



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



In the matter of:)
)
) ISCR Case No. 14-00500
)
Applicant for Security Clearance)

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: *Pro se*

07/07/2014

Decision

RIVERA, Juan J., Administrative Judge:

Applicant’s illegal marijuana use while possessing a security clearance in 2013 violated the trust placed in him by the Government. His criminal behavior raises serious questions about his reliability, trustworthiness, judgment, ability 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 July 25, 2013. The Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) and Guideline E (personal conduct) on March 20, 2014.¹ Applicant answered the SOR on March 31, 2014, and elected to have his case decided on the written record in lieu of 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 April 21, 2014, was mailed to him that same date. Applicant received the FORM on April 29, 2014. He was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. He did not answer the FORM and provided no additional information. The case was assigned to me on June 30, 2014.

Findings of Fact

Applicant admitted all the factual allegations in the SOR. His admissions are incorporated herein as findings of fact. After a thorough review of the record evidence, including his answers to the SOR and his July 2013 SCA, I make the following findings of fact:

Applicant is a 37-year-old systems engineer hired by a government contractor in September 2004. He was awarded a bachelor's degree in December 2000, completed a master's degree in May 2004, and received his doctorate degree in May 2012. He married his wife in December 2003, and they separated in the summer of 2013. In his answer to the SOR, he stated that he has three children under the age of seven.

Applicant was granted access to classified information at the secret level in May 2006, and he has possessed a top secret clearance since May 2008. He explained that the cumulative stress caused by his 2013 marital separation, having three children under the age of seven, a mortgage, and working 50-hour weeks led him to use marijuana as a means to find relief for his stress. He claimed he used marijuana during a brief period, and in a home environment. He did not provide information concerning the extent of the period during which he used marijuana, where he acquired the marijuana, and whether he used the marijuana alone or with others.

Applicant stated that his situation was exacerbated by the fact that he has suffered from depression and an obsessive-compulsive disorder for numerous years. At the time his stress peaked, he was in the process of seeking medical attention to find the right treatment and medications. He claimed that he recently found the right treatment and it is helping him greatly. He averred that he has disclosed his illness in prior SCAs, and that his condition never interfered with his ability to function at work or to protect classified information. Applicant provided no other information concerning his diagnosis, prognosis, or the treatment he is receiving.

Applicant noted that he has possessed a security clearance for many years without incidents or concerns, except for the current SOR allegations. He averred he was honest and upfront during the security clearance process. He believes that through his work he has made important contributions to the United States, and he considers himself to be a valuable asset to the Government.

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

Applicant averred that he has always been diligent and meticulous about the protection of classified information. He acknowledged that his illegal use of drugs, even as an outlet to relieve his stress, demonstrated poor judgment on his part. However, he claimed that he has never compromised, and would never compromise, classified information. He considers himself to be a law-abiding person who is honest, trustworthy, and has integrity. He promised never to again engage in the use of illegal drugs while possessing a security clearance.

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 about September 2013, 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;
- (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 apply. Applicant's most recent illegal drug-related behavior occurred in September 2013. As such, his drug-related behavior is recent. Although Applicant underwent a stressful period as a result of his marital separation, I do not find that a marital separation is an extraordinary circumstance that would justify the illegal use of drugs. Marital separations and divorces are a common occurrence in today's society.

Because of his age, education, and his experience working for government contractors 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 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 inability to comply with the law and follow regulations.

Applicant promised to never use illegal drugs in the future; however, his promise holds little weight. He was aware of the criminal prohibition against the illegal use of drugs, and that did not stop him from using marijuana in September 2013. Moreover, Applicant provided little evidence concerning the circumstances of his illegal drug use. Numerous questions remain about his illegal drug use such as: the extent of his illegal drug use; where did he acquire the illegal drugs; the periods of use; whether he has any drug-using associates and contacts; and whether he has completed a drug treatment program, participated in rehabilitation, and is undergoing aftercare requirements.

Applicant's security concerns are further exacerbated by the unknown circumstances regarding his depression and obsessive-compulsive disorder. Applicant claimed that he recently found the right treatment and that it is helping him greatly; however, he provided no documentary evidence from treating physicians concerning his diagnosis, prognosis, and treatment. In sum, Applicant's scant evidence is insufficient to mitigate the Guideline H security concerns.

Guideline E, Personal Conduct

AG ¶ 15 explains why personal conduct is a security concern stating:

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.

The personal conduct security concerns are based on the same facts alleged under the drug involvement guideline, incorporated herein. Applicant's illegal marijuana use in about September 2013, while possessing a top secret security clearance, triggers the applicability of disqualifying condition AG ¶ 16(e):

personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing.

AG ¶ 17 lists three conditions that could potentially mitigate the personal conduct security concerns:

(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;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

For the same reasons outlined under the Guideline H discussion, incorporated herein, I find that none of the mitigating conditions apply. Applicant's illegal use of marijuana is a recent, serious offence, committed while possessing a security clearance. The available evidence does not show that the criminal offense occurred under unique circumstances.

Applicant acknowledged his behavior and claimed he sought medical help to control his depression and obsessive compulsive disorder. Notwithstanding, the evidence presented is insufficient for me to conclude that the steps taken are sufficient to alleviate the stressors and circumstances that caused his illegal behavior, and that such illegal behavior is unlikely to recur. With the disclosure of his illegal drug use, Applicant has taken the first steps to reduce his vulnerability to exploitation and manipulation, but at this time, his efforts are not sufficient to fully mitigate the personal conduct security concerns.

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 and E in my whole-person analysis.

Applicant is a competent and highly educated systems engineer working for a government contractor since September 2004. He was granted access to classified information at the secret level in May 2006, and he has possessed a top secret clearance since May 2008.

Notwithstanding his personal qualifications and past contributions to the Government, Applicant's illegal use of marijuana in 2013 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 and Guideline E 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.b:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.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 to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge