



DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS



In the matter of:)	
)	
XXXXXX, XXXXXXXX XXXXXX)	ISCR Case No. 07-10552
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Kathryn D. MacKinnon, Esquire
Deputy Chief Department Counsel
For Applicant: *Pro se*

March 30, 2009

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 4 November 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H.¹ Applicant answered the SOR 1 December 2008, and requested a hearing. DOHA assigned the case to me 3 February 2009, and I convened a hearing 16 March 2009. DOHA received the transcript (Tr.) 20 March 2009.

¹DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1990), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (RAG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

Findings of Fact

Applicant admitted the SOR allegations. He is a 62-year-old senior technical director employed by a defense contractor for more than 20 years. He seeks to retain the clearance he has held during his 20 years military service and 24 years as a defense contractor. He had an exemplary military record, served in Viet Nam, and earned numerous awards and ribbons appropriate to his period of service—including two Meritorious Service Medals.

Applicant began using marijuana in 1995, when his domestic partner—an AIDS sufferer—brought some home to use as an appetite stimulant. Applicant joined him out of solidarity. The marijuana worked as an appetite stimulant, and Applicant has continued to use with his partner daily to weekly since, including the day before the hearing. Applicant has purchased marijuana for his personal use between 1995 and the day before the hearing.

In August 2004, Applicant was arrested for marijuana possession at an airport, while traveling to see his father. His case was placed on the stet docket, after which it would be deleted from his record if he had no further criminal conduct. Applicant complied with the requirement that he seek a drug evaluation, but was told by the program he consulted that he did not need to complete a program because he had no dependence issues. He continued to use marijuana after this arrest. He did not advise his employer of the arrest.

Applicant disclosed this drug history on a clearance application he executed in March 2006 (G.E. 1). He disclosed essentially the same information during a December 2006 subject interview (G.E. 3). However, the subject interview and later answers to interrogatories (G.E.4) in July 2008 revealed that he had misrepresented the amount and frequency of his marijuana use on his clearance application. On his SF 86, he claimed to have used marijuana only 10 times between 1995 and the date of his clearance application.

During his October 2006 subject interview, Applicant stated his intent to continue to use marijuana with his partner. However, in July 2008, he pledged to stop his marijuana use in order to retain his clearance. Nevertheless, he concluded that refraining from marijuana use just to retain his clearance was pointless unless and until he retained his clearance. He continued to use up to the day before the hearing as described above.

At hearing, Applicant pledged to stop using marijuana on a start date acceptable to the government if he can retain his clearance. He knew that marijuana use was prohibited by the military during his career, and knows it is prohibited by both his employer and the government. He believes that his marijuana use is no big deal, that he was candid about his drug use with the government, and that the “whole person” concept of the Directive should be applied to retain his clearance.

Applicant is a good employee (A.E. C), with over 20 years of service. He has not executed a formal drug statement of intent as contemplated by RAG ¶26(b)(4) of the Directive.

Policies

The Revised Adjudicative Guidelines (RAG) 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 common sense consideration of the factors listed in RAG ¶ 2(a). The presence or absence of a disqualifying or mitigating condition is not determinative for or against 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, applicable, 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 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.²

Analysis

The government established a case for disqualification under Guideline H by establishing Applicant's use and purchase of marijuana between 1995 and March 2009.³ Applicant has failed to mitigate the security concerns about his marijuana use, which began over 13 years ago. It has continued long past the point where he was

²See, *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

³¶25(a) any drug abuse ; (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; (g) any illegal drug use after being granted a clearance; (h) expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use.

aware of the potential consequences for his employment and clearance. He continued marijuana use after August 2004 despite his marijuana possession arrest. He continued despite company policy, government policy, and criminal proscription. His use was recent, and under the circumstances likely to recur.⁴ He has not demonstrated an intent to not abuse marijuana in the future.⁵ Applicant's newly-stated willingness to cease marijuana use is hardly convincing or unconditional. Under the circumstances of this case, I can give it no credence. A "whole person" analysis avails him not, in part because recognition for 20-years service does not establish the kind of employment characterization Applicant would have me find, and in part because a whole person analysis cannot overcome the plain disqualification of Applicant's continuous marijuana use since 1995, absent extraordinary circumstances not present here. Applicant offers nothing in the way of changed circumstances to give credence to his intent to refrain from marijuana use in the future. Indeed, nothing has changed except his desire to retain his clearance. Accordingly, I resolve Guideline H against Applicant.

Formal Findings

Paragraph 1. Guideline H: AGAINST APPLICANT

Subparagraph a-d: Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance denied.

JOHN GRATTAN METZ, JR
Administrative Judge

⁴¶ 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];

⁵¶ 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; (4) a signed statement of intent with automatic revocation of clearance for any violation.