



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



In the matter of:

[NAME REDACTED]

Applicant for Security Clearance

ISCR Case No. 15-05422

Appearances

For Government: Chris Morin, Esq., Department Counsel
For Applicant: *Pro se*

10/14/2016

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns raised by his use of illegal drugs over most of the past 35 years. His request for a security clearance is denied.

Statement of the Case

On February 20, 2015, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) to obtain a security clearance required for his employment with a defense contractor. Based on the results of the ensuing background investigation, Department of Defense (DOD) adjudicators could not determine that it is clearly consistent with the national interest for Applicant to continue to receive a security clearance.¹

On January 31, 2016, DOD issued a Statement of Reasons (SOR) alleging facts which raise security concerns addressed under the adjudicative guidelines² for involvement with illegal drugs (Guideline H) and personal conduct (Guideline E). Applicant timely responded to the SOR (Answer) and requested a hearing. The case

¹ Required by Executive Order 10865, as amended, and by DOD Directive 5220.6 (Directive), as amended.

² 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).

was assigned to me on May 18, 2016, and I convened the requested hearing on June 27, 2016. The parties appeared as scheduled. Department Counsel presented Government Exhibits (Gx.) 1 and 2.³ Applicant testified and presented Applicant's Exhibit (Ax.) A.⁴ A transcript of the hearing (Tr.) was received on July 7, 2016.

Findings of Fact

Under Guideline H, the Government alleged that Applicant used marijuana with varying frequency between 1970 and April 2015 (SOR 1.a); and that he purchased marijuana between 1970 and December 2014 (SOR 1.b). This conduct was cross-alleged as adverse personal conduct (Guideline E) at SOR 2.a. Applicant admitted all of these allegations. (Answer) In addition to the facts established through Applicant's admissions, I make the following findings of fact.

Applicant is 64 years old and works as a consultant for a defense contractor. He was hired for that position in October 2012. Before this job, Applicant spent more than 25 years in the banking industry, before retiring as vice president of a large nationally-known bank. Applicant has been married three times. His current marriage began in February 2009. He has no children of his own. (Gx. 1)

Applicant disclosed in his EQIP that he smoked marijuana, mostly on weekends and holidays, from 1970 until December 2014. He also disclosed that he had purchased marijuana over the same period. He also indicated in his EQIP that he did not intend to use illegal drugs in the future because he wanted "to remain employed." (Gx. 1)

Since submitting his EQIP, Applicant has been aware that illegal drug use is a security concern. On April 21, 2015, Applicant was interviewed by a Government investigator as part of Applicant's background investigation. He disclosed at that time that he had smoked marijuana a few times since submitting his EQIP, and had last used marijuana on April 19, 2015. (Gx. 2; Tr. 30 - 32)

At his hearing Applicant disclosed that he had smoked marijuana as recently as January 2016. He also disclosed that his current wife also uses marijuana on weekends and holidays. But since he received the SOR, she no longer uses drugs in his presence. Applicant obtained marijuana from his wife's friend's friend, whom Applicant last saw in December 2015. He usually paid about \$300 for one-half ounce each time he bought marijuana. (Tr. 25, 33 - 37, 42)

On June 16, 2016, Applicant tested negative for illegal drugs. He also submitted a written statement attesting to his intent to abstain from future illegal drug use. (Ax. B)

Applicant has an excellent reputation at work. His superiors remarked positively on Applicant's honesty, hard work, intelligence, and trustworthiness. Applicant's performance appraisals have been very good. (Ax. A)

³ At Department Counsel's request, I have included, as Hearing Exhibit (Hx.) 1, a copy of the May 3, 2016 letter that forwarded both exhibits to Applicant, in accordance with Directive Section E3.1.13. Also included, as Hx. 2, is a list identifying both exhibits.

⁴ Included with Applicant's Answer are (1) a 12-page handwritten statement; (2) two pages of court records regarding the allegation at SOR 2.a; (3) 11 pages of court and law enforcement information regarding the allegation at SOR 2.d; and (3) a single page of Applicant's handwritten notes also regarding the allegation at SOR 2.d.

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 (AG). Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the 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 interest⁶ for an applicant to either receive or continue to have 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.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 Directive, 6.3.

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

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; AG ¶ 2(b).

Analysis

Drug Involvement

Available information about Applicant's use of marijuana reasonably raises the trustworthiness concern expressed 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:

(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, Applicant's long history of illegal drug use requires application of the disqualifying conditions at AG ¶¶ 25(a) (*Any drug abuse (see above definition)*); and 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*). Applicant purchased and used marijuana for more than 35 years and as recently as the same month the SOR was issued. He did this knowing his conduct was illegal and that it posed a DOD security concern.

I also have considered the potential applicability of the following pertinent 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; 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.

Applicant has used marijuana with varying frequency for most of his adult life. He has always known this conduct is illegal. Since at least February 2015, when he submitted his EQIP, he has known using marijuana is wholly inconsistent with DOD standards for holding a security clearance. Yet he continued to use marijuana as recently as January 2016, despite being interviewed about his drug use during his background investigation in April 2015. Applicant's current wife also uses marijuana, and Applicant last saw the person from whom he buys marijuana (an associate of his current wife) in December 2015. There has been no discernable change in the

environment where he has used marijuana. Further, the information Applicant submitted in support of his claim that he will no longer use marijuana (a negative drug screening and a written statement of his intent to abstain from future drug use) is insufficient, given his long term and recent drug use, to support application of any of these mitigating conditions. On balance, I conclude he has not mitigated the trustworthiness concerns about his drug use.

Personal Conduct

Available information about Applicant's use of marijuana also reasonably raises a security concern under this guideline that is expressed 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.

Although none of the specific AG ¶ 16 disqualifying conditions apply here, Applicant's long and recent history of knowing and willful disregard of laws and DOD policies against using marijuana is sufficient to show poor judgment and reliability. Such conduct reasonably raises concerns that Applicant would also fail to comply with rules and regulations regarding protection of classified materials.

Of the mitigating conditions listed at AG ¶ 17, only the following are pertinent to these facts and circumstances:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment; and

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur.

The same information that precluded mitigation under Guideline H also bars application of these Guideline E mitigating conditions. The security concerns about Applicant's personal conduct are not mitigated.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). Applicant has established an excellent record in his current position. His superiors regard him as professional and reliable. However, this information is not sufficient to overcome the doubts about his suitability for access to classified information that have been raised by the Government's information about his drug use and personal conduct. Because protection of the national interest is the principal focus of these adjudications, any lingering doubts must be resolved against 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 and 1.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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. Applicant's request for a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge