



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



In the matter of:)	
)	
)	ISCR Case No. 08-10844
SSN:)	
)	
Applicant for Security Clearance)	

Appearances

For Government: James F. Duffy, Esquire, Department Counsel
For Applicant: *Pro Se*

June 24, 2009

Remand Decision

LAZZARO, Henry, Administrative Judge

Applicant used marijuana from January 2002 until November 26, 2008. He was charged with possession of marijuana on August 8, 2008. He was convicted of that offense in or about October 2008, and placed on six months unsupervised probation. Applicant failed to mitigate the security concerns created by his abuse of marijuana. Clearance is denied.

On February 19, 2009, 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 Guidelines H (drug involvement) and J (criminal conduct). Applicant submitted a response to the SOR, dated March 4, 2009, in which he admitted all SOR allegations and requested a decision based on the written record without a hearing.

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.

Department Counsel prepared a File of Relevant Material (FORM) on April 28, 2009, that was mailed to Applicant the same day. Applicant was notified he had 30 days from receipt of the FORM to submit objections thereto or any additional information he wanted considered. Applicant acknowledged receipt of the FORM on May 11, 2009. He did not object to anything contained in the FORM or submit any additional information for consideration. The case was assigned to me on June 17, 2009.

Findings of Fact

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

Applicant is a 25-year-old single man who has been employed as a digital design engineer by a defense contractor since July 2008. He graduated from high school and a community college in June 2002.² He received a bachelor of arts degree in physics and a bachelor of science degree in electrical engineering in June 2006. He is currently working toward a master of science degree in electrical and computer engineering. He worked as a salesman from June 2006 until August 2006, as a design engineer from September 2006 until July 2008, and as a tutor from May 2008 until July 2008. He was unemployed from August 2006 until September 2006. He held a variety of jobs while he attended college.

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on July 14, 2008. In response to a question asking if he had illegally used a controlled substance in the preceding seven years, Applicant admitted he used marijuana an undisclosed number of times between January 2002 and July 2008. He elaborated by stating:

I recreationally smoked marijuana while in college, but when my course work became more intense and when my occupations became more professional my recreational activities went to the wayside. I currently smoke marijuana as infrequently as 1 to 3 times a year when I am on vacation. Coincidentally my last time I smoked marijuana was inbetween [sic] jobs when I was celebrating the 4th of July with my friends. . . .

On December 16, 2008, in response to interrogatories propounded to him by DOHA, Applicant acknowledged he last used of marijuana on November 26, 2008. He also asserted he decided after that last use that he would not again use marijuana because of the recent trouble it had caused him and because he feared he would lose the opportunities presented to him by his current employment.

Applicant now works in a different state from where most of his marijuana use occurred. His current work and social lifestyle leave him neither the time nor desire to smoke marijuana. However, in his response to the DOHA interrogatories, Applicant acknowledged that five to six times a year he returns to the state where he formerly resided and visits with a couple of friends who continue to use marijuana.

² Under a state program, Applicant was permitted to attend the junior college while still in high school.

Applicant was charged with possession of marijuana on August 8, 2008. He was convicted of that offense in or about October 2008.³ Applicant was sentenced to serve six months unsupervised probation, fined \$512.50, ordered to perform 25 hours community service, and required to obtain a drug evaluation. He successfully completed these conditions of probation. On November 4, 2008, Applicant obtained the court-ordered drug evaluation. The person conducting the evaluation concluded Applicant did not require treatment. Applicant was ordered to not consume alcohol or drugs while on probation. He violated this condition of probation when he smoked marijuana on November 26, 2008.

In his response to the FORM, Applicant wrote:

I believe that guidelines J and H are the same. I agree with them that illegal drug use reflects that one wouldn't be willing to comply with laws . . . but I disagree with it on its poor reflection on a persons reliability and trustworthiness. I am a very reliable and trustworthy person, I just make mistakes.

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. Guidelines H (drug involvement) and J (criminal 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

³ The date entered on the sentencing document included as part of FORM Item 6 is illegible. However, the dates on other documents in the FORM pertaining to the conviction indicate it occurred in October 2008, or earlier.

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).

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

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 illegally used marijuana an undisclosed number of times between January 2002 and November 26, 2008. As of July 14, 2008, he admitted using it about one to three times a year while he was on vacation. He was convicted of possession of marijuana and placed on six months probation in or before October 2008. He obtained a drug evaluation on November 4, 2008. His last reported use of marijuana occurred after he submitted his e-QIP, while he was on probation and after he obtained the drug evaluation. Disqualifying Condition (DC) 25(a): *any drug abuse* applies.

Applicant last used marijuana less than seven months ago. On December 16, 2008, he averred he will not use marijuana again because of the trouble it has recently caused him and because of the risk it poses to opportunities that may arise from his current employment. However, his use of marijuana after he submitted his e-QIP, while he was on probation and after he obtained the drug evaluation indicate a very recent history of ignoring the potential consequences of the illegal use of marijuana. While Applicant’s work and lifestyle have recently changed, he still, on occasion, visits with friends who continue to abuse marijuana. Having considered all potential mitigating conditions, I conclude that the above factors preclude finding that any mitigating condition applies.

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.

Guideline J, Criminal Conduct

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 used marijuana from January 2002 until November 26, 2008. He was convicted of possession of marijuana and placed on six months probation in or before October 2008. His use of marijuana on November 26, 2008, was in violation of a term of his probation. DC 31(a): *a single serious crime or multiple lesser offenses*; 31(c): *allegation or admission of criminal conduct, regardless of whether the person was formally charged, formally prosecuted or convicted*; and 31(e): *violation of parole or probation*. . . apply.

Applicant abused marijuana for over seven years and as recently as less than seven months ago. Although he has asserted he will never use marijuana again, he still, at least on occasion, associates with friends who abuse marijuana. His recent history of drug abuse and the circumstances under which the most recent use occurred, as described above, preclude application of any mitigating condition.

I have considered all relevant and material facts and circumstances present in this case, including Applicant's age, his educational and work history, the period of time that has elapsed since his last reported use of marijuana, 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 failed to mitigate the security concerns caused by his abuse of a controlled substance and the criminal conduct issues that arise therefrom. He has not overcome the case against him nor satisfied his ultimate burden of persuasion. 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 - d:	Against Applicant
Paragraph 2, Guideline J:	AGAINST APPLICANT
Subparagraphs 2.a - c:	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

