



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



In the matter of:)
)
) ISCR Case No. 19-02575
)
Applicant for Security Clearance)

Appearances

For Government: Daniel Crowley, Esq., Department Counsel
For Applicant: *Pro se*

10/16/2020

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used and purchased marijuana between February 2015 and March 2017, while possessing a security clearance. There is no evidence of substance misuse after March 2017. 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 most recent security clearance application (SCA) on August 3, 2017. He was interviewed by a government investigator on June 20, 2018, and answered a set of interrogatories from the Defense Office of Hearings and Appeals (DOHA) on September 16, 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 November 22, 2019. Applicant answered the SOR on December 28, 2019, and requested a hearing before an administrative judge.

The case was assigned to me on February 6, 2020. On February 18, 2020, the Defense Office of Hearings and Appeals (DOHA) notified Applicant that the hearing was scheduled for March 18, 2020. In mid-March 2020, the hearing was cancelled because of DOD workplace and travel restrictions based on health concerns posed by the COVID-19 virus.

On July 17, 2020, DOHA notified Applicant that the hearing was rescheduled for August 7, 2020. I convened the hearing as rescheduled. Government Exhibits (GE) 1 and 2 were admitted in evidence without objection. Department Counsel's Discovery Letter was marked and made part of the record as GE 3. Applicant testified on his own behalf, but presented no other evidence. DOHA received the transcript (Tr.) on August 19, 2020.

Findings of Fact

Applicant admitted the sole SOR allegation - that he illegally used marijuana between February 2015 and March 2017, while possessing access to classified information. (¶ 1.a) His SOR admission and those at his hearing are incorporated as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 38-year-old employee of a federal contractor. He attended college between September 2000 and April 2002, but did not complete a degree. He then attended a trade-technical school (apprenticeship) between August 2003 and January 2007, and qualified as a journeyman electrician. He married in May 2009, and has a daughter, age 9 and a son, age 7. Applicant has been working for federal contractors since about 2004, and has possessed a security clearance since at least 2007. He has been working for his current employer and clearance sponsor since January 2007.

Applicant submitted his most recent SCA on August 3, 2017. In his responses to Question 23 (Illegal Use of Drugs or Drug Activity) of his 2017 SCA, Applicant disclosed that he illegally used marijuana between February 2015 and March 2017. He also disclosed that he purchased marijuana twice, once in July 2016, and once in December 2016. Applicant described his marijuana use and purchases as recreational. At the time he used and purchased the marijuana, Applicant possessed a security clearance. He indicated that he did not intend to use marijuana in the future because it was "not worth being in trouble/illegal and family more important." (GE 1)

On June 20, 2018, Applicant was interviewed by a background investigator from the Office of Personal Management (OPM). He confirmed to the interviewer his illegal use and purchases of marijuana between February 2015 and March 2017, while possessing a clearance. He told the investigator that he smoked marijuana two to three times per month by himself. He stated that he did not use marijuana with anyone else and that he purchased the marijuana through random people (unknown names). (GE 2)

At hearing, Applicant described his marijuana use as a mistake - he was going through a phase - and now hopes that his mistake will not be taken against him. When asked how he obtained the marijuana, Applicant explained that between February 2015 (when he claimed he started using marijuana) and July 2016 (when he claimed he purchased marijuana for the first time) he “bought the marijuana through the friend of a friend.” (Tr. 18)

When confronted with the discrepancy about how he acquired the marijuana, that he was using before he started purchasing it, Applicant testified:

A: I apologize. I don't want to get anybody else in trouble. I did use marijuana with a friend of mine. We both played guitar, I did do that a few times, and that was it. So I was able to get it through him.

Q: Okay. So you used it with your friend?

A: A couple of times, yes, when we worked together.

Q: All right, but most of the time you were alone?

A: Most of the time I was alone. (Tr. 18)

When asked to explain what he meant by “going through a phase” and why he suddenly started to use marijuana in February 2015, after claiming he never used it before, Applicant testified:

When I was introduced to it, I do play guitar and it enhanced the effect of me playing the guitar. So just like any drug, I guess once you try something you can sort of become addicted to it. Can I guess become addicted to it. So I did use it to enhance the effects of me playing the guitar or the piano anything like that. (Tr. 20)

Applicant further explained that he used to play in a band. And, they went to shows and made money playing as a side-business. Because Applicant now has children, playing is more of a hobby for him. (Tr. 20) He used to smoke marijuana in his home and at his parent’s home.

Applicant acknowledged that he has possessed a clearance since at least 2007, and that he was aware that the Government has a policy against people holding a clearance and using illegal drugs. He testified that he stopped smoking marijuana in March 2017, because he knew it was wrong, and he also believed that using marijuana was beginning to adversely affect his memory. Applicant is still in contact with the friend with whom he shared (smoked) and provided him with marijuana. (Tr. 22) He presented no evidence to show that 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 February 2015 and March 2017, Applicant illegally purchased and used marijuana while possessing a security clearance. He has possessed a clearance since at least 2007. He acknowledged knowing that the use of marijuana was illegal, and that the Government has a policy against security clearance holders using illegal drugs. 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
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The record established the disqualifying conditions under AG ¶¶ 25(a), (c), and (f) 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 illegally used marijuana between February 2015 and March 2017, while possessing a security clearance. He knew that the use of marijuana is illegal, and that the Government has a policy against people holding a clearance and using illegal drugs. He stopped smoking marijuana in March 2017, because he knew it was wrong.

Applicant was aware that the illegal use of marijuana would create a security concern and adversely affect his eligibility for a clearance. Notwithstanding, Applicant illegally purchased, possessed, and used marijuana.

Applicant's purchase, possession, and use of marijuana 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 substance misuse occurred while he possessed a clearance. He was aware of the government's policy against illegal drug use, and the adverse security consequences for such use. Nevertheless, he was unable or unwilling to stop using marijuana.

Moreover, Applicant's hearing testimony demonstrates that he was less than candid when he answered his 2017 SCA, and that he deliberately mislead or made false statements to the government investigator about the circumstances surrounding his purchase and use of marijuana. Presumably, to protect his marijuana-using friend and facilitator. He also continues to associate with his marijuana-using friends.

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 38-year-old employee of a federal contractor. He has worked for a federal contractor and possessed a security clearance since at least 2007. 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
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 interest of the United States to grant Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge