



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



In the matter of:

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ISCR Case No. 08-01049

Applicant for Security Clearance

Appearances

For Government: John B. Glendon, Esquire, Department Counsel

For Applicant: *Pro Se*

November 18, 2008

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has not mitigated the security concerns raised by under the guidelines for drug involvement and personal conduct. Accordingly, his request for a security clearance is denied.

Applicant requested a security clearance by in submitting an Electronic Questionnaire for Investigations Processing (e-QIP) on December 6, 2006. Because of an administrative

problem, he was required to re-submit it, which he did on February 21, 2007. After reviewing the results of the ensuing 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 grant Applicant's request.

On June 24, 2008, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision – security concerns addressed in the Directive under Guidelines H (Drug Involvement) and E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).²

Applicant received the SOR on July 21, 2008. He signed his Answer on July 29, 2008, in which he admitted to the following SOR allegations: ¶¶ 1.b. through 1f under Guideline H. He denied SOR ¶¶ 1.a, which addresses the time frame of his marijuana use; and 2.a, which alleges that he deliberately falsified information he provided on his security clearance questionnaire. He also requested a hearing before an administrative judge.

Department Counsel was prepared to proceed on August 28, 2008, and the case was assigned to me on September 3. DOHA issued a Notice of Hearing on October 1, 2008 and I convened the hearing as scheduled on October 21, 2008.

During the hearing, the government offered two exhibits, Government Exhibit (GE) 1 and 2, which were received without objection. Applicant testified, and offered one exhibit, Applicant's Exhibit (AE) A, which was received without objection as well. I held the record open to allow Applicant to submit an additional document. It was timely received, and forwarded without objection by Department Counsel. The document was entered as AE B. DOHA received the transcript on October 30, 2008, and the record closed on that day.

Findings of Fact

Applicant's admissions in response to the SOR are admitted as fact. After a thorough review of the pleadings, Applicant's response to the Statement of Reasons, and the record evidence, I make the following additional findings of fact.

Applicant, 54 years old, graduated high school and completed several college courses (Tr. 5). He married in 1989, and divorced in 2006. He has one daughter who is 17 years of age. Applicant has worked for the same defense contractor for the past 36 years

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. The Revised Adjudicative Guidelines supersede 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.

(GE 1). His current position is Designer/Drafter. His first security clearance was granted in 1972, and he held it until approximately the mid-1980s (Tr. 27).

Applicant began using marijuana in 1971, while attending high school, at the age of 17 (Tr. 26). He used it "practically daily" (Tr. 26), buying the drug from friends and other people he knew (Tr. 48). Applicant describes his habit as "...a chronic habit. I freely admit that. It was a serious habit." (Tr. 26). Applicant was granted his first security clearance in 1972. It was discontinued for administrative reasons around 1985. During the 13 years that he held his first security clearance, Applicant used marijuana daily (Tr. 27-29). Applicant also admits that he had a "mental and physical dependency" on marijuana during the period 1993 to 2003. Given his long-standing marijuana use, Applicant decided not to re-apply for a security clearance (Tr. 36).

In approximately 1992, Applicant was diagnosed with glaucoma (Tr. 63). Applicant believes that marijuana temporarily reduces internal pressure on the eye, and at the time, he considered this medical benefit justified using the drug. Since stopping his marijuana use, he has discovered a medication that will accomplish the same effect (Tr. 31). He listed his glaucoma diagnosis on his Security Clearance Application to explain why he continued to use marijuana at such a mature age. Applicant testified that he would have used marijuana regardless of whether he had glaucoma (Tr. 33-34). Applicant also used cocaine a few times between May and June of 2002 (GE 1).

Through his company's Employee and Family Assistance Program, Applicant was referred for drug treatment in 2003 (Tr. 59). From November 2003 until July 2004, Applicant participated in and completed an intensive treatment program, involving 12 weeks of group therapy, with four-hour sessions three times per week. The first 12 weeks were followed by an 18-week period of one-hour sessions once per week. He did not use marijuana during treatment, but did resume his daily use after completing the program. He continued using until April 2006 (Tr. 41-42), when he stopped using marijuana. He relapsed and used it once on December 31, 2006. He has not used marijuana since that date (Tr. 21).

Applicant used marijuana throughout his marriage. Although his wife was aware of his use, he kept the habit hidden from his daughter for many years (Tr. 35). In 2006, Applicant and his wife divorced. Because his wife worked nights, and their 15-year-old daughter still required parental guidance, they agreed that it would best if he took custody (Tr. 44). The realization that he would have primary custody, and the belief that he needed to set a good example for his daughter, motivated him to end his marijuana use (Tr. 43). Since that time, he has disclosed his drug history to his daughter (Tr. 49).

After Applicant completed his Security Clearance Application on December 6, 2006, his company closed for the holiday season (Tr. 22). When it re-opened, he completed his finger-printing, but it was discovered that his Security Clearance Application and his fingerprint record were not done within the necessary 30-day window. Therefore, he was required to re-submit his application. In February 2007, Applicant rushed to re-submit the document, re-entering the same information into the computer program that he had entered the first time (Tr. 54). In between his two submissions, Applicant used marijuana once on

December 31, 2006, after having abstained since the previous April. When he re-submitted the second Application, he failed to update the question regarding drug use to add his last use in December 2006. He always considered April 2006 as the date that he ended his long-standing drug use (Tr. 23).

Policies

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 (AG).³ Decisions must also reflect consideration of the “whole person” factors listed in ¶ 2(a) of the Guidelines.

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 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) and Guideline E (personal conduct).

A security clearance decision is intended only to resolve the questions of whether it is clearly consistent with the national interest⁴ 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.⁵ 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 his 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.⁶

³ Directive. 6.3.

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ See *Egan*, 484 U.S. at 528, 531.

⁶ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

Analysis

Drug Involvement

AG ¶ 24 expresses 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 facts raise three disqualifying conditions. AG ¶ 25(a) (*any drug abuse*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*) apply based on Applicant's purchase, possession and use of marijuana for more than 35 years. AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*) also applies. Applicant was granted his first security clearance in 1972 and held it until approximately 1985. During the 13 years that he held his first security clearance, Applicant used marijuana daily (Tr. 27-28).

Guideline H also provides four mitigating conditions, two of which are relevant here. 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*) cannot be applied. Applicant's last use of marijuana was slightly less than two years ago, which is not distant in time. When combined with the fact that he used marijuana daily for more than three decades, I cannot confidently predict that his current abstention will continue.

AG ¶ 26(b) is also relevant:

(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*

AG ¶ 26(b)(3) applies to some extent because Applicant has abstained from using marijuana for almost two years. However, his recent avoidance of marijuana must be weighed against more than 35 years of use which he himself characterizes as dependence

(Tr. 45). His long record of illegal drug use outweighs the comparatively short length of his abstinence.

Applicant's signed statement (AE B) attesting that he will not use illegal drugs in the future, under penalty of losing any security clearance granted to him, implicates AG ¶ 26 (b)(4). However, Applicant qualified his intent to abstain from using marijuana. In his signed statement and in his testimony, he states that he will not use an illegal drug *while holding a security clearance*; he did not state that he would abstain if he were not granted a security clearance. The question remains open whether or not Applicant would engage in illegal drug use if he does not obtain a clearance. Moreover, in his testimony, Applicant stated that if marijuana use were legalized for the treatment of glaucoma, "I really cannot categorically state here today that I would not take advantage of that." (Tr. 63). His statements, taken together, indicate an underlying desire to be able to return to marijuana use. Applicant fails to demonstrate a complete commitment to avoiding marijuana. Given these facts, AG ¶ 26 (b) (3) and (4) are insufficient to mitigate Applicant's disqualifying conduct.

Personal Conduct

AG ¶ 15 expresses the security concern about personal conduct:

Conduct 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.

The government alleges that Applicant deliberately failed to disclose his December 2006 marijuana use, implicating AG ¶ 16(a) (*deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*).

Applicant failed to list marijuana use on December 31, 2006, indicating on his Security Clearance Application that his last use was in April 2006. He testified that he has always considered April 2006 as the date that he stopped using marijuana. AG ¶ 17(c) (*the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) mitigates Applicant's omission of the December 2006 marijuana use. His failure to include the single use of marijuana in December 2006 was infrequent, since no other material facts were omitted. In fact, Applicant disclosed the most serious negative fact – his continuous marijuana use over a period of 35 years– showing that he did not intend to hide relevant

information from the government. Nor did he try to minimize his drug use, even going so far as to describe it as “chronic” in his security clearance application. Applicant completed his re-submission in a hurry, and admits that he should have listed the December use. But considering his disclosure of the extent and nature of his illegal drug use, as well as his disclosure of other facts against his own interest, such as an arrest for Driving Under the Influence of Alcohol and a brief use of cocaine, I find that Applicant’s failure to list the additional use in December 2006 is mitigated because it was not intentional.

Whole Person Analysis

Under the whole person concept, an administrative judge must evaluate the Applicant’s security eligibility by considering the totality of the 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) 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 common-sense judgment based upon careful consideration of the guidelines and the whole person concept. Under each guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Applicant voluntarily decided to use an illegal drug for more than 35 years. He did not discontinue his use until approximately two years ago, when he was a mature adult of 52 years. Although it is commendable that he has abstained from using marijuana for almost two years, Applicant’s past drug use has resulted in poor judgment and untrustworthy behavior: he hid his illegal drug use from his daughter; he used marijuana for 13 years while he held a security clearance; for the past 25 years, he avoided applying for a security clearance because he preferred to use an illegal drug. Finally, his intent to avoid future use is not unequivocal. His recent abstinence is insufficient to overcome his extensive history of drug use, and his resulting untrustworthy behavior.

Overall, the record evidence fails to satisfy the doubts raised about Applicant’s suitability for a security clearance. For all these reasons, I conclude Applicant has not mitigated the security concerns arising from the cited adjudicative guidelines.

Formal Findings

Paragraph 1, Guideline H	Against Applicant
Subparagraph 1.a.:	Against Applicant
Subparagraph 1.b.:	Against Applicant
Subparagraph 1.c.:	Against Applicant
Subparagraph 1.d.:	Against Applicant
Subparagraph 1.e.:	Against Applicant
Subparagraph 1.f.:	Against Applicant
Paragraph 2, Guideline E	For Applicant
Subparagraph 2.a:	For Applicant

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