



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



In the matter of:)
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Applicant in Personal Appearance)

ISCR Case No. 10-02271

Appearances

For Government: Marc G. Laverdiere, Esquire, Department Counsel

For Applicant: *Pro se*

December 21, 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, Applicant's request for a security clearance is denied.

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) signed on October 19, 2009. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals

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(DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a security clearance.

On August 3, 2010, DOHA issued to Applicant a Statement of Reasons (SOR), which specified the basis for its decision: security concerns addressed in the Directive under Guideline H (Drug Involvement) of the Adjudicative Guidelines (AG).²

Applicant submitted an Answer to the SOR, signed and notarized on August 12, 2010, in which he admitted both allegations. He requested a hearing before an administrative judge. Department Counsel was prepared to proceed on August 31, 2010, and the case was assigned to me on September 1, 2010. DOHA issued a Notice of Hearing on September 3, 2010. I convened the hearing as scheduled on September 20, 2010. I admitted two exhibits offered by the Government (GE 1-2). Applicant testified on his own behalf and offered on exhibit, which I admitted as Applicant's Exhibit (AE) A. I held the record open to allow Applicant to submit additional documentation. On September 27, 2010, he forwarded a document. Department Counsel did not object. I admit the document as AE B. Department Counsel's comment on AE B is admitted as Hearing Exhibit I. DOHA received the transcript on September 27, 2010.

Findings of Fact

Applicant's admissions in response to the SOR are incorporated as findings of fact. After a thorough review of the pleadings, Applicant's response to the SOR, and the record evidence, I make the following additional findings.

Applicant is 28 years old and single. He completed a bachelor's degree in political science in 2007, with a minor in Arabic. While working on his college degree, Applicant attended schools in four different states: state A (2003); state B (2004-2007); state C (January to December 2006); and state D (May to July 2006), and in Syria (November to December 2008). He studied Arabic in Syria for two months. He has worked for a federal contractor as a media research analyst since 2009. In 2008 and 2009, he traveled in Eastern Europe and Turkey. (GE 1; Tr. 16-17, 49)

At the hearing, Applicant testified that he smoked marijuana about monthly between the ages of 16 and 19. He dropped out of high school, and for a time, he was homeless. He completed his GED through a Job Corps program. The time that he spent

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 Adjudicative Guidelines, implemented by the Department of Defense on September 1, 2006.

in high school and in Job Corps is the primary time when he used marijuana. He then spent two years in AmeriCorps.³ He worked with a number of mentors, and when he completed AmeriCorps in 2002, he realized that he should attend college. As he became more serious about his goals, his marijuana use decreased to a few times during college. (Tr. 52-56)

On his security clearance application, he admitted to using marijuana twice in the previous seven years: in New Orleans in April 2006 and in Prague in January 2009. In New Orleans, he shared a marijuana joint with a friend. (Tr. 27) In Prague, Applicant took two puffs from a marijuana joint provided by youths he met at a hostel. (GE 1; Tr. 21-27, 31)

During his security interview, Applicant disclosed to the security investigator that he also smoked marijuana in his apartment in the United States in January 2009.⁴ (GE 2) A friend had obtained marijuana, and Applicant agreed to share it. They smoked something less than one “dime bag” in Applicant's apartment.⁵ Applicant also told the security investigator that he does not smoke marijuana habitually, but did not rule out the possibility of using marijuana in the future at social, recreational, or special events.⁶ (GE 2; Tr. 28-31)

At the hearing, Applicant testified that he also smoked marijuana at his home in about May 2010.⁷ He was going through a stressful period and was not able to sleep. Since marijuana use made him tired, he decided to use it to combat his insomnia. He purchased a “dime bag” and made two joints from it. He smoked a joint. Later in the summer, he discarded the remaining marijuana. He stated at the hearing that smoking

³ AmeriCorps is defined on its website as an organization in which volunteers work for one year to combat poverty in low-income communities in the United States. See <http://www.americorps.gov/>

⁴ At the hearing, Applicant testified that he did not remember the date he used marijuana with his friend at his apartment in the United States. Only one January 2009 use is alleged in the SOR; it is unclear from the record whether that use is the use in Prague, or the use in Applicant's apartment in the United States. It is clear, however, that one January 2009 use, and the May 2010 use, are unalleged. Those two uses will be considered only as part of the whole-person analysis. (Tr. 29) See App. Bd. Case No. 03-20327 at 4 (Oct. 26, 2006).

⁵ He testified that his friend agrees that he gave Applicant marijuana, but denies smoking it with Applicant in Applicant's apartment. (Tr. 30-31)

⁶ Applicant affirmed this information, which appears in the summary of the security interview, when he responded to the DOHA interrogatory. (GE 2)

⁷ This use occurred after Applicant had submitted his security clearance application.

marijuana “despite everything [he] was going through” with the security clearance process was a “stupid decision.” (Tr. 32-34)

Applicant has not used any other illegal drugs. Department Counsel asked Applicant about his statement to the investigator that he might use marijuana in the future. Applicant testified that he responded to the question as if it were a college hypothetical, *i.e.*, that it could happen, just as anything could happen. He did not realize the investigator was asking about his intent to smoke marijuana. When asked at the hearing about his intent, he testified, (GE 2; Tr. 38-44)

I regret over -- I can't say how much I regret using it. Just -- I mean, it's -- it -- just as early as this year, I've used marijuana. And I -- I can't make any excuses for it. But when I say I intend not to use it, I -- I mean it.

Applicant submitted a signed Statement of Intent declaring that he intends never to use illegal drugs in the future, and to abstain for “legal and health reasons” and for advancement in his career. Applicant did not submit character references. (AE B)

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).⁸ 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).

A security clearance decision is intended only to resolve the question of whether it is clearly consistent with the national interest⁹ for an applicant to either receive or

⁸ Directive. 6.3.

⁹ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

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.¹⁰ 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.¹¹

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(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia*). Applicant both possessed and used an illegal drug in 2006 and 2009. AG ¶¶ 25(a) and (c) apply.

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

(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

¹⁰ See *Egan*, 484 U.S. at 528, 531.

¹¹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

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 use of marijuana in 2006 was not recent, but his use in 2009, last year, is recent. It was not infrequent, as Applicant used marijuana about monthly for at least three years when he was in his teens, and then returned to marijuana use in 2006 and 2009. In addition, he used it, not in unusual circumstances, but in the common situation where he shared it with friends. His decision to use illegal drugs raises serious doubts about his judgment. AG ¶ 26(a) does not apply.

Applicant testified that he does not intend to use marijuana in the future, and submitted a statement to that effect. AG ¶ 26(b)(4) applies. However, in light of his recent use of marijuana, he has not demonstrated an appropriate period of abstinence. The partial mitigation offered by Applicant's statement of intent does not overcome Applicant's recent use.

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 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

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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.

Applicant has demonstrated remarkable character and resilience in overcoming homelessness and an initial lack of education. He provided volunteer service to the United States. He has responded to the guidance of mentors, earned a GED, attended community college, and then a four-year college, obtained a degree in political science, and traveled in many parts of the world. He wishes to use his education to work for the U.S. government. All of these positive facets of Applicant's character and accomplishments history weigh in his favor:

At the time Applicant first used marijuana, he was a teenager. This use is not recent, and he was less mature than he is now. He is remorseful for his use of marijuana. He has stated his intent to avoid using illegal drugs in the future. He was candid in his security clearance application and tried to be exact about the facts presented in his testimony.

However, Applicant's recent use of marijuana presents a security concern. He is an intelligent man and knew that marijuana use was illegal. Nevertheless, he used marijuana twice in 2009—once in Prague, and once with a friend in his apartment. And he then used it again in May 2010. His 2010 use is especially troubling: At that time, he was on notice that illegal drug use was an issue for security clearance holders because he had completed a security clearance application in October 2009 that asked about illegal drug use; and he had met with an investigator in January 2010 who specifically asked him about his illegal drug use, and whether or not he intended to use marijuana in the future. After this interview, Applicant used marijuana. He engaged in criminal conduct, despite the fact that he was on notice that use of illegal drugs was security-relevant and he was being considered for a security clearance. He placed his own desires above those of the Government. Applicant's actions failed to demonstrate the good judgment and trustworthiness required in those who are granted access to classified information.

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.

RITA C. O'BRIEN
Administrative Judge

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