



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



In the matter of:)	
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SSN: -----)	ISCR Case No. 07-07059
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)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: David P. Price, Esquire

February 27, 2008

Decision

MALONE, Matthew E., Administrative Judge:

After reviewing the results of Applicant’s most recent background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to give Applicant a security clearance. On August 28, 2007, DOHA issued to Applicant a Statement of Reasons (SOR) alleging facts which raise security concerns addressed in the Revised Adjudicative Guidelines (AG)² under Guideline E (personal conduct), Guideline H (drug involvement), and Guideline J (criminal conduct).

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

² Adjudication of this case is controlled by the Revised Adjudicative Guidelines, approved by the President on December 29, 2005, which were implemented by the Department of Defense on September 1, 2006. Pending official revision of the Directive, the Revised Adjudicative Guidelines supercede the guidelines listed in Enclosure 2 to the Directive, and they apply to all adjudications or trustworthiness determinations in which an SOR was issued on or after September 1, 2006.

Applicant timely responded to the SOR and requested a hearing. The case was assigned to me on November 18, 2007, and I scheduled a hearing to be held on December 10, 2007. The parties appeared as scheduled. Without objection, I admitted five exhibits offered by the government (Gx. 1 - 5). Applicant testified in his own behalf, presented three witnesses, and offered 37 documents, which were sorted by topic into four exhibits and admitted without objection as Applicant's Exhibits (Ax.) A - D. DOHA received the transcript (Tr.) on December 20, 2007. Based on the facts and conclusions set forth below, Applicant's request for continued access to classified information is denied.

Findings of Fact

Under Guideline J, the government alleged in SOR ¶1.a that Applicant was arrested in February 2005 and charged with possession of marijuana, for which he received a 30-day suspended jail sentence, and assessed a fine and court costs. Through SOR ¶1.b, the government alleged that the same arrest also included charges of assault and battery and abduction/kidnaping stemming from a warrant issued against him a few months earlier. The latter charge was entered *nolle prosequi*, and the assault charge was dismissed after he completed two years of good behavior. Through SOR ¶1.c, the government alleged Applicant received non-judicial punishment while in the U.S. Air Force in 1989 for wrongful use of a controlled substance (marijuana). Applicant admitted these allegations.

Under Guideline H, the government alleged in SOR ¶2.a that Applicant used marijuana at least seven times between 2004 and 2005. In SOR ¶2.b, it was alleged he used marijuana while holding a security clearance. In SOR ¶2.c, the government cross-alleged his marijuana use from SOR ¶1.c. Applicant admitted these allegations.

Under Guideline E, the government cross-alleged in SOR ¶2.a Applicant's marijuana use from SOR ¶2.c. Applicant admitted this allegation. After a thorough review of the pleadings, transcript, and exhibits, I make the following additional findings of fact.

Applicant is 45 years old and works for a defense contractor at a U.S. Navy shipyard as a radiation control technician/monitor. He has held this job since leaving the U.S. Air Force in 1989 after a four-year enlistment. He was promoted to a supervisory position in late 2006. His duties involve close work with nuclear materials, nuclear waste, and related equipment and systems. Applicant has held a security clearance the entire time he has worked at the shipyard. (Gx. 1; Tr., 91, 94)

Applicant and his wife were married in 1988. They have two children, ages 18 and 14. In late 2003, Applicant was sent on temporary duty (TDY) for nine months to another Navy shipyard. While on TDY, he began an affair with another woman. The affair continued even after the TDY ended and he returned home. At times, she would travel to see him after he returned home from TDY. Their relationship lasted until February or March 2005. Applicant has had no contact with her since the relationship ended. (Ax. A; Tr., 86 - 87)

Applicant's girlfriend smoked marijuana and Applicant used it with her about seven times between about November 2004 and February 2005. He had first experimented with marijuana in high school. (Tr., 106) He also used marijuana at least once while in the Air Force, for which he received non-judicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ). He was reduced in rank, forfeited ½ his monthly pay for two months, and ordered to confinement for 30 days, which was suspended. He was 28 years old at the time. (Gx. 4; Tr., 78)

Applicant and his wife separated in August 2004. In November 2004, they had an argument while sitting in his car. His wife tried to leave but he grabbed her and kept her from getting out of the car before eventually letting her leave. The next day they had another fight, after which she went to the police and reported what happened in the car the day before. She testified she only wanted a restraining order and did not intend to have Applicant charged with anything, but a warrant for his arrest was issued charging him with abduction/kidnaping and assault and battery. Applicant was not immediately arrested. (Ax. A; Tr., 82)

On February 15, 2005, Applicant was taking his girlfriend to the airport after one of her visits. She had a small amount of marijuana in her possession, and Applicant suggested she leave it with him rather than risk trying to take it with her through airport security. A few hours after he dropped her off at the airport, Applicant was in a car accident to which the police responded. When they checked his driver's license, they saw he had an outstanding warrant for his arrest based on his wife's complaint the previous November. During a search incident to arrest, the police found the marijuana on his person and charged him with possession. He was later found guilty, assessed a fine and court costs, and given a 30-day jail sentence, suspended for two years. As for the assault and kidnaping charges, the latter was entered *nolle prosequi*. The assault charge was dismissed after Applicant completed an anger management course and two years of probation. (Ax. A; Gx. 2; Gx. 5; Tr., 110 - 111)

Applicant held a security clearance at all times that he used marijuana in 2004 and 2005. (Gx. 6) He has never used drugs at work or before reporting to work. He was also aware that the Department of Defense (DoD) does not permit illegal drug use by its employees, and he receives refresher training about the DoD drug policy every year. (Tr., 104)

Applicant and his wife reconciled in about November 2006. Even during their separation, he stayed close to his children and helped out however he could. (Tr., 48) He enjoys a good reputation for reliability and integrity at work and in the community. His finances are sound and his performance evaluations at work have been generally outstanding. (Ax. A; Ax. D)

Policies

Each security clearance decision must be a fair, impartial, and commonsense determination based on examination of all available relevant and material information, and consideration of the pertinent criteria and adjudication policy in the Revised

Adjudicative Guidelines (AG).³ Decisions must also reflect consideration of the factors listed in ¶ 2(a) of the new guidelines.⁴ 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. In this case, the pleadings and the information presented by the parties at hearing require consideration of the security concerns and adjudicative factors addressed under Guideline E (personal conduct), at AG ¶15, Guideline H (drug involvement), at AG ¶24, and Guideline J (criminal conduct), at AG ¶30.

A security clearance decision is intended to resolve whether it is clearly consistent with the national interest⁵ 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.⁶ A person who has access to classified information enters into a fiduciary relationship with the government based on trust and confidence. The government, therefore, has a compelling interest in ensuring each applicant possesses the requisite judgement, 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

Criminal Conduct.

Under Guideline J, "[c]riminal activity creates doubt about a person's judgment, reliability and trustworthiness. By its very nature, it calls into question a person's ability or willingness to comply with laws, rules and regulations." (AG ¶30) The government's

³ Directive. 6.3.

⁴ Commonly referred to as the "whole person" concept, these factor 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.

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

⁶ See *Egan*, 484 U.S. at 528, 531.

⁷ See *Egan*; Revised Adjudicative Guidelines, ¶ 2(b).

exhibits, along with Applicant's admissions and testimony, are sufficient to support the SOR allegations in SOR ¶1. Applicant pleaded guilty to marijuana possession in 2005. Although he was not convicted of either the assault and battery charge or the kidnapping/abduction charge, the record shows he grabbed his wife and restrained her against her will as they argued. The assault charge was held in abeyance for two years to ensure Applicant would behave responsibly for two years. He was also required to complete an anger management course before the charge was dismissed. Applicant also received non-judicial punishment in 1989 for violating the UCMJ by using marijuana while he was in the Air Force. These facts require application of the disqualifying conditions listed in AG ¶31(a) (*a single serious crime or multiple lesser offenses*) and AG ¶31(c) (*allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*).

With respect to his assault and kidnaping arrests, available information also makes applicable the mitigating conditions listed in AG ¶32(a) (*so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's reliability, trustworthiness, or good judgment*) and AG ¶32(d) (*there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement*). Applicant has excelled at work, and he has a solid reputation among his friends and co-workers for reliability, honesty, and trustworthiness. The charges related to Applicant's argument with his wife are not likely to recur. He and his wife have reconciled, his affair ended and he has not seen his former girlfriend in nearly three years. Nor have there been any such incidents between Applicant and his wife since they ended their separation.

However, the benefit of AG ¶32(d) is tempered when assessing the security significance of his drug-related offenses. He was punished for using marijuana in 1989 when he was 28 years old and serving in the Air Force. His next use was in 2004, when he was 44 years old and working in the defense industry at a nuclear shipyard. In each instance, he knew that marijuana use was expressly prohibited by DoD policy. When he used marijuana in 2004 and 2005, he did so despite receiving annual training about DoD's drug policy over the course of his career. He also knowingly and wilfully took possession of his girlfriend's marijuana when he dropped her at the airport in 2005. Given Applicant's long association with DoD and the security requirements of his job handling nuclear materials, the seriousness of his drug-related criminal conduct cannot be overstated. On balance, security concerns remain about Applicant's criminal conduct.

Drug Involvement.

The security concern expressed under Guideline H is that "[u]se 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." (AG 24) Along with Applicant's admissions and testimony, available information is sufficient to support the allegations in SOR ¶2. Applicant first used marijuana in high school. Ten

years later, he used it again while in the Air Force. His most recent use occurred between about November 2004 and February 2005, more than 15 years after he was punished by the Air Force for illegal drug use. Applicant held a security clearance as part of his duties at a Navy nuclear shipyard. As noted under Guideline J, above, there can be no question Applicant was fully aware of the DoD prohibition against using marijuana, yet he knowingly violated that policy. These facts make applicable the disqualifying conditions listed at AG ¶25(a) (*any drug abuse ...*), AG ¶25(c) (*illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia*), and AG ¶25(g) (*any illegal drug use after being granted a security clearance*). Before the adjudicative guidelines were revised in December 2005, the disqualifying condition in paragraph E2.A8.1.2.5 of the Directive addressed illegal drug use while holding a security clearance as follows:

Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination.

The language of AG ¶25(g) requires greater scrutiny of drug use while cleared and does not contemplate exceptions due to the passage of time. Accordingly, the fact that Applicant's use of drugs while cleared is nearly three years old does not lessen its severity.

In response, Applicant argues, in part, that his Air Force drug use should be discounted as remote in time and a youthful indiscretion. However, security clearance determinations such as this may not be based on a piecemeal analysis of the facts, but must take into account the record as a whole. This argument might be plausible were the Applicant still a young person at the time. However, because he was 28 years old when he used marijuana in the Air Force, his conduct cannot be discounted as a byproduct of youth or inexperience. All of the available information about Applicant's involvement with illegal drugs indicates he has been willing to disregard DoD policy and risk possible criminal penalties by using illegal drugs.

The mitigating conditions in 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 AG ¶26(b)(3) (*a demonstrated intent not to abuse any drugs in the future, such as (3) an appropriate period of abstinence*) are applicable based on the information about Applicant's non-use in the past three years, his excellent work record, and his otherwise stable lifestyle. However, their potential benefit is greatly attenuated by the fact he repeated his conduct 15 years after being punished for the same conduct further exacerbates the seriousness of his involvement with illegal drugs. Mitigation is also limited by the scrutiny required by AG ¶25(g). On balance, and for the same reasons this conduct sustains the security concerns about Applicant's criminal conduct, it also sustains the concerns about his drug use.

Personal Conduct.

The security concern about Applicant's personal conduct, as expressed in AG ¶15, is that "[c]onduct 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." Available information supports the factual allegation under Guideline E. However, such conduct is specifically covered under Guideline H and must be addressed according to AG ¶ 25(g) (*any illegal drug use after being granted a security clearance*), as discussed above. Accordingly, the Guideline E allegation in SOR ¶ 3.a is resolved for the Applicant.

Whole Person Concept.

I have evaluated the facts presented in this record and have applied the appropriate adjudicative factors, pro and con, under Guidelines E and J. I have also reviewed the record in the context of the whole person factors listed in ¶ AG 2(a).⁸ Applicant is a mature adult who has been a good provider for his family despite the difficulties he and his wife endured during their separation. He also appears to be a trustworthy, honest individual. However, as a mature, responsible adult he has also engaged in conduct directly at odds with the position of trust he has held for the past 17 years. His drug use, which is also criminal conduct, last occurred three years ago and was infrequent. But it was completely voluntary and remains a security concern because of the sensitive and hazardous nature of his duties, and because he repeated the conduct despite his awareness of the prohibitions against it and despite having been punished for it by the military. The positive information about his job performance and personal life is insufficient to mitigate the ongoing doubts about his suitability for continued access raised by the adverse information in his background. A fair and commonsense assessment⁹ of all of the available information shows that doubts about his suitability to hold a clearance persist because of his criminal conduct and use of illegal drugs. Because protection of the national interest is paramount in these determinations, such doubts must be resolved in favor of the national interest.¹⁰

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 J:	AGAINST APPLICANT
Subparagraph 1.a - 1.c:	Against Applicant

⁸ See footnote 4, *supra*.

⁹ See footnote 3, *supra*.

¹⁰ See footnote 7, *supra*.

Paragraph 2, Guideline H:	AGAINST APPLICANT
Subparagraph 2.a - 2.c:	Against Applicant
Paragraph 3, Guideline E:	FOR APPLICANT
Subparagraph 3.a:	For Applicant

Conclusion

In light of all of the foregoing, it is not clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Request for continued access to classified information is denied.

MATTHEW E. MALONE
Administrative Judge