



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



In the matter of:)
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 [NAME REDACTED]) ISCR Case No. 10-08419
)
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)
 Applicant for Security Clearance)

Appearances

For Government: Rasheed Williams, Esquire, Department Counsel
For Applicant: Jacob Lloyd West, Personal Representative

04/23/2012

Decision

MALONE, Matthew E., Administrative Judge:

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

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) on May 7, 2010. After reviewing the results of Applicant’s most recent background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) sent interrogatories¹ to Applicant seeking to clarify or augment information contained therein. Based on his responses to the interrogatories and the results of the background investigation, it could not be determined that it is clearly consistent with the

¹ Authorized by DoD Directive 5220.6 (Directive), Section E3.1.2.2.

national interest to continue Applicant's access to classified information.² On June 15, 2011, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guideline (AG)³ for drug involvement (Guideline H).

Applicant timely answered the SOR and requested a hearing. The case was assigned to me on September 27, 2011, and I set this matter to be heard via video teleconference on February 9, 2012. The parties appeared as scheduled. The Government presented four exhibits, which were admitted without objection as Government's Exhibits (Gx.) 1 - 4. The Government also asked that I take administrative notice of three documents, which are included in the record as Hearing Exhibits (ADx. 1 - 3). Applicant testified and proffered one exhibit, admitted without objection as Applicant's Exhibit (Ax.) A. He also presented one witness. DOHA received a transcript (Tr.) of the hearing on February 14, 2012.

Findings of Fact

The Government alleged under Guideline H that Applicant used marijuana in March 2010 (SOR 1.a); that he used marijuana after being granted a security clearance in 2005 (SOR 1.b); and that, in March 2010, he tested positive for marijuana in a workplace drug screening (SOR 1.c). Applicant denied SOR 1.a and 1.b, but admitted SOR 1.c. His admission is 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 49 years old and has been employed by a defense contractor since March 2004. He has held a security clearance for the entire time he has held his current job. (Gx. 1) Applicant was married from May 1996 until June 2006, when he and his wife divorced. Applicant has four children between age 19 and 28. (*Id.*)

On March 28, 2010, Applicant was administered a workplace urinalysis. He failed, because the test showed the presence of THC, the active ingredient in marijuana. The level detected was 125 nanograms per milliliter (ng/ml). (Answer to SOR; Gx. 4) Applicant has denied any active use of marijuana since he briefly experimented with the drug in high school over 30 years ago. Instead, he claimed that the presence of THC in his bloodstream was the result of second-hand inhalation of marijuana smoked by others. (Answer to SOR; Gx. 3; Tr. 41)

Between January and March 2010, Applicant went skiing with his nephew and his nephew's friend every Wednesday. The drive from Applicant's home to a ski resort in a neighboring state was about two hours each way. Applicant's nephew drove and the friend rode in the backseat. Applicant occupied the front passenger seat. Applicant averred the nephew and his friend smoked marijuana using blunts, cigars in which most

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

³ 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).

of the tobacco was replaced by marijuana. Applicant testified that two or three blunts were smoked in the car during an average trip. At the resort, around lunchtime, more marijuana was smoked in the car, which was parked near the slopes. Applicant explained that he did not use the marijuana, but, in the interest of safety while they were driving to and from the resort, he would relay the blunts back and forth because he did not want the driver to be distracted and cause an accident. Applicant also acknowledged being in the car during a lunchtime break when more marijuana was smoked. But he did not explain why he, too, had to be in the car, as there was no safety issue related to passing blunts back and forth in a parked car. (Tr. 44 - 51, 72 - 73)

The last of Applicant's ski trips occurred on March 24, 2010, four days before he was given the urinalysis test at work. Applicant stated that, in addition to the marijuana smoke to which he was exposed on his ski trip, he may also have been exposed to marijuana smoke when he visited his daughter and granddaughter between the ski trip and the test. Applicant testified that persons with whom her daughter associates may have been at her house and smoking marijuana during his visit, but he gave few details about his level of exposure to marijuana smoke during his visit. (Tr. 64 - 67)

After Applicant failed the drug test, he was ordered by his employer to attend three monthly one-hour drug counseling sessions in April, May, and June 2010. On June 11, 2010, after the last session, he took another drug test, this time using a hair sample. The test results were negative for any illegal drug. The test was processed by the same company that processed his failed drug test. (Ax. A; Tr. 74 - 77)

The information submitted by Department Counsel for administrative notice (ADx. 1 - 3) presented several summaries of experiments conducted to determine how much, if any, THC might be absorbed into one's bloodstream through passive inhalation of marijuana smoke. The experiments presented cases of intense, prolonged exposure to marijuana smoke in confined spaces similar to a car with its windows up. Participants may or may not have had a history of prior use, but they generally did not have THC in their bloodstream at the beginning of the experiments. Testing conducted immediately after exposure under such circumstances yielded concentrations rarely in excess of 20 ng/ml. In no case, did the test results meet or exceed 50 ng/ml, which is the cut-off point used in government-sponsored urinalysis testing in civilian workplaces.⁴ Based on this information, I find that the 125 ng/ml concentration of THC in Applicant's bloodstream four days after his last ski trip establishes that he used marijuana.

⁴ In addition to the information presented at hearing, I advised the parties (Tr. 38) that I would do such research as I deemed reasonable and necessary regarding the effects of second-hand marijuana smoke on urinalysis testing. See, Substance Abuse and Mental Health Services Administration (SAMHSA) Medical Review Officer (MRO) Manual at www.workplace.samhsa.gov.

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ 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,⁶ 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.⁷

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.⁸

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

⁶ Directive. 6.3.

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

Analysis

Drug Involvement

Applicant illegally used marijuana with varying frequency between January 2010 and March 2010. At all times during his usage, he possessed a security clearance as part of his job with a defense contractor. 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*). Despite Applicant's claims, which I did not find credible, all of the available information shows that he ingested marijuana through primary inhalation, at least within a short time before the workplace urinalysis he failed in March 2010.

Available information also requires that I considered the potential applicability 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) 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; and

(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 since March 2010. He also completed employer-mandated drug counseling program after the failed test. But the counseling he completed consisted of three, one-hour sessions, and there is no information regarding an evaluation of Applicant's drug use or a prognosis of possible future use. In June 2010, Applicant tested negative for illegal drugs using a hair sample processed by the same company that processed his urine sample in March 2010. These facts support partial application of the mitigating conditions at AG ¶¶ 26(a), 26(b) and 26(d).

However, Applicant still associates with his nephew, and marijuana may be around when he visits his daughter. His negative drug test would carry more persuasive value had it been conducted soon after the positive test. Finally, Applicant's continued insistence on his theory of second-hand smoke inhalation is simply not credible. He has not contested the test result of 125 ng/ml, but all available information shows that such a result is highly unlikely unless there has been active inhalation by the person being tested. Applicant did not present any information to support his second-hand smoke theory.

Based on all of the foregoing, I conclude Applicant did not present sufficient information to show that he did not use drugs or that he is not likely to use illegal drugs again. He has not 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 49 years old, has been employed by the same company since 2004, and has held a security clearance during that time. Drug testing showed that Applicant used marijuana in March 2010. He likely used marijuana in January and February 2010, as well. At his age, and having worked in the defense industry for six years before he used marijuana, Applicant knew or should have known that his conduct was unacceptable. Equally unacceptable has been his insistence that he did not use marijuana, despite established facts to the contrary. Despite two years of abstinence from illegal drugs, a fair and commonsense evaluation of the record as a whole leaves me with significant doubts about Applicant's judgment and reliability. Protection of the national interest requires resolution of those doubts against the Applicant.

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.c: Against Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to continue Applicant's access to classified information. Request for security clearance is denied.

MATTHEW E. MALONE
Administrative Judge