



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



In the matter of:

[NAME REDACTED]

Applicant for Security Clearance

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ISCR Case No. 15-04738

Appearances

For Government: Robert J. Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

08/22/2017

Decision

MALONE, Matthew E., Administrative Judge:

The security concerns about Applicant's drug use and criminal conduct are mitigated by the passage of time and change in circumstances. Applicant's request for eligibility for access to classified information is granted.

Statement of the Case

On May 19, 2014, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain eligibility for access to classified information as required for his job with a defense contractor. After reviewing the completed background investigation, Department of Defense (DOD) adjudicators could not determine that it was clearly consistent with the interests of national security for Applicant to have access to classified information.¹

¹ Required by Executive Order 10865, as amended, and by the Directive.

On July 11, 2016, DOD issued a Statement of Reasons (SOR) containing allegations that raised security concerns addressed under Guideline H (Drug Involvement and Substance Misuse) and Guideline J (Criminal Conduct).² At the time the SOR was written, the DOD CAF applied the adjudicative guidelines (AG) implemented by the DOD on September 1, 2006. On December 10, 2016, the Director of National Intelligence (DNI) issued a new set of AGs, effective for all security clearance adjudications conducted on or after June 8, 2017. I have based my recommended decision in this case on the June 8, 2017 AGs.³

Applicant timely responded to the SOR (Answer) and requested a decision without a hearing. On September 27, 2016, Department Counsel for the Defense Office of Hearings and Appeals (DOHA) issued a File of Relevant Material (FORM)⁴ in support of the SOR. Applicant received the FORM on October 4, 2016, and had 30 days from the date of receipt to object to the use of the information included in the FORM and to submit additional information in response to the FORM.⁵ Applicant did not provide any additional information in response to the FORM. I received the case on August 10, 2017.

Findings of Fact

The Government alleged in the SOR that Applicant used marijuana “with varying frequency” between 2007 and 2008 (SOR 1.a); that he was arrested for possession of marijuana in December 2007 (SOR 1.b) and in March 2015 (SOR 1.c); and that prosecutors later dismissed both charges. Under Guideline J, the Government cross alleged all of the facts in SOR 1.a – 1.c as criminal conduct.⁶ Applicant admitted, with remarks, all three SOR allegations. (FORM, Item 1) In addition to the facts established by Applicant's admissions, I make the following findings of fact.

Applicant is a 28-year-old employee of a defense contractor, for whom he has worked as an aircraft washer since September 2013. He and his wife have been married since December 2012. Applicant has one child from this marriage and two stepchildren, all under 18 years old. (FORM, Item 2)

Applicant used marijuana about once a week between 2005 and 2008. In a subject interview with a government investigator on July 15, 2014, and in his notarized response to the SOR, he stated he has not used marijuana since January 2008. He also averred he understands that such conduct in the future would jeopardize his

² See Directive, Enclosure 2.

³ My decision in this case would have been the same under either version of the adjudicative guidelines.

⁴ See Directive, Enclosure 3, Section E3.1.7. In the FORM, Department Counsel relies on three enclosed exhibits (Items 1 - 3).

⁵ See Directive, Enclosure 3, Section E3.1.7.

⁶ SOR 2.a contains a typographic error, in that, it refers to information contained “in paragraph 2, above.” This allegation in fact refers to information in paragraph 1.

employment and his family's well-being. Applicant attended college between 2010 and 2012, but now intends to return to school to better himself. (FORM, Items 1 – 3)

In December 2007, police charged Applicant with possession of marijuana. After completing a pre-trial diversion program, the state dismissed the charge. On the evening of March 18, 2015, police pulled over Applicant as he drove home after dropping a friend off at his house. Applicant knew he had unpaid traffic tickets and so advised the officer. This gave the officer probable cause to search Applicant's vehicle, whereupon the officer found drug paraphernalia under the front passenger seat. Applicant denied that it was his or that he knew it was in his car. The state later dismissed the charge. (FORM, Items 1 and 3).

Applicant has been forthcoming about his drug use and drug-related arrests. He disclosed his use of marijuana in his e-QIP and discussed it in detail during his subject interview. In response to DOD adjudicators' request for information about drug-related offenses since July 2014, Applicant answered "no," indicating he had not been arrested since; however, he also provided records of his March 2015 arrest and dismissal.

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁷ and consideration of the pertinent criteria and adjudication policy in the adjudicative guidelines. Decisions must also reflect consideration of the factors listed in ¶ 2(d) 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 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 interest⁸ for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient reliable information on which DOD based its preliminary decision to deny or

⁷ Directive. 6.3.

⁸ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

revoke a security clearance for an applicant. Additionally, Department Counsel must prove controverted facts alleged in the SOR.⁹ If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.¹⁰

Because no one is entitled to a security clearance, applicants bear a heavy burden of persuasion to establish that it is clearly consistent with the national interest for them to have access to protected information.¹¹ 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.¹²

Analysis

Drug Involvement and Substance Misuse

The Government's information about Applicant's debts reasonably raised the security concern expressed at AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

More specifically, this record requires application of the disqualifying conditions at AG ¶¶ 25(a) (*any substance misuse (see above definition)*); and 25(c) (*illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). Applicant used marijuana, a controlled substance, for three years before 2008. He was also charged with possession of marijuana in 2007 and 2015.

By contrast, the mitigating condition at AG ¶ 26(a) (*the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely*

⁹ Directive, E3.1.14.

¹⁰ Directive, E3.1.15.

¹¹ See *Egan*, 484 U.S. at 528, 531.

¹² See *Egan*; Adjudicative Guidelines, ¶ 2(b).

to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment) applies. Applicant has not used marijuana for more than eight years. His explanation regarding drug paraphernalia found in his car in March 2015 is plausible, and it was sufficient for the state to dismiss the charge. Available information is sufficient to mitigate the security concerns under this guideline.

Criminal Conduct

Available information shows Applicant illegally used a controlled substance between 2003 and 2008. He also was twice charged with possession of that controlled substance. This information is sufficient to reasonably raise the security concern about criminal conduct at AG 30:

Criminal activity creates doubt about a person's judgment, reliability, and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules, and regulations.

More specifically, this record requires application of the following AG 31 disqualifying conditions:

- (a) a pattern of minor offenses, any one of which on its own would be unlikely to affect a national security eligibility decision, but which in combination cast doubt on the individual's judgment, reliability, or trustworthiness; and
- (b) evidence (including, but not limited to, a credible allegation, an admission, and matters of official record) of criminal conduct, regardless of whether the individual was formally charged, prosecuted, or convicted.

Applicant's repeated use of marijuana during the period alleged constitutes a series of minor illegal offenses. Further, the information about his two arrests, along with his admissions or remarks, is sufficient as evidence of criminal possession of a controlled substance.

By contrast, the following AG 32 mitigating conditions apply:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

Applicant has not used marijuana in over eight years, and the drug-related arrest to which he admits is older than that. As to the March 2015 drug-related arrest, his explanation about what happened was reasonable, and the matter was not prosecuted. Applicant last used marijuana at age 20. Since then, he has married and started a family. The passage of time since 2008 and Applicant's change in circumstances are sufficient to mitigate the security concerns about his drug use.

In addition to my evaluation of the facts and application of the appropriate adjudicative factors under Guideline F, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Applicant appears to have matured with age and with the advent of family life. He has worked for the same employer since 2013, and there has been no verifiable misconduct since 2008. A fair and commonsense assessment of all available information shows that the security concerns in this case should be resolved in Applicant's favor.

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
Paragraph 2, Guideline J:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Conclusion

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

MATTHEW E. MALONE
Administrative Judge