

DATE: December 11, 2007

In Re:)
)
)

-----)

SSN: -----)

Applicant for Security Clearance)
_____)

ISCR Case No. 07-04530

**DECISION OF ADMINISTRATIVE JUDGE
MATTHEW E. MALONE**

APPEARANCES

FOR GOVERNMENT

D. Michael Lyles, Esquire, Department Counsel

FOR APPLICANT

Michael Coleman, Esquire

SYNOPSIS

Applicant failed to mitigate the security concerns raised by his use of marijuana, at times while he held a security clearance, and a February 2006 drug-related arrest. He also failed to mitigate the security concerns raised by his failure to disclose his drug use and arrest during a July 2006 interview with a government investigator, and his failure to report his arrest to his employer as required. Clearance is denied.

STATEMENT OF THE CASE

After reviewing the results of Applicant's most recent background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to give Applicant a security clearance. On August 13, 2007, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed in the Revised Adjudicative Guidelines under Guideline H (illegal drugs) and Guideline E (personal conduct).²

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on October 22, 2007, and I convened a hearing on November 15, 2007, at which the parties appeared as scheduled. I admitted four exhibits proffered by the government (Gx. 1- 4). Applicant testified, presented one witness, and offered one exhibit, which was admitted as Applicant's Exhibit (Ax.) A . On November 29, 2007, DOHA received the transcript (Tr.).

FINDINGS OF FACT

The government alleged under Guideline H (illegal drugs) Applicant used marijuana from "in at least about 1986 and October 2006" (SOR ¶ 1.a); that he was arrested on February 17, 2006, and charged with possession of marijuana and drug paraphernalia, for which he performed 50 hours of community service and completed 10 weeks of pre-trial intervention drug counseling (SOR ¶ 1.b); that he attended said pre-trial intervention drug counseling between September 2006 and December 2006 (SOR ¶ 1.c); that in October 2006, he tested positive for drugs during a urinalysis administered during his pre-trial intervention counseling (SOR ¶ 1.d); and that he used marijuana while holding a security clearance he received in April 1999 (SOR ¶ 1.e).

The government further alleged under Guideline E (personal conduct) the Applicant failed to report his February 2006 arrest as required by his employer (SOR ¶ 2.a); that he intentionally failed to disclose his arrest when he was interviewed by a government investigator in July 2006, and only disclosed his arrest during a second such interview in December 2006 when the government investigator confronted Applicant with the information about Applicant's arrest (SOR ¶ 2.b); and that Applicant's use of marijuana while holding a security clearance is also disqualifying under Guideline E (SOR ¶ 2.c).

In response to the SOR, Applicant admitted without explanation all of the allegations. His admissions are incorporated herein as facts. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is 38 years old and employed by a defense contractor as a production electronics technician, which involves assembly and installation of communications and data processing

¹ Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

equipment racks aboard submarines and at shore facilities. Applicant served in the U.S. Air Force from 1989 until receiving a general discharge under honorable conditions as a senior airman (paygrade E-4) in 1995. In the Air Force, he performed similar duties (cable and equipment installation) in missile launch facilities. Applicant was granted a secret security clearance while he was in the Air Force. He has held that clearance without interruption since January 1998.³ It was most recently renewed in December 2005, most likely on an interim basis pending the outcome of a background investigation that commenced when he submitted his Electronic Questionnaire for Investigations Processing (e-QIP) on December 21, 2005.⁴

After leaving the military, Applicant worked for two other defense contractors while holding a security clearance performing similar work until late 2001. His clearance did not lapse while he was either unemployed or worked in retail sales from November 2001 until he was hired by his current employer in November 2002. He testified that he went to work immediately upon being hired by his current employer because his clearance was still active.⁵

On June 14, 2006, Applicant's employer submitted an Adverse Information Report, which informed the Defense Security Service that Applicant had been arrested on February 6, 2006, and charged with possession of marijuana and possession of drug paraphernalia. He claims he reported the arrest to his immediate supervisor a day or two after it happened; however, as of June 2006, he had not yet reported the incident to the security office as required by company policy. Applicant signed a copy of that policy when he was hired.⁶

In July 2006, Applicant was interviewed by a government investigator as part of his background investigation. The interview covered issues related to Applicant's finances, and he did not disclose his arrest because the investigator did not ask him about it and because his attorney, who also represented him at this hearing, advised him not to talk about the arrest.⁷ His attorney, while questioning the Applicant in this matter, acknowledged he was not giving advice to Applicant about security procedures.⁸

A copy of the police report of the arrest revealed police found a bag of marijuana and several marijuana cigarettes in Applicant's vehicle.⁹ In December 2006, during a subsequent interview with a government investigator, Applicant discussed the arrest after the investigator asked him about the

³ Gx. 1; Tr., 6 - 7, 44 - 45.

⁴ Gx. 4.

⁵ Tr., 44 - 45.

⁶ Gx. 3.

⁷ Gx. 2.

⁸ Tr., 33, lines 3 - 13.

⁹ Gx. 4.

incident. In describing the arrest, Applicant stated that all the police found was the remains of a marijuana cigarette and a pipe with marijuana residue in it.¹⁰

In the December 2006 interview, Applicant stated he used marijuana a few times in high school, but had not used marijuana in more than 20 years. As a result of his arrest, he was assigned to pre-trial intervention, which required him to attend weekly drug counseling sessions from September 2006 until December 2006. In October 2006, Applicant came up positive for marijuana after a urinalysis test. During his interview and in his testimony, Applicant offered a “second hand smoke” theory to explain the test results, asserting he inhaled marijuana by hanging out with friends who used it in his presence.¹¹ However, Applicant also testified he used marijuana the night he was arrested.¹² Applicant no longer associates with his friends who use marijuana.¹³

Applicant is a reliable worker. His former supervisor, who has worked closely with him for most of the past five years, regards him as trustworthy and, despite knowledge of Applicant’s arrest and drug use, recommends his security clearance should be renewed.¹⁴ Applicant completed satisfactorily all of the terms of his pre-trial intervention. He performed 50 hours of community service working at a local animal shelter, and he still does volunteer work there with his daughter.¹⁵

POLICIES AND BURDEN OF PROOF

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines.¹⁶ Decisions must also reflect consideration of the factors listed in the ¶ 2(a) of the new guidelines.¹⁷ The presence or absence of a disqualifying or mitigating condition is not determinative of a conclusion for or against an applicant. However, specific applicable guidelines should be followed whenever a case can be measured against them as they represent policy guidance governing the grant or denial of access to

¹⁰ Gx. 2.

¹¹ Gx. 2; Tr., 41 - 42.

¹² Tr., 44.

¹³ Tr., 35 - 36.

¹⁴ Tr., 47 - 52.

¹⁵ Gx. 2; Tr., 28- 29; Ax. A.

¹⁶ Directive. 6.3.

¹⁷ Commonly referred to as the “whole person” concept, these factor are:(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.

classified information. In this case, the pleadings and the information presented by the parties at hearing require that Revised Adjudicative Guideline E (personal conduct) and Guideline H (drug involvement) be applied.

_____ A security clearance decision is intended to resolve whether it is clearly consistent with the national interest¹⁸ 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 case. Because no one has a "right" to a security clearance, an applicant bears a heavy burden of persuasion.¹⁹ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, reliability and trustworthiness of one who will protect the national interests as his or her 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.²⁰

CONCLUSIONS

Personal Conduct. Under Guideline E, "[c]onduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process."²¹ In addition to Applicant's admissions to the SOR allegations, the government submitted sufficient information to show that Applicant did not report his February 2006 arrest to his company's security office as required by the security disclosure policy he signed when he was hired in 2002 (SOR ¶ 2.a). He also did not disclose his arrest during his first interview with a government investigator (SOR ¶ 2.b). While holding a security clearance, he admitted to using marijuana in February 2006 (SOR ¶ 2.c), but denies any use since then, despite testing positive while in drug counseling in October 2006.

In response to SOR ¶ 2.b, Applicant admitted the allegation, but asserted in his second (December 2006) interview that he did not volunteer information about his drug arrest or his drug use on advice of his attorney. However, all of the information about this claim demonstrates his attorney was not giving advice about whether to comply with company procedures or other requirements to disclose such adverse information. Additionally, Applicant's response to SOR ¶ 2.b (as well as his "second hand smoke" explanation for his October 2006 failed drug test) is not credible

¹⁸ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

¹⁹ See *Egan*, 484 U.S. at 528, 531.

²⁰ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

²¹ Revised Adjudicative Guidelines, ¶ 15.

because he lied to a government investigator in December 2006 about the details of his arrest and about the full extent of his use of marijuana.

Applicant may not be disqualified under Guideline E for the SOR ¶ 2.c allegation. While it was proven that he used drugs while holding a clearance, such conduct is covered under Guideline H (drug involvement) and must be addressed according to ¶ 25(g).²² As to SOR ¶¶ 2.a and 2.b, available information requires consideration of the disqualifying conditions listed in ¶¶ 16(b)²³ and 16(f)²⁴ of the Revised Adjudicative Guidelines.

I also have considered possible application of the mitigating conditions listed at ¶¶ 17(a)²⁵ and 17(b),²⁶ but neither is supported by this record. Applicant did not make a prompt, good-faith effort to correct his omission in his first interview because he did not disclose his arrest until nearly five months later, when he was confronted with that information in a second interview. His claim regarding ¶ 17(b) fails because his attorney advised him only about the disposition of the criminal charges, not about company or government disclosure requirements. Even if Applicant had received qualified advice not to disclose his arrest, he was not subsequently truthful. He lied about what was found in his car and he lied about his drug use. Applicant has failed to carry his burden of persuasion in response to the government's information. Accordingly, the Guideline E security concerns are not mitigated.

Drug Involvement. Under Guideline H, “[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.”²⁷ In addition to Applicant's admissions to the SOR allegations and his testimony about his drug use, the government presented sufficient information to show he used marijuana in 1986 and 2006 (SOR ¶ 1.a); that he was arrested and charged with marijuana possession in February 2006 (SOR ¶ 1.b); that he attended drug counseling between September and December 2006 (SOR 1.c); that he tested positive for illegal drugs during that counseling (SOR ¶ 1.d); and that he used marijuana while holding a security clearance (SOR ¶ 1.e).

²² “any illegal drug use after being granted a security clearance;”

²³ “deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative;”

²⁴ “violation of a written or recorded commitment made by the individual to the employer as a condition of employment;”

²⁵ “the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;”

²⁶ “the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;”

²⁷ Revised Adjudicative Guidelines, ¶ 24.

The allegation in SOR ¶ 1.c is not disqualifying. It merely presents additional information related to SOR ¶¶ 1.b and 1.d. As to SOR ¶¶ 1.a, 1.b, 1.d, and 1.e, available information requires consideration of the disqualifying conditions listed in ¶¶ 25(a),²⁸ 25(b),²⁹ 25(c),³⁰ and, as noted above, 25(g)³¹ of the Revised Adjudicative Guidelines. Further, of the Guideline H mitigating conditions, I have considered ¶¶ 26(b)(1) - (4)³² and have concluded Applicant may not benefit from any of those factors. While he no longer associates with friends who still use marijuana, his lack of candor about his drug use precludes a definitive finding that he has abstained from marijuana use for any meaningful length of time. Until his hearing, he denied any use in the past 20 years, and lied to a government investigator about the drugs that were found in his car when he was arrested in February 2006.

I have also considered ¶ 26(a),³³ and I decline to apply it here for many of the same reasons. Applicant's lack of credibility precludes a finding his drug use was remote in time, was infrequent, or that it is unlikely to recur. Because he lied about using marijuana since 1986, and lied about the details of his arrests in February 2006, and tested positive for drugs in October 2006, I conclude he probably used marijuana at or after the time he started drug counseling in September 2006. Most important, his reluctance to take responsibility for his actions by fully and truthfully disclosing information about his drug use casts unmitigated doubt on his current reliability. Applicant has failed to carry his burden of persuasion in response to the government's information. Accordingly, the Guideline H security concerns are not mitigated.

Whole Person. I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors, pro and con, under Guidelines E and H. I have also reviewed the record before me in the context of the whole person factors listed in section 2(a) of the Revised Adjudicative Guidelines.³⁴ At 38 years of age, Applicant has yet to demonstrate the level of maturity and trustworthiness expected of one in whom the government puts its trust. Applicant's response to the adverse information in his background only reinforced the government's concerns about his judgment and trustworthiness. A fair and commonsense assessment³⁵ of the information before me shows that the Applicant has not overcome the security concerns about his drug use and lack of

²⁸ "Any drug abuse (see above definition);"

²⁹ "testing positive for illegal drug use;"

³⁰ "illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;"

³¹ See footnote 20, *supra*.

³² "(b) a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation 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;"

³³ "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;"

³⁴ See footnote 15, *supra*.

³⁵ See footnote 14, *supra*.

candor. As a result, doubts persist about his ability to protect classified information and to exercise the requisite good judgment and discretion expected of one who holds a security clearance. Such doubts must be resolved in favor of the national security.³⁶

FORMAL FINDINGS

Formal findings regarding each SOR allegation are as follows:

Paragraph 1, Guideline H (Drug Involvement): AGAINST THE APPLICANT

Subparagraph 1.a :	Against the Applicant
Subparagraph 1.b :	Against the Applicant
Subparagraph 1.c :	For the Applicant
Subparagraph 1.d :	Against the Applicant
Subparagraph 1.e:	Against the Applicant

Paragraph 2, Guideline E (Personal Conduct): AGAINST THE APPLICANT

Subparagraph 2.a:	Against the Applicant
Subparagraph 2.b:	Against the Applicant
Subparagraph 2.c:	For the Applicant

DECISION

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

Matthew E. Malone
Administrative Judge

³⁶ See footnote 18, *supra*.