



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



In the matter of:)
)
) ISCR Case No. 14-03153
)
Applicant for Security Clearance)

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

04/06/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant's history of drug-related criminal conduct, in particular, his use of marijuana after he started working for his employer and after he submitted his most recent security clearance application, continues to raise security concerns. Moreover, he intentionally made a false statement to a government investigator about his drug use. His lack of honesty, judgment, and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 2, 2012. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) and Guideline E (personal conduct) on August 8, 2014.¹ Applicant answered the SOR on August 18, 2014, and requested a hearing before an administrative judge. The case was assigned to another

¹ The DOD acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive) (January 2, 1992), as amended; and the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

administrative judge on December 1, 2014, and reassigned to me on January 7, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on January 7, 2015, scheduling a hearing for January 12, 2015.

At the hearing, the Government offered three exhibits (GE 1 - 3). GEs 1 and 2 were admitted without objection. GE 3 was marked and made part of the record, but it was not admitted into evidence. Applicant testified and submitted no exhibits. DOHA received the hearing transcript (Tr.) on January 21, 2015.

Procedural Issues

The Government moved to amend SOR ¶ 2.a, by deleting from lines 14 and 15 of the allegation the words: “answered “NO;” whereas in truth, you.” Applicant did not object, and I granted the amendment as requested. (Tr. 11-13)

Applicant had less than 15 days advance notice of the day of the hearing. At the hearing, he stated that he had sufficient time to prepare and was ready to proceed. Applicant affirmatively waived his right to 15-day advanced notice of the hearing. (Tr. 14)

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a, 1.b, and 2.b. He denied SOR ¶ 2.a, with an explanation. His admissions are incorporated as findings of fact. After a thorough review of the evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 28-year-old employee of a defense contractor. He received a bachelor's degree in 2009, and completed a master's degree in business administration in 2010. He has never been married and has no children. After completing his master's degree, Applicant worked for a commercial bank from June 2010 to February 2012. Applicant was hired by his current employer, a government contractor, in February 2012. When he was inprocessing with both employers, he was advised of his employers' policies against the use of illegal drugs by their employees, and he was required to take a test for the presence of drugs.

Applicant disclosed in his May 2012 SCA that he had illegally used marijuana between November 2005 and December 2011. Concerning the frequency of his use, he stated: “Rare frequency in the most recent years and more heavier use in the freshman and sophomore years of college.” He further indicated that he did not intend to use marijuana in the future because: “It is illegal and it makes me an insomniac.”

In October 2012, Applicant was questioned by a government investigator concerning his illegal drug use. Applicant told the investigator that he used marijuana on an average of once a week from November 2005 until around 2007. His use increased to three times per week from around 2007 to 2008, and it diminished to once per week

from 2008 until December 2011. He consumed approximately 1-2 grams of marijuana every time he used it. He used marijuana with his roommate and friends to relax and have fun. The marijuana was provided to him by an acquaintance that he refused to disclose.

Applicant explained that in December 2011, he went home and visited with his friends, and they smoked marijuana together. He claimed this was the last time he smoked marijuana. Applicant also disclosed to the investigator that he used prescription medications (pain pills or muscle relaxants) one or two times between 2008 and 2009, without a prescription. He illegally used the prescription medication to relax and have fun with his friends. The medication was provided to him by a friend whose name he did not recall. (GE 2)

Applicant illegally used marijuana in July 2012. He disclosed his July 2012 use of marijuana in his May 2014 response to interrogatories. (GE 2) Applicant knowingly made a false statement to a government investigator during his October 2012 interview by failing to disclose his July 2012 marijuana use and stated that his last marijuana use was in December 2011.

Applicant's hearing statements concerning the frequency of his use of marijuana are somewhat inconsistent with the statement he provided to a government investigator in October 2012. Concerning his July 2012 use of marijuana, Applicant testified that he was vacationing with a friend, consumed alcohol, and had a lapse of judgment. When asked whether he used marijuana between December 2011 and July 2012, Applicant testified that he wanted to say no, but that he did not remember. (Tr. 31) He claimed he stopped using marijuana in December 2011, because marijuana made him feel paranoid, nauseous, he could not sleep at night, and he no longer liked the way it made him feel. He averred he has not used marijuana since July 2012, and he does not intend to use marijuana ever again. Applicant continues to associate with his marijuana-using friends a few times a year. One of his friends still uses marijuana in Applicant's presence. (Tr. 34)

At his hearing, Applicant testified that he started to use marijuana during his freshman or sophomore year of high school, around 2001-2002. He estimated he used marijuana approximately five or ten times a year, at the most. He explained that he really did not remember how frequently he used marijuana, but that it was not that often. His marijuana use continued while Applicant was in college and while pursuing his master's degree. His use of marijuana increased during his sophomore year in college (2006-2007) when he used marijuana a few times a week. Applicant claimed his use of marijuana tapered off during his junior and senior college years, and while in the master's program. He estimated his use decreased to maybe once a month or maybe once every other month.

Policies

Eligibility for access to classified information may be granted “only upon a finding that it is clearly consistent with the national interest to do so.” Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. The U.S. Supreme Court has recognized the substantial discretion of the Executive Branch in regulating access to information pertaining to national security, emphasizing that “no one has a ‘right’ to a security clearance.” *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).

The AG list disqualifying and mitigating conditions for evaluating a person’s suitability for access to classified information. Any one disqualifying or mitigating condition is not, by itself, conclusive. However, the AG should be followed where a case can be measured against them, as they represent policy guidance governing access to classified information. Each decision must reflect a fair, impartial, and commonsense consideration of the whole person and the factors listed in AG ¶ 2(a). All available, reliable information about the person, past and present, favorable and unfavorable, must be considered.

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 substantial evidence, controverted facts alleged in the SOR. If it does, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. The applicant bears the heavy burden of demonstrating that it is clearly consistent with the national interest to grant or continue his or her security clearance.

Persons with access to classified information enter into a fiduciary relationship with the Government based on trust and confidence. Thus, the Government has a compelling interest in ensuring each applicant possesses the requisite judgment, reliability, and trustworthiness of those who must protect national interest 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. “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; AG ¶ 2(b). Clearance decisions are not a determination of the loyalty of the applicant concerned. They are merely an indication that the applicant has or has not met the strict guidelines the Government has established for issuing a clearance.

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern for 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.

Between 2001 and July 2012, Applicant illegally used marijuana with varying frequency. He also illegally used prescription medications twice between 2008 and 2009. He used drugs knowing it was illegal. He used marijuana after he was hired by his two most recent employers, knowing his employers had a policy against it. His last use of marijuana was two months after he submitted the pending May 2012 SCA.

AG ¶ 25 describes conditions related to drug involvement that could raise a security concern and are applicable in this case:

- (a) any drug abuse; and
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

AG ¶ 26 provides two potentially applicable drug involvement mitigating conditions:

- (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; and
- (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.

I find that none of the Guideline H mitigating conditions fully apply. Applicant's most recent marijuana use occurred in July 2012. As such, his illegal drug-related behavior could be considered not recent. However, Applicant illegally used marijuana after he started working for two employers with policies against illegal drug use, and he had full knowledge of those policies. He illegally used marijuana during a period of 11 years with varying frequency. He used marijuana and prescription medication to have fun with his friends and to relax. Applicant continues to associate with his illegal drug-using friends. He failed to establish that his questionable criminal behavior is unlikely to recur.

I considered Applicant's age and maturity at the time of the offenses. I also considered his claim that he has not used any illegal drugs since July 2012. On balance, and given his inconsistent statements about his drug use, I find that not enough time has transpired since Applicant's last use of marijuana to fully establish Applicant's rehabilitation and that his illegal drug use is not likely to recur. At this time, his illegal drug use continues to cast doubt on his current reliability, trustworthiness, judgment, and his ability to comply with the law, rules and regulations.

Applicant promised to never use illegal drugs in the future. Applicant was aware of the criminal prohibition against the illegal use of drugs, and of the adverse consequences to his ability to hold his job if he illegally used drugs. That did not stop him from using marijuana after he submitted his May 2012 SCA.

Guideline E, Personal Conduct

AG ¶ 15 articulates the security concern about personal conduct:

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 other failure to cooperate with the security clearance process.

SOR ¶ 2.a alleged that Applicant falsified his May 2012 SCA when he disclosed his history of marijuana use, but failed to disclose that between 2008 and 2009, he twice used prescription medications without a prescription. I note that Applicant disclosed his illegal use of prescription medications when he was interviewed by a government investigator in October 2012. Considering the record as a whole, I find that the evidence is insufficient to show that Applicant's failure to disclose his use of illegal prescription medications was made with the intent to mislead the Government or to provide false information.

Applicant did make a false statement to a government investigator when he told the investigator that his last use of marijuana was in December 2011, when in fact, he had illegally used marijuana in July 2012.

Applicant's October 2012 false statement triggers the applicability the following disqualifying conditions under AG ¶ 16:

(b) deliberately providing false or misleading information concerning relevant facts to an employer, investigator, security official, competent medical authority, or other official government representative.

AG ¶ 17 lists six conditions that could potentially mitigate the personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(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;

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and

(f) the information was unsubstantiated or from a source of questionable reliability.

I find that none of the above mitigating conditions fully apply. AG ¶ 17(a) does not apply because Applicant did not make a prompt, good-faith effort to correct the falsification. It was not until May 2014, that he disclosed he used marijuana in July 2012.

Applicant's drug-related behavior also constituted criminal behavior. His marijuana use was frequent, and it extended from 2001 until July 2012. Appellant's evidence failed to establish that his illegal drug use occurred under unique circumstances and is unlikely to recur. On the contrary, it appears that it regularly occurred as part of Applicant's relaxing and fun lifestyle. Moreover, Applicant continues to associate with his illegal drug-using friends. Applicant's false statement and his illegal drug use cast doubt on his current reliability, trustworthiness, and judgment.

Whole-Person Concept

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case, and under the whole-person concept. AG ¶ 2(c).

Applicant is a 28-year-old employee of a government contractor. His history of drug-related criminal conduct, in particular his use of marijuana after he was hired by his employer, and two months after he submitted his 2012 SCA, continues to raise security concerns. Moreover, he made a false statement to a government investigator. Considering the evidence as a whole, Applicant's lack of judgment and unwillingness to comply with the law raise questions about his reliability, trustworthiness, and ability to protect classified information.

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 - 1.b:	Against Applicant
Paragraph 2, Guideline E:	Against APPLICANT
Subparagraph 2.a:	For Applicant
Subparagraph 2.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 eligibility for a security clearance to Applicant. Clearance denied.

JUAN J. RIVERA
Administrative Judge