



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



In the matter of:)
)
) ISCR Case No. 19-00997
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne M. Driskill, Esq., Department Counsel
For Applicant: *Pro se*

12/09/2019

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used drugs between 2012 and September 2018. He used marijuana after stating in his 2017 security clearance application (SCA) that he would forego any future use of illegal drugs. There is no evidence of substance misuse after September 2018. Nevertheless, the passage of time so far is insufficient to demonstrate his reliability, trustworthiness, ability to comply with the law, 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 his first SCA on June 8, 2017. He was interviewed by a government investigator on September 17, 2018, and answered a set of interrogatories from the Defense Office of Hearings and Appeals (DOHA) on April 26, 2019. 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 May 17, 2019. Applicant answered the SOR on June 10, 2019, 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 July 30, 2019. Applicant received the FORM on August 5, 2019. He was allowed 30 days to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. The case was assigned to me on September 26, 2019. Applicant did not respond to the FORM and waived any objections. I admitted the FORM's proffered evidence and considered it (FORM Items 2 and 3).

Findings of Fact

Applicant admitted that he illegally used marijuana between 2012 and September 2018. (SOR paragraph 1.a) He denied that he intends to continue to use marijuana in the future. His admission is incorporated as a findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 24-year-old employee of a federal contractor. He received his bachelor's degree in 2017. He has never married, and has no children. He has been working for his employer and clearance sponsor since he was hired in June 2017.

On June 8, 2017, Applicant submitted his first SCA. In his responses to Question 23 (Illegal Use of Drugs or Drug Activity) of his 2017 SCA, Applicant disclosed that he illegally purchased and used marijuana for himself and friends between December 2012 and March 2015. He explained that he used marijuana casually and typically socially. He described his use of marijuana as follows:

Usually about once a month during this period, never more than twice a week. Didn't begin using with any real regularity until May-June of 2013. Roughly around 50 times total. Typically in social situations, though around the time October to November of 2014, alone as well. (Item 2)

Concerning his purchase of marijuana, Applicant stated that he never purchased more than a half dozen times. When asked whether he intended to continue using the illegal drug in the future he stated:

As one gets older, the drug simultaneously becomes less interesting and the risks of use gets higher. I realized the benefits of use did not outweigh the risk, and the continued use would both negatively impact my health and functioning as well as eliminate various opportunities. Furthermore, while I am still in contact with some of the people [with whom] I used to smoke marijuana with, I almost never see them, and even if they were to offer me some, I wouldn't want to. Once you stop for [a] long enough period of time, you don't feel the desire to use anymore, and the drug feels like opening up a can of risks and difficulties for a very little reward. It makes sense to put all of it in the rear view mirror. It is not necessary to live a fulfilling life, and can open yourself up to myriad of other problems. (Item 2)

Applicant also disclosed that he illegally used psilocybin mushrooms (mushrooms) four times between February 2014 and January 2015. He stated that he did not intend to use mushrooms again, and provided the following explanation:

Not only does psilocybin usage associate itself with the same risks as any illegal drug (interactions with criminals, as well as a potential career and legal penalties) but is not even strictly speaking enjoyable I decided that hallucinogens were not going to provide me with anything other than depression and dread. I instead turned my focus to school, friends, and career. As with my cessation of marijuana use, I allowed those productive pursuits to grow in the space drugs once occupied.

On September 17, 2018, Applicant was interviewed by a background investigator from the Office of Personal Management (OPM). He told the interviewer that he illegally purchased and used marijuana between January and September 2018, approximately twice per week - about 50 times during the timeframe. Applicant further stated that he intended to continue to purchase and use marijuana in the future because it helped him with his depression and loneliness. Applicant was uncomfortable providing the names of those individuals associated with his illegal marijuana use. However, he disclosed that he uses marijuana with his current girlfriend in his apartment and purchases the marijuana from a dispensary. He stated that his use of marijuana has occurred due to his frustration with work. (Item 3)

In his SOR answer, Applicant denied that he intends to use marijuana in the future. He stated: "I was in a dark space when I began using marijuana that I have moved out. These experiences of being interviewed have shown me what I did wrong."

Applicant disclosed in his responses to Section 21 (Psychological and Emotional Health) of his 2017 SCA that he was admitted as an inpatient for treatment between June 2015 and May 2017, but he did not explain the cause of his treatment. He did not disclose his diagnosis. It is not clear whether he sought or received any medical or psychological treatment or counseling for substance abuse.

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 2012 and September 2018, Applicant illegally purchased and used marijuana. He illegally used marijuana after he submitted his June 2017 SCA in which he strongly averred he had no intention of ever using marijuana again. He also acknowledged knowing that the use of marijuana was illegal, that it would subject him to risks, eliminate various opportunities, and would expose him to a myriad of problems. 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);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

The record established the disqualifying conditions under AG ¶¶ 25(a), (c), and (g) 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 history of illegal marijuana purchase, possession, and use. Applicant disclosed in his 2017 SCA that he illegally used drugs between 2012 and March 2015, and claimed that he had stopped. The 2017 SCA made him further aware that the illegal use of drugs would create a security concern and adversely affect his eligibility for a clearance. Notwithstanding, Applicant illegally purchased, possessed, and used marijuana, allegedly to cope with his loneliness and depression, between January and September 2018.

Applicant's purchase, possessed, and use of illegal drugs 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, especially because his recent substance misuse occurred after he submitted his 2017 SCA. Applicant's statements in his 2017 SCA demonstrate that he was aware of the government's security concerns about his illegal drug use and the adverse security consequences. Nevertheless, he was unable or unwilling to stop using illegal drugs.

Applicant denied his intent to illegally purchase and use marijuana in the future. In light of the record as a whole, I consider Applicant's statement to be unreliable and to lack credibility. Applicant knew the adverse security clearance consequences of his substance misuse, and that did not dissuade him. More time without recurrence of substance misuse is needed for Applicant to establish his reliability, trustworthiness, ability to comply with laws rules and regulations, and 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 24-year-old employee of a federal contractor. He has worked for a federal contractor since June 2017. He disclosed his substance misuse in his 2017 SCA. This is his first clearance application.

The factors against granting a clearance are more substantial. Applicant's lack of judgment and his unwillingness to comply with rules and regulations continue to raise questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. The sincerity of his commitment to not use any illegal drugs in the future is unclear. The drug involvement and 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
Subparagraphs 1.a and 1.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 of the United States to grant Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge