



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



In the matter of:)	
)	
)	ISCR Case No. 12-11005
)	
Applicant for Security Clearance)	

Appearances

For Government: Robert Kilmartin, Esq., Department Counsel
For Applicant: *Pro se*

09/18/2014

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana with varying frequency, from around June 1974 to January 2012. He purchased and used marijuana while possessing a security clearance from about March 2009 to January 2012. He 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 a security clearance application (SCA) on June 4, 2012. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) on May 13, 2014.¹ Applicant answered the SOR and elected to have his case decided without a hearing.

¹ 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*

A copy of the Government's file of relevant material (FORM), dated July 14, 2014, was mailed to him on July 24, 2014. Applicant received the FORM on July 29, 2014. He was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. His undated one-page response to the FORM was received by the Defense Office of Hearings and Appeals (DOHA) on August 26, 2014, and was made part of the record. The case was assigned to me on September 10, 2014.

Findings of Fact

Applicant admitted all of the factual allegations in the SOR, with explanations. His admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, including his June 2012 SCA, his answers to the SOR, and his response to the FORM, I make the following findings of fact:

Applicant is a 58-year-old systems support engineer working for a government contractor. He married his wife in January 1978, and they have two adult children. A third child passed away unexpectedly in February 2009.

Applicant served on active duty in the U.S. Air Force from April 1978 to March 1985. While in the service, he tested positive for marijuana during a urinalysis screening test for illegal drugs. He was reprimanded for his illegal use of marijuana, and participated on a drug abuse rehabilitation program. Applicant was administratively discharged for misconduct, and issued a general discharge under honorable conditions in March 1985.

Applicant was hired by his current employer in 1985, and submitted a security clearance application. As part of the background investigation, on April 3, 1986, Applicant provided a statement to a government investigator. He told the investigator that he illegally used marijuana from 1975 until July 1976. He stopped using marijuana when he started dating his wife because she did not like him using marijuana. Applicant averred that although he had associated with individuals who used marijuana, he had not used marijuana since July 1976. He claimed that he did not illegally use marijuana prior to his 1985 urinalysis test. He claimed that he was in a very small room with people that were smoking marijuana, and that he ingested the marijuana through passive inhalation.

Applicant told the investigator that he thought too much of his family, job, and personal health to get involved with drugs again. He stated that he had no intention of using marijuana or any other illegal drugs in the future.

Applicant submitted his most recent security clearance application (SCA) on June 4, 2012. In response to Section 23 (Illegal Use of Drugs or Drug Activity),

for Determining Eligibility for Access to Classified Information (AG), implemented by the DOD on September 1, 2006.

Applicant disclosed that he started illegally using marijuana in June 1974, and that he first purchased marijuana in October 1975. Applicant further disclosed that after the death of his youngest son in February 2009, he illegally used marijuana two to three times per week to help him sleep and cope with the death of his son. He purchased marijuana from a close friend and a family member every three to four months. He claimed he last used marijuana in January 2012. A family doctor prescribed him medication to help him sleep in March 2012. He has not participated in any recent substance abuse counseling or treatment. In his 2012 SCA, Applicant stated that he has possessed a security clearance with access to sensitive compartmented information (SCI) since June 2001. He illegally used marijuana from March 2009 to January 2012, while possessing a security clearance.

On about February 9, 2012, during the scheduling of his upcoming lifestyle polygraph-assisted interview, Applicant reported to his personnel security manager that he “had used marijuana on a few occasions following the death of his son in February 2009.” Applicant explained that the death of his son had taken a tremendous toll on him and his family, and to cope with the tragedy he “had on occasion smoked marijuana over a period of approximately one month immediately preceding [his son’s] death.”

Applicant was interviewed by a government investigator in August 2012. During that interview, he confirmed that he used marijuana while possessing a security clearance. He stated that from approximately March 2009 to January 2012, he smoked one joint of marijuana once or twice a week when he could not sleep, and during the holidays when his grief would get the best of him. Applicant stated that he was given the marijuana by friends and family members, and claimed he purchased marijuana only once or twice from friends. According to the interview report, Applicant refused to disclose the name of his marijuana suppliers.

During the interview, Applicant acknowledged knowing that the use of marijuana was illegal, and that it could result in him losing his security clearance. However, Applicant felt this was his best coping mechanism. Applicant denied seeking any type of counseling, including grief counseling. He requested, and his doctor prescribed, a sleeping aid medication in January 2012.

In his response to the FORM, Applicant noted that he disclosed to his personnel security manager, and in his 2012 SCA, his illegal use of marijuana because he wanted to “clear the air and show that [he] was being totally truthful” about himself. He felt it was the right thing to do because he considers himself to be an honest and truthful person. Applicant averred that he decided not to illegally use marijuana in the future because of his family, his age, and his well being. He does not need the stress associated with using marijuana. He hopes to retire from his job in six to seven years and would like to put this incident behind. Applicant admitted that his illegal use of marijuana was wrong, and he should have sought professional help to handle his grief and depression.

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 on and off, with varying frequency, from around June 1974 to January 2012. He purchased and used marijuana while possessing a security clearance from about March 2009 to January 2012.

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.

None of the Guideline H mitigating conditions fully apply. Applicant's most recent illegal drug-related behavior occurred in January 2012, shortly before submitting his 2012 SCA. Considering the record as a whole, I find his drug-related behavior is recent. Applicant claimed that his marijuana use was infrequent, and that he only consumed small amounts of marijuana to cope with his grief. Nevertheless, he has illegally used marijuana recurrently from 1974 to January 2012.

Because of his age, his service experience, and his experience working for a government contractor and possessing a security clearance, Applicant knew of the adverse legal and security clearance consequences he would face as a result of his illegal use of marijuana. Applicant's illegal use of marijuana 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; however, his promise holds little weight. In 1985, he was reprimanded and administratively discharged from the Air Force for misconduct (illegal use of marijuana). He was issued a general discharge. During a subsequent background interview in 1985, he promised to never use marijuana or any illegal drugs ever again. He violated that promise.

Applicant was aware of the criminal prohibition against the illegal use of drugs, and of the adverse consequences to his ability to hold a security clearance if he illegally used drugs. That did not stop him from purchasing and using marijuana from March 2009 to January 2012 while possessing a security 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. (AG ¶ 2(c)) I have incorporated my comments under Guidelines J in my whole-person analysis.

Applicant is a competent and valuable systems support engineer working for a government contractor since 1985. According to his statements, he has possessed access to classified information at the top secret level with access to SCI during the last 13 years.

Notwithstanding his personal qualifications and past contributions to the Government, Applicant's illegal use of marijuana from March 2009 until at least January 2012 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 - 1.e:	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