



**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. 17-03545

Appearances

For Government: Jeff A. Nagel, Esq., Department Counsel
For Applicant: *Pro se*

06/18/2018

Decision

MALONE, Matthew E., Administrative Judge:

Applicant did not mitigate the security concerns about his involvement with illegal drugs. Applicant's request for a security clearance is denied.

Statement of the Case

On August 19, 2016, Applicant submitted an Electronic Questionnaire for Investigations Processing (EQIP) 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 November 22, 2017, DOD issued to Applicant a Statement of Reasons (SOR) alleging facts that raise security concerns addressed at Guideline H (Drug Involvement and Substance Misuse). Applicant timely responded to the SOR and requested a decision without a hearing. On January 24, 2018, Department Counsel issued a File of Relevant Material (FORM)² in support of the SOR. Applicant received the FORM on February 12, 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 March 14, 2018. The case was assigned to me on May 10, 2018.

Findings of Fact

Under Guideline H, the SOR alleged that Applicant used marijuana with varying frequency between May 2014 and May 2017 (SOR 1.a); that he purchased marijuana between September 2014 and May 2017 (SOR 1.b); and that he would not rule out future use of marijuana (SOR 1.c). In response, Applicant admitted, without explanation, each of those allegations. (FORM, Item 1)

The factual allegations in the SOR are established by Applicant's admissions, and by his disclosures in his e-QIP, during his discussions with a government investigator during a personal subject interview (PSI) on July 18, 2017, and by his November 1, 2017, responses to DOD interrogatories. (FORM, Items 1 – 3) In addition to the foregoing, I make the following findings of fact.

Applicant is a single, 22-year-old employee of a large defense contractor. He graduated from college in June 2017. The following month, he was hired as a permanent employee after previously interning there as a college student. Applicant smoked marijuana socially while he was in college but stopped using it during his internships. He has not used since May 2017 because he knew he would be working for a federal contractor with a strict drug policy and workplace drug testing. Applicant avers he has never failed a drug test. (FORM, Items 1 – 3)

In response to interrogatories from the Defense Office of Hearings and Appeals, Applicant denied illegally using marijuana since May 2017. He also averred he would not use marijuana while employed by a federal contractor because doing so would violate federal law. He also addressed the fact that, in the state where he lives, personal possession and use of marijuana is not subject to criminal prosecution. Most people with whom Appellant associates, including family members, use marijuana. When asked about his future intentions regarding use of marijuana, Applicant indicated he would not use marijuana as long as his "employment or potential security clearance requires it" and that he would "abstain for the duration." (FORM, Item 3)

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

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:

(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

³ Directive, 6.3.

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).

Analysis

Illegal 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:

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 May 2017. Appellant did not expressly state he would use marijuana in the future. However, his statements on the issue of future intent fall short of a commitment to abstain. At best, he expressed a willingness to abstain that is conditioned on his continued employment or eligibility for a security clearance. 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. On balance, Applicant did not mitigate the security concerns about his involvement with marijuana.

I have evaluated this record and applied the appropriate adjudicative factors under Guideline H. 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. Applicant failed to present sufficient information of mitigation in response to the Government's case. As a result, the doubts raised by the Government's information remain unresolved. 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

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