



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



In the matter of:)
)
) ISCR Case No. 11-00548
)
Applicant for Security Clearance)

Appearances

For Government: Julie R. Mendez, Esquire, Department Counsel
For Applicant: John F. Mardula, Esquire

January 20, 2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally possessed and used marijuana three times between August 2009 and November 2009, while working for a government contractor and holding a 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, judgment, and ability to comply with the law. Clearance is denied.

Statement of the Case

Applicant submitted the pending security clearance application (SCA) on May 25, 2010. After reviewing the results of the ensuing background investigation, adjudicators for the Defense Office of Hearings and Appeals (DOHA) were unable to make a preliminary affirmative finding¹ that it is clearly consistent with the national interest to grant Applicant's request for a 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 July 14, 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 allegation on August 24, 2011, and requested a hearing before an administrative judge. The case was assigned to me on October 13, 2011. DOHA issued a notice of hearing on October 25, 2011, convening a hearing for November 21, 2011. At the hearing, the Government offered exhibits (GE) 1 and 2, which were admitted without objection. Applicant testified, presented two witnesses, and submitted exhibits (AE) 1 through 16, which were admitted without objection. DOHA received the hearing transcript (Tr.) on November 29, 2011.

Findings of Fact

Applicant admitted the SOR factual allegation. His admission is incorporated as a finding of fact. After a thorough review of all the evidence, and having observed Applicant's demeanor and considered his testimony, I make the following additional findings of fact.

Applicant is a 31-year-old lead associate working for a government contractor. He attended college from 1998 until May 2003, when he received his bachelor's degree in mechanical engineering. During college, he was an impressive student. He made the Dean's List several times, and was a Distinguished Military Graduate from the Air Force Reserve Officer Training Corps (ROTC). He is currently pursuing a master's of science degree in electrical engineering, from which he expects to graduate in May 2012.

After college, Applicant received a commission in the U.S. Air Force, and served on active duty from 2003 until February 2007. While in the Air Force, Applicant became a combat jet pilot. He received numerous awards and commendations for his superior performance and abilities as a pilot. He was considered by his trainers and supervisors to be a "superstar" and destined for command. Applicant received access to classified information at the top secret level in 2005.

Applicant married his wife in March 2008. They had marital difficulties and separated from around July 2009 until February 2010. After another short separation, Applicant and his wife are together again. They have no children.

Applicant started working for his current employer in February 2007. His access to classified information was continued because of his job providing support to a government agency. There is no evidence to show that Applicant has ever compromised or caused others to compromise classified information.

In his May 2010 SCA, Applicant disclosed that he illegally used marijuana three times between August 2009 and November 2009. Applicant testified that during that period, he was going through a very difficult time. He was separated from his wife and

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

they were contemplating a divorce. His parents were pending a divorce, and he was having trouble adapting to his new life outside of the Air Force.

Applicant claimed that when he separated from his wife, he moved in with a friend he met in 2007 and his friend's roommate. Unbeknownst to Applicant, his friend's roommate smoked marijuana. Once in a while the roommate would have a friend over and they would smoke marijuana. Applicant was invited numerous times to smoke marijuana. Most of the time, he declined their offers. However, he relented on three different occasions and smoked marijuana. He used marijuana because he felt hopeless and hoped marijuana would make him feel better.

At his hearing, Applicant acknowledged his serious lapse in judgment. He claimed he had never used marijuana, or any other illegal drugs, before August 2009. He did not use marijuana while in high school or college because he knew that marijuana is a controlled substance, and that the possession and use of marijuana is prohibited by law. He did not want to place in jeopardy his future career and did not use any illegal drugs.

Applicant did not use illegal drugs while in the service. As a pilot in training, he was subject to frequent unannounced drug tests and he did not want to risk his Air Force training or career. Applicant claimed his last use of marijuana was in November 2009. Since leaving the home where he used marijuana, he has seen his marijuana-using friends on fewer than a handful of occasions. As of his hearing date, he had not seen them in several months. He averred that he does not initiate contact with them, and he does not respond when they initiate contact with him. (Tr. 60)

Applicant believes that his excellent high school, college, and Air Force performance shows that he is reliable, honest, and trustworthy. Additionally, he is doing an excellent job for his employer. In five years, Applicant was promoted twice. His performance ratings indicate that he exceeds qualifications, and his salary was increased by 50 percent because of his performance above and beyond expectations. Applicant is considered to be an expert in his field, and currently manages a team of co-workers.

Applicant's employer has a policy against the illegal use of drugs. Applicant acknowledged he knew about this policy when he joined the company and he was aware of it when he illegally smoked marijuana. Because of his military service, his company's policy against the use of drugs, and his experience holding a security clearance, Applicant was aware of the possible adverse consequences that would result from the use of illegal drugs while holding a security clearance.

Applicant has not participated in substance abuse counseling. However, he sought professional counseling to address his anxiety and the stress resulting from his marital separation. He believes that he is making significant progress and his counseling has helped him to control his stress and anxiety. Applicant expressed deep regret for his misconduct. He understands that he violated the trust placed on him by

the Government. He believes he has learned a valuable lesson. 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 2)

Applicant's friend and his direct supervisor testified at his hearing. Applicant's friend works for another government agency and possesses a security clearance. He has known Applicant since 2007. He considers Applicant to be his most reliable friend. In his opinion, Applicant follows rules and regulations, displays good judgment, and is highly qualified for his job. Applicant's supervisor has known Applicant since 2007, and has been his direct supervisor since October 2010. 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. He is meticulous and careful safeguarding classified information and following rules and regulations. He recommended Applicant for access to classified information.

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 illegally used marijuana three times between August 2009 and November 2009. He used marijuana at age 29, while possessing a security clearance at the top secret level. During college, he participated in ROTC training and received an Air Force commission after graduation. He was trained as a fighter jet pilot, and served on active duty until early 2007. He started working for a government contractor in February 2007. He was made aware of his employer’s policy against the use of illegal drugs. Applicant 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.

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:

(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 marijuana use is recent and frequent. He used marijuana at age 29. Because of his age, education, military training and service, experience working for a government contractor, and his four years possessing a top secret security clearance, he was aware of the illegality of his actions and the adverse consequences he would face because of his misconduct. Applicant’s behavior not only was illegal, but it also violated the trust bestowed on him by the Government.

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.

Applicant has not used marijuana since November 2009. He received professional counseling to help him avoid the stress and anxiety that caused him to use marijuana. He also claimed he has implemented some lifestyle changes to help him remain abstinent. He moved to another state and reconciled with his wife. He claimed that the stress and anxiety that caused his drug use are no longer present in his life. He promised never to use illegal drugs again.

Notwithstanding, his favorable evidence is not sufficient to establish that he has implemented permanent lifestyle changes to prevent his future use of marijuana. His evidence fails to demonstrate that he could be trusted again after he violated the trust placed on him by the Government in 2005. Marital conflict, stress, and anxiety are ordinary circumstances that we face frequently in our society. More likely than not, Applicant will suffer again from stress and anxiety not only caused from marital conflict, but also from his work, family, and life in general. Considering the record evidence as a whole, I find there has not been a sufficient period of abstinence for Applicant to show that he can control himself and remain abstinent. Additionally, he continues to have some association with his drug-using friends.

On balance, 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 used marijuana while working for a defense contractor and possessing a top secret security clearance.

In light of Applicant's age, his military training and years of active duty service, 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
Subparagraph 1.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 or continue eligibility for a security clearance for Applicant. Eligibility for a security clearance is denied.

JUAN J. RIVERA
Administrative Judge