



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



|                                  |   |                        |
|----------------------------------|---|------------------------|
| In the matter of:                | ) |                        |
|                                  | ) |                        |
| [NAME REDACTED]                  | ) | ISCR Case No. 10-05060 |
|                                  | ) |                        |
|                                  | ) |                        |
| Applicant for Security Clearance | ) |                        |

**Appearances**

For Government: Fahryn Hoffman, Esquire, Department Counsel  
For Applicant: *Pro se*

09/27/2012

**Decision**

MALONE, Matthew E., Administrative Judge:

Applicant mitigated the security concerns raised by his use of illegal drugs while holding a security clearance. His request to renew his security clearance is granted.

**Statement of the Case**

Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) on February 15, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) sent interrogatories<sup>1</sup> to Applicant seeking to clarify or augment information obtained by investigators. Based on his responses to the interrogatories and the results of the background investigation, adjudicators could not determine that it is clearly consistent with the national interest to continue Applicant's access to classified information.<sup>2</sup> On

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

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

January 11, 2012, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guideline (AG)<sup>3</sup> for drug involvement (Guideline H).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on June 1, 2012, and I set this matter to be heard on July 19, 2012. The parties appeared as scheduled. The Government presented four exhibits, which were admitted without objection as Government's Exhibits (Gx.) 1 - 4. Applicant testified and proffered one exhibit, admitted without objection as Applicant's Exhibit (Ax.) A.<sup>4</sup> I left the record open after the hearing to receive from Applicant additional relevant information. The record closed on August 9, 2012, when I received Applicant's post-hearing submission, which is admitted without objection as Ax. B. DOHA received a transcript (Tr.) of the hearing on July 27, 2012.

### **Findings of Fact**

The Government alleged under Guideline H that Applicant used marijuana during high school and, at times, weekly, until about 1999 (SOR 1.a); that he used marijuana in December 2009 and January 2010, while holding a security clearance (SOR 1.b); and that the drug use alleged in SOR 1.b was discovered when he tested positive for marijuana in a workplace drug screening, after which he completed employer-directed drug abuse counseling from January through April 2012 (SOR 1.c). Applicant admitted all three allegations. His admissions are incorporated in my findings of fact. Having reviewed the response to the SOR, the transcript, and exhibits, I make the following additional findings of fact.

Applicant is 31 years old and has been employed by a defense contractor since April 2006. He has held a security clearance for most of the time he has held his current job. (Gx. 1; Gx. 4; Tr. 28 - 29)

Applicant has one child, now six years old. He and the child's mother lived together from 2007 until late 2009. (Gx. 1; Tr. 29)

In January 2010, Applicant tested positive for marijuana in a workplace drug test. (Gx. 1; Gx. 2) He had used marijuana three times while on holiday leave in late December 2009 and early January 2010. The test was administered on January 18, 2010. (Gx. 1; Gx. 2; Gx. 3) He had also used marijuana during his junior and senior years of high school. Before his 2009 use, he had last used marijuana in the summer of 1999. (Gx. 2; Tr. 30 - 31)

Applicant's recent marijuana use began when a cousin visited his house during a family Christmas gathering. The cousin went outside to smoke marijuana and Applicant joined him for a few puffs from the joint his cousin offered. Applicant saw his cousin two

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<sup>3</sup> The adjudicative guidelines were implemented by the Department of Defense on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

<sup>4</sup> Tr. 19 - 24.

more times while Applicant was on holiday leave and smoked marijuana with the cousin both times. Applicant decided to use marijuana on those occasions to relieve stress he was experiencing from his relationship with his child's mother. Applicant is no longer in a relationship with her and he no longer associates with his cousin. (Gx. 2; Tr. 29, 39 - 41, 46)

Applicant obtained a commercial driver's license (CDL) in 2006 as a requirement for his current job. He works as a shipping and transportation work leader, which involves driving trucks and other large industrial vehicles. As a result, he has always been subject to periodic workplace drug testing. Before January 2010, he had not tested positive for any illegal substance. (Gx. 2) When Applicant returned from holiday leave in January 2010, he was ordered to take a drug test. After the test, but before he knew the results, he told his supervisor that he had used marijuana and would likely test positive. (Gx. 2)

After the positive test results came back, Applicant was suspended from work for 10 days, and his CDL was suspended for three months. He was also directed to obtain a drug abuse evaluation and to enroll in a drug counseling or treatment program, depending on the results of the evaluation. Applicant promptly obtained a drug evaluation, which did not indicate a problem with drug abuse or addiction. Thereafter, he attended 12 weekly drug counseling sessions with a licensed mental health counselor. Applicant successfully completed all employer-directed evaluation and counseling requirements, and his CDL privileges were restored in April 2010. (Gx. 1; Gx. 2; Tr. 50)

Applicant's drug evaluation contained a recommendation that he undergo drug testing each month for two years. Applicant passed monthly drug tests from February 2010 through at least August 2011. Records provided by Applicant show that he has been tested since then, but the results are not available. Since completing the monthly testing requirement in early 2012, he is still subject to less frequent testing as a normal requirement of his job. (Gx. 2; Gx. 3; Ax. A; Ax. B)

Applicant's work performance, before and after his positive drug test, has been excellent. He has received numerous awards, pay bonuses, and other forms of recognition for his work. Several evaluations since January 2010 note that he has performed well since his suspension, and that he continues to test negative for drugs. Applicant does not consume alcohol and he leads a healthy lifestyle through outdoor recreation and personal hobbies. He has not been exposed to marijuana since January 2010, but made clear that he would leave any situation in which drugs were produced as occurred at his house in 2009. Applicant is currently taking college courses and carries a 3.5 grade point average. (Ax. A; Ax. B; Tr. 41 - 46)

## Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest<sup>5</sup> for an applicant to either receive or continue to have access to classified information. Each decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,<sup>6</sup> and consideration of the pertinent criteria and adjudication policies in the adjudicative guidelines. 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 factors 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, by itself, conclusive. 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. Department Counsel 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, Department Counsel must be able to prove controverted facts alleged in the SOR. If that burden is met, it then falls to the individual 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 government.<sup>8</sup>

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

<sup>6</sup> Directive. 6.3.

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

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

## Analysis

### Drug Involvement

Applicant illegally used marijuana with varying frequency while he was in high school in 1998 and 1999. In December 2009 and January 2010, while holding a security clearance he received in 2006 for the job he currently holds, he also used marijuana three times while on holiday leave. These facts raise a security concern 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, the Government established applicability of the disqualifying conditions listed at AG ¶¶ 25(a) (*any drug abuse...*) and 25(g) (*any illegal drug use after being granted a security clearance*).

Available information also requires application of the following mitigating conditions under 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;

(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 ...

(d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

Applicant has not used illegal drugs in more than two years. His drug use in high school has little security significance given his presumed lack of maturity as a teenager, and because it is remote in time.

By contrast, his more recent drug use bears more directly on his suitability for access to classified information. It occurred as an adult and while holding a security clearance. Applicant knew that drug use was inconsistent with government policy and with the safety requirements of his job. However, he immediately realized that his drug use was a serious lapse in judgment that could cost him his job. He advised his supervisor of his drug use before the January 2010 test results were known. He completed all of the employer-directed evaluation and counseling requirements in April 2010, and numerous workplace drug tests over the past two years have been negative. The relationship that caused the stress from which he sought relief through marijuana use ended in December 2009. Since January 2010, Applicant has not associated with the cousin who supplied the marijuana. Applicant also completed an employer-mandated drug counseling program after the failed test. There is no indication that he is a drug abuser or is dependent on drugs, and Applicant leads a sober, productive lifestyle that does not include association with drugs or drug users.

All of the foregoing supports application of the mitigating conditions at AG ¶¶ 26(a), 26(b) and 26(d). I further conclude Applicant presented sufficient information to show that his recent drug use was an aberration and that he is not likely to use illegal drugs again. He has mitigated the security concerns about his drug involvement.

### **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). I further note that Applicant is 31 years old, has been employed by the same company since 2006, and has held a security clearance during that time. Drug testing showed that Applicant used marijuana in December 2009 and January 2010. Available information also shows that he was and is an excellent employee, that he is a successful student, and that he is exceedingly remorseful of his drug use. Consideration of the record as a whole supports a reasonable conclusion that Applicant is not likely to use illegal drugs again, and that the adverse conduct in this record does not detract from his overall good judgment and reliability.

### **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: | FOR APPLICANT |
| Subparagraphs 1.a - 1.c:  | For Applicant |

## **Conclusion**

In light of all of the foregoing, it is clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is granted.

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MATTHEW E. MALONE  
Administrative Judge