



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



In the matter of:)
)
) ISCR Case No. 17-03746
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esq., Department Counsel
For Applicant: Jeffrey D. Billett, Esq.

03/15/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally possessed and used marijuana between 2002 and February 2017. He used marijuana after submitting an application for a position of trust in 2013, serving in positions of trust in 2013 and 2015, participating in a drug screening test while in-processing for a position of trust in 2015, and after he was warned by a relative about the possible consequences of his illegal marijuana use. The passage of time so far is insufficient to demonstrate his reliability, trustworthiness, ability to comply with the law, rules and regulations, and his ability to protect classified information. Drug involvement and substance misuse security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 3, 2017. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) on November 22, 2017. Applicant answered the SOR and requested a decision based on the record in lieu of a hearing on December 15, 2017. After receiving the Government's File of Relevant Material (FORM) with the evidence supporting the security concerns

and the clearance denial, Applicant requested a hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

DOHA assigned the case to me on July 19, 2018. The initial Notice of Hearing (NOH) was issued on November 13, 2018, setting a hearing for December 17, 2018. Applicant was granted a continuance to retain counsel on November 30, 2018, and the hearing was rescheduled for January 29, 2019. At the hearing, the Government offered two exhibits (GE 1 and 2). Applicant objected to the admissibility of GE 2 (two unauthenticated summaries of Applicant's interviews conducted by background investigators) pursuant to Section 5 of the Directive. The Government withdrew GE 2, and the document was made part of the record, but it was not considered as evidence. Applicant testified and submitted six exhibits. (AE 1 through 6) All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on February 7, 2019.

Findings of Fact

In his Answer to the SOR, Applicant admitted the substance of the sole Guideline H allegation – that he illegally used marijuana between June 2002 and February 2017. In his Answer, he disputed the frequency of his use, the period during which he used it most frequently, and his recent diminishing use of marijuana. His admissions in his Answer to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, Applicant's demeanor while testifying, and his testimony, I make the following additional findings of fact:

Applicant is a 34-year-old employee of a federal contractor. He graduated from high school in 2003, earned a bachelor's degree in 2007, and completed a master's degree in 2014. He married in 2012, and has two sons, born in 2016, and 2017. This is his first application for a clearance, but he had previously applied for and was granted eligibility for a position of trust in 2013.

Applicant started illegally using marijuana during his last year of high school (2002). He continued using marijuana while in college, and after graduate school. He testified that his use was with a close group of friends at intimate party gatherings. (Tr. 40) He averred that he never sought out marijuana, never purchased it, and that he no longer socializes with his marijuana-using friends. He estimated he used marijuana a couple of times a year. (Tr. 42) Applicant testified he tapered off his illegal use of marijuana around early 2009, when he was offered a job. He continued to use marijuana, but in an annual or semiannual basis.

Applicant used marijuana once or twice a year until about 2016, when he started to cut down on his use. He claimed that he did not use marijuana during the two periods of nine months in 2013 and 2015, when he held positions of trust. A corporation hired Applicant for an internship position while he was a graduate student in about June 2013. He submitted a Questionnaire for Public Trust Positions (SF85P Format) in September 2013. (GE 1) In his response to Section 21 (Illegal Drugs) he denied using any illegal

drugs, including marijuana, during the last year. In his response to Section 23 (Your Use of Illegal Drugs or Drug Activity), Applicant disclosed that: in the last seven years he had illegally used marijuana “a couple of times” and further qualified his use as “a few times while a student in college,” between August 2003 and May 2007.

In August 2015, Applicant, while working for his current employer, was assigned to a position of trust with a federal agency. (Tr. 37) He was required to participate in a drug-screening test when he in-processed for his 2015 position. Applicant claimed that he did not use marijuana while working on the two positions of trust, because he did not want to use it while working in a privileged position, and he had a very busy school schedule, was married, and was working.

After his assignment to the position of trust ended in 2016, Applicant claimed he illegally used marijuana only twice. Once in July 2016 during a summer barbecue party with family and friends, an “old family friend” offered him marijuana and he accepted it. He explained that had had a few beers, was not driving, had no other obligations, felt in control of himself, and took “a hit of the joint.” (Tr. 48)

Applicant claimed that he regretted the incident immediately and began a period of reconsidering his behavior. He averred he did not feel great and the incident provoked him anxiety. His father learned about his illegal use of marijuana and asked him, “Is that really something you want to be doing at this point in your life?” His father suggested Applicant put his priorities in order and advised he did not use marijuana again. (Tr. 80)

In February 2017, Applicant’s soon-to-be brother-in-law was having a three-day bachelor’s party in another state with friends and family. Applicant stated that he was encouraged by his friends to illegally use marijuana and he did. Applicant claimed that he no longer enjoys using marijuana and that he immediately regretted his illegal marijuana use. Applicant claimed he has no knowledge about his brother-in-law using marijuana again since the bachelor’s party.

Applicant’s current employer, a federal contractor, hired him in August 2015. Applicant submitted an Electronic Questionnaire for Investigations Processing (SF86 Format) in March 2017. (SCA, GE 1) In his response to Section 23 (Illegal Use of Drugs or Drug Activity), Applicant described his illegal use of marijuana as “used very sporadically . . . very infrequent use, roughly once a year,” between June 2002 and February 2017. He claimed that he did not intend to use drugs of any sort once granted a security clearance.

Applicant has done well in his analyst position, and was promoted to consultant. He is currently pending further promotion to senior consultant. Both Applicant’s co-worker and his counselor consider him to be honest, reliable, and an invaluable asset to his employer. He continuously receives outstanding feedback from clients, coworkers, and supervisors. He always conducts himself in a professional manner, works well with others, and frequently takes the initiative in complicated issues. Both references believe

Applicant is genuinely embarrassed and remorseful about his past use of drugs. They strongly recommended his eligibility for a clearance. I note that Applicant's counselor did not seem to know the extent of his illegal marijuana use. She referred to his 17-year period of illegal marijuana use as "his mistake two years ago," and "his brief lapse in judgment."

Applicant submitted a statement of intent promising never to use any illegal drugs again, and agreeing to the immediate termination of his clearance for any violation. He stated that in 2016, he started thinking about the choices he was making and before going to the bachelor's party, he had decided to forego marijuana. He explained that the use of marijuana did not represent the person he wants to be or the lifestyle he wants to live. He noted that the demands on his life have increased as he got older. He now has two children, recently purchased a home, and has been promoted to a more demanding position.

Applicant noted that he has been honest and forthcoming during the clearance process, disclosing his marijuana use in the 2013 application for eligibility for a trust position and in his 2017 SCA. Applicant claimed he was not aware whether his employer has a policy against the illegal use of drugs. However, he was aware that possession of marijuana is illegal under federal law. He claimed that the first instance he realized his illegal marijuana use could be a problem for his clearance was when he received the SOR. Applicant loves his work and the career opportunities it provides. He believes that he has been working hard to get to this point in his career. He would like to be trusted with a clearance and to continue his career progression.

Policies

The SOR was issued under Executive Order (Exec. Or.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

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, § 2. 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 SEAD 4, App. A ¶¶ 2(d) and 2(f). 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; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 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

Drug Involvement and Substance Misuse

AG ¶ 24 articulates the security concern for the illegal use of drugs:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802.

Between 2002 and February 2017, Applicant illegally possessed and used marijuana. He illegally possessed and used marijuana after getting married in 2012, after submitting his 2013 application for a public trust position and holding public trust positions in 2013 and 2015, after participating in an unscheduled drug screening test while in-processing for his 2015 public trust position, after the birth of his son in early-2016, and after being counseled by his father about the possible adverse consequences

of his illegal marijuana possession and use in 2016. AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia

The record established the disqualifying conditions under AG ¶¶ 25(a) and (c), requiring additional inquiry about the possible applicability of mitigating conditions under AG ¶ 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; and
- (b) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and
 - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*.

“Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security.” Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

None of the mitigating conditions apply. Applicant has a 17-year history of illegal marijuana use. He started his possession and use of marijuana during high school (2002), and he continued using marijuana until February 2017. His marijuana use was recent, frequent, and did not occur under circumstances making recurrence unlikely. He knew that the possession of marijuana was illegal. Moreover, considering his education and job experience, he knew the illegal use of drugs was a concern for the Federal government because he was asked about it in his 2013 SF85P, and he was required to participate in a drug-screening test while in-processing for a position of trust in 2015. Notwithstanding, he continued his illegal marijuana use until February 2017.

Applicant’s illegal use of marijuana after submitting an application for a position of trust and knowing about the concerns raised by it cast doubts on his current reliability, trustworthiness, good judgment, ability or willingness to comply with laws, rules, and regulations, and suitability to hold a clearance.

I considered that Applicant self-reported his past illegal marijuana possession and use in his 2013 application for a position of trust and in his 2017 SCA. I also considered that he promised in his SCA and at his hearing to stop using marijuana in the future. I consider Applicant’s promises to be lacking weight and credibility. Applicant knew the possession of marijuana is illegal under Federal law. He became aware of the security concerns it raised when he submitted his 2013 position of trust application, when he participated in a drug screening test in 2015, and when he was counseled by his father about the possible consequences of his marijuana use in 2016. Notwithstanding, he was not dissuaded from using marijuana until at least in February 2017.

The DOHA Appeals Board has noted that “Drug involvement after having completed an SCA draws into serious questions the applicant’s judgment, reliability, and willingness to follow rules and regulations, insofar as it placed the applicant on notice of the consequences of such misconduct.” ISCR Case No. 16-02877, at 3 (App. Bd. Oct. 2, 2017).

Applicant provided a signed statement of intent to abstain from further illegal drug involvement. However, applicants who begin to address their security-significant conduct only when their personal interests are at stake may be lacking in judgment and reliability. See ISCR Case No. 16-01221 (App. Bd. May 30, 2018). His evidence is insufficient to show that he no longer associates with illegal marijuana users. In 2016, he associated with a college friend and family members during a barbecue and used marijuana in their presence. In 2017, he used marijuana with his now brother-in-law, family, and friends at a bachelor’s party. More mitigating evidence and additional time

without recurrence of substance misuse is needed for Applicant to establish his reliability, trustworthiness, his ability to comply with laws rules and regulations, and his suitability for a clearance.

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. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guideline H in my whole-person analysis and applied the adjudicative factors in AG ¶ 2(d). Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant, 34, has been employed with a federal contractor for about four years. His good performance has been noted. He is a successful and valuable employee and has been promoted accordingly. He disclosed his substance misuse in his 2013 application for a position of trust and in his 2017 SCA. He stated his intent to abstain from further illegal drug involvement.

The factors against granting a clearance are more substantial. Applicant's lack of judgment and his unwillingness to comply with the law, rules, and regulations continue to raise questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. His lack of judgment is demonstrated by his continued use of marijuana after submitting his 2013 application for a position of trust, working on two position of trust in 2013 and 2015, participating in a drug screening test while in-processing for a position of trust in 2015, and after being counseled about the possible consequences of his use of marijuana by his father after he used marijuana during a family barbecue in 2016. Applicant has demonstrated an inability or unwillingness to follow Federal law. The substance misuse security concerns are not mitigated.

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
Subparagraph 1.a:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge