

KEYWORD: Drugs

DIGEST: Applicant used marijuana with varying frequency from 1969 to October 2005. While he does not intend to use marijuana in the future, it is too soon to conclude that his drug involvement is safely in the past. Clearance is denied.

CASENO: 06-20169.h1

DATE: 03/30/2007

DATE: March 30, 2007

In re:)
)
)
 -----) ISCR Case No. 06-20169
 SSN: -----)
)
 Applicant for Security Clearance)
)
)
)

**DECISION OF ADMINISTRATIVE JUDGE
ELIZABETH M. MATCHINSKI**

APPEARANCES

FOR GOVERNMENT

John B. Glendon, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant used marijuana with varying frequency from 1969 to October 2005. While he does not intend to use marijuana in the future, it is too soon to conclude that his drug involvement is safely in the past. Clearance is denied.

STATEMENT OF THE CASE

The Defense Office of Hearings and Appeals (DOHA) declined to grant or continue a security clearance for Applicant. As required by Department of Defense Directive 5220.6 ¶ E3.1.2 (Jan. 2, 1992), as amended, DOHA issued a Statement of Reasons (SOR) on September 26, 2006, detailing the basis for its decision—security concerns raised under Guideline H (drug involvement) of the revised Adjudicative Guidelines (AG) issued on December 29, 2005, and implemented by the Department of Defense effective September 1, 2006. The revised guidelines were provided to Applicant when the SOR was issued. Applicant answered the SOR on October 18, 2006, and elected to have a hearing before an administrative judge. The case was assigned to me on December 4, 2006.

With the consent of the parties, I convened a hearing on March 1, 2007, to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. One government exhibit (Ex. 1), and five Applicant exhibits (Ex. A-E), were admitted, and testimony was taken from Applicant, as reflected in a transcript (Tr.) received on March 13, 2007.

The record was held open until March 15, 2007, for Applicant to submit additional evidence of his work performance. On March 13, 2007, Applicant timely offered his performance review for the period February 2003 to February 2004, along with a one-page letter from him. On March 16, 2007, Department Counsel indicated the government had no objection. Accordingly, the letter and performance review were marked collectively and admitted as Applicant Exhibit F.

FINDINGS OF FACT

DOHA alleged under Guideline H, Applicant used marijuana with varying frequency from about 1969 to at least October 2005. When he answered the SOR, Applicant admitted the use of marijuana as alleged but none since October 2005. He expressed a willingness to swear an oath or sign a statement that he will not use marijuana in the future. After consideration of the pleadings, exhibits, and hearing transcript, I make the following findings of fact.

Applicant is a 49-year-old married father of two children born in August 1983 and July 1986. Since October 1998, he has been employed by a defense firm that designs and manufactures hazardous duty mobile robots utilized in explosive ordnance disposal and tactical law enforcement. Initially hired as a software engineer, he was promoted in November 2005 to the position of deputy manager of a computer software group that sustains the software used on a man-portable robot.

On November 8, 2005, Applicant executed an electronic questionnaire for investigations processing (e-QIP) for a clearance needed at that time to read the final report of a field test of a robot device in Iraq.¹ He responded “Yes” to question 24a concerning any illegal use of a controlled

¹Applicant testified that his employer knew that by the time a security clearance was granted, it would no longer be needed (“relevant”) for that particular field test but that it was believed that similar situations were likely to come up in the future where he would need a clearance. (Tr. 46)

substance in the last 7 years, and indicated that he used marijuana from October 1995 to present approximately 10 times. A detailed history of Applicant's involvement with marijuana follows

Applicant began smoking marijuana with his older siblings in 1969 in the family home. In high school, he continued to use marijuana with friends on the weekends only, no more frequent than a couple of times per month. While attending a private college in his home state, his use of marijuana became more frequent. At times, he smoked the drug daily. Applicant also tried cocaine, used LSD a handful of times, and ingested amphetamines once or twice as an undergraduate.

After he earned his bachelor of science degree in mathematics, Applicant relocated to another state to pursue a doctorate in computer science. His marijuana use continued on the order of once or twice weekly, in the context of socializing with two different groups of friends in graduate school. Applicant's spouse, whom he married in 1980, was aware of his illegal drug involvement. She did not use marijuana herself but also did not have a problem with him using it.

Applicant left graduate school in 1981 without finishing his degree to pursue full-time employment. His marijuana use continued thereafter, but only when he got together with old friends with whom he had smoked the drug previously. With familial and job obligations, his marijuana use dropped off to less than once per month.

From about May 1984 to May 1986, Applicant pursued a master's degree in computer science during the evenings while working a full-time job. By March 1988, Applicant had moved his family back to his home state. By that time he had lost touch with two of his three closest friends with whom he had used marijuana in graduate school. He continued to smoke the drug when he got together with the third friend (Mr. X), who provided him the marijuana.

In April 1998, Applicant and his family moved to his present state of residence where Applicant began working as a senior software engineer for a company that was acquired by his present employer in October 1998. Applicant stayed in the job.

After he moved, Applicant continued his friendship with Mr. X. Applicant smoked marijuana while visiting Mr. X back in his home state, usually in a cabin owned by Mr. X. Applicant estimates he smoked marijuana ten times with Mr. X between October 1995 and October 2005. Mr. X provided the marijuana they used. They were careful to not smoke the drug around their children but did use it in their spouses' presence. Applicant was aware that marijuana use was illegal in his home state. He attributes his willingness to risk possible criminal prosecution to a "streak of defiance left over from when [he] was younger."

Applicant has not used any marijuana since October 2005, as he decided to stop using marijuana when he completed his clearance application. He had previously not given it a lot of thought. Applicant did not socialize with Mr. X in 2006.

Applicant believes alcohol causes more harm than marijuana, but understands it is a problem for his security clearance. As to whether marijuana use may reflect negatively on a person's reliability, trustworthiness, and willingness to comply with rules, regulations, he is of the opinion that "one should look beyond that individual factor." Applicant last visited with Mr. X in late January/early February 2007. Applicant told his friend he was no longer interested in smoking

marijuana (“That I was interested in the benefit of having a security clearance at work than in smoking marijuana which really didn’t mean a lot to [him] any more.”).

Applicant intends to socialize with Mr. X in the future. He considers it “possible” that Mr. X will smoke marijuana in his presence in the future, but does not see any circumstances under which he will smoke the drug himself, citing the government’s concerns, his waning interest, the risks, and increasing concerns over the immorality of it. Applicant understands his employer has a drug-free workplace policy, meaning that illegal drugs are not to be used on the premises and employees are not to be under the influence while on the premises. A “handful” of his coworkers are aware that he has used marijuana “in the past.”

Applicant has been a good employee for the defense firm, especially in the technical side of the business. He was instrumental in the development of the software for the man-portable product line, but his lack of planning and product integration skills has caused delays at times, especially during 2003. Since November 2005, he has managed the software group that sustains and improves the software on the man-portable robot product line. He has earned the respect of his software team and has shown himself willing to work long hours.

POLICIES

“[N]o one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has “the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information.” *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). An applicant “has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002).

The revised Adjudicative Guidelines set forth potentially disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline H—Drug Involvement

Use 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). Drugs are defined as mood and behavior altering substances, and include drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens). (AG ¶ 24(a)(1)). The use of a controlled substance such as marijuana is considered drug abuse under the Directive (¶ 24(b) *drug abuse is the illegal use of a drug*). Drug involvement disqualifying conditions (DC) ¶ 25(a) *any drug abuse*, and ¶ 25(c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale or distribution; or possession of drug paraphernalia) apply as Applicant smoked marijuana with varying frequency from about 1969 to October 2005. He purchased the drug in the past, although not since October 1995. Although not alleged in the SOR, Applicant also used LSD, and tried cocaine and amphetamines when he was in college.

Applicant submits in his favor that he has been free of all illicit drugs since his last use in October 2005, and that when he completed his application for security clearance in November 2005, he resolved to refrain from any future involvement. Although Applicant's use of marijuana has been limited to about ten occasions since October 1995, mitigating condition (MC) 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*, does not apply given his involvement with marijuana throughout his teens and most of his adult life. A frequent user of marijuana (up to daily at times) as an undergraduate, Applicant did not leave his drug abusing past behind after he relocated for graduate school, married, and had two children. In graduate school, he found not one but two separate groups of friends with whom he used marijuana. With one of these friends, he continued to smoke marijuana as recently as October 2005. Clearly, he enjoyed the drug and was willing for many years to put his personal desires ahead of obeying the drug laws. A "streak of defiance left over from when [he] was younger" (Tr. 55) does not adequately excuse his behavior.

A demonstrated intent to refrain from any future illicit drug use may yet mitigate the security concerns presented by illegal drug abuse, although Applicant bears a heavy burden in this regard given his 26 years of involvement with marijuana. Under MC 26(b), among the factors that may demonstrate that intent are: (1) *disassociation from drug using associates and contacts*, (2) *changing or avoiding the environment where drugs were used*; (3) *an appropriate period of abstinence*; (4) *a signed statement of intent with automatic revocation of clearance for any violation*. Applicant plans on continuing his association with his longtime friend from graduate school, who provided him with the marijuana he used since October 1995. Applicant's present 16 months of abstinence is not long enough to be considered "appropriate," in light of the duration and extent of his abuse history. Nor has Applicant signed a statement of intent to refrain from illegal drug use in the future (*see* 26(b)(1)). However, he testified credibly to that effect under advisement of Title 18, Section 1001 of the United States Code. Given Applicant's candor about his drug abuse history, I do not doubt the sincerity of his resolve to abstain. Yet, Applicant has also shown little understanding of the risk presented to that resolve by his ongoing association with Mr. X, who showed little reaction to Applicant's decision to give up illegal drug use. According to Applicant, when he told his friend in late January/early February 2007 that he was "more interested in the benefit of having a security clearance at work than in smoking marijuana which really didn't mean a lot to [him] anymore," his friend "just said oh." (Tr. 61). Applicant admitted that it is possible that this friend will smoke marijuana in his presence in the future (Tr. 62), and that while his friend did not offer him marijuana during their recent visit, Applicant was sure that this friend had some. (Tr. 65). It is too soon to

