



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



In the matter of:)
)
) ISCR Case No. 10-09636
)
Applicant for Security Clearance)

Appearances

For Government: Fahryn Hoffman, Esquire, Department Counsel
For Applicant: William F. Savarino, Esquire

January 9, 2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally possessed and used marijuana from December 2009 until May 2010, while working for a government contractor and holding a secret security clearance. I find that not enough time has passed to establish that Applicant’s use of drugs is unlikely to recur. His recent behavior casts doubt on his reliability and judgment. Clearance is denied.

Statement of the Case

After receiving information about Applicant’s drug-related misconduct, adjudicators for the Defense Office of Hearings and Appeals (DOHA) made a preliminary finding¹ that it is not clearly consistent with the national interest to continue Applicant’s security clearance.

¹ Required by Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended; and Department of Defense (DoD) Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as revised.

On June 15, 2011, DOHA issued Applicant a statement of reasons (SOR), alleging security concerns under Guideline H (Drug Involvement) of the adjudicative guidelines (AG).² Applicant responded to the SOR allegations on July 5, 2011, and requested a hearing before an administrative judge. The case was assigned to me on September 9, 2011. Applicant requested a hearing in November 2011. (Hearing exhibit (HE) 1) DOHA issued a notice of hearing on September 16, 2011, convening a hearing for November 3, 2011. At the hearing, the Government offered exhibits (GE) 1 through 4, which were admitted without objection. Applicant testified, presented two witnesses, and submitted exhibits (AE) 1 and 2, which were admitted without objection. DOHA received the transcript of the hearing (Tr.) on November 14, 2011.

Findings of Fact

Applicant admitted all the SOR factual allegations. His admissions are incorporated herein as findings of fact. After a thorough review of all the evidence, including Applicant's demeanor and testimony, I make the following additional findings of fact.

Applicant is a 25-year-old software programmer working for a Government contractor. He has never been married and has no children. In the summer of 2007, Applicant received an internship and started working for his employer while attending college. He received his bachelor's degree in computer science in 2008, and accepted a permanent position with his employer.

Consequent with his internship, on June 29, 2007, Applicant submitted a security clearance application (SCA). He was granted access to classified information at the secret level in September 2007, and held the clearance until late May 2010, when it was withdrawn. During Applicant's security clearance application process, his employer's facility security officer (FSO) provided Applicant training about his responsibilities and obligations as a security clearance holder. Applicant was informed of the company's policy against the use of drugs, and of the possible adverse consequences that could result from the use of illegal drugs while holding a security clearance. Applicant knew that marijuana is a controlled substance, and that the possession and use of marijuana is prohibited by law.

Applicant illegally possessed and used marijuana from around December 2009 until May 2010. During that period, he purchased marijuana three to four times, spending between \$40 and \$50 to purchase around three and one-half to seven grams of marijuana each time. He claimed that he purchased the marijuana from an acquaintance of a college friend. Applicant used marijuana once or twice a day, every few days each week. At the time, he was living with a co-worker. Applicant testified he smoked the marijuana in the bathroom to hide his use of marijuana from his co-worker. However, during his August 2010 interview with a government investigator, Applicant

² Adjudication of this case is controlled by the AGs, implemented by the DoD on September 1, 2006.

told the investigator that he smoked marijuana at dinnertime. (GE 2) Applicant denied any use of marijuana prior to December 2009 or after May 2010. He also denied ever using any other illegal substances.

In May 2010, Applicant drove his car to purchase marijuana from his provider. After he purchased the marijuana, a police officer stopped him for a traffic violation. During the stop, he and his car were searched using a police dog, and the dog found marijuana in Applicant's possession. Applicant was charged with possession of marijuana. He pled guilty to possession of drug paraphernalia. He was sentenced to one year unsupervised probation and to pay a fine and court costs. At the time of his misconduct, Applicant held a security clearance at the secret level.

Approximately two weeks after his arrest, Applicant told his FSO and his supervisor about his illegal drug-related misconduct and the pending criminal charge against him. He testified that he also informed his parents, brother, and some of his friends about his questionable behavior and criminal charge. The FSO withdrew Applicant's security clearance and reported Applicant's misconduct to the Government.

Applicant testified he used marijuana because he was under a lot of work-related stress caused by working 50- to 60-hour weeks. He told the investigator that he used marijuana recreationally for stress reduction and to alleviate boredom. Applicant averred that his most recent use of marijuana was in May 2010. Since then, he has not been in contact with his dealer, whom he believes was convicted of drug-related offenses. Applicant claimed he does not associate with any other illegal drug users, except for his older brother. According to Applicant, his brother has used marijuana since high school, and he is a habitual marijuana user. Applicant's brother used to smoke marijuana in front of Applicant. Applicant claimed he only has contact with his brother approximately twice a year, mostly during the holidays. Applicant informed his brother of the charges against him, and of his intent to never use illegal drugs again.

In October 2011, Applicant sought counseling from a state-licensed professional counselor. After an hour-long interview, the counselor concluded that Applicant's six-month drug use was situational and not symptomatic of a personality or mood disorder. In her opinion, Applicant does not have a current substance abuse disorder, and the risk of a future substance abuse relapse is low. She believes that as a result of her one-hour counseling session, Applicant has a better understanding of his stressors and triggers and he is now equipped with tools and techniques for dealing with them in more healthy and constructive ways. (AE 2) Applicant submitted a written statement of intent to refrain from any illegal drug activity, and consented to the automatic revocation of his security clearance for any violation. (AE 1)

Applicant's FSO and direct supervisor testified at his hearing. They have known Applicant and have observed his performance during the last three years. Applicant is considered to be a valuable employee with an outstanding performance record. He is dedicated, reliable, and demonstrates technical proficiency. Except for the misconduct alleged in the SOR, Applicant has not been involved in any other misconduct. His

performance safeguarding classified information and following rules and regulations has been otherwise exemplary.

Policies

The Secretary of Defense may grant eligibility for access to classified information “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).

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the adjudicative guidelines. These AGs are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with an evaluation of the whole person. An administrative judge’s adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable to reach his decision.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation of potential, rather than actual, risk of compromise of classified information. Clearance decisions must be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See Exec. Or. 10865 § 7. See also Executive Order 12968 (Aug. 2, 1995), Section 3. Thus, a clearance decision is merely an indication that the Applicant has or has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. See *Egan*, 484 U.S. at 531. “Substantial evidence” is “more than a scintilla but less than a preponderance.” See *v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed and an applicant’s security suitability. See ISCR Case No. 95-0611 at 2 (App. Bd. May 2, 1996).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant “has the ultimate burden of demonstrating that it

is clearly consistent with the national interest to grant or continue [his or her] security clearance.” ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). The burden of disproving a mitigating condition never shifts to the Government. See ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005). “[S]ecurity clearance determinations should err, if they must, on the side of denials.” *Egan*, 484 U.S. at 531; see AG ¶ 2(b).

Analysis

Guideline H, Drug Involvement

AG ¶ 24 articulates the security concern about 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 possessed and used marijuana from December 2009 until May 2010. He purchased and used marijuana at age 23, while possessing a security clearance at the secret level. He knew that his possession and use of marijuana was illegal, and that his drug-related behavior would adversely affect his ability to retain his job and to possess a security clearance. He promised to never use illegal drugs again.

AG ¶ 25 describes eight conditions related to drug involvement that could raise a security concern and may be disqualifying. Three drug involvement disqualifying conditions raise security concerns in this particular case: AG ¶ 25(a) “any drug abuse,”³ AG ¶ 25(c) “illegal drug possession including cultivation, processing, manufacture, purchase,” and AG ¶ 25(g) “any illegal drug use after being granted a security clearance.”

AG ¶ 26 provides four 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:

³ AG ¶ 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.”

AG ¶ 24(a) defines “drugs” as substances that alter mood and behavior, including: (1) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens), and (2) inhalants and other similar substances.

- (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used;
 - (3) an appropriate period of abstinence; and
 - (4) a signed statement of intent with automatic revocation of clearance for any violation;
- (c) abuse of prescription drugs was after a severe or prolonged illness during which these drugs were prescribed, and abuse has since ended; 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.

I find that none of the Guideline H mitigating conditions fully apply. Applicant's illegal possession and use of marijuana is recent and frequent. He used illegal drugs after he was hired by his current employer and while in possession of a security clearance. He was aware of the illegality of his actions and the adverse consequences he would face because of his misconduct.

Applicant has not used marijuana since May 2010. He received professional counseling to help him avoid the stress and triggers that caused him to use marijuana. He also claimed he has implemented some lifestyle changes to help him remain abstinent. Notwithstanding, his favorable evidence is not sufficient to establish that he has implemented permanent lifestyle changes to prevent his future use of illegal drugs. He continues to have some association with his drug-using brother.

Considering the record evidence as a whole, I find there has not been a sufficient period of abstinence. Not enough time has passed for me to conclude that his questionable behavior is unlikely to recur. Applicant's past questionable behavior still casts doubt on his reliability, judgment, and willingness and ability to comply with the law. His favorable evidence, at this time, is not sufficient to fully mitigate the Guideline H 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). Applicant illegally purchased and used marijuana for approximately six months while working for a defense contractor and possessing a secret security clearance. He stopped his questionable behavior because of his criminal prosecution and the withdrawal of his security clearance.

In light of Applicant's age, his years working for a government contractor while holding a security clearance, and the recency of his drug use, his promise to not use illegal drugs in the future is not sufficient to establish his questionable behavior is unlikely to recur. At this time, the record evidence fails to convince me of Applicant's eligibility for a security clearance.

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.d:	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 or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge