



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



In the matter of:

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ISCR Case No. 09-02344

Applicant for Security Clearance

Appearances

For Government: Jennifer I. Goldstein, Esquire, Department Counsel

For Applicant: *Pro se*

December 31, 2009

Decision

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, and exhibits, I conclude that Applicant has not mitigated the security concerns raised under Guideline H, Drug Involvement, and Guideline E, Personal Conduct. Accordingly, his request for a security clearance is denied.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP), on January 6, 2009. 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 August 27, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) that 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 signed his notarized Answer to the SOR on September 9, 2009, in which he admitted all allegations under Guideline H and Guideline E. In his Answer, Applicant also requested a decision without a hearing. DOHA Department Counsel submitted a file of relevant materials (FORM), dated October 20, 2009, which included six documents (Items 1-6) offered in support of the government's case. Applicant received the FORM on November 2, 2009, and was given 30 days to file a response. His response, dated November 17, 2009, included four exhibits (Items A-D). Department Counsel did not object to Applicant's documents. The case was assigned to me on December 16, 2009.

Findings of Fact

Applicant's admissions in response to the SOR are accepted 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, 32 years old, earned a bachelor's degree in 2005. He is single, but as of January 2009, was in a committed relationship. He does not have children. Applicant has worked for a defense contractor since 2008 (Item 4).

Applicant used marijuana from February 2000 to February 2009. At the time he used marijuana, Applicant was 22 to 31 years old. He stated in his Answer to the SOR that his use was casual and infrequent. In his security clearance application, he disclosed that he used it 100 times between February 2000 and April 2008. However, during his security interview,³ he revised this estimate to approximately 600 times between February 2000 and February 2008. He then admitted that he used it about four more times, with the last use occurring in early February 2009 (Item 5). He usually

¹ Required by Executive Order 10865, as amended, and 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.

³ Applicant attested to the accuracy of the security interview report in an interrogatory response signed and notarized on May 8, 2009 (Item 6).

smoked marijuana with friends on weekends. He did not sell marijuana, but sometimes provided it to his friends. He stated to the interviewer that he is not addicted to marijuana; however, he admitted that he returned to using it after believing that he had ended his use in April 2008. He also stated that if his job or security clearance depended on ending his marijuana use, he would do so. His last use in February 2009 occurred after he was granted a security clearance on January 12, 2009. He notes in his response to the FORM, however, that he was unaware that he had been granted his security clearance until February 18, 2009, after his last use had occurred (Item 5; Item B).

Applicant also said during his interview that he hoped to stop using marijuana, but might use it again if the opportunity arose in the future. He expanded on this statement in his Answer to the SOR, and clarified that he had no intention of using it in the future, because he now grasps the significance of drug use in relation to holding a security clearance. He reiterated that he would not use marijuana if it would cause him to lose his job or his security clearance (Item 3).

When Applicant completed his security clearance application on January 6, 2009, he answered question 24 concerning drug use, by stating that he used marijuana 100 times between February 2000 and April 2008, when he actually used it 600 times, and his use extended to at least January 2009. The government alleges in SOR allegation 2.a., that Applicant deliberately falsified this answer. He admits the facts stated in the allegation, but claims that he did not pay sufficient attention to the questions, and had no intent to deceive the government (Items 3, 4; Item B).

Applicant's Response to the FORM contained four exhibits, including several character letters. A letter from his company president, a former U.S. Navy commanding officer, indicates that Applicant is a highly talented employee who can be depended upon to solve whatever problem arises. He strongly recommends that a security clearance be granted to Applicant. His supervisor commends Applicant's maturity, leadership ability, and integrity. A co-worker who travels on international missions with Applicant praises his dedication and trustworthiness. An operations director noted that Applicant has demonstrated strong character and integrity, and can be trusted with high-cost equipment and sensitive intellectual property, including while traveling abroad (Item D).

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).⁴ Decisions must also reflect consideration of the "whole person" factors listed in ¶2(a) of the Guidelines.

⁴ Directive. 6.3.

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 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 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 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.⁷

Analysis

Guideline H, 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 two disqualifying conditions: AG ¶25(a) (*any drug abuse*) and AG ¶25(g) (*any illegal drug use after being granted a security clearance*). Applicant admits

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

⁶ See *Egan*, 484 U.S. at 528, 531.

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

using marijuana over a period of nine years. He was granted his security clearance in January 2009, and admits that he used marijuana after receiving it. Both conditions apply.

Guideline H also includes two relevant mitigating conditions. The first, 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 in February 2009, less than one year ago, which is recent. His use of illegal drugs did not occur under unique circumstances, but with friends on weekends. His repeated use indicates a long-standing willingness to ignore the rule of law, and raises doubts about his trustworthiness and good judgment. Moreover, Applicant used an illegal drug after submitting an application for a security clearance. He claims that he was unaware that he had received the clearance at the time that he last used marijuana. However, he had submitted a security clearance application, and knew or should have known that he had accepted the obligations imposed on those who hold security clearances. His conduct raises doubts about his good judgment and reliability and his ability to follow rules and regulations. AG ¶26(a) does not apply.

Mitigating condition 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.

There is no record evidence to support AG ¶26(b)(1), (b)(2), or (b)(4). As to AG ¶26(b)(3), Applicant has abstained from marijuana use since mid-February 2009. A period of 10 months is an insufficient period of abstinence on which to base an intent to end marijuana use, especially when compared to nine years of use. It is also significant that Applicant told the security investigator that he might use marijuana in the future if the opportunity arose. His statement raises doubts as to his commitment to avoid marijuana. Although in later statements he said that he intends to end his marijuana use, his intent appears to be more related to the effect of marijuana use on his security clearance eligibility than to a commitment to avoid engaging in illegal activity. AG ¶26(b) does not apply.

Guideline E, 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 falsified information provided to the government on his security clearance application, implicating AG ¶16(a). Application of this disqualifying condition requires intent to deliberately falsify information. Applicant's failure to list the full extent of his marijuana use was not intentional. His disclosure of 100 uses of marijuana over a period of eight years shows that he did not intend to hide relevant information from the government. His disclosure put the government on notice that drug use was an issue that required further investigation, and it was explored in a security Interview five weeks after he submitted his application. I conclude that Applicant did not intend to hide his drug use from the government. Disqualifying condition AG ¶16(a) does not apply and mitigation is not required.

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) 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.

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 decided to engage in criminal conduct by using illegal drugs hundreds of times over the years between 2000 and 2009. His last use was less than one year ago, when he was a mature adult 31 years of age. Applicant's recent abstinence is insufficient to overcome his history of drug use. Moreover, Applicant's most recent illegal drug use occurred while he held a security clearance. He claims he did not know the security clearance had actually been granted at the time he last used marijuana. However, Applicant decided to use an illegal drug after completing his application; his actions indicate that he did not accept the obligations he assumed when he requested that he be granted a security clearance.

It is troubling that Applicant returned to marijuana use after thinking he had successfully ended his drug use in 2008. Even more troubling is Applicant's statement that he might use marijuana in the future. Although his candor is commendable, such a lack of commitment cannot be condoned, as it indicates willingness to engage in illegal conduct. It appears Applicant ended his current marijuana use only because it jeopardized his security clearance eligibility, not because it involved illegal conduct. Taken together, Applicant's actions raise doubts as to his trustworthiness, reliability, and good judgment.

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. – 1.d.	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