



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 08-06311
)	
Applicant for Security Clearance)	

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: *Pro Se*

September 18, 2009

Decision

MALONE, Matthew E., Administrative Judge:

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

On August 15, 2007, Applicant submitted a Questionnaire for National Security Positions (SF 86) to obtain a security clearance required for his job with a defense contractor. After reviewing the results of Applicant’s background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) twice issued to Applicant written interrogatories¹ regarding information in his background. Based on the results of the background investigation and his responses to the interrogatories, DOHA adjudicators were unable to make a preliminary affirmative finding² that it is clearly

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

² Required by Executive Order 10865, as amended, and by DoD Directive 5220.6 (Directive), as amended.

consistent with the national interest to grant Applicant's request for access to classified information. On March 27, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the revised Adjudicative Guidelines (AG)³ under Guideline H (illegal drugs).

On April 14, 2009, Applicant responded to the SOR and requested a decision without a hearing. On May 7, 2009, Department Counsel prepared a File of Relevant Material (FORM)⁴ in support of the government's preliminary decision. The FORM included six documents (Items 1 - 6) proffered in support of the government's case. Applicant received the FORM on May 13, 2009. He had 30 days from receipt of the FORM in which to file a response and additional information.⁵ However, he did not timely submit further information and the case was assigned to me on August 4, 2009.

Findings of Fact

The government alleged Applicant used marijuana between 24 and 50 times from 1993 until at least April 2008 (SOR ¶ 1.a); that he grew marijuana and sold it to help finance his wedding in 2003 (SOR ¶ 1.b); and that he grew and sold marijuana while he was in college (SOR ¶ 1.c). Applicant admitted these allegations without explanation. (FORM, Item 3) In addition to the facts entered in the record through Applicant's admissions, I make the following findings of relevant fact.

Applicant is a 35-year-old college graduate with a degree in Management and Information Systems. He has worked as a Lead Developer for his current employer since February 2005. Applicant and his wife have been married since June 2003, and they have two children (ages 4 and 2). (FORM, Items 4 and 5)

When Applicant submitted his SF 86, he disclosed that he had used marijuana 10 times since February 2004 and that he had produced, bought, and sold illegal drugs for profit. (FORM, Item 4) When he was interviewed by a government investigator in November 2007, he further disclosed that he had actually used marijuana as many as 50 times from 1993, his second year in college, until October 2007. He stated that he has generally used the drug alone or with his wife. He also disclosed that he grew and sold about one pound of marijuana to finance his wedding reception. (FORM, Item 5).

At the time he responded to a second set of DOHA interrogatories on July 14, 2008, Applicant had last used marijuana in April 2008. He also stated that his wife still used marijuana at home, and that his use had moderated such that he had used about 24 times over the previous 24 months. He also averred that he easily could stop using,

³ 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 replace the guidelines listed in Enclosure 2 to the Directive.

⁴ See Directive, Enclosure 3, Section E3.1.7.

⁵ *Id.*

if necessary for his job or security clearance, because his use of marijuana is so infrequent. He has stopped in the past for work or when his wife has been pregnant. (FORM, Item 6)

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).⁶ 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 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.

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 concern and adjudicative factors under AG ¶ 24 (Guideline H - drug involvement).

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁷ 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.⁸ 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

⁶ Directive. 6.3.

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ See *Egan*, 484 U.S. at 528, 531.

interest 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.⁹

Analysis

Drug Involvement

The security concern raised by the allegations of illegal drug involvement by the Applicant is that “[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 ¶ 24.

The government’s information is sufficient to support, and Applicant has admitted to, the allegations in SOR ¶¶ 1.a - 1.c; specifically, that he used, produced, possessed, and/or trafficked in illegal drugs from the time he was about 19 years old until he was 35 years old. Available information requires application of the disqualifying conditions at AG ¶ 25(a) (*[a]ny drug abuse*) and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*).

The security significance of Applicant’s illegal drug involvement might be mitigated if he could show that his use was not recent, that it was infrequent, is not likely to recur, or does not cast doubt on his “current reliability, trustworthiness, or good judgment.” (AG ¶ 26(a)) The facts established here might also be mitigated if Applicant could establish “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.” (AG ¶ 26(b)) As to recency and “an appropriate period of abstinence,” he has not stated that he no longer uses marijuana. Even if he did stop using in April 2008, because he had used marijuana for his entire adult life, abstinence between over the ensuing 18 months is insignificant. Further, Applicant’s statement that he would stop using if necessary for his job or security clearance is not sufficient for the government to entrust him with sensitive information. Finally, he has not, and likely will not, disassociate himself from others who use illegal drugs, because his wife still smokes marijuana. On balance, there is no information available on which to base application of any of the Guideline H mitigating conditions.

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 35 years old and

⁹ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

presumed to be a mature adult. However, available information shows only that he has been significantly involved with illegal drugs for his entire adult life and that marijuana is still prevalent in his personal circumstances through his wife's ongoing use, if not through his own use. There is no information in this record about any other facet of his background that sufficiently counters the adverse information underlying the security concerns about his drug use. A fair and commonsense assessment¹⁰ of all available information bearing on Applicant's drug use shows he has failed to address satisfactorily the government's doubts about his suitability for access to classified information. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.¹¹

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
Subparagraphs 1.a - 1.c:	Against Applicant

Conclusion

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

MATTHEW E. MALONE
Administrative Judge

¹⁰ See footnote 6, *supra*.

¹¹ See footnote 9, *supra*.