



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



In the matter of:)
)
 [NAME REDACTED]) ISCR Case No. 11-04309
)
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)
 Applicant for Security Clearance)

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: *Pro Se*

07/26/2012

Decision

MALONE, Matthew E., Administrative Judge:

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

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) on November 29, 2010. After reviewing the results of the ensuing 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 national

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

interest to continue Applicant's access to classified information.² On March 14, 2012, 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 responded to the SOR (Answer) and requested a hearing. The case was assigned to me on June 7, 2011, and I scheduled this matter to be heard on June 28, 2012. The hearing was subsequently rescheduled to June 27, 2012. The parties appeared as scheduled. The Government presented three exhibits, which were admitted without objection as Government's Exhibits (Gx.) 1 - 3. Applicant testified in his own behalf and proffered one exhibit, admitted via post-hearing submission without objection as Applicant's Exhibit (Ax.) A. DOHA received a transcript (Tr.) of the hearing on July 6, 2012.

Findings of Fact

The Government alleged under Guideline H that Applicant used marijuana as often as three times a week between 2007 or 2008 and March 2010 (SOR 1.a); that he was separated from the Navy because he tested positive for marijuana through a urinalysis administered when he reported for basic training (SOR 1.b); that he used marijuana before reporting to basic training because he knew he would be tested for illegal drugs and he regretted his decision to enlist in the Navy (SOR 1.c); and that in March 2010, he was charged with and pleaded guilty to possession of marijuana and speeding (15 - 19 mph over the speed limit).

Applicant admitted with explanations all of the SOR 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 24 years old and has been employed by a defense contractor since November 2010. This is his first application for a security clearance, but he also may have started the process of applying for a clearance during a brief stint in the U.S. Navy, which is more fully discussed below. (Gx. 1)

Applicant grew up in State A, but moved to his current residence in State B in August 2009. He lives with his older brother, who is a Navy veteran and now works for the federal government. Applicant's parents are divorced and each has remarried. While he was growing up, he was very close to his grandmother, who lived nearby. She died in early 2010. (Gx. 1; Tr. 55 - 56)

Applicant graduated from high school in 2007. He started using marijuana during his senior year and smoked it with varying frequency up to three times weekly. After he graduated, he continued working at a local resort where he had worked during high

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).

school. In October 2007, he enlisted in the Navy, but he did not report for basic training until January 2008. (Gx. 1; Tr. 27 - 32, 57)

When Applicant reported for basic training, he was given an entry level urinalysis to test for illegal drug use. Applicant failed the drug test, which showed he had used marijuana. In February 2008, Applicant was separated from the Navy before proceeding any further in his training. He characterized this action as an entry level separation. (Gx. 1; Gx. 2)

Applicant used marijuana just before he left for basic training. He had regretted his decision to enlist and knew that he would be given a drug test when he reported. Applicant's recruiter told him that he had to report because he had signed a contract, so Applicant thought he had no other recourse than to try to disqualify himself from military service through illegal means. (Answer; Gx. 2; Gx. 3)

Applicant returned home to State A and was re-hired at the resort where he worked before his enlistment. He also resumed using marijuana, albeit, less frequently than before. In August 2009, Applicant moved to State B to live with his older brother. Applicant wanted to make positive changes in his life and to start a career. After he moved, he obtained work at a resort similar to the job he had held in State A. However, in November 2010, he was hired by his current employer for work in support of Navy ship maintenance, repair, and overhaul. (Gx. 1; Tr. 32 - 34)

After Applicant moved in with his brother, he continued to use marijuana sporadically. However, the passing of his grandmother in early 2010 hit Applicant hard, and he used marijuana to cope with his grief. From January 2010 until March 2010, Applicant used marijuana as often as daily and at least two to three times weekly. (Gx. 1; Gx. 3; Tr. 34 - 35, 57 - 58)

In March 2010, Applicant was pulled over for speeding. When the police officer approached Applicant's car, he saw a small amount of marijuana on the backseat of Applicant's car. In addition to being cited for speeding, Applicant was issued a citation for possession of marijuana. He later appeared in court and pleaded guilty to both charges. Applicant's driver's license was restricted for six months, he was fined and assessed court costs, and ordered to complete a drug awareness class. Applicant complied with all of the terms of his sentence. Applicant claims he has not used any illegal drugs since 2010 and that he will not use illegal drugs in the future. (Answer; Gx. 1; Gx. 2; Gx. 3; Tr. 35 - 41)

When Applicant submitted his eQIP, he disclosed his arrest for marijuana possession and his use of that drug between January and March 2010. He also disclosed that he tested positive for illegal drugs when he reported for basic training in 2008. When he responded to DOHA interrogatories about his drug use, he disclosed his use of marijuana between January and March 2010, and acknowledged that he "tried it a couple of times prior to these dates." At hearing, Applicant further acknowledged that he intentionally had not disclosed all of his drug use in his application and during the investigation and adjudication of his clearance. He admitted that he was trying to

minimize the scope of his drug use so it would not hurt his chances of getting a clearance. (Gx. 1; Gx. 3; Tr. 46 - 51, 59 - 60, 65 - 68)

Applicant's older brother, who himself holds a security clearance, recommends Applicant for a security clearance. Applicant has met all of his responsibilities regarding sharing of expenses and other obligations since they started living together. Applicant's brother does not tolerate drug use, and despite Applicant's missteps in the past, expresses confidence in Applicant's maturation and personal growth over the past two years. (Ax. A)

Policies

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁴ 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,⁵ 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.⁶

⁴ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁵ Directive. 6.3.

⁶ See *Egan*, 484 U.S. at 528, 531.

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.⁷

Analysis

Drug Involvement

Applicant illegally used marijuana with varying frequency between 2007 and 2010. He used marijuana in a successful attempt to avoid military service after he regretted his decision to enlist in 2007. He was arrested and pleaded guilty to marijuana possession in March 2010. 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.

The Government established applicability of the disqualifying conditions listed at AG ¶ 25(a) (*any drug abuse...*); AG ¶ 25(b) (*testing positive for illegal drug use*); and AG ¶ 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*).

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

⁷ See *Egan*; AG ¶ 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) 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.

None of these mitigating factors apply. Applicant claims he has changed, that he has not used marijuana for more than two years, and that he will not use drugs in the future. However, his false statements about his drug use, made to protect his chances of getting a security clearance, greatly undermine my confidence in his claims. Accordingly, available information does not currently provide a sufficient basis for application of any of the AG ¶ 26 mitigating conditions. Applicant 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). Until moving in with his older brother and obtaining his current job in 2010, Applicant did not have much guidance or direction. However, for most of the past two years, he has been working in a field that offers a good income and, more important, personal and financial stability. Nonetheless, Applicant's decision to try to conceal the full extent of his drug use shows poor judgment and undercuts the Government's confidence that he will not again engage in illegal drug use and that he will properly safeguard the Government's sensitive information. 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.d: Against Applicant

Conclusion

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

MATTHEW E. MALONE
Administrative Judge