



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



In the matter of:)	
)	
XXXXX, XXXXXXXX XXXX)	ISCR Case No. 08-06724
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Candace L'ei, Esquire, Department Counsel
For Applicant: *Pro se*

July 29, 2009

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 9 April 2009, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) to Applicant detailing security concerns under Guideline H, E, and J.¹ Applicant answered the SOR 28 April 2009, and requested a hearing. DOHA assigned the case to me 10 April 2009, and I convened a hearing 7 July 2009. DOHA received the transcript (Tr.) 13 July 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 30-year-old network administrator employed by a defense contractor since June 2007. He previously held a clearance as far back as June 2004.

When Applicant completed a questionnaire for non-sensitive positions in July 2004 (GE 2), he failed to disclose his marijuana use within the last year (question 14) as required.² He justified this omission because he only completed the form in conjunction with his government contractor employment in a position that did not require a clearance. When he became aware of the significance of his drug use as it related to his clearance, he truthfully disclosed his marijuana use on clearance applications in November 2004 (AE A) and August 2007 (GE 1). In the former, he disclosed marijuana use from July 1995 to January 2004; in the latter, he disclosed marijuana use from July 1995 to May 2007. In neither case did he describe the frequency of his use. However, on the August 2007 clearance application, he also disclosed marijuana-related arrests in March and May 2007.

Applicant used marijuana with varying frequency from July 1995 to May 2007. He used marijuana after being granted a security clearance in June 2004.³ He was arrested for marijuana possession in March and May 2007. The charges were heard together in May 2007. Applicant was directed to a drug intervention program, the successful completion of which would result in the charges being nolle prossed—which they were in June 2008. Early in the drug intervention program, Applicant tested positive for marijuana use during two program-directed drug screens.

In addition to the two arrests in 2007, Applicant was arrested for reckless driving in August 2002. He was later found guilty of a lesser offense and fined. In December 2008, he was again arrested for reckless driving. He was found guilty and fined.

At hearing, explaining his deliberate falsification of his July 2004 questionnaire for non-sensitive positions, Applicant posited that he would feel justified in giving a false answer regarding his marijuana use to individuals without any reason to know the truth or any employer with a drug-free workplace policy—in order to get a job with the

²Applicant is also alleged to have falsified his marijuana use on a January 2003 clearance application (SOR 2.e). I find that allegation for Applicant for three reasons. First, the record copy is not signed, and thus Applicant did not certify the truth of his entries. Second, Applicant credibly testified that he completed this application as part of the interview process with a company that ultimately did not hire him. Consequently, the company should not have submitted the application for processing by the government. Finally, consistent with the fact that the company did not hire Applicant, it does not appear that the government began a background investigation based on this application, and thus could not have been misled. The interim clearance would have been granted simply because there was no derogatory information listed on the form.

³The SOR alleges the clearance date as January 2003, for an interim clearance. As noted in footnote 2 above, that application was improperly submitted, Applicant was never hired by the company, and he had no reason to know that he had been granted a clearance. However, his October 2004 clearance application (AE A) establishes that he knew he had a clearance as of June 2004.

employer. He indicated that he probably made such false statements on employment applications with two “big box” employers he worked for before he entered the professional workplace.

Applicant’s former facility security officer (FSO) considers him an outstanding, security conscious employee. His work and character references (AE B)—who include a former employer, a current co-worker, a current supervisor, and a current professor—consider Applicant a trustworthy and reliable individual. None of them appears to be aware of the issues in the SOR.

Applicant asserts that he has not used marijuana since May 2007, and has no intent to do so. He claims he does not associate any more with marijuana smoking acquaintances. He cites his increased maturity, and his understanding of the effect his continued drug use has on his clearance as reasons he will not use drugs in the future.

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 commonsense 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 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, applicable, adjudicative guidelines are Guideline H (Drug Involvement), Guideline E (Personal Conduct), and Guideline J (Criminal Conduct).

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, 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.⁴

⁴See, *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 sporadic marijuana use between July 1995 and May 2007, a period during which he had a clearance.⁵ However, Applicant has not mitigated the security concerns. There was nothing unusual about the circumstances of his marijuana use, so I cannot conclude that the marijuana use is unlikely to recur.⁶ He has not demonstrated intent to not abuse these drugs in the future.⁷ Accepting his claim that he has not used marijuana since May 2007, he was under the threat of criminal penalties until June 2008, slightly more than a year ago. Without some corroboration of his changed circumstances, his past falsifications make it difficult to credit his claims of rehabilitation. While he has satisfactory character and work references, none of them appear to be aware of his drug history or past falsifications. Under these circumstances I cannot conclude that Applicant is unlikely to use drugs in the future. Accordingly, I resolve Guideline H against Applicant.

The government established a case for disqualification under Guideline E, and Applicant did not mitigate the security concerns. He deliberately concealed his illegal drug use on a questionnaire for non-sensitive positions in July 2004. He had previously falsified employment applications with retail employers. He falsified his questionnaire knowing that his drug use was of concern to the government. His statement that he would never falsify a clearance application even though he would—and did—falsify information on government and retail employment applications is a distinction without a difference. The government is entitled to truthful answers on its forms, whether designed for assessing suitability for employment or access to classified information.

None of the Guideline E mitigating conditions apply. The concealed information was relevant to a clearance decision. His eventual disclosures cannot be considered either forthright or prompt. Applicant's failure to disclose his illegal drug use shows a lack of candor required of cleared personnel. The government has an interest in examining all relevant and material adverse information about an applicant before making a clearance decision. The government relies on applicants to truthfully disclose that adverse information in a timely fashion, not when it is perceived to be prudent or convenient. Further, an applicant's willingness to report adverse information about

⁵¶ 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 security clearance.

⁶¶ 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];

⁷¶ 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.

himself provides some indication of his willingness to report inadvertent security violations or other security concerns in the future, something the government relies on to perform damage assessments and limit the compromise of classified information. Applicant's conduct suggests he is willing to put his personal needs ahead of legitimate government interests. I resolve Guideline E against Applicant.

The government established a case for disqualification under Guideline J, and Applicant did not mitigate the security concerns. Record evidence clearly establishes that Applicant intended to conceal his illegal drug use from the government in July 2004 to secure his contractor position with a government agency. This conduct violated 18 U.S.C. §1001,⁸ whether or not he intended only to retain his employment or intended to effect the course of an investigation or suitability determination. In addition, reckless driving arrests in August 2002 and December 2008 and drug possession arrests in March and May 2007 constitute a pattern of misconduct that is neither distant nor infrequent. I resolve Guideline J against Applicant.

Beyond the specific guidelines alleged by the government, the generally applicable disqualifying and mitigating conditions lead to the same result. Drug abuse, criminal conduct, and falsifications are core security concerns [RAG ¶2(a)(1)]. His behavior was deliberate and not due to circumstances beyond his control [RAG ¶2(a)(2); RAG ¶2(a)(5)]. His misconduct was both recent and frequent [RAG ¶2(a)(3)]. I have considered Applicant's relative youth, but that consideration does not overcome the adverse inferences of his misconduct, particularly with honesty being a core requirement for access, and not a difficult concept to understand or hold Applicant's to [RAG ¶2(a)(4).]. Rehabilitation or behavioral changes are difficult to measure under these circumstances, given the scrutiny Applicant has been under since his drug use came to light [RAG ¶ 2(a)(6)]. He clearly sought to mislead the government about his drug record, or was at least willing to benefit from his misconduct [RAG ¶2(a)(7)]. Applicant's willingness to put his personal needs ahead of legitimate government interests increases his potential vulnerability and he has not demonstrated that the misconduct is unlikely to recur [RAG ¶ 2(a)(8); RAG ¶ 2(a)(9)]. The concern is whether Applicant would disclose situations or circumstances, whether deliberate or inadvertent, that raise security concerns. Overall, the record evidence leaves substantial doubt about Applicant's eligibility and suitability for a security clearance. Accordingly, I conclude Applicant has not mitigated the security concerns arising from his drug abuse, criminal conduct, and falsifications.

Formal Findings

Paragraph 1. Guideline H:	AGAINST APPLICANT
Subparagraph a:	Against Applicant
Subparagraph b:	For Applicant

⁸¶31.(a) a single serious crime or multiple lesser offenses; (c) allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted;

Subparagraph c-f:	Against Applicant
Paragraph 2. Guideline E:	AGAINST APPLICANT
Subparagraph a-e:	Against Applicant
Paragraph 3. Guideline J:	AGAINST APPLICANT
Subparagraph a-b:	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