



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



In the matter of:)	
)	
)	ISCR Case No. 08-01081
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: *Pro Se*

January 9, 2009

Decision

LAZZARO, Henry, Administrative Judge

Applicant mitigated the security concern caused by his former abuse of marijuana and the related security concerns that arose therefrom.

On May 8, 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, which is in essence the administrative complaint, alleges security concerns under Guidelines H (drug involvement), J (criminal conduct) and E (personal conduct). Applicant submitted a response to the SOR that was received by DOHA on July 21, 2008. He admitted all SOR allegations except the allegation contained in SOR subparagraph 2.a, which he denied. He requested a decision based on the written record without a hearing.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 Department Counsel, pursuant to Paragraph E3.1.7 of the Additional Procedural Guidance at Enclosure 3 of DoD Directive 5220.6, requested a hearing by memorandum, dated August 29, 2008. Appellate

The case was assigned to me on September 18, 2008. A notice of hearing was issued on October 6, 2008, scheduling the hearing for October 22, 2008.³ The hearing was conducted as scheduled. The Government submitted two documentary exhibits that were marked as Government Exhibits (GE) 1 and 2 and admitted into the record without objection. Applicant testified but did not submit any documentary exhibits. The record was held open to provide Applicant the opportunity to submit documentation in support of his case. One document was timely received, marked as Applicant Exhibit (AE) 1 and admitted into the record without objection. Department Counsel's forwarding memorandum was marked as App. Ex. II and is included in the file. The transcript was received on November 6, 2008.

Procedural Matters

Prior to taking evidence, I clarified the allegation contained in SOR subparagraph 3.a for Applicant's benefit to make certain he understood to what he had admitted in his response to the SOR. I thereafter granted him permission to withdraw his previous admission to that allegation and to substitute a denial thereto without objection by Department Counsel.

During the hearing, Department Counsel moved to amend the SOR by adding an additional allegation under Guideline J, to wit: "3.b That information set forth under paragraph 1 above." Applicant did not object to the requested amendment. Accordingly, I granted the motion and made the requested amendment on the face of the SOR. Applicant thereafter admitted the allegation and indicated he did not require additional time to respond to it.

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 22-year-old single man who has been employed by a defense contractor since July 2007. He works as a janitor assigned to the floor crew that is responsible for keeping the office floors clean. He graduated from high school in 2004. Following high school, except for a few months immediately after he graduated spent working as a laborer, Applicant was unemployed and lived with his mother until he obtained employment in a pizza restaurant in May 2006. Thereafter, with the exception of a one-month period of unemployment in June 2007, he worked at the pizza restaurant until he began his current employment.

Applicant first used marijuana in May 2004 when a marijuana cigarette was passed to him at a party. From then until March 2007, he used and purchased marijuana on a fairly

Exhibit (App. Ex.) I

³ Applicant was telephonically contacted by Department Counsel prior to issuance of the Notice of Hearing and agreed to the hearing date of October 22, 2008.

regular basis. He estimates he smoked marijuana as much as three to four times a week. (GE 2) Applicant admitted his use of marijuana was illegal.

Applicant stopped using marijuana in March 2007 because he wanted to get the job he currently has with a government contractor and knew that drug use was prohibited. He has not used any controlled substance since that time and he does not intend to use any controlled substance in the future. Applicant submitted a notarized statement to that effect in which he acknowledged that the use or possession of illegal drugs or controlled substances in the future “will result in the immediate termination of my clearance privileges.” (AE 1) This document was faxed to Department Counsel from Applicant’s employer’s workplace.

Applicant has been dating a woman he has known since childhood who he hopes to marry. She knows he previously smoked marijuana but she neither uses nor approves of the use of any controlled substances. Applicant testified his goals in life are to “(L)ive life to the fullest that I can, make as much money as I can, provide for a family.” (Tr. p. 46)

Applicant failed to disclose his use of marijuana, as required, in the security clearance application he submitted in September 2007. Applicant testified he improperly answered “no” to the applicable question because he rushed through the program without carefully reading the questions and did not review the completed Electronic Questionnaire for Investigations Processing (e-QIP) before signing it. (Tr. pp. 62-64) Applicant was interviewed by an investigator from the Office of Personnel Management (OPM) on November 14, 2007. In his report of interview, the investigator noted:

The subject was asked about drug use and he immediately admitted to using marijuana (discrepant). This was different than what was entered on the SF-86. He did not try to hide this fact, but could not give any reason for not marking yes to this question. . . . (GE 2)

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, Guidelines H (drug involvement), J (criminal conduct) and E (personal conduct), with their disqualifying and mitigating conditions, are 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.⁴ The Government has the burden of proving controverted facts.⁵ The burden of proof in a security clearance case is something less than a preponderance of evidence,⁶ although the Government is required to present substantial evidence to meet its burden of proof.⁷ “Substantial evidence is more than a scintilla, but less than a preponderance of the evidence.”⁸ 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.⁹ Additionally, an applicant has the ultimate burden of persuasion to obtain a favorable clearance decision.¹⁰

No one has a right to a security clearance¹¹ and “the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials.”¹² Any reasonable doubt about whether an applicant should be allowed access to classified information must be resolved in favor of protecting national security.¹³

Analysis

Guideline H, Drug Involvement; and Guideline J, Criminal Conduct

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. Likewise, criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness; and, by its very nature, calls into question a person’s ability or willingness to comply with laws, rules and regulations.

Applicant illegally purchased and used marijuana on a regular basis between May 2004 and March 2007. Under guideline H, disqualifying conditions (DC) 25(a): *any drug abuse*; and 25(c): *illegal drug possession, including . . . purchase, sale, or distribution*

⁴ ISCR Case No. 96-0277 (July 11, 1997) at p. 2.

⁵ ISCR Case No. 97-0016 (December 31, 1997) at p. 3; Directive, Enclosure 3, Item E3.1.14.

⁶ *Department of the Navy v. Egan* 484 U.S. 518, 531 (1988).

⁷ ISCR Case No. 01-20700 (December 19, 2002) at p. 3 (citations omitted).

⁸ ISCR Case No. 98-0761 (December 27, 1999) at p. 2.

⁹ ISCR Case No. 94-1075 (August 10, 1995) at pp. 3-4; Directive, Enclosure 3, Item E3.1.15.

¹⁰ ISCR Case No. 93-1390 (January 27, 1995) at pp. 7-8; Directive, Enclosure 3, Item E3.1.15.

¹¹ *Egan*, 484 U.S. at 528, 531.

¹² *Id* at 531.

¹³ *Egan*, Executive Order 10865, and the Directive.

apply. Under guideline J, DC 31(a): *a single serious crime or multiple lesser offenses*; and 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted* apply.

It has now been almost two years since Applicant last used marijuana. His use and purchase of marijuana occurred while he was somewhat younger and without much direction in his life. His testimony makes clear that he made a conscious choice to stop using marijuana when he sought more meaningful employment with a defense contractor in 2007, and that he has abided by that decision ever since. He is now looking forward to getting married, raising a family, and earning an income with which he can support that family. Applicant convincingly testified he does not intend to abuse any controlled substance in the future and he submitted a notarized statement acknowledging that his clearance will be immediately terminated if he violates that condition of his clearance eligibility.

Applicant is a young man who is guilty of the not uncommon youthful indiscretion of illegally using marijuana. His testimony and totality of the evidence available in this case establish he has matured and he is committed to being a useful and productive employee and family man. While maintaining the Government's position that Applicant should not be granted a security clearance, Department Counsel, acknowledged:

Applicant has come to us today and I think it's pretty clear that he seems candid and forthcoming, answers questions directly I'll be it [sic] quietly and the Government does appreciate that. (Tr. p. 77)

She also noted:

And so, you know, although he's come here today and he's been very candid and open, he does seem in earnest about his present intent to not smoke marijuana in the future. (Tr. p. 79)

Under Guideline H, 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*; and 26(b): *a demonstrated intent not to abuse any drugs in the future, such as: . . . (3) an appropriate period of abstinence; (4) a signed statement of intent with automatic revocation of clearance for any violation* apply. Under Guideline J, MC 32(a): *so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment*; and 32(d): *there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement* apply.

Guideline E, Personal Conduct

Personal conduct is always a concern because conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations

can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any failure to cooperate with the security clearance process.

Applicant's explanations for not listing his marijuana use in the 2007 e-QIP he submitted are credible. His appearance, manner of testifying and the substance of his testimony abundantly establish he is a relatively unsophisticated individual who very believably could be overwhelmed by the effort of preparing an electronic security clearance application. Most significant are the notations by the OPM investigator to the effect that Applicant immediately and completely disclosed his use of marijuana when asked about it during a routine interview. Applicant was not confronted with any independent information that would indicate the interviewer was aware of the use. Instead, Applicant was apparently simply asked a clear question that he could understand. Department Counsel echoed my impressions about Applicant's credibility in her closing argument when she observed: "I think that the Applicant did testify creditably [sic] regarding the allegation under Guideline E" (Tr. p. 81) Accordingly, I find Applicant did not deliberately falsify the 2007 e-QIP.

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.

I have considered all relevant and material facts and circumstances present in this case, including Applicant's age, the period of time that has elapsed since he last used marijuana, the sincerity he demonstrated in his testimony and through the statement he submitted to remaining drug free, to being a productive member of society, a successful employee and a committed family man. I have also considered the whole person concept, the factors listed in ¶ 6.3.1 through ¶ 6.3.6 of the Directive, and the applicable disqualifying conditions. Applicant has mitigated the security concern caused by his former use of marijuana and the related criminal conduct. He has overcome the case against him and satisfied his ultimate burden of persuasion. It is 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:	FOR APPLICANT
Subparagraphs 1.a & b:	For Applicant
Paragraph 2, Guideline E:	FOR APPLICANT
Subparagraph 2.a:	For Applicant

Paragraph 3, Guideline J: FOR APPLICANT

Subparagraphs 3.a & b: For Applicant

Conclusion

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 is granted.

Henry Lazzaro
Administrative Judge

