



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



In the matter of:)	
)	
)	ISCR Case No. 13-00310
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie Mendez, Esq., Department Counsel

For Applicant: *Pro se*

06/28/2013

Decision

O'BRIEN, Rita C., Administrative Judge:

Based on a review of the pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised under the guideline for Drug Involvement. Accordingly, his request for a security clearance is denied.

Statement of the Case

On April 1, 2013, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) citing security concerns under Guideline H (drug involvement) of the Adjudicative Guidelines (AG).¹ In his Answer to the SOR, Applicant admitted the two allegations, and requested a hearing before an administrative judge. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on

¹ Adjudication of the case is controlled by Executive Order 10865, as amended; DOD Directive 5220.6 (Directive), as amended; and the Adjudicative Guidelines, which supersede the guidelines listed in Enclosure 2 to the Directive. They apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

May 20, 2013, and I convened the hearing as scheduled on June 18, 2013. I admitted four Government exhibits (GE 1-4), and four exhibits offered by the Applicant (AE A-D). DOHA received the transcript on June 21, 2013.

Findings of Fact

Applicant's admissions to the drug involvement allegations are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings of fact.

Applicant is 28 years old, single, and has no children. He attended a university from 2003 to 2005; a community college from 2005 to 2006; and a university from 2006 to 2009. He received a bachelor's degree in business administration in 2009. Applicant worked as a tire-service manager at an auto care center from 2009 to 2010. After six months of unemployment, he was employed as a senior watch officer for a federal contractor from December 2010 to November 2011. He was then unemployed for five months. In April 2012, he accepted his current position with a federal contractor as a watch analyst for a federal agency. From November 2006 to November 2012, Applicant was a member of the National Guard. (GE 1, 4; AE A, C; Tr. 18-21)

Applicant began using marijuana when he started college in the fall of 2003. He used it from 18 to 25 years of age. He testified he used it approximately once per month from 2003 to 2005. However, during his security interview, he said he smoked it daily to weekly from 2003 to 2005. He also stated he used marijuana at parties with friends, and by himself; that he purchased marijuana for his own use and to share with friends; and that he never sold marijuana. He said from 2005 to 2009, he purchased marijuana from Friend A, and they used it at least monthly. At the hearing, he said he smoked with Friend A about once every month or two, from 2005 to 2006. Applicant's last in-person contact with Friend A was in 2009, and their last telephone contact was in 2011. He remains "best friends" with one of his college friends with whom he used marijuana, but that friend has not used it since he finished college in 2010. (GE 1, 4; Tr. 28-32, 54-57)

Applicant testified that when he returned to college in 2006, his marijuana use increased. He smoked about once every two to four weeks from 2006 to 2009. After graduating in spring 2009, he returned home and continued to use marijuana with Friend A until 2010. On his security clearance application, he listed his use from 2009 to 2010 as two to three times per year. However, at the hearing, he testified that he used it about once every two months from spring 2009 to January 2010.² (GE 1, 4; Tr. 28-32)

Applicant has had two drug-related arrests.³ In March 2005, a police officer discovered Applicant using a pipe to smoke marijuana with college friends in a parked

² Applicant testified that his entry of November 2010 as his last marijuana use in his security clearance application was an error, and he intended to enter January 2010. (GE 1; Tr. 31-32)

³ Applicant's arrests are not alleged in the SOR. Unalleged conduct can be considered for certain

car in state A. Applicant was charged with possession of drug paraphernalia. He pleaded no contest in April 2005 and was found guilty. He was fined and placed on probation. He testified that he believed the charge would be reduced to a lesser charge if he performed community service. The record evidence does not indicate if the charge was reduced. (GE 4; TR. 27, 60)

In September 2005, Applicant was delivering a car to a customer in state B, as part of his employment. Friend A accompanied him, and they smoked marijuana during the drive. Applicant was stopped by a police officer for speeding, and subsequently charged with possession of marijuana. He pleaded guilty to a charge of possession of marijuana, a misdemeanor. He was fined; ordered to serve one year probation and 40 hours of community service; and his driving privileges were restricted for six months. He served probation from November 2005 to November 2006. (GE 1, 4; Tr. 26-27)

Applicant had other charges brought against him. In June 2008, he was stopped for driving 81 miles-per-hour in a 65 mile-per-hour zone. He was charged with reckless driving. He pleaded guilty, and paid a fine and court costs. In a June 2009 road-rage incident, a man followed Applicant into a parking lot. The man acted threatening, and Applicant displayed a handgun. He was charged with brandishing a firearm, a misdemeanor. In September 2009, he was found not guilty. The charge was dismissed and expunged from his record on October 13, 2009. In January 2010, Applicant was pulled over by a police officer for having tinted windows in his car. The officer saw that Applicant was carrying a firearm in his vehicle, and charged him with carrying a concealed weapon, a misdemeanor. On February 23, 2010, Applicant was found not guilty. In his security clearance application, Applicant explained that he was found not guilty because he had a permit to carry a concealed weapon, and the weapon was not concealed. (GE 1, 4)

Applicant used marijuana while serving in the National Guard. He was aware that it was prohibited. In March 2009, he underwent a drug test. Applicant and his command did not learn the results of the test because of personnel had changed in the medical command. In early 2010, Applicant's National Guard platoon sergeant told him that he was considering him for squad leader. However, he believed Applicant was using marijuana and warned him to stop. The sergeant's warning convinced Applicant to end his illegal drug use, and his last use was in January 2010. He was promoted in October 2010. (GE 4; Tr. 21-26, 31, 52-54)

Applicant testified that while he was on annual summer training in 2012, he and his command learned that his 2009 drug test was positive for illegal drug use. Applicant

purposes, as discussed by the DOHA Appeal Board in ISCR Case No. 00-0633 at 3 (App. Bd. Oct. 24, 2003). (Conduct not alleged in an SOR may be considered: (a) to assess an applicant's credibility; (b) to evaluate an applicant's evidence of extenuation, mitigation, or changed circumstances; (c) to consider whether an applicant has demonstrated successful rehabilitation; (d) to decide whether a particular provision of the Adjudicative Guidelines is applicable; or (e) to provide evidence for whole person analysis under Directive § 6.3.) I will not rely on Applicant's unalleged conduct to reach my decision. However, I will consider it as part of the Whole-Person analysis.

stated in his security interview that the matter was investigated by the judge advocate general's office, and administrative processing started. Applicant lost his expected promotion to staff sergeant. His commander recommended no further action. Although Applicant enjoyed the military and had considered making it a career, he did not want to risk being discharged under other than honorable conditions. In November 2012, he was honorably discharged from the National Guard. Regulations prohibit him from reenlisting for 12 months following a positive drug test. Applicant has not decided if he will reenlist. At the time he tested positive, he was aware that using illegal drugs was prohibited while serving in the National Guard. (GE 4; AE D; Tr. 21-26, 32, 54)

Applicant testified that he has no intent to use marijuana in the future. He submitted a notarized statement with his Answer, signed on April 6, 2013, that he understands any future use of marijuana or any other criminal drug involvement will result in revocation of his security clearance. (Tr. 50-51)

The SOR alleges that Applicant used marijuana after being granted a security clearance in 2007. When Applicant completed his June 2012 security clearance application, he answered "Yes" when asked if he had ever been granted a security clearance, and estimated that his investigation for a secret security clearance was completed in November 2007. Applicant also disclosed his drug use from 2006 to 2010.⁴ In response to the question, "Was your use while possessing a security clearance?" he answered "Yes." He stated in his SOR Answer that he input "Yes" only because his first security clearance application is dated during the time he was using marijuana. However, he contends that he had no knowledge at the time he used marijuana that he had been granted a security clearance. (GE 1; Tr. 32-39)

Applicant admitted that his signature appears on the 2007 security clearance application. However, he stated that he did not input the information in the document. He testified that he signed many pages of documents when he was beginning his service, and did not read each one. He believes someone else input the information because several sections of the application contain information he would not have entered, such as an inaccurate reference name, wrong address, and wrong foreign visit information. He was never aware an application had been submitted for a security clearance, or that he had been granted one. (GE 2; Tr. 32-45)

Applicant joined the National Guard in November 2006. His first security clearance application shows a printed date of November 16, 2006. However, that date is crossed out in ink, and a date of April 9, 2007 is stamped next to it. The stamped date has hand-written initials next to it that match the initials of the security manager listed on the agency transmittal page on the front of the application. The DOD personnel database, JPAS, indicates that Applicant's investigation was opened on April 13, 2007, a few days after the date stamped on Applicant's 2007 security clearance

⁴ Applicant's drug use from 2003 to 2005 was not within the 7-year time frame encompassed by the question. (GE 1)

application. The JPAS printout indicates that Applicant's request for a security clearance was granted on June 25, 2007. (GE 2, 3)

Applicant testified that he was never informed he held a security clearance while serving in the National Guard, and that his military occupational specialty (MOS), combat engineer 12B, did not require a security clearance, except during deployment. He first learned he had a security clearance in late 2010, when the facility security officer for one of his civilian employers informed him that DOD had granted him a secret security clearance in 2007. As to his illegal drug use, Applicant testified that, "If I would have known that I was being processed for a clearance or potentially have a clearance, I definitely would have taken it more seriously." (GE 2; Tr. 32-45, 49)

Applicant submitted three character reference letters. An Air Force colonel described Applicant as one of the "best and brightest" and an integral part of the team. A lieutenant colonel who supervised him opined that Applicant has excellent verbal and written communications skills and is able to see "the big picture." Applicant also provided 22 recommendations by coworkers posted on the LinkedIn website, which describe him as proactive, energetic, and hard-working. Applicant received a Certificate of Commendation from the National Guard Bureau in September 2011 for outstanding performance and dedicated leadership. (AE B)

Policies

Each security clearance decision must be a fair and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the AG.⁵ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the Guidelines, commonly referred to as the "whole-person" concept. The presence or absence of a disqualifying or mitigating condition does not determine a conclusion for or against an applicant. However, specific applicable guidelines are followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to classified information. In this case, the pleadings and the information presented by the parties require consideration of the security concerns and adjudicative factors addressed under Guideline H (drug involvement).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. The Government bears the initial burden of producing admissible information on which it based the preliminary decision to deny or revoke a security clearance for an applicant. Additionally, the Government must be able to prove controverted facts alleged in the SOR. If the Government meets its burden, it then falls to the Applicant to refute, extenuate or mitigate the Government's

⁵ Directive. 6.3.

⁶ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

case. Because no one has a “right” to a security clearance, an applicant bears a heavy burden of persuasion.⁷ A person who has access to classified information enters into a fiduciary relationship with the Government based on trust and confidence. Therefore, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the national interests as her or his own. The “clearly consistent with the national interest” standard compels resolution of any reasonable doubt about an applicant’s suitability for access in favor of the Government.⁸

Analysis

Guideline H, Drug Involvement

AG ¶ 24 expresses the security concern about 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.

Of the eight disqualifying conditions listed at AG ¶ 25, the following apply:

- (a) any drug abuse;
- (b) testing positive for illegal drug use;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (g) any illegal drug use after being granted a security clearance.

Applicant admits to using marijuana over a period of seven years. He also purchased marijuana from Friend A. In 2009, he tested positive for illegal drugs while serving in the National Guard. Despite knowing the Guard prohibited such drug use, and knowing that he was subject to drug testing, he continued using marijuana. Applicant was granted a secret security clearance in 2007. His illegal drug use from 2007 to 2010 occurred while he held that security clearance. AG ¶¶ 25(a), (b), (c), and (g) apply. Applicant's illegal conduct also raises questions under the Drug Involvement

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; AG ¶ 2(b).

Concern, because his it demonstrates an unwillingness to comply with laws, rules, and regulations.

Two of the four mitigating conditions are relevant under 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;

(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;

(4) a signed statement of intent with automatic revocation of clearance for any violation.

Mitigation is available to Applicant under AG ¶ 26(b). I find his testimony credible that he has no intent to use marijuana in the future, based on his abstention from marijuana use for the past three and one-half years, his lack of contact with drug-using friends, and his notarized statement that he will not use marijuana and other illegal drugs in the future, subject to revocation of his security clearance.

Applicant testified he did not complete the 2007 security clearance application that bears his signature. When he signed a security clearance application, shortly after joining the National Guard, it was his responsibility to know the import of the document. He testified that someone else input the information on his application. However, it is unclear how another person could have known the detailed information about Applicant that appears in his application. Moreover, it is unlikely that during the three years he worked for the National Guard from 2007 to 2010, he never encountered a situation where the issue of his security clearance status arose. I do not find it credible that he was unaware for three years that he held a security clearance.

Applicant's use of an illegal drug over an extended period of time, from 2003 to 2010, raises doubt about his trustworthiness and judgment. His seven years of use is longer than his three-plus years of abstinence. He also used it frequently, ranging from daily use at times in 2003 to 2005, to once or twice per month in 2009-2010. He used it with friends at social events, in situations that were not unusual, but commonplace. For

seven years, he displayed poor judgment and untrustworthiness by using a drug he knew to be illegal. Of special concern is that he used illegal drugs during the period when he has the obligations and responsibilities of a member of the National Guard. Applicant used an illegal drug both in college when he knew it was illegal, and also in the National Guard, when he knew it was prohibited by regulation. AG ¶ 26(a) does not apply.

Whole-Person Analysis

Under the whole-person concept, an administrative judge must evaluate the applicant's security eligibility by considering the totality of an applicant's conduct and all the 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.

AG ¶ 2(c) requires that the ultimate determination of whether to grant a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guidelines, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant's history includes positive factors that weigh in his favor, including his abstinence from marijuana use for more than three years, his solid employment history, his positive character references from his supervisor and coworkers, and his commendations and achievements while serving in the National Guard.

However, Applicant's illegal conduct outweighs these factors. He knowingly violated the law by using an illegal drug for an extensive period of seven years, sometimes using it as frequently as every two weeks. He used marijuana while serving in the National Guard, knowing that it was prohibited; and he used an illegal drug while he held a security clearance. He has two drug-related arrests. His arrests and convictions in 2005, and his year of probation, should have been a wake-up call. Instead, he continued to use marijuana for almost five more years. Even after his drug test in March 2009, he continued to use marijuana. His conduct raises concerns about his willingness to abide by the rule of law. Finally, his use of marijuana after he

received a security clearance raises serious doubts about his suitability for access to classified information.

A fair and commonsense assessment of the available information shows Applicant has not satisfied the doubts raised about his suitability for a security clearance. For these reasons, I conclude he has not mitigated the security concerns arising from the cited adjudicative guideline.

Formal Findings

Formal findings on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are as follows:

Paragraph 1, Guideline H:	AGAINST APPLICANT
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Subparagraphs 1.a – 1.b	Against Applicant
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Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the interests of national security to allow Applicant access to classified information. Applicant's request for a security clearance is denied.

RITA C. O'BRIEN
Administrative Judge