



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



In the matter of:)	
)	
)	ISCR Case No. 07-13842
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert E. Coacher, Esquire, Department Counsel
For Applicant: *Pro Se*

June 27, 2008

Decision

LAZZARO, Henry, Administrative Judge

Applicant failed to mitigate the security concern caused by his use of marijuana while possessing a security clearance.

On February 25, 2008, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant stating it was unable to find it is clearly consistent with the national interest to grant or continue a security clearance for Applicant.¹ The SOR alleges security concerns under Guideline H (drug involvement). Applicant submitted a response to the SOR that was received by DOHA on April 1, 2008. Applicant admitted all SOR allegations, except the allegation contained in subparagraph 1.e, and requested a decision based on the written record without a hearing. Department Counsel requested a hearing by memorandum dated April 7, 2008, that was made part of the record as Appellate Exhibit (App. Ex.) I.²

¹ This action was taken under Executive Order 10865, DoD Directive 5220.6, dated January 2, 1992, as amended and modified (Directive), and revised adjudicative guidelines which became effective within the Department of Defense for SORs issued after September 1, 2006.

² As authorized by Paragraph E3.1.7, Additional Procedural Guidance, Enclosure 3 of the Directive.

The case was assigned to me on April 17, 2008. A notice of hearing was issued on April 24, 2008, scheduling the hearing for May 19, 2008. The hearing was conducted as scheduled. The government submitted four documentary exhibits that were marked as Government Exhibits (GE) 1-4, and admitted into the record without objection. Applicant testified and submitted three documentary exhibits that were marked as Applicant Exhibits (AE) 1-3, and admitted into the record without objection. The record was held open to provide Applicant the opportunity to submit additional documentation in support of his case. One additional document was timely received, marked as AE 4, and admitted into the record without objection. The transcript was received on June 2, 2008.

Findings of Fact

Applicant's admissions to the allegations in the SOR are incorporated herein. In addition, after a thorough review of the pleadings, testimony and exhibits, I make the following findings of fact:

Applicant is a 50-year-old single man who has been employed as an engineer by a defense contractor since October 1990. From August 1985 until October 1990, he was employed as an engineer by a different defense contractor. Applicant graduated from high school in 1975. He thereafter attended college, graduate school, and ultimately was awarded a PhD in engineering in June 1985. Applicant's work performance appraisals and letters of recommendation establish that he is a valued and trusted employee. He has possessed a secret level security clearance since 1985 and no previous adverse action has been taken to revoke or downgrade that clearance.

Applicant used and purchased marijuana while in high school. On one occasion he purchased a quarter pound of marijuana, divided it into four smaller packages, and sold them for profit. He denies using marijuana or associating with anyone who used marijuana from his high school years until approximately 1999. He was questioned about his use of marijuana when he first applied for a security clearance in 1985 and assured the investigator who questioned him that he would never use marijuana in the future.

Applicant submitted a Questionnaire for Sensitive Positions in May 2006 (GE 1) in which he disclosed he had used marijuana between seven and fourteen times from January 1999 to May 2006. He blamed his use of marijuana during this time period on associating with one or more cousins who used marijuana and with whom he wanted to be friendly. He last used marijuana on December 31, 2006, and asserts he will not use it again in the future because he does not want to jeopardize his security clearance. (GE 4) However, he told a DoD investigator on May 29, 2007, that he could not definitely rule out future use if he visited with the cousin who he had been smoking marijuana with, and he further qualified that assertion at the hearing as follows:

Now, how do I know what is going to happen in the future. I won't do it. I tell you if you are a good Hollywood screenwriter you could dream up some station [sic], you know, where it winds up happening. (Tr. 48)

Applicant submitted a random urinalysis sample on May 21, 2008, that was negative for the presence of any controlled substance, including marijuana. (AE 4)

POLICIES

The Directive sets forth adjudicative guidelines to consider when evaluating a person's eligibility to hold a security clearance. Chief among them are the disqualifying conditions and mitigating conditions for each applicable guideline. Additionally, each clearance decision must be a fair and impartial commonsense decision based upon the relevant and material facts and circumstances, the whole person concept, and the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive. Although the presence or absence of a particular condition or factor for or against clearance is not outcome determinative, the adjudicative guidelines should be followed whenever a case can be measured against this policy guidance. Considering the evidence as a whole, Guideline H (drug involvement), with its disqualifying and mitigating conditions, is most relevant in this case.

The sole purpose of a security clearance decision is to decide if it is clearly consistent with the national interest to grant or continue a security clearance for an applicant.³ The government has the burden of proving controverted facts.⁴ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁵ although the government is required to present substantial evidence to meet its burden of proof.⁶ "Substantial evidence is more than a scintilla, but less than a preponderance of the evidence."⁷ Once the government has met its burden, the burden shifts to an applicant to present evidence of refutation, extenuation, or mitigation to overcome the case against him.⁸ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.⁹

No one has a right to a security clearance¹⁰ and "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."¹¹ Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹²

³ ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

⁴ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁵ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁶ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁷ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁸ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

⁹ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

¹⁰ *Egan*, 484 U.S. at 528, 531.

¹¹ *Id* at 531.

¹² *Egan*, Executive Order 10865, and the Directive.

Analysis

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.

Applicant purchased and used marijuana while in high school. On one occasion while in high school he purchased, divided and resold a quarter pound of marijuana. He abstained from marijuana use for almost 25 years before starting to smoke it with a cousin with whom he wanted to become more friendly. He used marijuana approximately seven to fourteen times between January 1999 and December 31, 2006, including after he submitted his security clearance application in 2006. He possessed a security clearance at all times while using marijuana after 1999.

While Applicant asserts he will not use marijuana in the future, he found it necessary to qualify that assertion by pointing out that he could not definitely rule out future use if he visited with his cousin and that it is always conceivable some unforeseen circumstance could occur that would result in him using marijuana. Disqualifying Conditions (DC) 25(a): *any drug abuse*; 25(c): *illegal drug possession, including . . . purchase, sale, or distribution*; 25(g): *any illegal drug use after being granted a security clearance*; and 25(h): *. . . or failure to clearly and convincingly commit to discontinue drug use* all apply.

I have considered all mitigating conditions and conclude that none apply. While it has been almost 18 months since Applicant last used marijuana, he went almost 25 years between his high school use and when he resumed smoking marijuana in 1999. Further, his explanation for resuming the use of marijuana and using it intermittently over the course of almost eight years amounts to nothing more than his succumbing to mild peer pressure and a desire to become more friendly with his cousin. He most recently saw that cousin when he visited Applicant about six months ago. Add to these facts Applicant's equivocation in his assertion that he will not use marijuana in the future and there cannot be a reliable prediction that he will not use marijuana in the future, including while possessing a security clearance. Thus, Mitigating Conditions (MC) 26(a): *the behavior happened so long ago . . . 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; and 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* do not apply. The remaining mitigating conditions have no application to the facts of this case.

The objective of the security-clearance process is the fair-minded, commonsense assessment of a person's trustworthiness and fitness for access to classified information. Indeed, the "whole person" concept recognizes we should view a person by the totality of their acts and omissions. Each case must be adjudged on its own merits, taking into

consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Considering all relevant and material facts and circumstances present in this case, the whole person concept, to include Applicant's educational background, the letters of recommendation and work performance appraisals he submitted, his lengthy work history, the number of years he has held a security clearance, the factors listed in ¶ 6.3.1 through ¶6.3.6 of the Directive, and the applicable disqualifying conditions, Applicant has failed to mitigate the security concern caused by his drug involvement. He has failed to overcome the case against him or satisfy his ultimate burden of persuasion. Guideline H is decided against Applicant. It is not clearly consistent with the national interest to grant Applicant a security clearance.

Formal Findings

Formal findings for or against Applicant 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 H: AGAINST APPLICANT

Subparagraphs 1.a-f: 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 is denied.

Henry Lazzaro
Administrative Judge