



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



In the matter of:)
)
) ISCR Case No. 14-00206
)
Applicant for Security Clearance)

Appearances

For Government: David F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

10/24/2014

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s illegal use of drugs after possessing a top secret security clearance violated the trust placed in him by the Government. His criminal behavior raises serious questions about his reliability, trustworthiness, judgment, willingness to comply with the law and follow regulations, and his ability to protect classified information. Clearance is denied.

Statement of the Case

Applicant submitted his most recent SCA on January 17, 2013. The Department of Defense (DOD) sent him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) on April 26, 2014, which was amended on June 30, 2014.¹ Applicant answered the SOR on May 19, 2014 and July 25, 2014

¹ The DOD acted under Executive Order 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 Adjudicative Guidelines for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

(respectively), and requested a hearing before an administrative judge. The case was assigned to me on July 7, 2014. The Defense Office of Hearings and Appeals (DOHA) issued the notice of hearing on August 11, 2014, scheduling a hearing for September 4, 2014.

At the hearing, the Government offered one exhibit (GE 1). Applicant testified and submitted 19 exhibits (AE 1 through 19). All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on September 16, 2014.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a and 1.b, with explanations. He denied the factual allegations in SOR ¶ 1.c. His admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 40-year-old principal contract administrator working for a government contractor. He was awarded a bachelor's degree in May 1997, and received a master's certificate from a prestigious U.S. university in 2012-2013. He has never been married and has no children.

Applicant worked for two large government contractors from November 2006 to December 2008. He was hired by his current employer, a government contractor, in January 2009. He submitted his first security clearance application (SCA) in 2006, and participated in his first background interview in November 2007. He has possessed a top secret security clearance since June 2008.

On January 17, 2013, Applicant submitted his most recent SCA requesting the renewal of his eligibility for a security clearance. In his answer to Section 23 (Illegal Use of Drugs or Drug Activity), Applicant claimed that he had never used any illegal drugs.

On May 4, 2013, Applicant attended a public concert and illegally smoked marijuana. He did not report his illegal use of marijuana to his facility security officer (FSO). On May 16, 2013, Applicant was interviewed by a government investigator conducting his security clearance background interview. During the interview, Applicant disclosed that he illegally smoked marijuana on May 4, 2013. He told the investigator that he took two draws off a marijuana cigarette provided to him by an acquaintance. He averred this was the first time in his life he used illegal drugs. He considered his illegal use of marijuana a momentary lapse in judgment. Applicant stated that he considered smoking an unhealthy habit, and he did not intend to use illegal drugs in the future. He explained that he had been drinking and was not thinking clearly about the possible security clearance consequences of his illegal use of marijuana.

On April 18, 2014, Applicant and his partner went on vacation to a state where the use of marijuana is legal under state law. After being picked up at the airport, Applicant's partner was offered candy laced with marijuana, and Applicant asked to try

it. He ingested the candy laced with marijuana, and claimed that he got a headache and did not ask for more.

Two days later, Applicant and his partner attended a public party where they were offered chocolates laced with psychedelic mushrooms. At the time he eat the chocolate, Applicant believed it contained illegal mushrooms. Because he did not feel the expected effects of the mushrooms, Applicant now believes that the chocolate did not have mushrooms. At his hearing, Applicant explained that because he was on vacation, away from his job, and in a state where marijuana is legal, he did not analyze what he was doing. He was not thinking about his security training while on vacation. After receipt of the April 2014 SOR, Applicant disclosed to his facility security officer (FSO) his illegal drug use on April 18 and 20, 2014. He wanted to bring all of his illegal use of drugs into the open and have a clean start.

At his hearing, Applicant acknowledged knowing that the use of illegal drugs, including marijuana and psychedelic mushrooms, constitutes a federal criminal offense and it is incompatible with possessing a security clearance. He also knew that the use of illegal drugs was against DOD policies, the policies established by the three government contractors he worked for since 1998, and that government contractors regularly conduct training and urinalysis tests to determine whether prospective or current employees use illegal drugs. He has known that the use of illegal drugs creates a Government security concern since he submitted his first SCA in 2006, and was interviewed by government investigators about his possible illegal drug use in November 2007.

Applicant stated that his illegal use of drugs was a “dumb decision that showed a lack of judgment.” He had his responsibilities laid before him, and he forgot to apply his training. Applicant explained that he has known his partner two years. When he first met his partner, he did not know that he used illegal drugs. He learned about his partner’s illegal drug use about a year into their relationship. Applicant believes he is in a difficult situation because he has feeling for his partner and he does not want to separate from him. Applicant is trying to make his partner understand the adverse consequences he will face if his partner uses illegal drugs around him. Applicant stated: “I have discussed my wish to remain clear of these substances with my significant other and he understands that he cannot use them while I am present.” Applicant claimed that his partner agreed to abstain from using illegal drugs around him. His partner’s roommate also used illegal drugs in front of Applicant. He has known the roommate for approximately one year.

Applicant believes that going through the security clearance process has been a learning experience. He understands the reasons for the security clearance rules. He believes he is now a better person for having gone through this experience. He repeatedly stated that illegal drugs are not part of his life. He believes that his use of illegal drugs are examples of aberrational behavior, which he promised not to repeat. He expressed remorse for straying from his responsibilities as a cleared person.

Applicant sought counseling through his employer's employee assistance program. He has participated in nine counseling sessions since May 21, 2014. His counselor believes that Applicant's illegal drug use was not the norm, and that Applicant demonstrated remorse for his lapse in judgment. Additionally, he is taking training courses at work to learn to manage his time. He promised to make better and healthier choices.

Applicant considers himself to be an outstanding, hard-working employee who is responsible, trustworthy, and mindful of rules. He claims to take responsibility for his wrongdoings. His performance evaluations (exceeding expectations), achievement awards, and his references' statements confirmed his excellent performance, accomplishments, honesty, and commitment. Applicant noted that he has possessed a security clearance for around six years without any security concerns, except for those alleged in the SOR. Applicant submitted the results of a negative drug screening test he took on July 24, 2014. He volunteered to take drug screening tests in the future to prove his commitment to remain drug free. Applicant submitted a statement of intent never to use illegal drugs again with automatic revocation of his security clearance if he fails to do so. (AE 19)

Applicant believes that his illegal use of marijuana was infrequent and it is not recent. He averred that he has abstained from any illegal drug since April 2014. Because of his counseling, rehabilitative efforts, and his promise to abstain from illegal drugs in the future, Applicant believes that his illegal drug use is unlikely to recur.

Policies

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, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended. 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 AG ¶ 2(a). 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; AG ¶ 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

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern for drug involvement:

Use of an illegal drug or misuse of a prescription drug can raise questions about an individual’s reliability and trustworthiness, both because it may impair judgment and because it raises questions about a person’s ability or willingness to comply with laws, rules, and regulations.

Applicant illegally used marijuana in May 2013 and April 2014, and consumed psychedelic mushrooms in April 2014. He used illegal drugs while possessing a top secret security clearance.

AG ¶ 25 describes three conditions related to drug involvement that could raise a security concern and are disqualifying in this case:

- (a) any drug abuse;
- (c) illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (g) any illegal drug use after being granted a security clearance.

AG ¶ 26 provides two potentially applicable drug involvement mitigating conditions:

- (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;
and

(b) a demonstrated intent not to abuse any drugs in the future, such as:

(1) disassociation from drug-using associates and contacts;

(2) changing or avoiding the environment where drugs were used;

(3) an appropriate period of abstinence;

(4) a signed statement of intent with automatic revocation of clearance for any violation.

None of the Guideline H mitigating conditions fully apply. Applicant's most recent illegal drug-related behavior occurred in April 2014. As such, his drug-related behavior is recent. At the time he used illegal drugs, Applicant was 39 years old, had worked for government contractors for over 15 years, and possessed a top secret clearance for six years. He voluntarily used illegal drugs in public social settings without regard for the law, DOD policies, his training, and the Government's security concerns. I find that Applicant's illegal use of drugs occurred under ordinary circumstances and it is likely to recur.

Because of his age, education, and his experience working for a government contractor and possessing a security clearance, Applicant knew or should have known of the adverse legal and security clearance consequences he would face as a result of his illegal use of drugs. Applicant's illegal use of drugs is a violation of the trust placed in him by the Government. It demonstrates a lack of judgment, reliability, trustworthiness, and an unwillingness to comply with the law and follow regulations.

Applicant promised to never use illegal drugs in the future, and submitted a signed statement of intent with automatic revocation of clearance for any violation; however, his promises hold little weight. He was aware of the criminal prohibition against the illegal use of drugs, and that did not stop him from using illegal drugs in May 2013. Applicant did not immediately report his illegal use of marijuana. He waited until he was interviewed by a government investigator to disclose his May 2013 use of marijuana. He called it an aberrational, one-time lapse of judgment, and promised never to use illegal drugs ever again. Notwithstanding, in April 2014, Applicant not only used marijuana again, but also psychedelic mushrooms.

Moreover, Applicant continues his close association with known drug-users and presented little evidence of lifestyle changes made to avoid the environments where illegal drugs are used. I find that his short period of abstinence is insufficient to show a demonstrated intent not to use illegal drugs in the future.

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. (AG ¶ 2(c)) I have incorporated my comments under Guideline H in my whole-person analysis.

Applicant is a competent and valuable principal contract administrator working for a government contractor since January 2009. He has possessed access to classified information at the top secret level during the last 6 years. He has established an excellent reputation based on his outstanding performance and accomplishments.

Notwithstanding his personal qualifications and past contributions to the Government and his employer, Applicant's illegal use of drugs violated the trust placed on him by the Government. His criminal behavior while possessing a security clearance raises serious questions about his reliability, trustworthiness, judgment, ability to comply with the law, and his ability to protect classified information. He failed to mitigate the Guideline H security concerns.

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.c:	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 to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge