



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



In the matter of:	)	
	)	
[NAME REDACTED]	)	ISCR Case No. 12-02227
	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Robert J. Kilmartin, Esquire, Department Counsel  
For Applicant: David Aylor, Esquire

05/28/2013

**Decision**

MALONE, Matthew E., Administrative Judge:

Applicant failed to mitigate security concerns raised by his involvement with illegal drugs, his history of other criminal misconduct, and his repeated attempts to mislead the Government about important information in his background. Clearance denied.

**Statement of the Case**

On February 16, 2001, Applicant submitted a Security Clearance Application (SCA) to obtain a security clearance required for his job with a defense contractor. On March 3, 2010, Applicant submitted an Electronic Questionnaire for Investigations Processing (eQIP) to renew that security clearance for employment with a different defense contractor. After reviewing the results of Applicant's most recent background investigation, which included his responses to interrogatories from Department of

Defense (DOD) adjudicators,<sup>1</sup> it could not be determined that it is clearly consistent with the national interest for Applicant to have access to classified information.<sup>2</sup> On November 21, 2012, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the adjudicative guidelines (AG)<sup>3</sup> for drug involvement (Guideline H) and personal conduct (Guideline E).

Applicant timely answered the SOR (Answer) and requested a hearing. The case was assigned to me on February 12, 2013, and I convened a hearing in this matter on March 6, 2013. The parties appeared as scheduled. Department Counsel presented Government's Exhibits (Gx.) 1 - 9, which were admitted without objection. Applicant testified and presented Applicant's Exhibits (Ax.) A and B, which were admitted without objection. Four witnesses testified for Applicant. DOHA received a transcript (Tr.) of the hearing on March 25, 2013.

### **Findings of Fact**

Under Guideline H, the Government alleged that Applicant used marijuana between 1992 and 2011 (SOR 1.a); that in August 2011, he was arrested for driving under the influence (DUI) and simple possession of marijuana, charges that were later nolle prosequi (SOR 1.b); and that he used marijuana after being granted a security clearance in 2002 (SOR 1.c).

Under Guideline E, the Government alleged that in October 2012, Applicant intentionally made a false official statement in response to DOD interrogatories by answering "no" when asked if he had used any illegal drug since 1990 (SOR 2.a); that he intentionally made false official statements in his December 2011 eQIP when he answered "no" to all questions in Section 23 (*Illegal Drugs*), thereby omitting his drug use over the previous seven years (SOR 2.b), and his use of drugs while holding a security clearance (SOR 2.c). It was also alleged that Applicant deliberately made false official statements in his 2001 SCA by answering "no" to question 27 (*Use of Illegal Drugs in the Last 7 Years*), thereby omitting his use of marijuana between 1994 and 2001 (SOR 2.d).

Finally, the Government alleged Applicant was charged in March 2001 with violating a noise ordinance, providing false information, and failure to surrender a driver's license (SOR 2.e); that in 1999, he was charged with violating probation (SOR 2.f); that in March 1999, he was arrested for battery, a charge that was later dismissed (SOR 2.g); that in September 1998, he was charged and convicted of battery, for which he was sentenced to 30 days in jail and 12 months probation (SOR 2.h); and that in February 1998, Applicant was charged and convicted of DUI, for which he was placed on probation for one year (SOR 2.i).

---

<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.

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

Applicant admitted 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 38 years old. He has been married since June 2006, and he has one adult child from before his marriage. Applicant received an associate's degree in electronics in June 1996. (Gx. 1)

Applicant is employed by a defense contractor as an electronics technician. He has been with his current employer since June 2006. From February 2000 until June 2006, he was employed by a defense contractor in a similar job, for which he first applied for a security clearance in February 2001. He was awarded that clearance in 2002. As part of his current job, he was deployed to Iraq between June and November 2006, to Kuwait between June and September 2007, and to Afghanistan between September 2009 and September 2010. (Gx. 1; Gx. 2; Gx. 9; Tr. 75 - 76)

Applicant has used marijuana with varying frequency since about 1992. At first, he used marijuana about twice monthly, because he wanted to be cool with his friends. Around 1994, his use declined to about once a year. In 1996, his father was murdered, a crime for which no one has been charged. His father's death affected him greatly and he began to rely on marijuana and alcohol to cope with his loss. Applicant used marijuana about twice weekly until about 1999, when his use declined to about once every other year. (Gx. 2)

In August 2011, Applicant was stopped at a police road block as he drove to a party. An officer claimed to smell marijuana about the car and detained Applicant for possibly driving under the influence of marijuana. A search of Applicant's car produced a gram of marijuana, which Applicant had purchased to use at the party. He was arrested and charged with driving under the influence of marijuana, and with simple possession of marijuana. Applicant later pleaded guilty to reckless driving and the possession charge was dismissed. (Gx. 2; Gx. 5)

In August 1997, Applicant was charged and convicted of DUI. He had been drinking alone at his apartment, but decided to drive to the store. After rolling through a stop sign, he was stopped by police who administered a field sobriety test. Applicant failed the test and was charged with DUI. In February 1998, Applicant was convicted, fined, and sentenced to one year probation. (Gx. 2; Gx. 6 - 8)

In September 1998, Applicant was charged and convicted of simple battery after an argument he had with his girlfriend became physical. He was confined for 30 days, placed on probation for 12 months, and fined \$1,200. In July 2001, an arrest warrant was issued for violating probation because he had not paid all of his fines. Applicant also was charged with battery in 1999 after an argument with the same girl. That charge was dismissed. (Gx. 2; Gx. 7; Gx. 8; Tr. 81)

In March 2001, Applicant was at a car wash when he was asked by a policeman to turn down his car stereo. Applicant was asked to produce a driver's license but claimed that, although he had a valid permit, he did not have it with him. When he was

searched, his license was retrieved and found to be suspended. Applicant was charged with violating a noise ordinance, failure to produce a driver's license, and making a false statement to police. He was convicted and fined. (Gx. 2; Gx. 5; Gx. 6; Tr. 80 - 81)

In his 2001 SCA, Applicant disclosed his 1997 DUI conviction and his 1998 battery conviction. In his 2011 eQIP, he disclosed his 1997 DUI conviction and his 2011 DUI and possession of marijuana charges. He did not disclose in either application that he had used marijuana. He also did not disclose that he used marijuana after having been granted a security clearance. In October 2012, DOD adjudicators sent Applicant interrogatories about his drug and alcohol use. The first question asked therein was, "Have you used any narcotic, depressant, stimulant, hallucinogen (to include LSD or PCP), any Cannabis (to include marijuana and hashish), and/or used a prescription drugs not prescribed to you or not for its intended purpose, except as prescribed by a licensed physician, since 1990?" Applicant answered "no." Applicant testified that, while he disclosed other adverse information, he feared that full disclosure of his drug use would cost him his job. (Tr. 74)

In addition to his defense contractor job, Applicant is a real estate agent. He also owns his own business, a club that he manages in the evenings after work. Applicant's wife, also a real estate agent, testified that he works hard at these endeavors. The owner of the real estate agency where Applicant works, and a co-worker, who has known Applicant for about 12 years, testified for Applicant. Both witnesses praised Applicant for his reliability and integrity. However, neither witness knew before the hearing that Applicant had used marijuana. (Gx. 2; Tr. 30 - 45, 52 - 61)

In March 2013, Applicant completed a 10-week outpatient drug treatment program. He also tested negative for marijuana and other controlled substances as recently as March 5, 2013. (Ax. A; Ax. B)

### **Policies**

A security clearance decision is intended to resolve whether it is clearly consistent<sup>4</sup> with the national interest 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>5</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

---

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

<sup>5</sup> Directive. 6.3.

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. 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 the 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.<sup>6</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>7</sup>

## **Analysis**

### **Drug Involvement**

Applicant has used or possessed marijuana with varying frequency beginning in 1992, when he was about 18 years old, and August 2011, when he was 37 years old. His drug use after 2002 occurred while he held a security clearance. 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:

---

<sup>6</sup> See *Egan*, 484 U.S. at 528, 531.

<sup>7</sup> See *Egan*; AG ¶ 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, information about Applicant's drug use requires application of the following AG ¶ 25 disqualifying conditions:

(a) any drug abuse (see above definition);

(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and

(g) any illegal drug use after being granted a security clearance.

I have considered all of the mitigating conditions listed at AG ¶ 26. I conclude that none of them apply here. Applicant's last possession of illegal drugs occurred less than two years ago, and his involvement with illegal drugs has spanned his entire adult life. He claimed that he is now mature, healthy and sober, and that he will not use drugs in the future. However, his claims in this regard are undermined by his willingness to use drugs despite working in military and defense industry jobs where he knew such conduct was not acceptable. His claims of future abstinence fail because of his intentional false official statements about his drug use. His completion of a drug treatment program is a step in the right direction, but it comes only after years of illegal drug involvement and it does not present a positive prognosis of ongoing abstinence. On balance, Applicant has not mitigated the security concerns under this guideline.

## **Personal Conduct**

Applicant deliberately provided multiple false official statements about his drug use in two security applications and in response to DOD interrogatories about his drug use. In 2002, he was awarded a security clearance based, in part, on the presumed absence of drug use in his background. He withheld that information to protect his own interest, i.e., keeping his job. While holding a security clearance and access to sensitive information and facilities for the past ten years, he possessed and used marijuana despite knowing such conduct was unacceptable. Further, Applicant's other misconduct between 1997 and 2011 casts doubt on his judgment, reliability and trustworthiness. Available information raises a security concern about his personal conduct, which is addressed at AG ¶ 15, as follows:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful

and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

Specifically, the record requires application of the following AG ¶ 16 disqualifying conditions:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative; and

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information.

In response to the allegations of falsification, Applicant did not plausibly explain his multiple misrepresentations. He did not establish that he was improperly advised about the required information or that he made a good-faith effort to accurately disclose his drug use and other adverse information in his background. His falsifications were not minor events, in that they violated federal law governing such conduct. Nor did Applicant provide sufficient other information to show that the misconduct documented since 1995 will not recur. Accordingly, I conclude that none of the AG ¶ 17 mitigating conditions apply, and that Applicant has failed to mitigate the security concerns about his personal conduct.

### **Whole-Person Concept**

I have evaluated the available information and have applied the appropriate adjudicative factors under Guidelines H and E. 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 38 years old and presumed to be a mature, responsible adult. He and his wife work together in real estate and Applicant also runs his own business. He is willing to work hard. Two persons with whom he has worked in real estate and in defense contracting praised his character as worthy of a continued security clearance. However, their testimony is undermined by the fact that Applicant also withheld his drug use from them as well. The positive information in the record – Applicant’s recent drug treatment, his claims of current and continued abstinence, and his remorse for his past misconduct – are not enough to outweigh the concerns about nearly 20 years of illegal drug involvement, other incidents of misconduct, and repeated attempts to mislead the

Government. A fair and commonsense assessment of all information bearing on Applicant's suitability for access to classified information reveals significant doubts about his judgment, trustworthiness, and reliability. Because protection of the national interest is the primary concern here, those doubts must be resolved against continuing Applicant's access to classified information.

### **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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a - 2.i:	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