



**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. 17-02603

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

09/17/2018

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns about his involvement with illegal drugs or his falsification of answers to questions in his security clearance application. Applicant's request for a security clearance is denied.

Statement of the Case

On April 11, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) to obtain a security clearance required for his employment with a defense contractor. After reviewing the results of the ensuing background investigation, adjudicators for the Department of Defense (DOD) could not determine that it is clearly consistent with the national interest for Applicant to have access to classified information.¹

¹ Required by Executive Order 10865, as amended. See also Directive, Section E3.1.1.

On January 30, 2018, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns about drug involvement and substance misuse (Guideline H) and personal conduct (Guideline E). Applicant timely responded to the SOR and requested a decision without a hearing. On May 7, 2018, Department Counsel issued a File of Relevant Material (FORM)² in support of the SOR. Applicant received the FORM on May 16, 2018, and was notified that he had 30 days to file a response to the FORM. He did not submit any additional information, and the record closed on June 15, 2018. The case was assigned to me on July 27, 2018.

Findings of Fact

Under Guideline H, the SOR alleged that Applicant used and purchased marijuana with varying frequency between 2010 and at least March 2017 (SOR 1.a); that in March 2017, he was charged with possessing less than one ounce of marijuana, a charge that was still pending disposition when the SOR was issued (SOR 1.b); and that in June 2013, Applicant was charged with possession of marijuana with intent to distribute (SOR 1.c). In response, Applicant admitted, with explanation, each of those allegations. (FORM, Item 1)

Under Guideline E, the SOR alleged that Applicant deliberately made false official statements when he answered “no” to the first two questions in Section 23 (Illegal Use of Drugs or Drug Activity) of his April 2016 e-QIP, thereby omitting from his e-QIP the involvement with marijuana to which he admitted in response to SOR 1.a (SOR 2.a). In response, Applicant denied any intent to falsify his answers or to mislead the government. (FORM, Item 1) In addition to the facts established by Applicant’s admissions in response to the SOR, I make the following findings of fact.

Applicant is 22 years old. At the time he submitted his e-QIP, he was attending a state university with a projected graduation in May 2018. With his Answer, he provided a copy of his academic transcript showing a 3.19 GPA through the end of 2017. While attending college, Applicant completed three internships at the defense contractor that sponsored his 2016 request for a security clearance. (FORM, Item 1)

In response to e-QIP Section 23 (Illegal Use of Drugs or Drug Activity), Applicant answered “no” to each question about his drug involvement (i.e., use, possession, purchase, or sale) in the preceding seven years. The background investigation that ensued from the submission of his e-QIP revealed that Applicant used marijuana between 2010 and 2015. It also revealed that he was arrested in June 2013, while he was a minor and still in high school, and charged with possession with intent to sell marijuana. Additionally, the investigation showed that Applicant was cited for possession of marijuana in March 2017, a charge that was still pending in January 2018. In response to the FORM, Applicant did not provide any new information about that charge. (FORM, Items 1 – 5)

² See Directive, Enclosure 3, Section E3.1.7. The FORM included five exhibits (Items 1 – 5) proffered in support of the Government’s case.

Applicant was interviewed by a government investigator during a personal subject interview (PSI) on March 17, 2017. The investigator confronted Applicant with information about Applicant's 2013 arrest. Applicant was found to be in possession of over an ounce of marijuana during a search incident to a traffic stop. Applicant was driving with a friend after having purchased the marijuana. The charge was later dismissed in juvenile court and expunged from Applicant's record after he completed a weekly drug counseling course. In discussing his drug use with the investigator, Applicant stated that he started using marijuana in 2010. For the next two years, he smoked marijuana with friends on most weekends. Applicant also spent between \$100 and \$200 each week to buy one or two ounces of marijuana. Applicant continued to smoke marijuana in college, but claimed he stopped smoking marijuana in January 2015 because he saw it as a waste of time. He also stated that he knew most companies, with whom he would likely seek employment after graduating, would require him to pass a drug test. In response to interrogatories from Department Counsel, Applicant stated he does not intend to use marijuana in the future. He also affirmed the accuracy of the PSI summary provided with the interrogatories, and he adopted that summary as an accurate representation of what he told the investigator. (FORM, Item 3)

During Applicant's PSI, he also discussed the drug possession citation he had received the week before his interview. On March 9, 2017, Applicant was one of two passengers in a car that was stopped for having a burnt-out headlight. Because the driver and other passenger had recent drug-related offenses, the police had probable cause to search the vehicle. In the PSI, Applicant stated that the search produced a small amount of marijuana found in the vehicle, and that because no one in the vehicle admitted to possession of the drugs, all three were issued citations for possession of marijuana. Applicant has denied the marijuana was his. (FORM, Items 1 and 3)

The police report of the March 9, 2017, event shows that Applicant admitted to police before they searched the vehicle that he had marijuana on his person, and that he produced from his pants pocket a baggie containing 3.79 grams of marijuana. The report also shows that no other drugs were found or detected by a drug-sniffing dog used in the search. The driver of the car was cited for having a failed headlight, and Applicant was issued a citation charging him with possession of less than one-half ounce of marijuana. Applicant responded to the charge by returning the citation noting his intent to plead not guilty to this charge. Available information does not reflect a final disposition of this charge. (FORM, Items 1, 3, and 4)

Policies

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

³ Directive, 6.3.

(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 interest⁴ for an applicant to either receive or continue to have access to classified information. Department Counsel must produce sufficient reliable information on which DOHA 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.⁵ If the Department Counsel meets its burden, it then falls to the applicant to refute, extenuate, or mitigate the case for disqualification.⁶

Because no one is entitled to a security clearance, an applicant bears a heavy burden of persuasion to establish that it is clearly consistent with the national interest for the applicant to have access to protected information.⁷ 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.⁸

Analysis

Drug Involvement and Substance Misuse

The facts established through the Government's information, and by Applicant's statements and admissions, reasonably raise a security concern about illegal drug use. That security concern is stated at AG ¶ 24:

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

⁵ Directive, E3.1.14.

⁶ Directive, E3.1.15.

⁷ See *Egan*, 484 U.S. at 528, 531.

⁸ See *Egan*; Adjudicative Guidelines, ¶ 2(b).

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 has illegally used, purchased, and possessed a controlled substance as recently as the week before his PSI in March 2017. Appellant admitted to using marijuana through early 2015; however, his possession of a small amount of marijuana, usually intended for personal use, supports a reasonable inference that he continued using marijuana even after he applied for a security clearance. That possession also undermines his claims in his PSI and in response to interrogatories that he has no future intent to use marijuana. The foregoing requires application of the following AG ¶ 25 disqualifying conditions:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

I also considered the following pertinent 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; and
- (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.

Nothing in Applicant's response to the Government's information supports any of the mitigating conditions. His drug use in high school and college was not infrequent, occurring as often as weekly over a period of at least five years. His 2013 arrest involved a significant amount of marijuana, which he had just purchased. Before that arrest, Applicant spent as much as \$200 a week to buy marijuana. His last-known involvement with illegal drugs is recent, coming after he submitted his e-QIP and just before his PSI. When he was cited for drug possession in March 2017, he was riding in a car with persons who themselves had previously been charged with drug-related offenses. The foregoing renders valueless his claims that he will not use drugs in the future. On balance, Applicant did not mitigate the security concerns about his involvement with marijuana.

Personal Conduct

The facts established through the Government's information, and by Applicant's statements and admissions, reasonably raise a security concern about his personal conduct. That security concern is stated 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 answered "no" to all questions in e-QIP Section 23. The allegation at SOR 2.a specifically addressed the first two of those questions, which together required him to disclose whether, in the preceding seven years (between April 11, 2009 and April 11, 2016) he had used, purchased, or possessed illegal drugs, including marijuana. The record shows that he, in fact, bought, possessed, and used marijuana during that period. Thus, he should have answered "yes" to both questions.

To be disqualifying, Applicant's responses must have been given with an intent to conceal the information, or to mislead the government about that information. Specifically, the issue is whether the record supports application of 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 national security eligibility or trustworthiness, or award fiduciary responsibilities.

I conclude AG ¶ 16(a) applies. Applicant did not respond directly to the SOR 2.a allegation. Instead, he stated he did not disclose his 2013 arrest because he believed the record was expunged and he was under the impression he did not have to disclose it. That arrest is not at issue under this guideline. What is at issue is his failure to disclose his use of marijuana after 2009. For that omission he provided no explanation. In reaching my conclusion that Applicant intended to conceal his drug use, I have considered the record evidence as a whole. That evidence includes his apparent falsifications of the details of his 2017 arrest, both during his PSI and in response to the SOR. Applicant's version of those events in his PSI and in response to the SOR stands in stark contrast to the police report generated at the time of the citation. Although this aspect of the record was not alleged in the SOR, I considered it as relevant circumstantial evidence of Appellant's candor and truthfulness, or lack thereof.

I also considered the following pertinent 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. Rather than correct his omissions, Applicant chose to misrepresent the details of his involvement with illegal drugs during a PSI and in response to the Government's information. Although he stated his belief he did not have to disclose a drug-related arrest as a minor because the record had been expunged, he did not present any information about guidance regarding whether he should have disclosed his frequent use of drugs that began in 2005 and continued at least until his stated termination of drug use in 2015. After he received the FORM, Applicant

did not avail himself of his opportunity to clarify or further explain his position regarding SOR 2.a.

Finally, there is nothing minor about Applicant's deliberate falsification of information the government needed to make an accurate, well-informed assessment of his suitability for access to classified information. Applicant did not present any information that shows why his omissions should not cast doubt on his judgment, reliability and trustworthiness. The security concerns under this guideline are not mitigated.

I have evaluated this record and applied the appropriate adjudicative factors under Guidelines H and E. I also have considered the whole-person factors listed in AG ¶ 2(d). The record evidence as a whole does not support any of the whole-person factors. His drug use is recent, voluntary, and likely to recur. The positive information about his academic record is not sufficient to resolve the doubts, raised by the Government's information, about Applicant's suitability for access to classified information. Because protection of the interests of national security is the principal focus of these adjudications, those doubts must be resolved against the 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 - 1.c: Against Applicant

Paragraph 2, Guideline E: AGAINST 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 a security clearance is denied.

MATTHEW E. MALONE
Administrative Judge