dated October 21, 2013, acknowledging that he understood his company's drug-free policy and that he was subject to drug testing at any time; (3) a signed company policy and procedure acknowledgement form dated October 21, 2013;

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<sup>1</sup>The facts described above were derived from Applicant's May 2014 ESI. Additional facts regarding his drug use history may be found in his ESI. (Item 6.)

(4) a case manager job description review form dated November 13, 2013; (5) a case management training completion memo dated April 28, 2014; (6) a personal action form promoting Applicant to case management team leader dated August 11, 2014; (7) a team leader job description; (8) a team leader review form dated August 2, 2014; (9) a training completion list for Applicant covering the timeframe from December 2013 to October 2014; (10) 2014 security briefing dated October 27, 2014; (11) random drug test memo dated November 3, 2014; and (12) negative drug specimen result certificate dated October 4, 2014. (Response to FORM.)

Applicant reiterated in his Response to FORM his commitment to leading a drug-free life and that he made significant lifestyle changes supporting a drug-free life. He spoke of his progression in the company from trainee to case manager to team lead in a relatively short time. (Response to FORM.)

### **Character Evidence**

Applicant's Human Resources Manager compiled a comprehensive package described *supra* supporting Applicant's favorable security clearance adjudication. She discussed her company's support of maintaining a drug-free work place, steps her company had taken to enforce that policy, and Applicant's character and excellent work performance. (Response to FORM.)

### **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.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. 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 safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about 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), § 3.1. 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 about 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 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).

## **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. Two of those drug involvement disqualifying conditions are applicable in this case: "(a) any drug abuse,"<sup>2</sup> and "(c) illegal drug possession or sale or distribution."<sup>3</sup> The Government established its case through Applicant's admissions and evidence presented.

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;

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<sup>2</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>3</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, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

(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.

AG ¶ 26(a) does not apply. Applicant's last drug use was in March 2014 at his cousin's funeral service *after* he began working for a defense contractor in October 2013. He claimed to have stopped using drugs when he began employment with his company – a company that offered him upward mobility with a bright future. Furthermore, at the time he was hired he was informed of his company's drug-free policy and the consequences of violating that policy. However, when faced with what should have been an easy decision, as a 27-year-old with a lot at stake, he was unable to walk away from the situation.

Applicant claims that he has disassociated from drug-using associates and contacts, that he avoids environments where drugs are used, and submitted a signed statement of intent with automatic revocation of clearance for any drug violation. Apart from his written assertions and absent corroboration, I am only able to give Applicant partial credit under AG ¶ 26(b)(1), (2), and (4). I am unable to give Applicant any credit under AG ¶ 26(b)(3) given his intermittent and sometimes extensive drug use from 1998 to 2013 and his inability to refrain from further drug use as demonstrated by his use of marijuana in March 2014.

AG ¶ 26(c) is not applicable because Applicant did not sustain a severe or prolonged illness during which these drugs were prescribed nor produce evidence of same. AG ¶ 26(d) is not applicable. Applicant denied receiving drug and alcohol

treatment or counseling adding that no one suggested that he needed any such treatment or counseling.

In sum, Applicant's long history of using a variety of illegal drugs and then reverting to reported one-time marijuana after being hired by a defense contractor leaves me with doubts. He violated the significant trust the Government and his employer placed in him. While Applicant is to be commended for his stated intent to lead a drug-free life, his conduct and choices leave me with doubts about his ability to comply with the behavior expected of those entrusted with a security clearance.

### **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 decision to stop using drugs. During the relatively short time Applicant has been working in his current position, he has done quite well. From all indicators, Applicant has a number of positive qualities.

Nonetheless, security concerns remain after Applicant's 16-year history of drug use and his use of drugs after he was employed by a defense contractor. In requesting an administrative determination, Applicant chose to rely on the written

record. In so doing, however, he failed to submit sufficient information or evidence to supplement the record with relevant and material facts regarding his circumstances, articulate his position, and mitigate the drug involvement security concerns. It may have been helpful to have had some additional evidence such as a comprehensive drug and alcohol evaluation and evidence corroborating Applicant's claims of his disassociation from drug-using associates and contacts. Additionally helpful would be an opportunity to make a credibility assessment of Applicant's testimony rather than rely on the written record. For all these reasons, I conclude Applicant failed to mitigate the security concerns arising from his drug involvement.

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 and supporting evidence, my application of the pertinent factors under the adjudicative process, and my interpretation of my responsibilities under the adjudicative guidelines. Applicant has not fully mitigated or overcome the Government's case. For the reasons stated, I conclude he is not 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:

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|---------------------------|-------------------|
| Paragraph 1, Guideline H: | AGAINST APPLICANT |
| Subparagraphs 1.a – 1.g:  | Against Applicant |

### **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