



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



In the matter of:)
)
) ISCR Case No. 09-01224
)
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esquire, Department Counsel
For Applicant: *Pro se*

October 21, 2009

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 his drug involvement and personal conduct. Accordingly, his request for a security clearance is denied.

On September 11, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to request a security clearance (Item 5). 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.

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

On July 9, 2009, DOHA issued to Applicant a Statement of Reasons (Statement of Reasons) (Item 1) that specified the basis for its decision: security concerns addressed in the Directive under Guideline H (Drug Involvement) and Guideline E (Personal Conduct) of the Revised Adjudicative Guidelines (AG).² Applicant received the SOR on July 13, 2009. He signed his notarized Answer on July 22, 2009, in which he admitted to all the allegations listed under Guidelines H and E in SOR ¶¶ 1 and 2. In his Answer, Applicant also requested a decision without a hearing. DOHA Department Counsel submitted a file of relevant materials (FORM),³ dated August 20, 2009, which included eight documents (Items 1 - 8) proffered in support of the government's case. Applicant received the FORM on August 25, 2009 and was given 30 days to file a response. He timely submitted a Response to the FORM, dated September 1, 2009. The case was assigned to me on October 7, 2009.

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 SOR, and the FORM submitted by the government, I make the following additional findings of fact.

Applicant is 39 years old. He attended community college from 1993 to 1995; the record is silent as to whether he received a degree. He served on active duty in the U.S. Army in 1991, but received a medical discharge after two months. Applicant is employed in the information technology field, and as of April 2009, he held the position of lead systems integrator. He married in 1994, and has three children, ranging in age from one year to thirteen years old (Items 5, 6).

Applicant started smoking marijuana in high school, approximately in the mid to late 1980s. The extent of his use of marijuana in the 1990s is unclear from the record. However, on one occasion when he was using it in June 1993, he was charged with possession of marijuana. Applicant was approximately 23 years old at the time. He was fined and sentenced to one year unsupervised probation. Applicant stated during his subject interview that he had no reason for his continuous marijuana use except that it relaxed him. Between 2001 and 2008, when Applicant was approximately 31 to 38 years old, he used marijuana approximately 100 times, usually in social settings. He also purchased marijuana about once per year, but did not sell it. His last use was June 2008 (Item 6).

In June 2005, Applicant experimented with cocaine, using it three or four times. He did not purchase or sell it, and has no intention to use it again (Item 6).

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.

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

Applicant stated in his Response to the Statement of Reasons that he has “not used any illegal drugs in nearly a year...” and has no intention to use illegal drugs in the future “due to his security clearance.” His current employer does not conduct random drug tests. The record does not indicate whether Applicant has participated in a drug treatment program (Response; Item 6).

In October 2003, when Applicant completed a Questionnaire for Public Trust Positions, he did not disclose his marijuana use. In 2007, he applied for a secret security clearance by completing an Electronic Questionnaire for Investigations Processing (e-QIP). He did not disclose either his marijuana or cocaine use on the application. In September 2008, when he completed another Electronic Questionnaire for Investigations Processing (e-QIP), he did admit his use of these illegal drugs. In his Response, Applicant admits that he “was not completely honest in my applications for clearances in 2003 and 2007—I omitted information about my use of certain illegal drugs, both in the past and at the current time.” He notes that he was immature, was concerned that he might be criminally prosecuted, and also was afraid that such a disclosure would result in his being denied a security clearance. When he completed an Electronic Questionnaire for Investigations Processing (e-QIP) in 2008, he disclosed his drug use, and his arrest for marijuana possession, because he wanted to “wipe the slate clean and not have this hanging over my head for the rest of my life.” Currently, Applicant believes that using illegal drugs is “not worth the trouble it causes.” He is “perfectly willing to submit to random drug tests, complete a treatment program, sign a statement of intent with automatic revocation of clearance for any violation, or take all of these actions.” (Response; Items 5, 7, 8).

Policies

A 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).⁴ 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 whether it is clearly consistent with the national interest⁵ 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

⁴ Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

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.⁶ 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 judgement, reliability and trustworthiness to 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.⁷

Analysis

Guideline H, Drug Involvement

Under Guideline H, 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 record shows that Applicant admits to using illegal drugs, including a brief use of cocaine and extensive use of marijuana. He began using marijuana in high school in the 1980s. In 1993, he was arrested on a charge of marijuana possession and served one year probation. Applicant admits to purchasing marijuana, and to using it from 2001 to 2008, including after being granted a security clearance in 2007. Three disqualifying conditions apply: AG ¶ 25(a) (*any drug abuse*); AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); and AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*).

Two mitigating conditions are relevant: 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*) and AG ¶ 26(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;*

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

(3) *an appropriate period of abstinence; and,*

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

Applicant's illegal drug use is not in the distant past, since his last known use occurred 16 months ago. Moreover, Applicant used marijuana for seven years between 2001 and June 2008. He was using it when he applied for a public trust position in 2003, and when he applied for a security clearance in 2007. Applicant's conduct casts serious doubt on his trustworthiness. AG ¶ 26(a) does not apply.

There is no evidence that Applicant disassociated from his friends with whom he used drugs. Although he is willing to submit a statement concerning his future intent, he has not done so. Applicant's abstinence since June 2008 is commendable; however, it is a much shorter span of time than the period that he used illegal drugs. It is too short to confidently predict that he will not return to illegal drug use in the future. AG ¶ 26(b) does not apply. I find against Applicant on Guideline H.

Guideline E, Personal Conduct

AG ¶ 15 expresses the security concern pertaining to 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.

Applicant falsified his responses to drug-related questions when he completed applications in 2003 and 2007 because he was concerned that he might be prosecuted for illegal conduct and he feared that his request for a security clearance would be denied. AG ¶ 16(a) applies (*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*).

The potentially applicable mitigators are AG ¶ 17(a) (*the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts*) and 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*). However, these conditions do not apply. The record contains no evidence that Applicant attempted to inform the government of

his drug use after falsifying his public trust position application in 2003 or his security clearance application in 2007. His decision to disclose the true facts in 2008 does not constitute a good-faith effort to correct his falsifications, nor does it mitigate his previous willingness to deliberately conceal relevant and material information that the government required in order to determine his trustworthiness. AG ¶ 17(a) does not apply. In addition, under AG ¶ 17(c), Applicant's falsification cannot be considered either minor or isolated. Applicant made a conscious decision to provide false information to the government not once, but on two separate occasions, four years apart. The government relies on information provided by applicants, and deliberate falsification both undermines the security clearance process, and casts serious doubts on an Applicant's trustworthiness. I find against Applicant on Guideline E.

Whole Person Concept

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) 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.

Applicant is 39 years old and presumed to be a mature, responsible adult. Although Applicant was young when he began using marijuana, he continued to use it well into adulthood, stopping only 16 months ago at age 38. Nor was he a youth when he provided false information to the government at 33 years of age, or when he falsified again at 37. Moreover, Applicant's Response to the FORM reflects not remorse for breaking the law over a period of approximately 20 years, but a desire to maintain his security clearance. A fair and commonsense assessment of the available information bearing on Applicant's suitability for a security clearance shows he has not satisfied the doubts raised by his conduct. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.

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
Subparagraph 1.a. - 1.e.	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a. - 2.c.	Against Applicant

Conclusion

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

RITA C. O'BRIEN
Administrative Judge