



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



In the matter of:)	
)	
XXXXX, XXXXXXXX XXXX, Xx.)	ISCR Case No. 08-07318
SSN: XXX-XX-XXXX)	
)	
Applicant for Security Clearance)	

Appearances

For Government: Braden M. Murphy, Esquire, Department Counsel
For Applicant: Kathleen E. Voelker, Esquire

June 30, 2009

Decision

METZ, John Grattan, Jr., Administrative Judge:

On 6 March 2009, 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 23 March 2009, and requested a hearing. DOHA assigned the case to me 4 May 2009, and I convened a hearing 4 June 2009. DOHA received the transcript (Tr.) 12 June 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 22-year-old IT advisory associate employed by a defense contractor since June 2008. He has not previously held a clearance.

Applicant used marijuana four times between July 2005 and April 2008. He used marijuana in July 2005, August 2005, October 2005, and April 2008. The two times he used during summer 2005, he used with his next door neighbor—a young man who later enlisted in the U.S. Army, just returned from a tour of duty in Iraq, and no longer uses marijuana. He used marijuana in October 2005 with college classmates who he has not seen since graduation. He used marijuana in April 2008 with college classmates from his freshman year—during senior-year-end celebrations. Applicant testified credibly that he knew immediately that he had made a mistake and left the company of his classmates. He regretted his last use of marijuana and has not used marijuana since. He has seen some of these college classmates at alumni functions since graduation, but otherwise has no contact with them.

There is no record evidence of physiological or psychological impairment as a result of Applicant's marijuana use. He never bought or sold marijuana, and has not been involved with illegal drugs other than marijuana. He took, and passed, drug screening for two different employers in high school and his early college years.

Applicant accepted an offer of employment from his current employer in fall 2007 of his senior year. He disclosed his current drug history on a clearance application he executed in February 2008 (G.E. 1). He disclosed the same information during an April 2008 subject interview (G.E. 2), but also disclosed his April 2008 marijuana use.

Applicant stopped using marijuana in April 2008 because he realized that continued marijuana use was inconsistent with the professional career he hoped for. He has not used since. After college, Applicant moved back home to live with his parents, but plans to rent his own place once he can find a suitable roommate. He mostly socializes with co-workers now. He does not intend to use marijuana in the future. He signed a statement of intent with automatic revocation of clearance for any violation (A.E. E).

Applicant's supervisor is aware of the clearance issues, but opines that Applicant's demonstrated trustworthiness and reliability on the job warrants his getting his clearance. He has similar recommendations from a co-worker (A.E. D) and a college classmate—who himself is embarking on a professional career with the military. He has been commended for his work performance (A.E. C), and his performance evaluations confirm his coworker and supervisor assessments (A.E. B).

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 demonstrating Applicant's use of marijuana on four occasions between October 2005 and April 2008.³ However, Applicant mitigated the security concerns, by demonstrating that the use was under circumstances unlikely to recur,⁴ and further demonstrating

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;

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];

intent to not abuse drugs in the future.⁵ While Applicant’s use is fairly characterized as “recent,” this term has less meaning under the new adjudicative criteria, where the corresponding language “the behavior happened so long ago. . .” [¶ 26.(a)], is used in the disjunctive with language that clearly applies to Applicant. Further, his marijuana use was clearly infrequent and confined to the years he was in college—albeit including summers with his neighborhood friend. Nevertheless, he seldom sees this college friends or his neighbor now, and his neighbor has himself entered the military and foresworn his marijuana use. Finally, while his abstention from marijuana use since April 2008 might not necessarily constitute an appropriate period of abstinence, given the minimal marijuana use by Applicant and his change in environment—both physical (returning home) and psychological (career versus school)—I conclude that this abstinence is appropriate [¶ 26.(b)]. Applicant also executed the sworn statement of intent. On this record, it is extremely unlikely that Applicant would return to illegal drug use.⁶ Accordingly, I resolve Guideline H for Applicant. Additionally, this conclusion is completely consistent with a whole person analysis.

Formal Findings

Paragraph 1. Guideline H: FOR APPLICANT

Subparagraph a-d: 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 granted.

JOHN GRATTAN METZ, JR
Administrative Judge

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.

⁶Department Counsel argues, albeit not strongly, that drug use after completing a clearance application can undercut claims of reform or rehabilitation—consistent with Appeal Board rulings. I have given appropriate consideration to this argument but find it unpersuasive on these facts. The appropriate disqualifying condition, which Department Counsel does not invoke, is use after being granted a clearance. Granting that completion of a clearance application puts an applicant on notice of the government’s requirements regarding drug use, the Appeal Board’s reasoning gains more credence the closer the application is to the actual start of employment or clearance grant. The reasoning loses credence where, as here, the application is completed months before the actual start of employment—an employment probable, but not absolutely certain—and while an applicant is still ensconced in the relatively care-free college environment.