



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



In the matter of:	)	
	)	
-----	)	
SSN: -----	)	ISCR Case No. 08-03953
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Ray T. Blank, Esquire, Department Counsel  
For Applicant: Pro Se

December 23, 2008

---

**Decision**

---

MALONE, Matthew E., Administrative Judge:

Based upon a review of the pleadings, exhibits and testimony, Applicant's request for eligibility for a security clearance is denied.

On December 28, 2007, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his job with a defense contractor. 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 finding<sup>1</sup> that it is clearly consistent with the national interest to allow Applicant access to classified information. On July 23, 2008, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which

---

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

raise security concerns addressed in the Revised Adjudicative Guidelines (AG)<sup>2</sup> under Guideline H (drug involvement).

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on September 9, 2008, and I convened a hearing on October 21, 2008. The parties appeared as scheduled. The government presented four exhibits (Gx. 1 - 4). Applicant testified and submitted two exhibits (Ax. A and B). I also left the record open after the hearing to receive additional relevant information. On October 29, 2008, I received a post-hearing submission, which is included in the record without objection as Ax. C. DOHA received the transcript of hearing (Tr.) on November 5, 2008.

### **Findings of Fact**

The government alleged in the SOR that Applicant used marijuana from age 17 until he graduated college in 1984 at age 25 (SOR ¶ 1.a); that he previously submitted a security clearance application in October 2001, thus becoming aware that illegal drug use may raise a concern about his suitability to hold a security clearance (SOR ¶ 1.b); and that Applicant again used marijuana, about 30 times, between May 2006 and May 2007 (SOR ¶ 1.c).

Applicant admitted with explanation all of the SOR allegations. As to SOR ¶ 1.b, the facts alleged are relevant to this decision; however, they are not potentially disqualifying in and of themselves. Rather, this allegation merely pleads evidence of Applicant's awareness of the security significance of his involvement with illegal drugs, a fact I have considered in reaching my decision. SOR ¶ 1.b is concluded for the Applicant. I have also made the following additional findings of relevant fact.

Applicant is 49 years old. He graduated from college in 1984 with a degree in electrical engineering. Since at least August 2000, he has been employed in the information technology (IT) sector. Since December 2007, he has worked for a defense contractor as a senior engineer. He requires a security clearance for his current job, but had submitted applications for a security clearance (SF 86) in October 2001, and for a public trust position (SF 85P) in March 2006. Each of Applicant's applications for clearance or positions of trust required Applicant to disclose any involvement with illegal drugs in the preceding seven years. (Gx. 1; Gx. 3; Gx. 4; Tr. 22 - 23)

Applicant first used marijuana at age 17 and continued to use it until he completed his undergraduate studies in 1984. Applicant flunked out of the first college he attended because he was "partying too much." He continued his studies at a community college before transferring to the college where he obtained his engineering degree. Between 1984 and May 2006, Applicant was not involved with illegal drugs. (Tr. 30 - 31; Gx. 2)

---

<sup>2</sup> 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.

Applicant is an avid musician and works with local students through recording sessions at a studio in his house. On one evening in May 2006, Applicant and a friend went to another person's house to rehearse. At some point, that person produced some marijuana and all three smoked it in a pipe. Before leaving that evening, Applicant purchased about 1/4 ounce of marijuana for his own use. He smoked it by himself at home over the next year at a rate of about twice monthly. (Tr. 32 - 35) At the time he resumed his marijuana use, Applicant was working as a database administrator for a company that supported a government agency. (Gx. 1; Gx. 4; Tr. 31, 49)

Applicant has been married since January 1988. His wife has used marijuana but not in the past 25 years. She was aware, but did not approve of Applicant's drug use. (Tr. 47 - 48) Applicant stopped using marijuana in May 2007, in part, after his brother died unexpectedly. Applicant claimed that event caused him to re-evaluate his life and his priorities. He also is interested in living a healthier lifestyle. (Tr. 50 - 51; Gx. 2)

Applicant still sees occasionally one of the people with whom he used marijuana in 2006. He also socializes with a neighbor whom he knows uses marijuana. Applicant asserted that he has made clear to both that he cannot be involved in any way with illegal drugs. (Tr. 37 - 38, 52)

In October 2008, Applicant completed six months of weekly drug counseling sessions, which included periodic urine tests for marijuana and cocaine. Applicant has repeatedly stated he would submit to drug testing at anytime, and he has submitted a written statement of intent asserting he will not use illegal drugs in the future. (Answer to SOR; Ax. B; Ax. C; Tr. 28)

Applicant has a good reputation at work. (Ax. A) He is also active in the community through his musical work with local youth, and through free dog training services he offers. (Tr. 38)

## **Policies**

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>3</sup> and consideration of the pertinent criteria and adjudication policy in the Revised Adjudicative Guidelines (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines. Commonly referred to as the "whole person" concept, those factors 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

---

<sup>3</sup> Directive. 6.3.

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

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 AG ¶ 24 (Guideline H - Drug Involvement).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>4</sup> 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.<sup>5</sup>

A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. Thus, 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 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.<sup>6</sup>

## **Analysis**

### **Drug Involvement.**

The government presented sufficient information to support all of the SOR allegations. The facts established by the government's information and the Applicant's admissions raise a security concern addressed in AG ¶ 24 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.

---

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

<sup>5</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>6</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

(a) Drugs are defined as mood and behavior altering substances, and include:

(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;

(b) drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Applicant used marijuana while in college, but stopped 24 years ago. Had he not resumed using marijuana in 2006, his past drug use would be of little or no security concern. Further, his recent use was not a one time lapse in judgment that might be written off as reliving old times with old friends. Applicant bought marijuana, which he illegally possessed and used over the course of the next 12 months. Because he had previously completed two government applications for positions of trust, it cannot reasonably be disputed that he knew such conduct could cause the government to question his suitability for access to classified information. Yet, he resumed using marijuana about two months after he submitted his SF 85P, and continued using through most of his tenure with the federal contractor where he worked immediately before his current employer hired him. These facts require application of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse (see definition [at AG ¶ 25(a)])*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*).

In response, Applicant's information shows he has not used illegal drugs since May 2007, that he completed a program of counseling and drug testing between April and October 2008, and that he does not intend to use illegal drugs in the future. Further, although he still occasionally sees a friend with whom he used marijuana and who still uses marijuana, Applicant has made clear that he will not tolerate any drug use in his presence. These facts require application of the mitigating condition at AG ¶ 26(b) (*a demonstrated intent not to abuse any drugs in the future, such as: (1) dissociation from drug-using associates and contacts...(4) a signed statement of intent with automatic revocation of clearance for any violation*). Additionally, while the counseling program he completed was not prescribed by a medical professional, he is entitled to some limited consideration under the mitigating condition at AG ¶ 26(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*).

Of the remaining Guideline H mitigating conditions with potential application to these facts, I have specifically declined to apply the mitigating condition at 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*). His conduct must be considered recent despite his current record of abstention from drug use. It is too soon to conclude he will not use drugs in the future because of his resumption of drug use two years ago

after a 24 year hiatus. For the same reason, Applicant may not benefit from AG ¶ 26(b) (*a demonstrated intent not to abuse any drugs in the future, such as...(3) an appropriate period of abstinence*). On balance, I am not persuaded that Applicant's illegal drug use is behind him. Applicant resumed frequent drug use after a long period of abstinence, and he did so knowing that such conduct is illegal and directly at odds with government policies about drug use. Notwithstanding the positive information about Applicant's conduct since May 2007, he has failed to mitigate the security concerns established through the government's information.

### **Whole Person Concept.**

I have evaluated the facts presented and have applied the appropriate adjudicative factors under Guideline H. I have also reviewed the record before me in the context of the whole person factors listed in AG ¶ 2(a). Applicant is 49 years old and presumed to be a mature adult. Since he graduated college in 1984, it appears he has lived a stable and responsible lifestyle. He has been married for 20 years and, at least since 2000, has been steadily employed in the IT industry. He stays active in the community and there do not appear to be any concerns about his honesty or his job performance. However, his decision to resume regular drug use severely undermines the value of this positive information. It is recent, serious, and repeated conduct, and he engaged in that behavior knowing that it was wrong. All of the information regarding Applicant's recent drug use make it more likely than not that such conduct will recur.

The facts and circumstances of Applicant's drug use present an unacceptable risk to the national interest were he to be given access to classified information. A fair and commonsense assessment<sup>7</sup> of all available information shows there are still doubts about his ability or willingness to protect the government's interests as his own. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.<sup>8</sup>

### **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:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	Against Applicant

---

<sup>7</sup> See footnote 3, *supra*.

<sup>8</sup> See footnote 6, *supra*.

## **Conclusion**

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

---

MATTHEW E. MALONE  
Administrative Judge