



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



In the matter of: )  
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Applicant in Personal Appearance )

ISCR Case No. 09-02573

**Appearances**

For Government: Alison O'Connell, Esquire, Department Counsel

For Applicant: Patrick McGuire, Esquire

July 29, 2010

**Decision**

O'BRIEN, Rita C., Administrative Judge:

Based upon a review of the case file, pleadings, exhibits, and testimony, I conclude that Applicant has failed to mitigate the security concerns raised under the guideline for drug involvement. Accordingly, his request for a security clearance is denied.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) signed on November 21, 2008. 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 grant Applicant's request for a security clearance.

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

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On January 8, 2010, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision: security concerns addressed in the Directive under Guidelines C (Foreign Preference), E (Personal Conduct), and H (Drug Involvement) of the Adjudicative Guidelines (AG).<sup>2</sup>

Applicant submitted his Answer, signed and notarized on February 1, 2010. Applicant requested a hearing before an administrative judge. Department Counsel was prepared to proceed on March 30, 2010, and the case was assigned to me on April 5, 2010. DOHA issued a Notice of Hearing on April 21, 2010. I convened the hearing as scheduled on May 18, 2010. I admitted three exhibits offered by the Government (GE 1 through 3). Applicant testified on his own behalf and offered 17 exhibits, which I admitted as Applicant Exhibits (AE) A through Q. DOHA received the transcript on May 26, 2010.

### **Procedural Ruling**

Prior to the hearing, by memoranda dated March 30, 2010 and April 12, 2010, the Government moved to amend the SOR as follows:

Guideline C: The Government withdrew the entire paragraph;

Guideline E: The Government withdrew the entire paragraph;

Guideline H: The government transferred allegation 3.a. from Guideline E to Guideline H. The transferred allegation becomes subparagraph 1.b., under Guideline H, reading as follows:

1.b. You used marijuana after you had been granted a Department of Defense secret security clearance in about February 2004.

The SOR is so amended.

### **Findings of Fact**

Applicant's admissions in response to the SOR are incorporated herein as findings of fact. After a thorough review of the pleadings, Applicant's response to the

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<sup>2</sup> Adjudication of this case is controlled by the Adjudicative Guidelines, implemented by the Department of Defense on September 1, 2006.

Statement of Reasons, and the record evidence, I make the following additional findings.

Applicant, 30 years old, was single at the time of the hearing, and does not have children. He planned to be married on July 23, 2010. He holds a master's degree in electrical engineering. He has worked for a federal contractor since 2003, currently holding the position of test engineer. (GE 1; Tr. 18, 20)

In 2001, while he was in college, Applicant used marijuana three times with college friends and roommates, during parties at the homes of friends. He did not purchase the drug. When Applicant was hired by a defense contractor in 2003, he submitted to a drug test. On his first security clearance application in May 2003, he disclosed that he had used marijuana three times between June and December 2001. When he met with a security investigator in the fall of 2003, he admitted this marijuana use. He told the investigator that he had no intention to use marijuana again. Subsequently, he was granted a security clearance in January 2004. (GE 1; Tr. 21-22, 32-34)

In summer 2004, Applicant was at a music concert with a friend. He shared a marijuana joint that was being passed around. He most recently saw this friend at a wedding in May 2010. He testified that he does not associate with her regularly, though he sees her approximately five times per year. He again used marijuana after leaving a party on New Year's Eve 2006 or New Year's Day, 2007, when he was 26 years old. He used it with a former co-worker. He testified that he has little to no contact with the people with whom he used marijuana. Upon further questioning, he testified that two of the people with whom he used marijuana are close friends, and he sees them approximately ten times per year. However, they no longer use illegal drugs. On his November 2008 security clearance application, Applicant listed that he used marijuana five times between 2000 and 2007. (GE 1, 3; Tr. 22- 24, 31, 35-38, 42, 46-47)

Applicant testified that he was not aware that his drug use would have an impact on his security clearance. He does not remember if he thought about his security clearance when he accepted the marijuana at the concert in 2004. He realized it was illegal conduct, and that it was a poor choice. He did not report his marijuana use to his facility security officer or other supervisory personnel in his company. He testified that management became aware of it through his disclosure on the security clearance applications. Applicant has never been treated for drug abuse, or tested positive for illegal drugs. He testified that he has matured since he used illegal drugs, and that he has no intent to use them in the future. He submitted a letter declaring that he will not do so. (AE A; Tr. 25-30, 38-41, 45-46)

Applicant testified that he does not recall receiving formal security training, and his security department had no record of any before a briefing he received in December

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2009. He also stated that he knew drug use was an issue for his security clearance, but not the exact effect. He remembers receiving information about the Employee Assistance Program for drug use. He submitted to a drug test in 2003, as part of the hiring process for his current defense contractor position, but had no drug tests since then. His facility security officer submitted a letter stating that Applicant "...has met the annual DOD security refresher briefing for cleared personnel. Mr. [name] has been proactive in keeping an active and current knowledge of security practices by reading security training materials on December 17, 2009." (AE B; Tr. 25, 34, 41, 43-45)

Applicant's evaluations show that he either met or exceeded standards between 2005 and 2009, and has received monetary awards for his performance. Applicant's supervisor, who has known him for more than two years, submitted a character reference letter. She opined that he is dedicated, trustworthy and loyal, and goes above and beyond the requirements to get the job done. His program manager corroborated that Applicant volunteers for extra work in order to accomplish the mission. He was shocked that Applicant had used marijuana after receiving a security clearance, but believes Applicant will not make the same mistake in the future. A former roommate was also surprised at finding that Applicant used marijuana while holding a clearance, and stated that he never saw Applicant use marijuana in the year they lived together. His friends and co-workers, who have known him for several years, attest that he is trustworthy and dependable. (AE C - Q)

## **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 Adjudicative Guidelines (AG).<sup>3</sup> 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 does not determine a conclusion for or against an applicant. However, specific applicable guidelines are 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).

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

A security clearance decision is intended only to resolve the question of 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 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. 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.<sup>6</sup>

## **Guideline H, Drug Involvement**

The security concern about drug involvement is that

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. AG ¶ 24.

The record evidence raises two disqualifying conditions: AG ¶ 25(a) (*any drug abuse*), and AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*). Applicant used an illegal drug several times in 2001, before he held a security clearance. He used marijuana again in 2004, and in 2006/2007. Both of these uses occurred while he held a security clearance that was granted in 2004. AG ¶¶ 25(a) and (g) apply.

I have considered all of the mitigating conditions under AG ¶ 26, especially the following:

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<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*; Adjudicative Guidelines, ¶ 2(b).

(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

(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.

Applicant's uses of marijuana in 2001 and 2004 were not recent. The last use occurred more recently, in 2006/2007. However, Applicant did not use marijuana occur under unusual circumstances, as he used the illegal drug at parties and at a concert with friends. Moreover, Applicant engaged in illegal conduct in 2004 and 2006/2007 while he held a security clearance. The fact that he did not consider the relationship between his illegal conduct and the fact that he held a security clearance raises serious doubts about his judgment. Because some of his uses were not recent, AG ¶ 26(a) applies in part.

Applicant testified that he has no plans to use marijuana in the future, and submitted a statement to that effect. He also has not used marijuana in more than three years. However, Applicant continues to associate with the friends with whom he used marijuana. AG ¶ 26(b) also applies in part. The partial mitigation under AG ¶ 26(a) and (b) does not overcome the fact that Applicant used marijuana while he held a security clearance.

### **Whole-Person Analysis**

Under the whole-person concept, an administrative judge must evaluate an 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

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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 commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. Under the cited guideline, I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case.

Weighing in Applicant's favor are several positive factors: he has performed successfully at work. His supervisor and program manager, as well as friends and co-workers, attest to his dependability and honesty. He is remorseful for his use of marijuana and has abstained for more than three years.

At the time Applicant first used marijuana, he was a 21-year-old college student. This use is not recent, and he was less mature than he is now. If this had been the only event, Applicant might have mitigated the security issue. His use in 2004 and 2006/2007, however, presents a significant concern because it occurred after Applicant had been granted a security clearance. Whether or not he received adequate security briefings, he knew that marijuana use was illegal. Moreover, he was on notice that illegal drugs were an issue for security clearance holders because he underwent a drug test when he became an employee of the defense contractor; he completed a security clearance application in 2003 that asked about illegal drug use; and he met with an investigator at that time who asked him about his illegal drug use.

Applicant's trustworthiness and reliability are a concern because in 2003 he told the security investigator that he would not use marijuana in the future. But after that promise, he decided to use it not once but two different times, in 2004 and in 2006/2007. It is a concern that he used an illegal drug without considering the fact that he held a security clearance, despite the fact that he was on notice that use of illegal drugs was security-relevant. Applicant's conduct indicates a lack of good judgment and trustworthiness: he engaged in criminal conduct, he reneged on a promise not to use in the future; and he ignored the obligations he accepted when he was granted a security clearance.

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 guideline.

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### **Formal Findings**

Paragraph 1, Guideline H:                   AGAINST APPLICANT

Subparagraphs 1.a. – 1.b.:               Against Applicant

### **Conclusion**

In light of all of the circumstances presented by the record in this case, 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.

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RITA C. O'BRIEN  
Administrative Judge

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