



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



In the matter of:)
)
) ISCR Case No. 18-01496
)
Applicant for Security Clearance)

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

02/28/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana between 2005 and May 2018. He used marijuana after he submitted his security clearance application (SCA) in May 2017, and after he was questioned about his illegal marijuana use during a background interview in December 2017. 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 SCA on May 23, 2017. He was interviewed by a government investigator on December 13, 2017. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) on June 18, 2018. Applicant answered the SOR on June 25, 2018, and requested a decision based on the record in lieu of a hearing.

A copy of the Government’s file of relevant material (FORM), submitting the evidence supporting the security concerns, was provided to Applicant by letter dated

August 10, 2018. Applicant received the FORM on August 15, 2018. He was allowed 30 days to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant did not respond to the FORM. The case was assigned to me on December 10, 2018. Lacking any objections, I admitted and considered the Government's proposed evidence.

Findings of Fact

Applicant admitted the sole SOR allegation under Guideline H. In his SOR answer he noted that he disclosed his marijuana use in his 2017 SCA, and that his use of marijuana was legal in his state of residence. He promised to discontinue using marijuana if required for his job or clearance eligibility. His admission is incorporated as a finding of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 30-year-old employee of a federal contractor. He graduated from high school in 2006, earned a bachelor's degree in 2010, and received a doctorate degree (Ph.D.) from a prestigious U.S. university in 2017. He is engaged to be married. He has no children.

Between 2010 and 2016, Applicant worked as a research assistant at the university where he earned his doctorate degree. His current employer and clearance sponsor, a federal contractor, hired him in 2016, and he has worked there ever since. In his response to Section 23 (Illegal Use of Drugs or Drug Activity) of his May 2017 SCA, Applicant disclosed that he illegally used marijuana between June 2005 and April 2017. He stated that had not participated in substance-abuse counseling.

During his December 2017 background interview with a government investigator, Applicant confirmed that he illegally used marijuana about weekly during social occasions, and for pain management for sports-related injuries, between 2005 and December 2017. He noted that his fiancée, siblings, and friends were aware of his marijuana use. He told the investigator that he was not marijuana dependent. He promised to stop using marijuana if required for his job or clearance eligibility. In his response to DOHA interrogatories, Applicant stated that his most recent use of marijuana occurred on May 26, 2018.

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 2005 and May 2018, Applicant illegally used marijuana. He illegally used marijuana after submitting his May 2017 SCA, and after being questioned about his illegal marijuana use during a background interview in December 2017. Moreover, he continued to use marijuana at least until he answered DOHA interrogatories in May 2018. 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;
- (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 long history of illegal marijuana use. Applicant started his illegal use of marijuana during high school (2006), and he continued using marijuana until at least May 2018. He knew that the possession of marijuana was illegal. Moreover, he knew the illegal use of drugs was a concern for the Federal government because he was asked about it in his May 2017 SCA, and during his December 2017 background interview. Notwithstanding, he continued his illegal marijuana use until May 2018.

Applicant’s long-term illegal use of marijuana after submitting a SCA 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 use in his 2017 SCA. I also considered that he promised in his SCA and during his background interview to stop illegally using marijuana, if required for his job and his clearance eligibility. 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 SCA and when he was questioned about his illegal use of marijuana during his background interview. Notwithstanding, the notice that he received concerning the security concern about marijuana, he was not dissuaded from using marijuana until at least May 2018.

The DOHA Appeals Board has stated 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). Additionally, Applicant’s evidence is insufficient to show that he no longer associates with illegal marijuana users or dealers. 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. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 30-year-old employee of a federal contractor. He attended prestigious U.S. universities and achieved a Ph.D. He has worked for a federal contractor since 2016. Applicant disclosed his substance misuse in his 2017 SCA. He stated his intent to not use marijuana illegally if required for his job or clearance eligibility.

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 2017 SCA, and after being questioned about his use of marijuana during a background interview in December 2017, until at least May 2018. He 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