



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



In the matter of:)
)
) ISCR Case No. 19-03957
)
Applicant for Security Clearance)

Appearances

For Government: Daniel O’Reilly, Esq., Department Counsel
For Applicant: *Pro se*

03/04/2021

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana on and off between 2004 and the day before his hearing on February 4, 2021. He used marijuana while possessing a security clearance between January 2019 and April 2019. Moreover, he deliberately falsified his 2018 security clearance application (SCA) to cover his illegal marijuana use. Drug involvement and substance misuse (Guideline H) and personal conduct (Guideline E) security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted his first SCA on November 13, 2018. He was interviewed by a government investigator on January 8, 2019, and April 8, 2019. He answered a set of interrogatories from the Defense Office of Hearings and Appeals (DOHA) on February 7, 2020. 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) and Guideline E (personal conduct) on April 30, 2020. Applicant answered the SOR on May 19, 2020, and requested a hearing before an administrative judge.

The case was assigned to me on January 5, 2021. On January 15, 2021, DOHA notified Applicant that the hearing was scheduled for February 5, 2021. I convened the hearing as scheduled. Government Exhibits (GE) 1 through 4 were admitted in evidence without objection. (Department Counsel's Discovery Letter was marked and made part of the record as GE 4 for identification.) Applicant testified on his own behalf, and presented two exhibits marked and admitted as AE 1 and AE 2. DOHA received the transcript (Tr.) on February 12, 2021.

Findings of Fact

SOR ¶ 1.a alleged that Applicant used marijuana in high school and again from about 2016 to at least April 2019, after being granted access to classified information in January 2019. Applicant admitted only to using marijuana in high school. SOR ¶ 1.b alleged Applicant intends to continue using marijuana in the future. In his answer, Applicant qualified his response. He admitted to using marijuana and being a state medical marijuana patient since 2017.

SOR ¶ 2.a alleged Applicant falsified his November 2018 SCA when he deliberately failed to disclose his use of marijuana in high school and from about 2016 to about November 2018. Applicant admitted to "unknowingly answering the question wrong." I considered Applicant's response a denial of SOR ¶ 2.a. Applicant's SOR admissions 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 34-year-old employee of a federal contractor. He graduated from high school in 2004, and received an associate's degree in computer systems in 2008. He has never been married. He has a four-year-old daughter and he shares custody with her mother. His grandmother also lives with him. (Tr. 37-38)

Applicant has been working for his current employer, a federal contractor and clearance sponsor, since October 2018. He submitted his first SCA in November 2018, and was granted interim eligibility for access to top-secret information in January 2019.

In his responses to Question 23 (Illegal Use of Drugs or Drug Activity) of his 2018 SCA, Applicant denied any illegal use, purchase, receiving, or handling of drugs or controlled substances in the last seven years. (GE 1) On January 8, 2019, Applicant was interviewed by a background investigator from the Office of Personal Management (OPM). During the interview, he disclosed having financial issues, driving under the influence (DUI) in 2011 and 2015, and that he was terminated from a job in August 2018. He deliberately failed to disclose his illegal use, purchase, receiving, or handling of drugs or controlled substances (marijuana) in the last seven years. (GE 3)

On April 8, 2019, Applicant was re-interviewed and confronted with a 2016 positive test result for marijuana use while he was attending court-mandated alcohol treatment following his 2015 DUI conviction. Applicant was on probation between January 2016 and January 2018, and he was required to attend alcohol treatment. (Tr.

46 -47) Applicant admitted his use of marijuana in 2016, and disclosed that he started using marijuana in high school. He initially claimed he used marijuana only about six times for experimental purposes.

During the April 9, 2019 interview, Applicant also disclosed that he began using medical marijuana in 2017, when it became legal in his home state. (The state's Medical Cannabis Commission (SMCC) became operational and sales began in December 2017). He claimed he has not used any illegal drugs in the last seven years because he purchases the marijuana through a valid state prescription. (GE 3) Applicant submitted a certification from the SMCC indicating that he is a qualified patient for the period of September 29, 2020, through September 29, 2021. (AE 2) Applicant explained that he did not disclose his marijuana use in his 2018 SCA because he obtained the marijuana legally.

Applicant uses marijuana every other day, as needed, to help him sleep, to control his anxiety, depression, and for his self-care and mental health, which is extremely important to him. He obtained and used marijuana after he was granted an interim top-secret clearance in January 2019. Applicant told the investigator that he was aware that the use of marijuana is against federal law, but he believes that it does not make any sense for him not to use marijuana if it's allowed under state law. He told the interviewer that his most recent use of medical marijuana was in April 2019. (GE 3)

Applicant noted that he has been using marijuana legally and sees a doctor to remain compliant with his state laws. He claimed his "medicine" is only for use outside of work. He does not believe the Federal government should exclude people who are getting treatment from being able to work for the Government. He stated that if he is to be judged, his on-the-job performance should be what defines him. (Tr. 37)

Applicant believes that he is a good, caring person, and a loving father. He has overcome adversity in his life and, like many, has mental health struggles that should not define him. He believes that there are a lot of people out there that need the same treatment. He believes the Federal government is discriminating against him and others because of his mental health issues.

Applicant has worked in Information Technology (IT) or on computers professionally for over 13 years. He had not been able to get a job in his geographical area because he did not possess a security clearance. In October 2018, his dream became a reality when he was hired for his current job, which is within four miles of his home. Before that, he was commuting as far as 50 miles each way, or had jobs that required him to travel. He loves his current job and his coworkers. He believes that he is doing a great job for his employer and customers. He would like to continue working for his employer.

At hearing, Applicant expanded on the statements he made to the investigator in 2019. He testified that he has been using marijuana on and off (or every once in a while

– or monthly) with friends since high school (2004), to present. He also purchases or obtains marijuana from friends on a monthly basis. (Tr. 48 - 52) He has stopped using marijuana a few times, but the only occasions he remembered doing so were both while attending alcohol treatment classes after his 2011 and 2015 DUIs. He used marijuana about seven times in between the end of the alcohol treatment classes and before he received his state MCC certification in 2017. (Tr. 54 – 55) He admitted that he used marijuana during the seven-year period before he submitted his November 2018 SCA. He told the Government interviewer that he intended to continue using marijuana in the future. At hearing, he was evasive and failed to clearly and convincingly commit to discontinue using marijuana.

Applicant continued to use marijuana after he was granted an interim top-secret clearance in January 2019. He believed it was okay for him to do so because it is legal for him to use marijuana under state law. At hearing he stated: “If I can't have a clearance because of that, then I will take my mental health”. Applicant presented no documentary evidence to show that he sought or received any medical or psychological treatment or counseling for substance abuse, other than the alcohol treatment he received after his DUIs in 2011 and 2015. Applicant used marijuana the day before his hearing. (Tr. 63 - 65)

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.

In reaching my decision, I specifically considered the following:

On October 25, 2014, the Director of National Intelligence Memorandum *Adherence to Federal Laws Prohibiting Marijuana Use*, made it clear that state laws do not authorize citizens to violate federal law, including the Controlled Substances Act (21 U.S.C. §§ 801-971 (1970)), which identifies marijuana as a Schedule I controlled drug.

Changes to state laws or the District of Columbia, pertaining to marijuana use do not alter the existing National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8 2017). An individual's disregard of federal law pertaining to the use, sale, or manufacture of marijuana remains adjudicatively relevant in national security determinations. The adjudicative authority must determine if the use of, or involvement with, marijuana raises questions about the individual's judgment, reliability, trustworthiness, and willingness to comply with law, rules, and regulations, including federal laws, when making eligibility decisions of persons proposed for, or occupying, sensitive national security positions.

The Intelligence Reform and Terrorism Prevention Act (IRTPA), as amended, 50 U.S.C. § 3343 (2008), specifically prohibits a federal agency from granting or renewing a clearance to an unlawful user of a controlled substance or an addict, and under federal law, use of marijuana remains unlawful. (See, SEAD 4, App. B)

Executive Order 12564, *Drug Free Federal Workplace* (25 September 1985) mandates a drug-free workplace and drug-free federal workforce, and expressly states that use of illegal drugs on or off duty by federal employees in positions with access to sensitive information may pose a serious risk to national security and is inconsistent with the trust placed in such employees as servants of the public.

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.

Applicant has used marijuana on and off since he was in high school in 2004 to at least February 4, 2021. Between January 2019 and April 2019, Applicant purchased and used marijuana while possessing a top-secret clearance granted on January 2019. He acknowledged knowing that the use of marijuana was illegal under federal law, 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);
- (b) testing positive for an illegal drug;
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia;
- (f) any illegal drug use while granted access to classified information or holding a sensitive position; 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 above disqualifying conditions. Considering the evidence as a whole, only mitigating condition 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," is partially applicable to this case, but it does not mitigate the concerns.

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).

As stated above, none of the mitigating conditions apply. Applicant has a long history of illegal marijuana purchase, possession, and use spanning from high school (2004) to the day before his hearing in February 2021. Applicant illegally used marijuana between January 2019 and April 2019, while possessing a top-secret clearance. He knew that the use of marijuana is illegal under federal law, and that the Federal Government has a policy against people holding a clearance and using illegal drugs.

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 Federal Government's policy against illegal drug use, and the adverse security consequences for such use. Nevertheless, he was unwilling to stop using marijuana.

Guideline E, Personal Conduct

AG ¶ 15 articulates the security concern for 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.

Applicant deliberately failed to disclose in his November 2018 SCA that he used marijuana on and off since high school until at least November 2018.

AG ¶ 16(a) describes a condition that could raise a security concern and may be disqualifying in this case: “deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire . . . used to conduct investigations, determine security clearance eligibility or trustworthiness”

Only two personal conduct mitigating conditions are partially raised by the facts:

AG ¶ 17(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts; and

AG ¶ 17(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.

Applicant denied that he falsified his 2018 SCA, because he was not using marijuana illegally. He argued that as a certified marijuana user under the state MCC, he is legally allowed by the state to purchase and use marijuana.

Even if I was to consider Applicant's argument valid (which I do not), the facts show that he falsified his 2018 SCA. Applicant's state MCC started functioning in December 2017. Thus, any marijuana use before December 2017 was illegal under state law and federal law. Applicant admitted he used marijuana on and off between 2011 and 2018. Applicant's 2018 SCA required him to disclose any use of illegal drugs during the seven years preceding his 2018 SCA. He deliberately failed to disclose his use of marijuana between at least 2011 and December 2017 on his 2018 SCA. AG ¶ 16(a) therefore applies.

Moreover, Applicant's hearing testimony demonstrates that he was less than candid when he submitted his 2018 SCA responses, and that he deliberately misled or made false statements to the government investigator about the full extent and circumstances surrounding his purchase and use of marijuana. Therefore, AG ¶ 17(a) does not apply. Applicant intends to continue purchasing and using marijuana in the future through the state's MCC. Therefore, the offense is likely to recur and his criminal behavior continues to cast serious doubts on Applicant's judgment. AG ¶ 17(c) does not apply.

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 Guidelines H and E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 34-year-old employee of a federal contractor. He was hired in 2018, and was granted eligibility for access to top-secret information between January 2019 and April 2019. Applicant's lack of judgment and his unwillingness to comply with federal rules and regulations continue to raise serious questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. He intends to continue his use of marijuana in the future. The drug involvement and substance misuse security concerns are not mitigated. Moreover, he falsified his 2018 SCA.

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 |
| Paragraph 2, Guideline E: | 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