



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



In the matter of:)	
)	
XXXXXX, Xxxxx XXXXXXXXX)	ISCR Case No. 14-01307
)	
Applicant for Security Clearance)	

Appearances

For Government: Alison O’Connell, Esquire, Department Counsel
For Applicant: Nicole A. Smith, Esquire

10/30/2014

Decision

METZ, John Grattan, Jr., Administrative Judge:

Based on the record in this case,¹ Applicant’s clearance is granted.

On 12 May 2014, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant listing security concerns under Guideline H, Drug Involvement.² Applicant timely answered, requesting a hearing before the Defense Office of Hearings and Appeals (DOHA). DOHA assigned the case to me 4 September 2014, and I convened a hearing 1 October 2014. DOHA received the transcript (Tr.) 9 October 2014.

¹Consisting of the transcript (Tr.), Government exhibit (GE) 1, Applicant exhibits (AE) A-D, and HE I-IV. AE D and HE III-IV were timely received post hearing.

²DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; DoD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) effective within the DoD on 1 September 2006.

Findings of Fact

Applicant admitted the SOR allegation. She is a 52-year-old principal employed by a defense contractor since December 2007. She seeks to retain the clearance she was issued in October 2005. She has been married since September 1988 and has two grown daughters and some grandchildren. Company policy requires her to hold a clearance because of her seniority in the company. She does not currently work in a classified environment.

Applicant first applied for a clearance in July 2005, when her previous employer was bidding on a new classified contract and she was expected to serve on the team working on the contract. Applicant received notification in due course that her interim clearance had been granted. However, her employer was unsuccessful in its bid for the contract, so she continued working in an unclassified environment. She never received notification that her final clearance had been granted in October 2005. She never received the initial and periodic security briefings that would have been required if she had been given access to classified information.

Applicant went to work for her current employer in December 2007, again in an unclassified environment. Applicant continued to be unaware that she had been granted a clearance in October 2005. She gave no thought to her clearance status until 2010, when her employer polled its employees about their clearance statuses, in anticipation of moving into other contracting areas. Applicant then recalled that she had previously applied for a clearance, but was unsure of its status. Further investigation disclosed that her clearance had been granted in October 2005. She then began receiving regular security briefings from her company. During an annual security briefing, she encountered a question about past drug use on a company questionnaire, and disclosed her 2009 marijuana use. This was the first time she was aware of any requirement to report use of illegal drugs.

Applicant's September 2013 clearance application (GE 1) disclosed that she had used marijuana once in July 2009, while on vacation with her husband and close friends:

When visiting friends in [city, state] in 2009 I smoked marijuana (one time, two puffs) when offered. I did not instigate the drug use or purchase the drugs . . . One use only. After a long hike, my friend decided to smoke marijuana and suggested I try some. I took two puffs at the time. It was the only time that anyone smoked marijuana during our stay in [state]. I have not smoked or had ANY exposure to marijuana since. I was not in [state] for business purposes . . . I do not smoke marijuana or use any other illegal drugs. The incident in [state] was a "one-off". I don't have access to marijuana, don't feel the need to smoke it, and don't socialize with people who smoke it.

Applicant credibly testified to the same facts, and the long-time friend she was visiting at the time confirmed the essence of the incident (AE D). Applicant has had no further contact with the person who provided the marijuana on the occasion she used it.

Applicant's co-worker considers her an outstanding employee, and recommends her for her clearance. He recalls Applicant told him about the marijuana use sometime after she came back from vacation (Tr. 19-26). Applicant's character references (AE C) have known her for many years, consider her one-time marijuana use in 2009 completely out of character, and recommend her for her security clearance. She has signed a statement of intent regarding future drug use (AE B). Company policy also precludes any use of illegal drugs (AE A).

Policies

The adjudicative guidelines (AG) list factors 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 issue fairly raised by the facts and circumstances presented. Each decision must also reflect a fair and impartial commonsense consideration of the factors listed in AG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against an applicant. However, specific adjudicative guidelines should be followed where 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 adjudicative guideline is Guideline H (Drug Involvement).

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, it establishes a baseline case against granting a clearance. Applicant must then 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.

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.³

³See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

Analysis

The Government established a case for disqualification under Guideline H, by demonstrating Applicant's marijuana use in July 2009.⁴ The Government also established that Applicant used marijuana in July 2009 after being granted a security clearance in October 2005.⁵ However, for this disqualifying condition to have security significance, it must contemplate that Applicant knew that she held a clearance, if not actually having been granted access to classified information. Without minimizing the security significance of Applicant's marijuana use, it is clear that she was unaware that she held a clearance in July 2009. In any event, Applicant mitigated the security concerns.

The Government's stated security concerns relate to her marijuana use after being granted a security clearance. However, notwithstanding Applicant's admission, the evidence fails to establish the essential security concern of the allegation: that Applicant used marijuana knowing she held a clearance. Certainly the security concern contemplates an Applicant with clearance and access nevertheless choosing to use marijuana or some other illegal drug. Applicant's conduct clearly falls outside the concerns of the disqualifying condition alleged.

Once her company failed to obtain the classified contract after July 2005, Applicant had no reason to know, or care, whether her clearance had been granted. She received no notification of the final grant of her clearance, and she continued to work in an unclassified environment. She received no periodic security briefings as required if she had both clearance and access. Once she changed jobs, her first employer was required to inform the Government that her employment was terminated, even assuming that her previous employer carried her on its records as having been granted a clearance.⁶ Her clearance would not have been automatically transferred to her new employer. She continued to work in an unclassified environment and received no periodic security briefings at her new employer until 2010, when her employer questioned its employees about their clearance status. Be that as it may, her single use of marijuana in July 2009 is adequate to raise the security concern.

Nevertheless, the drug involvement mitigating conditions give substantial support to Applicant. Her marijuana use was not frequent, nay was clearly no more than

⁴¶ 25(a) any drug abuse; (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;

⁵¶ 25(g) any illegal drug abuse after being granted a security clearance;

⁶National Industrial Security Program Operating Manual (NISPOM), **1-302 Reports to Be Submitted to the CSA (Cognizant Security Agency) . . . c. Change in Cleared Employee Status**. Contractors shall report: . . . (3) the termination of employment . . .

experimental, and ended in July 2009, over five years ago.⁷ She has not seen the provider of the marijuana since that vacation. Further, she demonstrated intent to not abuse drugs in the future by abstaining for more than five years.⁸ She has signed a statement of intent about future drug use as contemplated by the Directive.⁹ She recognizes the consequences of renewed marijuana use, not the least of which is the clearance hearing precipitated by her use. I conclude Applicant is unlikely to abuse marijuana in the future. Accordingly, I resolve Guideline H for Applicant.

Formal Findings

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph a: For Applicant

Conclusion

Under 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

⁷¶ 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 [Emphasis supplied];

⁸¶ 26 (b) a demonstrated intent not to abuse any drugs in the future, such as: (1) disassociation from drug using associates and contacts; (2) changing or avoiding the environment where drugs were used; (3) an appropriate period of abstinence;

⁹¶ 26(b) a demonstrated intent not to abuse any drugs in the future, such as: . . . (4) a signed statement of intent with automatic revocation of clearance for any violation;