



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



In the matter of:	)	
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SSN: -----	)	ISCR Case No. 09-04650
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Paul M. DeLaney, Esquire, Department Counsel  
For Applicant: *Pro Se*

February 24, 2010

**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 January 30, 2009, 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 Applicant's background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) sent interrogatories to Applicant to obtain clarification of and/or additional information about adverse information in her background.<sup>1</sup> Based on the results of the background investigation, including Applicant's response to the interrogatories, DOHA adjudicators

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<sup>1</sup> Authorized by DoD Directive 5220.6, Section E3.1.2.2.

were unable to make a preliminary affirmative finding<sup>2</sup> that it is clearly consistent with the national interest to continue Applicant's access to classified information. On September 4, 2009, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the Revised Adjudicative Guidelines (AG)<sup>3</sup> under Guideline H (illegal drugs).

On September 19, 2009, Applicant responded to the SOR and requested a decision without a hearing. On October 20, 2009, Department Counsel prepared a File of Relevant Material (FORM)<sup>4</sup> in support of the government's preliminary decision. Applicant received the FORM on November 30, 2009, and was given 30 days to file a response to the FORM. His response was submitted the same day, and was received by DOHA on December 11, 2009. The case was assigned to me on January 27, 2010.

### **Findings of Fact**

The government alleged Applicant used marijuana illegally between January and April 2003. (SOR ¶ 1.a) It was also alleged that he used marijuana again in May 2009. (SOR ¶ 1.b) Applicant admitted both allegations. (FORM, Item 4) In addition to the facts entered in the record through Applicant's admissions, I make the following findings of relevant fact.

Applicant is 27 years old. Since January 2009, he has been employed by a defense contractor as a wireman at a job site abroad. He has been steadily employed since August 1997, and, in 2007, he completed two years of training in computer repair and networking. When he submitted his e-QIP to obtain a security clearance required for his current job, Applicant disclosed that he had used marijuana about ten times with a roommate between January 2003 and April 2003. (FORM, Item 5) This is his first application for a security clearance.

On May 5, 2009, Applicant was interviewed by a government investigator as part of his background investigation. He stated that he used marijuana on one occasion with his roommate in March 2004. (FORM, Item 7) However, in response to DOHA interrogatories, stated that he used marijuana from January 2003 until April 2003, which was consistent with his e-QIP disclosure. He further stated that he stopped using marijuana at that time because he wanted to earn a promotion at work and started to take his job more seriously. (FORM, Item 6)

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

<sup>3</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.

<sup>4</sup> See Directive, Enclosure 3, Section E3.1.7. The FORM included seven documents (Items 1 - 7) proffered in support of the government's case.

In response to the same interrogatories, and during his May 2009 interview, Applicant also stated that he used marijuana on May 2, 2009, because he was emotionally stressed over the death of his girlfriend's father, to whom he was very close. The marijuana he used that day was supplied by his girlfriend's brother-in-law. (FORM, Items 6 and 7)

Applicant has acknowledged that he used very poor judgment when he used marijuana in 2009. Through his notarized responses to the SOR (FORM, Item 4) and the FORM, he has stated in writing that he has not used marijuana since May 2009, and that he intends to abstain from using marijuana in the future. However, he has also acknowledged that it will be difficult to disassociate himself from his girlfriend's brother-in-law, but he will try to avoid any situation that might include the possibility of illegal drug use.

Applicant has a good reputation at work. His supervisor since about June 2009 lauds Applicant's integrity and dedication to his job. He further cited Applicant's value to his company's work for the Department of Defense, which resulted in Applicant's retention with the company despite a recent force reduction for the contract to which Applicant is assigned. (Response to FORM)

### **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).<sup>5</sup> 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).

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<sup>5</sup> Directive. 6.3.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>6</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>7</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 national interest.<sup>8</sup>

## Analysis

### Drug Involvement

The government presented sufficient information in the FORM to support the SOR allegations that Applicant used illegal drugs between January and April 2003, and in May 2009. Applicant also admitted those allegations. Available information raises a security concern about Applicant's use of illegal drugs 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. (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.

More specifically, available information requires application of the disqualifying conditions listed at AG ¶ 25(a) (a) *Any drug abuse (see above definition)*. I have also considered the possibility that Applicant was given an interim clearance when he submitted his e-QIP. This would make applicable the disqualifying condition at AG ¶

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<sup>6</sup> See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

<sup>7</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>8</sup> See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

25(g) (*any illegal drug use after being granted a security clearance*); however, available information does not clearly establish that he held a security clearance in May 2009.

By contrast, of the mitigating conditions listed under AG ¶ 26, only 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) 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*) are potentially applicable here.

Applicant's last drug use must be considered recent as it happened less than 12 months ago. Had he not used drugs after he stopped in April 2003, his conduct would likely not be a current security concern. It may be unlikely that he will again be offered marijuana while he is as emotionally stressed as when his girlfriend's father died. However, because he resumed using marijuana after more than six years of abstinence, he may still associate with his girlfriend's brother-in-law who uses marijuana, and used marijuana after submitting his e-QIP, not enough time has passed to safely conclude that Applicant will not use marijuana in stressful times to come. Despite his stated intent to abstain from future drug use, I conclude that AG ¶ 26(a) and AG ¶ 26(b) do not apply, and that Applicant has failed to mitigate the adverse inferences of 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, a 29-year-old defense contractor, is presumed to be a mature, responsible adult. He has the confidence of his supervisor of the past eight months, and he has been steadily employed for his entire adult life. However, the positive information in the record is insufficient to overcome the security concerns raised by his recent use of illegal drugs. A fair and commonsense assessment<sup>9</sup> of all available information bearing on Applicant's involvement with illegal drugs shows that the recent recurrence of his conduct in this regard after more than six years creates doubts about Applicant's suitability to hold a clearance that his responses have not adequately addressed. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the government.<sup>10</sup>

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<sup>9</sup> See footnote 5, *supra*.

<sup>10</sup> See footnote 8, *supra*.

### **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.b:                   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.

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MATTHEW E. MALONE  
Administrative Judge