



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



In the matter of:)	
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)	
[NAME REDACTED])	ISCR Case No. 11-15193
)	
)	
Applicant for Security Clearance)	

Appearances

For Government: David F. Hayes, Esquire, Department Counsel
For Applicant: *Pro se*

04/17/2014

Decision

MALONE, Matthew E., Administrative Judge:

Applicant's drug use was not recent and is not likely to recur. He was not arrested for drug possession as alleged, and he has severed all ties with his friends who used drugs. The security concerns raised by his use of illegal drugs are mitigated. His request for a security clearance is granted.

Statement of the Case

On May 6, 2008, Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) to obtain or renew a security clearance required for his job with a defense contractor. After reviewing the results of the ensuing background investigation, which included his responses to interrogatories from Department of

Defense (DOD) adjudicators,¹ it could not be determined that it is clearly consistent with the national interest for Applicant to have access to classified information.²

On May 21, 2013, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed by Guideline H (Drug Involvement).³ Applicant timely responded to the SOR and requested a decision without a hearing. On September 17, 2013, Department Counsel issued a File of Relevant Material (FORM)⁴ in support of the SOR. Applicant received the FORM on October 3, 2013, and was notified that he had 30 days to file a response to the FORM. The record closed after Applicant failed to submit any additional information within the time allowed. The case was assigned to me on April 9, 2014.

Findings of Fact

Under Guideline H, the Government alleged that between October and December 2008, Applicant used cocaine about three or four times, and used marijuana once, while working as a civilian overseas (SOR 1.a); that in December 2008, Applicant was arrested by foreign law enforcement after he and some of his co-workers purchased cocaine, that U.S. Army law enforcement found a small amount of marijuana at his residence, and that he resigned from his job after his arrest (SOR 1.b); and that the conduct alleged in SOR 1.a and 1.b occurred while Applicant held a security clearance (SOR 1.c). Applicant admitted SOR 1.a and 1.c. He denied SOR 1.b. (FORM, Item 4) In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is 42 years old and has been employed as an aircraft mechanic since 1998. He has been employed by defense contractors since March 2007. He has worked for his current employer since March 2009, but submitted his eQIP while working for a previous employer. He received a secret level security clearance in June 2008. Applicant is a high school graduate and has never been married. (FORM, Items 6 and 8)

After receiving his clearance, Applicant was assigned to work for several months at an overseas U.S. Army installation. He and his co-workers were provided quarters at the installation. In October or November 2008, Applicant and a co-worker went out drinking at a local bar. Applicant drank but did not become intoxicated. At one point that evening, his co-worker produced a small amount of cocaine and offered some to Applicant. Applicant inhaled a single small spoonful of cocaine through his nose. During

¹ See DOD Directive 5220.6 (Directive), as amended, Section E3.1.2.2.

² Required by Executive Order 10865, as amended. See *also* Directive, Section E3.1.1.

³ See Directive, Enclosure 2. See *also* 32 C.F.R. § 154, Appendix H (2006).

⁴ See Directive, Enclosure 3, Section E3.1.7. The FORM included eight documents (Items 1 - 8) proffered in support of the Government's case.

October and November 2008, this conduct was repeated three or four times. Applicant never bought or possessed cocaine. (FORM, Items 4 and 7)

In December 2008, Applicant's co-worker was arrested by local police when he tried to buy cocaine. Applicant and other co-workers were subsequently interviewed by Army Criminal Investigation Command (Army CID) about possible drug involvement. During questioning, Applicant volunteered that he had purchased two marijuana cigarettes in October 2008. He had smoked one when he bought it. When questioned by Army CID, he still had one at his quarters. The marijuana cigarette was retrieved by Army CID during a consensual search of his quarters. No charges were filed against Applicant. (FORM, Items 4 and 7)

After Army CID questioning, Applicant disclosed what had happened to his employer and offered to resign. His supervisor recommended he not resign until the Army finished its investigation. Nonetheless, Applicant resigned in January 2009, and returned to the United States. He averred in his November 2011 interview that he wanted to get away from co-workers who were using illegal drugs. (FORM, Item 7)

In March 2009, Applicant was hired by his current employer. He since has deployed to Iraq and Afghanistan for work in support of military aviation. He has also been promoted to a maintenance manager position. Applicant's only other drug involvement was during his senior year of high school when he smoked marijuana with varying frequency until June 1989. He has not used cocaine or any other illegal drug since November 2008. He regards his 2008 drug involvement as an unusual and "stupid" lapse in good judgment. (FORM, Item 7)

Policies

Each security clearance 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 policy 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 determinative of a conclusion for or against an applicant. However, specific applicable

⁵ Directive. 6.3.

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.

A security clearance decision is intended only to resolve whether it is clearly consistent with the national interest⁶ for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient reliable information on which DOHA based its preliminary decision to deny or revoke a security clearance for an applicant. Additionally, Department Counsel must prove controverted facts alleged in the SOR.⁷ If the Department Counsel meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.⁸

Because no one is entitled to a security clearance, an applicant bears a heavy burden of persuasion to establish that it is clearly consistent with the national interest for the applicant to have access to protected information.⁹ A person who has access to such information enters into a fiduciary relationship with the Government based on trust and confidence. Thus, there is a compelling need to ensure each applicant possesses the requisite judgment, reliability, and trustworthiness of one who will protect the nation's 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 to classified information in favor of the Government.¹⁰

Analysis

Drug Involvement

Applicant used cocaine about three or four times between October and November 2008. He also used marijuana once during that time. He held a security clearance while engaged in this conduct. This information raises a security concern articulated at 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:

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

⁷ Directive, E3.1.14.

⁸ Directive, E3.1.15.

⁹ See *Egan*, 484 U.S. at 528, 531.

¹⁰ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

(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 at AG ¶¶ 25(a) (*any drug abuse (see above definition)*) and 25(g) (*any illegal drug use after being granted a security clearance*).

By contrast, Applicant has not used illegal drugs in more than five years. His use was infrequent, and he no longer associates with his former co-worker who provided him the cocaine. Applicant acknowledged that he had also purchased and used a small amount of marijuana around the same time as his cocaine use. But he willingly disclosed his marijuana use to authorities and, subsequently, to his employer. Applicant did not have to resign when he did, but he wanted to get away from a circumstance he knew was inappropriate. He regrets his 2008 drug use as a “stupid” mistake. His current circumstances show he is productive in the workplace and there is no further indication of illegal drug use.

All of the foregoing supports application of the following AG ¶ 26 mitigating conditions:

(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

(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; and (3) an appropriate period of abstinence.

On balance, I conclude Applicant is not likely to use illegal drugs in the future, and that his past drug use does not reflect adversely on his current judgment and trustworthiness. The security concerns about his drug use are mitigated.

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). All available information suggests Applicant's involvement with illegal drugs can be ascribed to a brief period of indiscretion Applicant's drug use was not recent and is not likely to recur. He was not arrested for drug possession as alleged, and he has severed all ties with his friends who

used drugs. The security concerns raised by his use of illegal drugs are mitigated. His request for a security clearance is granted. His circumstances have changed and there has been a sufficient period of abstinence from which to conclude Applicant is not likely to again use drugs. A fair and commonsense assessment of this record shows the Government's security concerns are mitigated.

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
Subparagraph 1.a - 1.c:	For Applicant

Conclusion

In light of all available information, it is clearly consistent with the national interest for Applicant to have access to classified information. Applicant's request for a security clearance is granted.

MATTHEW E. MALONE
Administrative Judge