

KEYWORD: Drugs; Personal Conduct

DIGEST: Applicant's use of marijuana in December 2005 was mitigated by the circumstances and infrequency of the use, and his demonstrated intent not to abuse any drugs in the future. The record did not establish conduct cognizable under Guideline E: Personal Conduct. Clearance granted.

CASENO: 06-26217.h1

DATE: 06/30/2007

DATE: June 30, 2007

In Re:)	
)	
)	
-----)	ISCR Case No. 06-26217
SSN: -----)	
)	
Applicant for Security Clearance)	
)	

**DECISION OF ADMINISTRATIVE JUDGE
JOHN GRATTAN METZ, JR**

APPEARANCES

FOR GOVERNMENT

Candace L. Le'i, Esquire, Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

____ Applicant's use of marijuana in December 2005 was mitigated by the circumstances and infrequency of the use, and his demonstrated intent not to abuse any drugs in the future. The record did not establish conduct cognizable under Guideline E: Personal Conduct. Clearance granted.

STATEMENT OF THE CASE

Applicant challenges the 2 February 2007 Defense Office of Hearings and Appeals (DOHA) Statement of Reasons (SOR) recommending denial or revocation of his clearance because of illegal drug use and personal conduct.¹ He answered the SOR 4 April 2007, and requested a decision without hearing. He did not respond to DOHA's 30 April 2007 File of Relevant Material (FORM). The record closed 7 June 2007, when his response was due. DOHA assigned the case to me 19 June 2007.

FINDINGS OF FACT

Applicant admitted the allegations of the SOR. Accordingly, I incorporate the admissions as findings of fact.²

Applicant—a 28-year-old mechanical engineer employed by a defense contractor since June 2003—seeks to retain the access to classified information he has held since approximately September 2004.

Applicant first applied for a clearance in November 2003 (Item 4), truthfully claimed to have no history of drug use, and was granted his clearance in September 2004. On 12 December 2005, Applicant used marijuana at a concert when it was offered to him. On 21 December 2005, he was subjected to a random drug screen at work and tested positive for marijuana use. His employer suspended him from work and ordered him to undergo a substance abuse evaluation. He returned to work three weeks later when he passed a subsequent drug screen and was found by the substance abuse evaluation to not require further treatment. In approximately September 2006, he passed a random drug screen at work.

In late January 2006, Applicant annotated his clearance application to reflect his drug involvement, and the company resubmitted the application to the government. The application (Item 4) is the only record evidence supporting issuance of the SOR.

In his Answer (Item 3), Applicant acknowledged exercising poor judgment in trying marijuana at the concert when it was offered to him. However, he credibly stated he had made a conscious effort since to avoid similar situations where illegal drugs might be present. He also credibly asserted that he had no desire or inclination to use any drug again, and pledged not to do so.

¹Required by Executive Order 10865 and Department of Defense Directive 5220.6, as amended—most recently in August 2006 (Directive).

²However, while I incorporate Applicant's admissions as findings of fact under Paragraph 2, I do not conclude that Applicant has admitted the applicability of Guideline E as a matter of law, as the applicability of Guideline E is a matter solely within my jurisdiction to decide.

POLICIES AND BURDEN OF PROOF

The Directive, Enclosure 2 lists adjudicative guidelines to be considered in evaluating an Applicant's suitability for access to classified information. Administrative Judges must assess both disqualifying and mitigating conditions under each adjudicative issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial common sense consideration of the factors listed in Section 6.3. of the Directive. The presence or absence of a disqualifying or mitigating condition is not determinative for or against Applicant. However, specific adjudicative 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. Considering the SOR allegations and the evidence as a whole, the relevant, applicable, adjudicative guideline is Guideline H (Drug Involvement).³

Security clearance decisions resolve whether it is clearly consistent with the national interest to grant or continue an Applicant's security clearance. The government must prove, by something less than a preponderance of the evidence, controverted facts alleged in the SOR. If it does so, it establishes a *prima facie* case against access to classified information. Applicant must then refute, extenuate, or mitigate the government's case. Because no one has a right to a security clearance, the Applicant bears a heavy burden of persuasion.

Persons with access to classified information enter into a fiduciary relationship with the government based on trust and confidence. Therefore, the government has a compelling interest in ensuring each Applicant possesses the requisite judgement, reliability, and trustworthiness of those who must protect national interests as their 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.⁴

CONCLUSIONS

The government established a case for disqualification under Guideline H, by demonstrating that Applicant used marijuana in December 2005,⁵ tested positive for marijuana use later that

³Guideline E: Personal Conduct is wholly inapplicable to the facts of this case. Applicant's conduct did not involve deliberate omission . . . [§ 16.(a)], deliberately providing false or misleading information . . . [§ 16.(b)], personal conduct . . . that creates a vulnerability . . . [§ 16.(e)], violation of a written or recorded commitment . . . [§ 16.(f)], or association with persons involved in criminal activity [§ 16.(g)]. The closest Applicant's conduct gets to implicating Guideline E is credible adverse information **in several adjudicative issue areas** . . . [§ 16.(c)] and credible adverse information that **is not explicitly covered under any other guideline** . . . [§ 16.(d)][Emphasis added.]. Applicant's misconduct is completely circumscribed by the adjudicative criteria delineated by the disqualifying and mitigation conditions enumerated under Guideline H: Drug Involvement.

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

⁵Any drug abuse [§ 25.(a)];

month,⁶ and did so after being granted a clearance in September 2004.⁷ However, Applicant mitigated the security concerns, by demonstrating that the use was infrequent and under circumstances unlikely to recur,⁸ and further demonstrated intent to not abuse drugs in the future.⁹ The record reflects that Applicant used marijuana on a single occasion, in a concert setting, when the drug was passed to him. The drug does not appear to have been passed to him by friends, but by fellow concert-goers. While Department Counsel fairly characterizes Applicant's use as "recent," this term has less meaning under the new adjudicative criteria, where the corresponding language "the behavior happened so long ago. . ." [§ 26.(a)], is used in the disjunctive with language that clearly applies to Applicant. Further, given the minimal marijuana use by Applicant, his abstention from marijuana use from December 2005 to June 2007—nearly 18 months—is an appropriate period of abstinence [§ 26.(b)]. Applicant used marijuana once in an admitted exercise of poor judgment, and suffered consequences, both at work and with regard to his clearance, that clearly sobered him and impressed upon him the importance of refraining from drug use in the future. On this record, it is extremely unlikely that Applicant would return to illegal drug use. Accordingly, I resolve Guideline H. for Applicant.

The government failed to establish a Guideline E case. There is no aspect of Applicant's conduct that is not completely addressed by the adjudicative criteria for drug involvement, and the drug involvement did not occur under any circumstances implicating the more substantive criteria under personal conduct. I resolve Guideline E for Applicant.

FORMAL FINDINGS

Paragraph 1. Guideline H: FOR APPLICANT

 Subparagraph a: For Applicant

 Subparagraph b: For Applicant

 Subparagraph c: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

 Subparagraph a: For Applicant

⁶Testing positive for illegal drug use [§ 25.(b)];

⁷Any illegal drug use after being granted a security clearance [§ 25.(g)];

⁸The behavior happened so long ago, was so infrequent, **or** happened under such circumstances that it is unlikely to recur **or** does not cast doubt n the individual's current reliability, trustworthiness, or good judgment [§ 26.(a)][Emphasis supplied];

⁹A demonstrated intent not to abuse any drugs in the future, such as: . . . (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence; . . . [§ 26.(b)].

DECISION

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance granted.

John Grattan Metz, Jr.
Administrative Judge