



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



In the matter of:)	
)	
SSN:)	ISCR Case No. 08-08257
)	
Applicant for Security Clearance)	

Appearances

For Government: Jennifer I. Goldstein, Department Counsel
For Applicant: *Pro Se*

September 10, 2009

Decision

WESLEY, Roger C., Administrative Judge:

Statement of Case

On February 20, 2009, the Defense Office of Hearings and Appeals (DOHA), pursuant to Department of Defense Directive 5220.6 (Directive), dated January 2, 1992, issued a Statement of Reasons (SOR) to Applicant, which detailed reasons why DOHA could not make the preliminary affirmative determination of eligibility for granting a security clearance, and recommended referral to an administrative judge to determine whether a security clearance should be granted, continued, denied or revoked.

Applicant responded to the SOR on March 30, 2009, and requested a hearing. The case was assigned to me on May 11, 2009, and was scheduled for hearing on June 25, 2009. A hearing was held on the scheduled date for the purpose of considering whether it would be clearly consistent with the national interest to grant, continue, or deny Applicant's application for a security clearance. At hearing, the Government's case consisted of two exhibits and a report on marijuana produced by the U.S. Drug Enforcement Administration, for which official notice was taken. Applicant, in turn, relied

on one witness (himself) and two exhibits. The transcript (Tr.) was received on July 6, 2009. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is denied.

Procedural Issues and Rulings

Prior to the close of the hearing, Applicant requested leave to supplement the record with information concerning his state's legalization of marijuana for medicinal purposes. For good cause shown, Applicant was granted seven days to July 6, 2009, to provide supplemental documentation. The Government was afforded an equal amount of time, to July 15, 2009, to respond to Applicant's submissions. Within the time permitted, Applicant provided post-hearing documentation of his state's medicinal marijuana law (entitled the Compassionate Use Act, C Health & Safety Code, ¶ 11362.5 (2005)), along with legislative citations to laws banning unauthorized marijuana use and possession and guidelines adopted by major cities in the state.

Department Counsel objected to Applicant's post-hearing submissions covering medical marijuana use in his state as irrelevant, and cites the Supreme Court's decision in *United States v. Oakland Cannabis Buyers and Jeffrey Jones*, 532 U.S. 483 (2001) as controlling on the issue.

After a thorough consideration of Applicant's legal submission concerning his state's legalization of marijuana for medicinal purposes only, and the Government's interposed objection to its admissibility, Department Counsel's admission exception is overruled. *Oakland Cannabis Buyers, supra*, has limited application to Applicant's marijuana for medicinal purposes state exception. This decision held that the federally mandated Controlled Substances Act (CSA) (21 U.S.C. §§ 801 *et seq.*) that bars the manufacture, distribution, and possession of various drugs, including marijuana, has no medical benefits worthy of any exception outside of the narrow confines of government-approved research. Without any sustainable marijuana medical exception to employ, the Supreme Court used its federal jurisdictional authority to preserve the reach of the CSA over illegal drug manufacturing, distributing, and possession.

Oakland Cannabis Buyers did not attempt to invalidate the enabling legislation adopted by the state of Applicant's domicile. This legislation was designed to implement the key enabling provisions of Proposition 215, under §§ 11362.5 *et seq.* Proposition 215 (known as the Compassionate Use Act) was passed by the state's voters in 1996 to validate the right of residents of the state to possess and use marijuana for medical purposes, when they have a recommendation from a licensed physician. Proposition 215 gives the patient's primary caregiver the right to cultivate and possess marijuana for the patient. But the *Oakland Cannabis Buyers* Court did affirm continued Federal jurisdiction over drug violators covered by the law without regard to the state's marijuana exception.

More recently, the Supreme Court seized the opportunity to refine and clarify the reach of its holding in *Oakland Cannabis Buyers, supra*. In *Raich v. Gonzales*, 545

U.S. 1, 8-14 (2005), the Court addressed the claims of two state residents who suffered from a variety of serious medical conditions and has sought to avail themselves of medical marijuana pursuant to the terms of the state's Compassionate Use Act. Notwithstanding that county investigating officials had found that one respondent's medical use of marijuana was entirely lawful, federal agents seized and destroyed all six of her cannabis plants.

In *Raich v. Gonzales, supra*, the Supreme Court held that the regulation of marijuana under the CSA was fully within Congress' commerce power (U.S. Const., art. I, ¶ 8), because marijuana production intended for home production could have a substantial effect on supply and demand in the national market. The *Raich* Court reasoned that federal failure to regulate the intrastate manufacturing and possession of marijuana would leave a considerable gap in the CSA. In turn, the Court vacated the Ninth Circuit's judgment.

So, even if Applicant's current roommate had a state-approved permit to use marijuana for medicinal purposes, his permit would not foreclose the Federal Government from prosecuting illegal possession charges under the CSA. His friend, as such, has no exemption from federal drug possession charges, just because he had a marijuana use exception from the state.

To the extent Applicant's submission is intended only to validate medicinal marijuana use of excepted quantities under the state's Compassionate Use Act, his state's medically-based marijuana exception retains some relevance to his claims that he no longer associates with persons who use marijuana illegally under state law. It has no relevance, though, to federally-based marijuana possession violations. Applicant's e-mail submission is accepted for the limited purpose of establishing a state-based marijuana exception, and is admitted as exhibit C.

Applicant's other post-hearing submission consisted of e-mails covering his stated intention to vacate his current residence and move into an apartment with his girlfriend, with the stated hope of demonstrating he will no longer be associating with drug-using associates and contacts. He qualified his intentions with an updated e-mail that provided an August 1 target date for vacating his current residence. Department Counsel did not object to Applicant's submissions, but noted that he was still residing with the same roommate as of the date of closing of the record. Applicant's e-mailed submissions will be included as Applicant's exhibit D.

Summary of Pleadings

Under Guideline H, the SOR alleges Applicant (a) used marijuana with varying frequency from 1999 to at least July 2008 and (b) continued to use marijuana after he had completed a security clearance application (SF-86) in May 2008.

Under Guideline E, the SOR alleges that Applicant's continued use of marijuana after he completed his security clearance application constituted conduct involving

questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations that can raise questions about an individual's reliability, trustworthiness and ability to protect classified information.

For his answer to the SOR, Applicant admitted he used marijuana, with varying frequency, from about 1999 to at least July 2008, but confined his marijuana use to occasional social situations with friends. He admitted, too, continuing his use of marijuana after he completed his security clearance application, but ceased using the substance after being advised by an interviewing investigator in June 2008 that his continued use could endanger his getting a security clearance. Applicant claimed he does not intend to abuse any drugs in the future, including marijuana, and agreed to an automatic revocation of his clearance for any violation.

Findings of Fact

Applicant is a 27-year-old software developer for a defense contractor who seeks to retain his security clearance. The allegations covered in the SOR and admitted by Applicant are incorporated herein and adopted as relevant and material findings. Additional findings follow.

Applicant is single and has no children. He attended an accredited university between 2001 and 2005 and was awarded a bachelor of science degree in computer science in June 2005 (see ex. 1). Following his graduation, he worked as a consultant for two years for an accredited public accounting firm (Tr., at 38).

Applicant was introduced to marijuana in high school. Between 1999 and 2001, he smoked the substance (mainly with a pipe) three to five times a month in social situations (see ex. 2; Tr., at 26, 31). In college, he used marijuana five to 10 times (Tr., at 41-43), but abstained from using the substance during his two-year employment term with his consulting firm.

Applicant left his consulting firm on good terms in June 2007 to join several friends on an Appalachian Trail hiking journey (Tr., at 40). When hiking on the Trail (between July and December 2007), Applicant and his friends spent their nights in cabins or shelters (Tr., at 34). In the evenings, they often passed marijuana around between themselves. Some of his friends on the Trail smoked marijuana on a regular basis (*i.e.*, daily)(Tr., at 34, 43). Applicant, though, generally resisted marijuana offers from his Trail friends. He estimates to have used the substance between 10 and 15 times in all during his six months on the Trail (Tr., at 26, 34, 37). He attributes his limited use to peer pressure (Tr., at 34).

After completing his Appalachian Trail adventure, Applicant maintained intermittent contact with his Trail friends. He continued to maintain his contacts after his relocation to his current state of residence in January 2008 (Tr., at 28). He assures he has had no personal contact with these friends since his relocation (R.T., at 45).

Between January and July of 2008, Applicant used marijuana two to three times in social situations with his housemates (Tr., at 26). Applicant generally refused any marijuana at these parties (Tr., at 28-31).

In the security clearance application (e-QIP) he completed in May 2008, Applicant estimated that he used marijuana between 20 and 30 times between 1999 and March 2008 (see ex. 1). When asked about his marijuana use in a follow-up interview with an investigator from the Office of Personal Management (OPM) in July 2008, he told the investigator that “[a]s of this date, he was still using marijuana “ (ex. 2). When informed of the seriousness of his “habit,” he told the investigator “he needed his job and as of right now he will stop using marijuana” (ex. 2). At hearing, he reaffirmed his e-QIP estimates and his last use of the drug in July 2008, citing the importance of his job and the relationship he has since established with his girlfriend (Tr., at 26). Applicant assured that he never purchased marijuana or owned any drug paraphernalia. His estimates are not challenged and are accepted.

In the household that Applicant shared with roommates over the past year, Applicant indicated that one of the roommates used marijuana for pain relief (Tr., at 45-46). This roommate kept his marijuana in his own room and did not use it in Applicant’s presence (Tr., at 46). Applicant did not say whether he had ever seen proof of his roommate’s having a state-approved medical exception. Applicant’s understanding of the roommate’s having authorization from state authorities to use marijuana is not challenged, though, and his good-faith understanding of his roommate’s marijuana claims are worthy of acceptance (Tr., at 36, 46).

Applicant’s girlfriend and her parents have all expressed disappointment with his using marijuana in the past and with his sharing an apartment with an individual who uses marijuana, even for legal medicinal purposes (see ex. D). While Applicant maintained that marijuana use for certified medicinal purposes is legal in his state, he assured in his post-hearing submission that he will be vacating his apartment (effective August 1, 2009), and moving in with his girlfriend (ex. D).

Marijuana, according to study by the U.S. Drug Enforcement Administration (DEA), can have adverse short-term effects on body functioning and, if smoked regularly, can cause lasting damage to the user’s short-term memory. Marijuana distribution is widespread in the U.S., according to the DEA Study, and is mainly controlled by criminal groups in Mexico and Asia. The DEA mainly targets criminals engaged in cultivation and trafficking of marijuana (see *id.*).

Applicant is well regarded by longstanding friends who wrote on his behalf (see ex. B). They uniformly characterize Applicant as reliable and trustworthy and unlikely to abuse illegal drugs in the future (see ex. B). Applicant’s current girlfriend is deeply impressed with his honesty and trustworthiness (ex. B). Early in their relationship, he told her about his infrequent past use of marijuana in high school, on his Appalachian Trail hiking journey, and at a few parties in his current residence state (ex. B; Tr., at 35). While she does not approve of such conduct, she attests to her certainty that he has not

used marijuana since they began dating in October 2008, or even entertained the idea of smoking the substance. Her statements corroborate Applicant's assurances, and are not contradicted by any evidence in the record. Her statements are credible and are accepted.

Policies

The revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (effective September 2006) list Guidelines to be considered by judges in the decision-making process covering DOHA cases. These Guidelines require the judge to consider all of the "[c]onditions that could raise a security concern and may be disqualifying" (Disqualifying Conditions), if any, and all of the "Mitigating Conditions," if any, before deciding whether or not a security clearance should be granted, continued or denied. The Guidelines do not require the judge to assess these factors exclusively in arriving at a decision. In addition to the relevant Adjudicative Guidelines, judges must take into account the pertinent considerations for assessing extenuation and mitigation set forth in E2.2 of the Adjudicative Process of Enclosure 2 of the Directive, which are intended to assist the judges in reaching a fair and impartial common sense decision.

Viewing the issues raised and evidence as a whole, the following adjudication policy factors are pertinent herein:

Drug Involvement

The Concern: 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. AG ¶ 24.

Personal Conduct

The Concern: Conduct involving questionable judgment, untrustworthiness, unreliability, 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 other failure to cooperate with the security clearance process. AG, ¶ 15.

Burden of Proof

By virtue of the precepts framed by the revised Adjudicative Guidelines, a decision to grant or continue an applicant's security clearance may be made only upon a threshold finding that to do so is clearly consistent with the national interest. Because the Directive requires administrative judges to make a commonsense appraisal of the

evidence accumulated in the record, the ultimate determination of an applicant's eligibility for a security clearance depends, in large part, on the relevance and materiality of that evidence. As with all adversary proceedings, the judge may draw only those inferences which have a reasonable and logical basis from the evidence of record. Conversely, the judge cannot draw factual inferences that are grounded on speculation or conjecture.

The Government's initial burden is twofold: (1) It must prove any controverted fact[s] alleged in the Statement of Reasons; and (2) it must demonstrate that the facts proven have a material bearing to the applicant's eligibility to obtain or maintain a security clearance. The required showing of material bearing, however, does not require the Government to affirmatively demonstrate that the applicant has actually mishandled or abused classified information before it can deny or revoke a security clearance. Rather, consideration must take account of cognizable risks that an applicant may deliberately or inadvertently fail to safeguard classified information.

Once the Government meets its initial burden of proof of establishing admitted or controverted facts, the burden of persuasion shifts to the applicant for the purpose of establishing his or her security worthiness through evidence of refutation, extenuation, or mitigation of the Government's case. Because Executive Order 10865 requires that all security clearances be clearly consistent with the national interest, "security-clearance determinations should err, if they must, on the side of denials." See *Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988).

Analysis

Over a nine-year period (between 1999 and at least June 2008), Applicant used marijuana intermittently in social situations (between 20 and 30 times altogether) with friends before permanently discontinuing his use in July 2008. His admissions to using marijuana after applying for a security clearance do raise initial security concerns over risks of recurrence, as well as judgment issues. On the strength of the evidence presented, several disqualifying conditions of the Adjudicative Guidelines for drug abuse are applicable: DC ¶ 25(a), "any drug abuse," DC ¶ 25(c), "illegal possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia," and DC ¶ 25(h), "expressed intent to continue illegal drug use, or failure to clearly and convincingly commit to discontinue drug use."

Judgment concerns exist over Applicant's continued drug use after applying for a security clearance in March 2007. These actions reflect both judgment lapses and disregard of the DoD's rules and policies for clearance holders. Applicant's actions are expressly covered by Guideline E, and are entitled to independent cognizance under this Guideline according to the Appeal Board. See ISCR Case No. 06-20964, at 6 (App. Bd. April 10, 2008). Where (as here) there is additional probative adverse information covered by Guideline E that is not covered by Guideline H, and *vice versa*, and which reflects a recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior, independent grounds do exist for considering questionable judgment and trustworthiness allegations under Guideline E as well as Guideline H. Authority for

considering overlapping conduct under both guidelines is contained in the guidance provided in Enclosure 2, ¶ 2(d) of the Directive's August 2006 amendments.

So, under Guideline E, core judgment and trustworthiness concerns covered by D.C. ¶ 16(d), "credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information," have some applicability to this case.

Applicant has made some noticeable gains in his efforts to mitigate his past marijuana use. While Applicant's acknowledged marijuana use covered a considerable period (almost nine years), his use was never frequent, and it was generally limited to social situations after high school. MC ¶ 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," is disjunctive and can be applied to Applicant's situation. Applicant's demonstrated intent not to abuse drugs in the future has some application as well. Available considerations under ¶ 26(b) include "(3) an appropriate period of abstinence," and "(4) a signed statement of intent with automatic revocation of clearance for any violation."

Because of Applicant's current living situation (which includes a roommate who uses marijuana for claimed medicinal purposes), MC ¶ 26(b)(1), "disassociation from drug-using associates and contacts," and MC ¶ 26(b)(2), "changing or avoiding the environment where drugs were used," have only limited application. In fairness to Applicant, he has exhibited open candor about his past marijuana use and his associations with persons who have used the substance. His girlfriend, who has maintained a close relationship with him for the past year, assures he has never used marijuana in her presence, or anywhere else that she knows of. She earnestly corroborates his expressed intentions never to use marijuana again, and is apparently willing to partner his vacating his apartment and moving in with her (effective August 1, 2009).

Applicant's commitments to breaking all ties and connections with friends and associates who use or are in any way involved with marijuana are encouraging. These additional assurances and expressed changes in Applicant's living situation and lifestyle enable him to take partial advantage of MC ¶ 26(b)(1) and (b)(2).

Still, with the closing of the record, Applicant continues to reside in a residence where one of his roommates uses marijuana for claimed medicinal purposes. Having a state-approved medicinal exception would not absolve the roommate of exposure to the potential of federal prosecution (as unlikely as this might be). Whether this roommate even has a certified medical need for the drug, or has inflated his reasons for his using marijuana to allay any Applicant concerns, is less than clear. And, more importantly, his

roommate's having a marijuana use exception would not reduce the seductive risk that stored marijuana in such close proximity might pose for Applicant.

So, while Applicant's assurances that he has no intention of ever resuming his use of marijuana, or any illegal substance, in the future, are entitled to considerable weight, they cannot be totally separated from the recurrence risks that face Applicant for so long as he continues to occupy his current residence. Changing his home environment is vital to safely managing his recurrence risks. Applicant's living in the same apartment unit in close proximity to the drug's sponsor only prolongs his exposure to recurrence.

Furthermore, medicinal use of marijuana that might be legal under the laws of Applicant's state is not immune to federal prosecution for violation of the CSA under the federal government's concurrent jurisdiction over manufacturing, distributing, and possessing illegal drugs. By his continued residing in a residence where marijuana is used, he remains privy to potential violations of the CSA.

For his candid acknowledgment of his current roommate's use of marijuana for pain relief and his ensuing commitment to move in with his girlfriend (effective August 1, 2009), Applicant is entitled to take some advantage of MC ¶ 17(g), "association with persons involved in criminal activity has ceased or occurs under circumstances that do not cast doubt upon the individual's reliability, trustworthiness, judgment, or willingness to comply with rules and regulations," and MC ¶ 17(d), "the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur," of the mitigating conditions in the personal conduct guideline.

Because of the recency of Applicant's discontinued use of marijuana (less than a year) and his continued association with a person who uses marijuana (albeit for claimed medicinal purposes), it is still too soon to conclude that Applicant's marijuana use and judgment lapses associated with his continued use of the drug after he applied for a security clearance are fully mitigated. More seasoning is necessary before safe predictive judgments can be made that Applicant will not resume his use of marijuana.

From the whole person perspective, Applicant has established independent probative evidence of his overall honesty, trustworthiness, and understanding of DoD policy constraints on the use of illegal substances. His positive endorsements from his colleagues and girlfriend who are familiar with his past marijuana involvement reinforce his discontinuance assurances. Still of some concern, though, are Applicant's continued use of marijuana after completing his e-QIP, his expression of surprise when advised of the seriousness of his continuing use by the OPM agent who interviewed him, and the implicit opening he left to resuming his use of marijuana should it not longer be an impediment to his job. In the context they were made, Applicant's extemporaneous statements, while sincere, do raise questions about his motivating reasons for his willingness to abruptly cease his marijuana use. For example, was his decision the

result of a mature reassessment of his need for marijuana in his life, or was it based on his prioritizing of the importance of his job that requires a security clearance? Because motivation is never easy to objectively establish, the placement of reasonable time lines on clearance applicants to test and absolve them of recurrence risks makes safe and practical sense when balancing the interests of protecting national security with the interests of those who seek access to the nation's secrets.

Considering the record on a whole, at this time there is too little seasoning of Applicant's mitigation efforts to avert foreseeable risks of recurrent marijuana use. While he is to be commended on his decision to discontinue marijuana usage, it is still too early to make safe predictions about his ability to sustain his abstinence, Taking into account all of the facts and circumstances surrounding Applicant's drug use and judgment lapses, Applicant fails to mitigate security concerns related to his drug use and personal conduct issues. Unfavorable conclusions warrant with respect to the allegations covered by Guidelines H and E.

In reaching my decision, I have considered the evidence as a whole, including each of the E2(a) factors enumerated in the Adjudicative Guidelines of the Directive.

Formal Findings

In reviewing the allegations of the SOR and ensuing conclusions reached in the context of the findings of fact, conclusions, conditions, and the factors listed above, I make the following formal findings:

GUIDELINE H: (DRUG INVOLVEMENT): AGAINST APPLICANT

Subparas. 1.a and 1.b: Against Applicant

GUIDELINE E: (PERSONAL CONDUCT): AGAINST APPLICANT

Subpara. 2.a: Against Applicant

Conclusions

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 Applicant's security clearance. Clearance is denied.

Roger C. Wesley
Administrative Judge

