



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



In the matter of:)
)
) ISCR Case No. 12-10341
)
Applicant for Security Clearance)

Appearances

For Government: Tovah Minster, Esquire, Department Counsel
For Applicant: *Pro se*

06/30/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s urine sample tested positive for marijuana. Notwithstanding, after considering all the evidence, I determined that Applicant unknowingly ingested the marijuana. He mitigated the drug involvement security concerns. Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted a security clearance application (SCA) on March 28, 2012. The Department of Defense (DOD) issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) on December 31, 2014.¹

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.

Applicant answered the SOR on February 19, 2015, and requested a hearing before an administrative judge. The case was assigned to me on April 3, 2015. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on April 6, 2015, scheduling a hearing for May 6, 2015.

At the hearing, the Government offered two exhibits (GE 1 and 2), which were admitted without objection. Applicant testified, but did not submit any documentary evidence. However, attached to his answer to the SOR, Applicant submitted copies of negative urinalysis test results that he took from 2007 to 2014. Additionally, he submitted letters of appreciation for a job well done, an e-mail notifying him of his successful completion of a counter-intelligence interview, a reference letter from his supervisor, and an employee of the month award. These documents are part of the record, and I considered them in my decision-making process. DOHA received the hearing transcript (Tr.) on May 14, 2015.

Findings of Fact

In his response to the SOR, Applicant admitted that in December 2011, he submitted a urine sample that tested positive for marijuana and that at the time he held a security clearance. His admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence, and having considered Applicant demeanor while testifying, I make the following additional findings of fact:

Applicant is a 53-year-old aircraft mechanic and crew chief. He has been employed by a federal contractor for close to 32 years. He completed avionics electronics technician school in 1980. He has held a secret clearance for 30 years and a top secret clearance for 20 years. He does not believe his loss of access to classified information will result in the loss of his employment. His only limitation will be a lack of access to classified areas of an aircraft. He has never been married, and he does not have any children.

Applicant used marijuana a few times when he was in high school. He did not knowingly use marijuana after high school. On December 4, 2011 (Sunday), Applicant attended a football game party. He was invited to the party by a friend, and the party was held at one of his friend's family members. Applicant testified that this was the first time ever, and the last time, he visited his friend's family. The host offered marijuana-laced brownies to Applicant. The brownies were in a tin container away from the food table. Applicant claimed that he declined the offer. However, there were other brownies in plates at the food table, and he consumed two to four of those brownies. He did not believe the brownies at the table were laced with marijuana because they were there for everybody's consumption. He did not feel any effects after consuming the brownies. (Tr. 22-27)

On December 6, 2011 (Tuesday), Applicant provided a urine sample, which tested positive for the marijuana metabolite. Applicant denied knowingly consuming marijuana. When asked why he tested positive for marijuana, Applicant offered two

possibilities - that he unwittingly consumed marijuana-laced brownies, or that his specimen was tampered, because his impression was that the vials of urine were not sealed in his presence. (The document Applicant submitted relating to the chain of custody for his urinalysis sample indicates he certified that "Each sample bottle used was sealed with a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct." The nurse-observer and Applicant signed the form indicating the sealing and integrity of the urine sample Applicant provided. (Tr. 31-32; 42-43))

Because of his job as an aircraft mechanic, Applicant has been required to take random urinalysis tests since he started working for his employer. He testified that he had about 15 negative urinalysis tests before he tested positive on December 6, 2011, and about 30 after December 6, 2011. All of those urinalysis tests before December 2011, and after, including a test on January 4, 2012, were negative for the presence of illegal drugs. (Tr. 17, 19, 35-36) He was usually urinalysis tested at least once a month after December 2011. His most recent urinalysis test was in December 2014. Applicant credibly testified that he has not consumed any illegal drugs since December 2011.

In his response to the SOR, Applicant included copies of urinalysis test documents from May 2007; December 2011; January–May 2012, July 2012, September-December 2012; February 2013, May-August 2013, October-December 2013; and August-September 2014. There were three additional urinalysis test documents, but the dates were illegible. All the above documents reflect negative test results, except for the December 2011 test. After he tested positive for marijuana, Applicant participated in substance abuse counseling through his employer's employee assistance program, and attended four substance abuse classes.

Applicant has not returned to the location where he believes he consumed the marijuana-laced brownies. He has friends that are marijuana users, but if they use marijuana they do it behind his back and do not let him know. (Tr. 33) His most recent attendance at a party where marijuana was openly used was at a neighbor's bonfire party about three years ago. He claimed he has not been to another party with his neighbors since, but he still feels compelled to talk to them. (Tr. 33-34) He has attended other parties where he believed marijuana may have been discretely used outside of Applicant's close proximity. (Tr. 34)

Applicant assures that he is conscientious about security matters and making sure the aircraft entrusted to his care are properly maintained. His employer decided not to fire him after he tested positive for marijuana because he is such an excellent mechanic; however, he believes if he tests positive for illegal drugs again, he will be fired. (Tr. 39) Applicant's aircraft mechanic's license will also be revoked if he tests positive for drugs again. He promised that his urinalysis tests will not be positive for illegal drugs in the future. (Tr. 45)

Applicant believes that he is an honest person that exercises good judgment, and an excellent aircraft mechanic. Applicant's direct supervisor for the past five years

lauded his motivation, intelligence, professionalism, reliability, contributions to mission accomplishment, and emphasis on safety and maintenance. In 2010, Applicant received the employee of the month award from his employer, and a letter of appreciation for support of a demonstration flight. On December 10, 2012, he also successfully completed a counterintelligence polygraph.

Considering the evidence as a whole, including Applicant's demeanor while testifying, I find that Applicant did not knowingly use marijuana before his December 2011 urinalysis test.

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

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

AG ¶ 25 describes four drug-involvement disqualifying conditions that raise a security concern and may be disqualifying in this particular case: "(a) any drug abuse,"² "(b) testing positive for illegal drug use;" "(c) illegal drug possession;" and "(g) any illegal drug use after being granted a security clearance."

Applicant's urine sample tested positive for marijuana in December 2011. Nonetheless, after considering all the evidence, I find that Applicant unknowingly ingested the marijuana. I have arrived at that determination based on his extensive participation on a urinalysis testing program (with negative results for the presence of drugs, except for the December 2011 test) in combination with his character evidence and his credible testimony. Because I determined that Applicant did not use marijuana knowingly, there is no illegal drug abuse, possession, or use. AG ¶¶ 25(a), 25(b), 25(c), and 25(g) are not applicable.

Since I determined that Applicant did not illegally use marijuana in 2011, there is no conduct to be mitigated, and it is unnecessary to discuss mitigating conditions.

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. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 53-year-old aircraft mechanic and crew chief, who has been an employee of a defense contractor for more than 31 years. He has held a secret clearance for 10 years and a top secret clearance for 20 years. He is considered to be a good aircraft mechanic who makes significant contributions to his employer. He was

²AG ¶ 24(b) defines "drug abuse" as "the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction."

lauded for his motivation, intelligence, professionalism, reliability, and emphasis on safety and maintenance. He successfully completed a counterintelligence polygraph in December 2012.

There is no evidence of security violations or of any security concerns, except for his December 2011 positive urinalysis test. Considering the evidence as a whole, I determined that Applicant unknowingly ingested the marijuana. Applicant credibly testified that he will never consume illegal drugs in the future. He clearly understands the possible adverse consequences he will face if he is ever involved in the use of illegal drugs. He specifically understands that he will be fired from his job, and his aircraft mechanic license and his eligibility for a security clearance will be revoked.

I considered that Applicant displayed poor judgment by consuming brownies after his host offered him marijuana-laced brownies. He indicated that he will refrain from associating with any marijuana users in the future. Notwithstanding, after weighing all the facts and circumstances, in the context of the whole person, I conclude that Applicant has mitigated the drug involvement 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:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

JUAN J. RIVERA
Administrative Judge