



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



In the matter of:)
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 [NAME REDACTED]) ISCR Case No. 15-06277
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 Applicant for Security Clearance)

Appearances

For Government: Ross Hyams, Esq., Department Counsel
For Applicant: Ronald C. Sykstus, Esq.

05/09/2017

Decision

MALONE, Matthew E., Administrative Judge:

Applicant illegally used and purchased marijuana between 1994 and 2012. Applicant continued to use marijuana after receiving a security clearance in 2006. He received that clearance after submitting a security clearance application from which he intentionally omitted his drug use to that point. Applicant mitigated the security concerns about his deliberate falsification, but security concerns about his illegal drug involvement remain unresolved. Applicant's request for a security clearance is denied.

Statement of the Case

On January 21, 2006, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his employment with a defense contractor. Based on the results of an ensuing background investigation, Applicant received a security clearance. On September 10, 2014, Applicant submitted another e-QIP to renew his eligibility for access to classified information. Based on the results of another background investigation, Department of Defense (DOD)

adjudicators could not determine that it is clearly consistent with the national interest for Applicant to have a security clearance.¹ On April 27, 2016, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under the adjudicative guidelines² for drug involvement (Guideline H) and personal conduct (Guideline E).

Applicant timely responded to the SOR (Answer) and requested a hearing. I received this case on September 26, 2016, and convened the requested hearing on November 17, 2016. The parties appeared as scheduled. Department Counsel for the Defense Office of Hearings and Appeals (DOHA) presented Government Exhibits (Gx.) 1 - 3. Applicant testified and submitted Applicant's Exhibits (Ax.) A - P. Five witnesses also testified for Applicant. All exhibits were admitted without objection. DOHA received a transcript of the hearing (Tr.) on November 30, 2016.

Findings of Fact

Under Guideline H, the Government alleged that Applicant illegally used marijuana between 1994 and 2012 (SOR 1.a); that he purchased marijuana for personal use between 1996 and 2012 (SOR 1.b); and that Applicant used marijuana while holding a security clearance granted in June 2006 (SOR 1.c).

Under Guideline E, the Government alleged that Applicant deliberately made a false official statement in his January 2006 e-QIP when he answered "no" to questions in Section 24 (Illegal Drugs) that required disclosure of illegal drug use in the preceding seven years (SOR 2.a).

Applicant admitted, with explanations, all of the SOR allegations. In addition to the facts established by his admissions, I make the following findings of fact.

Applicant is 40 years old. He and his wife have been married since December 2001 and have two children, ages 10 and 4. Applicant holds a doctoral degree in electrical engineering earned in June 2013. He has held his current job since July 2013. Applicant previously worked for a defense contractor in another state. He held an information technology (IT) position there between August 2005 and January 2007, and his work required access to sensitive military facilities. That company sponsored Applicant's previous request for clearance through his January 2006 e-QIP. Between 2007 and 2013, Applicant was self-employed in the IT field in work that did not require a clearance. (Gx. 1 – 3; Tr. 20 - 23)

Applicant first used marijuana in high school. He used it once or twice in high school, but his drug use became frequent, as often as a few times each week, during and

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

² The Department of Defense implemented the adjudicative guidelines on September 1, 2006. These guidelines were published in the Federal Register and codified through 32 C.F.R. § 154, Appendix H (2006).

after college. Applicant last used marijuana in 2012. He estimates he used marijuana several hundred times after high school. He decided to stop using marijuana in anticipation of getting his current job. Applicant sometimes purchased drugs by contributing to the cost of drugs he was sharing with friends. He has purchased drugs from friends and acquaintances in each place he has lived, worked and attended school. At one time, he bought drugs from his brother-in-law.³ While studying for his doctorate, Applicant fraudulently obtained a medical marijuana prescription despite having no apparent need for pain relief. (Answer; Gx. 3; Tr. 24 - 27)

When Applicant submitted his first application for a clearance in 2006, he did not disclose his drug involvement, as he was required to do. He withheld that information because he was concerned that doing so would jeopardize his chances of getting a clearance and, with it, the job that required access to classified information. After receiving his clearance, Applicant continued to smoke marijuana and did not tell anyone about it. He did not want to “open a can of worms.” Applicant always has been aware that use and possession of marijuana is illegal under federal law. Applicant first disclosed his drug use to the government in a September 2014 e-QIP submitted through sponsorship of his current employer. (Answer; Gx. 1 – 3; Tr. 27 – 29, 31 - 33)

Applicant and his wife used marijuana together once or twice annually until 2005 or 2006, when she last used marijuana. They moved to their current location from the state where Applicant received his PhD in 2014. Because of the more conservative views about marijuana where they currently reside, they do not currently associate with anyone who uses illegal drugs. However, before 2014, they usually were able to associate with people more accepting of marijuana and with whom Applicant and his wife could use marijuana. Applicant’s wife likened Applicant’s use of marijuana at social gatherings there to having a beer. (Gx. 1; Tr. 39 - 42)

In response to SOR 1.a, Applicant stated, in part:

I do not believe that the consumption of marijuana is justification for denial of a security clearance because my consumption did not negatively impact my work or family life, and I come from a culture where smoking marijuana is generally accepted. (Answer)

In response to SOR 1.c regarding his use of marijuana while holding a security clearance, Applicant further stated, in part:

I recognized the criticality of the work performed at [previous DOD contractor employer] but struggled to understand how occasional consumption of marijuana was a severe transgression that would impact my ability to protect classified information. While I did not discuss marijuana in classified environments, I also did not conceal my marijuana use, so I did not understand how use of marijuana could be used for coercion or as a form of blackmail. I do not believe that the use of marijuana while holding a DoD

³ It is not clear from the record if he was referring to his wife’s brother or to the spouse of a sibling.

Industrial Security Clearance is justification for denial of a clearance because my access to classified information was very limited, my marijuana use was infrequent, and I do not believe that marijuana use could be used as leverage to force me to reveal classified information. (Answer)

Applicant has an impressive technical, professional, and academic background. His employer and managers within his company actively recruited him for work in a variety of projects. Applicant demonstrated technical leadership on a number of fronts. He has received several professional and academic awards, and work evaluations since 2013 reflect superior performance. Witnesses from the workplace expressed their high regard for Applicant personally and professionally. Each witness testified that Applicant is a valuable asset to the company and the work they perform in support of DOD missions. Applicant has a reputation for honesty and reliability. He has always been physically active, engaging in outdoor activities and martial arts instruction. (Ax. B – P; Tr. 42 – 70)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁴ 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, administrative judges should follow specific applicable guidelines whenever it possible to measure a case against them as they represent policy guidance governing the grant or denial of access to classified information.

The principal purpose of a security clearance decision is to resolve whether it is clearly consistent with the national interests 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

⁴ See Directive. 6.3.

⁵ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

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.⁶ 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

The Government's information, along with Applicant's admissions, supports the allegations at SOR 1.a – 1.c regarding Applicant's illegal use and purchase of marijuana between 1994 and 2012. Applicant illegally used a controlled substance while holding a security clearance after 2006 and while employed in work that required a clearance until 2007. Available information raises security concerns addressed 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, the record requires application of the disqualifying conditions at AG ¶¶ 25(a) (*any drug abuse (see above definition)*); 25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); and 25(g) (*any illegal drug use after being granted a security clearance*). As Applicant explained in his interview, he considered the sensitive

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; AG ¶ 2(b).

nature of his work when first granted a security clearance. Nonetheless, he decided to engage in illegal drug use. He is an intelligent, sophisticated professional who was aware that using marijuana was illegal, even in places where he lived and worked in which marijuana use is “acceptable.” He also knew that using marijuana is wholly incompatible with holding a DOD security clearance. His reliance on his own speculation that illegal drug use would not subject him to blackmail is misplaced. Nothing in the AG ¶ 24 security concern addresses “blackmail.” Instead, the concern here centers on an individual’s judgment, reliability, and “willingness to comply with laws, rules, and regulations.” Applicant illegally used marijuana for 18 years. During that time he illegally purchased marijuana, at one point illegally manipulating medical marijuana laws while studying for his doctorate. Further, he continued to use marijuana after receiving a security clearance from the Government. All of the foregoing supports the disqualifying conditions at AG ¶¶ 25(a), 25(c), and 25(g).

I also have considered the mitigating conditions at 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 26(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*).

At the outset, I conclude the record does not support AG ¶ 26(a). Applicant’s illegal drug involvement occurred over the span of 18 years. Beginning in high school, his use increased significantly during his academic career, and continued into adulthood as he embarked on his professional career. Applicant may have grown up in a culture that accepted marijuana in the same sense as casual alcohol use. Nevertheless, it is not negotiable that illegal drug use is incompatible with working in a classified environment. Applicant’s willingness to continue using marijuana despite his understanding of that incompatibility precludes mitigation based on judgment, frequency of use, and remoteness in time.

As to AG ¶ 26, only AG ¶ 26(4) is available to Applicant. He submitted an affidavit stating he does not intend any future illegal drug involvement. In the affidavit, he also acquiesced to an immediate revocation of his clearance if he again becomes involved with illegal drugs. The collective benefit from AG ¶¶ 26(b)(1) and (b)(2) is attenuated by the fact that Applicant’s change of circumstances and disassociation are more the result of an employment opportunity than his own decisions to avoid illegal drug involvement. As to AG ¶ 26(b)(3), Applicant used marijuana on a significant basis for most of his adult life. Abstention for less than five years, in light of all of the information probative of his involvement with illegal drugs, does not constitute an appropriate period of abstinence. On balance, the security concerns about Applicant’s drug involvement remain.

Personal Conduct

Applicant admitted he deliberately omitted from his 2006 application for clearance the fact that he had used marijuana within the preceding seven years. This information is sufficient to raise a security concern expressed at AG ¶ 15:

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.

More specifically, Applicant's conduct invokes the disqualifying condition at AG ¶ 16(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.

Applicant's deliberate falsification reflected his own self-interest, in that he did not want to risk not getting a clearance and, with it, a job. The government needed the information he concealed in order to make an accurate and well-informed decision regarding Applicant's suitability for access to classified information.

I also have considered the mitigating conditions at AG ¶ 17

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully; and

(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.

After initially concealing his drug use in a 2006 e-QIP, Applicant disclosed his drug use eight years later. This does not qualify as a “prompt, good-faith” correction of his earlier falsification. His 2006 omission was not the result of any guidance or advice from someone authorized to give it. Applicant’s decision to conceal relevant and material adverse information from the government arose solely from a desire to put his own interests ahead of the government’s compelling interest in ensuring its decision to allow access is based on all available information.

Finally, Applicant’s intentional conduct in this regard is not minor. In his first opportunity to be candid about facts in his background, Applicant decided his interests were more important than the national interest. The fact it happened only once is irrelevant when viewed as an ongoing deception. Applicant knew his drug use (which was still ongoing) was of security concern to his employer and the government, but he did not disclose it, not wanting to “open a can of worms” that might cost him his job. For the same reasons, the passage of time does not help Applicant here because he maintained his deception until less than three years ago.

The only question remaining is whether Applicant’s decision to make and perpetuate a falsehood in his dealings with the government is likely to recur and whether it is reflective of his current judgment and reliability. I conclude it is unlikely that Applicant will again intentionally make false statements to the government. The mitigating condition at AG ¶ 17(c) applies and is sufficient to mitigate the allegations under this guideline.

I also have evaluated this record in the context of the whole-person factors listed in AG ¶ 2(a). As noted, Applicant presents with an impressive record of achievements and professional expertise. His witnesses testified positively regarding his character and his value to the work undertaken by his employer in support of DOD. Nonetheless, doubts about Applicant’s suitability for a security clearance raised by the Government’s information about his long history of illegal drug involvement, especially after receiving a security clearance, remain unresolved. Because protection of the national interest is the principal focus of these adjudications, those doubts must be resolved in favor of the Government’s intent to deny Applicant’s request for clearance.

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:	FOR APPLICANT
Subparagraph 2.a:	For 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