



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



In the matter of:)
)
) ISCR Case No. 21-00731
)
Applicant for Security Clearance)

Appearances

For Government: Patricia Lynch-Epps, Esq., Department Counsel
For Applicant: *Pro se*

08/15/2022

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana with varying frequency between March 2015 and December 2020. He used marijuana after he was hired by a federal contractor, after his employer tested him for the use of illegal drugs, and after he submitted his October 2020 security clearance application (SCA). Drug involvement and substance misuse (Guideline H) security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted his first SCA on October 7, 2020. He was interviewed by government investigators on January 7, 2021, and answered a set of interrogatories from the Defense Office of Hearings and Appeals (DOHA) on April 9, 2021. 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 June 18, 2021. Applicant answered the SOR on July 8, 2021, and requested a decision based on the written record in lieu of a hearing.

The Government's written case, containing the evidence supporting the security concerns, was submitted on March 16, 2022. A complete copy of the file of relevant material (FORM) was provided to Applicant on March 22, 2022, who was afforded an opportunity to file objections and submit material to refute, extenuate, or mitigate the security concerns. Applicant received the FORM on March 31, 2022. He did not submit an answer to the FORM. The case was assigned to me on June 16, 2022. Without objections, I admitted and considered all of the FORM's proffered evidence.

Findings of Fact

SOR ¶ 1.a alleged that Applicant used marijuana with varying frequency, from March 2015 to about December 2020. SOR ¶ 1.b alleged that Applicant purchased a dab pen and tincture to use marijuana in June 2019. He admitted both SOR allegations, except for his alleged intent to continue to use marijuana in the future, which he denied. His SOR admissions 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 24-year-old employee of a federal contractor. He graduated from high school in 2016, and received a bachelor's degree in 2020. He has never been married and has no children. Applicant worked as an intern for his current employer and security sponsor, a federal contractor, between June and September 2019. He has been a full-time employee with the federal contractor since July 2020.

In his answers to Section 23 (Illegal Use of Drugs or Drug Activity) of his October 2020 SCA, Applicant disclosed that he illegally used marijuana with varying frequency between March 2015 and September 2020. (Item 3) He described his illegal marijuana use as follows:

"Purely recreational. I only smoke when hanging out with friends. I first tried pot during my junior year in high school and did not touch it again until my junior year of college 4 years later . . . I smoked the most during junior and senior year of college probably averaging 2 times a month at my peak. Now I would say I smoke about every 2 or 3 months."

He also stated his intent to use marijuana in the future.

During a January 7, 2021 interview with a government investigator, Applicant was questioned about his illegal use of marijuana. (Item 4) He indicated he started using marijuana in high school in 2015, because of peer pressure. He clarified that he resumed his marijuana use during his sophomore year in college in 2018. He purchased marijuana when he turned 21 in June 2019. He claimed that his most recent uses of marijuana were in September and December 2020.

Applicant acknowledged knowing that marijuana is illegal under both his state and federal law. He admitted during his interview that he was currently using marijuana. He explained that he had purchased a dab pen and tinctures (liquid marijuana extractions)

and still had four or five doses left. When asked about his current and future use of marijuana, he stated that he did not believe he is addicted to marijuana, but intended to keep on using his tincture until it runs out.

Applicant has been tested for drug use by his employer at least twice since he was hired in July 2020. He stated he is not concerned about testing positive because his use is infrequent, only once every few months. Initially, he claimed not to know whether his employer has a policy against the use of illegal drugs, but believes that if he tested positive there would be a problem.

When asked whether he would continue his illegal marijuana use knowing it is illegal under both state and federal law, and knowing his employer has a policy against it, Applicant stated he would not use marijuana in the future and that he would probably throw his tincture away. He does not want to risk losing his clearance eligibility over his use of marijuana. He noted that his friends and some coworkers know about his marijuana use. He is not concerned about being blackmailed because his use is infrequent.

In his April 2021 response to DOHA interrogatories, Applicant stated that he decided to stop using marijuana in December 2020 because he wanted to get a clearance. He stated twice that he did not intend to use marijuana in the future. The last time he purchased marijuana was roughly one year and nine months prior to his answer to the interrogatories. He claimed that he no longer hangs out with anyone that does drugs often. He presented no documentary 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 National Security Adjudicative Guidelines (Security Executive Agent Directive 4, effective June 8, 2017, or 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. 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* (September 25, 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.

On December 21, 2021, the Director of National Intelligence signed the memorandum, *Security Executive Agent Clarifying Guidance Concerning Marijuana for Agencies Conducting Adjudications of Persons Proposed for Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*. It emphasizes that federal law remains unchanged with respect to the illegal use, possession, production and distribution of marijuana. Individuals who hold a clearance or occupy a sensitive position are prohibited by law from using controlled substances. Disregard of federal law pertaining to marijuana (including prior recreational marijuana use) remains relevant, but not determinative, to adjudications of eligibility. Agencies are required to use the “whole-person concept” stated under SEAD 4, to determine whether the applicant’s behavior raises a security concern that has not been mitigated.

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. Substance misuse is the generic term adopted in this guideline to describe any of the behaviors listed above.

Applicant used marijuana with varying frequency, from about 2015 to December 2020. He used marijuana after he started working for his employer as an intern in June 2019, after he was hired as a permanent employee in July 2020, and after he was tested at least twice for the use of illegal drugs. He used marijuana one-month before he submitted his October 2020 SCA, and he used marijuana in December 2020 after he submitted his October 2020 SCA.

Applicant told a government investigator during a 2021 interview, that he did not intend to use marijuana in the future. He acknowledged knowing that the use of marijuana was illegal under federal and state law, and that his employer has a policy against employees using illegal drugs. At the time of the interview, he was still in possession of

four or five doses of marijuana tincture. Initially, he stated he intended to continue using his supply until it ran out. Later, he indicated he would probably throw it away.

AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse; 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 above disqualifying conditions. An evaluation of applicable mitigating conditions is required.

AG ¶ 26 provides conditions that could mitigate security concerns. The following are potentially applicable:

- (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;
 - (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; and
- (d) satisfactory completion of a prescribed drug treatment program, including, but not limited to, rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

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).

Considering the evidence as a whole, none of the mitigating conditions apply. Applicant has a history of illegal marijuana possession and use between 2015 and December 2020. He knew that the use of marijuana is illegal under both his state and federal law, and that his employer has a policy against employees using illegal drugs. He illegally used marijuana between June 2019 and December 2020, after he was tested for drug use by his employer, and after he was hired and applied for a clearance in October 2020. Applicant’s evidence is inconclusive as to whether he has disassociated from his marijuana-using friends and coworkers.

Applicant claimed he had not used marijuana after December 2020, and promised not to use marijuana in the future. However, considering his past criminal behavior, the passage of time so far is insufficient to establish that his use of marijuana is unlikely to recur. He was aware of his state and the Federal laws, and his employer’s policy against illegal drug use, and the adverse security consequences for such use. Nevertheless, he was unwilling to stop using marijuana after he submitted his October 2020 SCA.

Applicant’s possession and use of marijuana casts doubt on his current reliability, trustworthiness, good judgment, and his ability or willingness to comply with laws, rules, and regulations. His suitability to hold a clearance is questionable, especially because his substance misuse occurred after applying 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 been working for his employer since July 2020. He illegally used marijuana between 2015 and December 2020. 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. Considering the record as a whole, the passage of time since his most recent marijuana use so far is

insufficient to establish that his use of marijuana is unlikely to recur. 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