



**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. 16-00602

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

11/20/2017

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns raised by his use of marijuana and by his deliberate false statements to a government investigator. Applicant's request for eligibility for access to classified information is denied.

Statement of the Case

On November 27, 2013, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to renew his 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 August 19, 2016, DOD issued a Statement of Reasons (SOR) alleging facts that raise security concerns addressed under Guideline H (Drug Involvement and Substance Misuse) and Guideline E (Personal 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 November 7, 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 November 15, 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 October 1, 2017.

Findings of Fact

Under Guideline H, the Government alleged in the SOR that Applicant used marijuana, while holding a security clearance, between July and October 2014 (SOR 1.a); and that on October 29, 2014, during an interview with a government investigator, he declined to state that he would not use marijuana in the future (SOR 1.b). Applicant admitted, with remarks, both allegations. (FORM, Items 1 and 4)

Under Guideline E, the Government alleged that Applicant deliberately made a false official statement by failing to disclose his prior use of marijuana during an interview on August 6, 2014 with a DOD investigator (SOR 2.a). Additionally, he is alleged to have deliberately made two false official statements in his November 27, 2013 e-QIP by omitting the 2014 use of marijuana alleged in SOR 1.a, and by failing to disclose that his 2014 marijuana use occurred while he held a security clearance (also alleged in SOR 1.a) (SOR 2.b and 2.c, respectively). Additionally, the Government alleged that Applicant deliberately made a false official statement by failing to disclose he had received mental health treatment between 2012 and 2014 (SOR 2.d). (FORM, Items 1 and 4)

Applicant admitted, with explanations, all of the Guideline E allegations. Nonetheless, I resolve the SOR 2.b and 2.c allegations for the Applicant. His marijuana

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 seven enclosed exhibits (Items 1 - 7).

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

use had not yet occurred when he completed his November 2013 e-QIP. Indeed, Applicant pointed this out in October 2014, when he Applicant met with an investigator during his background investigation. (FORM, Items 1, 4 – 6)

The remaining SOR allegations are supported by the Government's information and by Applicant's other admissions. I make the following additional findings of fact.

Applicant is a 32-year-old employee of a defense contractor, for whom he has worked since April 2012. He has worked in the information technology sector since September 2007, not long after he graduated from college. He has been married since August 1999 and has one child. Applicant has held a security clearance since 2008. (FORM, Item 4)

In 2012, Applicant began treatment and medication for severe anxiety. In his 2013 e-QIP, he did not disclose that treatment as required by questions in e-QIP Section 21 (Psychological and Emotional Health). Applicant admitted he did not disclose it, but he does not agree that he intentionally withheld that information. He is proud of the progress he has made in combatting his condition and does not know of a reason to conceal it. (FORM, Items 4 – 7)

In July 2014, Applicant's anxiety medication prescription expired. He could not get it refilled for several weeks and had to find a new treating physician. In October 2014, he received a new prescription. During the intervening weeks, Applicant managed his symptoms by smoking marijuana as often as two or three times daily. He understood at the time that he had a security clearance and that marijuana possession and use was a violation of federal law. (FORM, Items 3 and 6)

As part of his most recent background investigation, a DOD investigator interviewed Applicant on August 6, 2014. The investigator asked, *inter alia*, if he had used marijuana in the previous seven years. Applicant answered "no." During that interview, Applicant volunteered information about his mental health treatment and signed a release allowing the investigator to obtain treatment records. (FORM, Item 6)

On October 20, 2014, the DOD investigator re-interviewed Applicant and confronted him with information in Applicant's mental health treatment records about his marijuana use. During that interview, Applicant declined to state that he would not use marijuana in the future. He also stated that he did not disclose his marijuana use in his previous interview because he did not want to jeopardize his clearance or employment. (FORM, Items 6 and 7)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information,⁶

⁶ Directive. 6.3.

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 interest⁷ 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 revoke a security clearance for an applicant. Additionally, Department Counsel must prove controverted facts alleged in the SOR.⁸ If the Government meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.⁹

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.¹⁰ 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.¹¹

⁷ See *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

⁸ Directive, E3.1.14.

⁹ Directive, E3.1.15.

¹⁰ See *Egan*, 484 U.S. at 528, 531.

¹¹ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

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.

Applicant used marijuana multiple times daily between July and October 2014. He knew it was illegal and that it was inconsistent with the fact that he held a security clearance at the time he engaged in that conduct. When asked about his future intentions regarding marijuana use, he declined to state that he would not use marijuana in the future. Accordingly, this record requires application of the disqualifying conditions at AG ¶¶ 25(a) (*any substance misuse (see above definition)*); 25(c) (*illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*); 25(f) (*any illegal drug use while granted access to classified information or holding a sensitive position*); and 25(g) (*expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse*).

By contrast, I have considered 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;

(b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;
and

(3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant has not established any of these mitigating conditions. There is no information that shows he has used marijuana since October 2014. But Applicant's reasons for using marijuana with such intensity may, in light of his anxiety disorder, easily recur should his prescriptions lapse. Applicant seemed to recognize this when he decided not to state that he would abstain from marijuana use in the future. None of these mitigating conditions apply.

Personal Conduct

The allegations at SOR 2.b and 2.c are resolved for Applicant. As pleaded by the Government, Applicant could not omit facts about something that had not yet happened. As to Applicant's failure to disclose his mental health treatment in his 2014 e-QIP, it appears he volunteered that information in his first DOD interview. Unlike his reluctance to disclose illegal drug use for fear of losing his job, he claims no such motivation for not disclosing his mental health treatment. Applicant's explanation in this regard is plausible and I conclude he did not intend to conceal that information or to mislead the government about his mental health issues. SOR 2.d also is resolved for Applicant. Nonetheless, the Government's information and Applicant's admissions to the remaining Guideline E allegations are sufficient to raise a security concern about Applicant's personal conduct. That concern is 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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes. The following will normally result in an unfavorable national security eligibility determination, security clearance action, or cancellation of further processing for national security eligibility:

(a) refusal, or failure without reasonable cause, to undergo or cooperate with security processing, including but not limited to meeting with a security investigator for subject interview, completing security forms or releases, cooperation with medical or psychological evaluation, or polygraph examination, if authorized and required; and

(b) refusal to provide full, frank, and truthful answers to lawful questions of investigators, security officials, or other official representatives in connection with a personnel security or trustworthiness determination.

Applicant deliberately withheld information about his drug use when he met with a DOD investigator in August 2014. He did not admit to his conduct until the DOD investigator confronted Applicant in a second interview with information in his mental health treatment records. Accordingly, the disqualifying condition at AG ¶ 16(b) applies:

deliberately providing false or misleading information; or concealing or omitting information, concerning relevant facts to an employer, investigator, security official, competent medical or mental health professional involved in making a recommendation relevant to a national security eligibility determination, or other official government representative.

I also have considered the potential applicability of the following AG ¶ 17 mitigating conditions:

(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 advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. 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.

None of these mitigating conditions apply. Applicant only disclosed his past drug use when confronted with that information in a second interview. Applicant did not establish that his omissions resulted from any authorized guidance or legal advice. To the contrary, Applicant stated that he was reluctant to disclose his drug use because he feared it would cost him his clearance and his job. Finally, intentional omissions and attempts to mislead the government are not minor matters. In addition to being a violation of federal law, such conduct is anathema to the most fundamental tenets of the personnel security program's reliance on individuals' candor and trustworthiness. The security concerns raised under this guideline remain unresolved.

In addition to my evaluation of the facts and application of the appropriate adjudicative factors under Guidelines H and E, I have reviewed the record before me in the context of the whole-person factors listed in AG ¶ 2(d). Available information suggests that Applicant is likely to use marijuana in the future. The record also sustains doubts regarding Applicant's willingness or ability to place the national interests ahead of his own. Because protection of the interests of national security is the principal focus of these adjudications, any remaining doubts must be resolved against the granting of 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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.b, 2.c, 2.d:	For Applicant
Subparagraph 2.a:	Against Applicant

Conclusion

In light of all available information, it is not clearly consistent with the interests of national security for Applicant to have access to classified information. Applicant's request for security clearance eligibility is denied.

MATTHEW E. MALONE
Administrative Judge