



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



In the matter of:)
)
) ISCR Case No. 11-03366
)
Applicant for Security Clearance)

Appearances

For Government: Marc G. Laverdiere, Esquire, Department Counsel
For Applicant: *Pro se*

04/04/2012

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally purchased, possessed, and used marijuana between January 2009 and August 2009, while working for a government contractor and holding a security clearance. As of his hearing day, he was living with his drug provider and marijuana-user friend. His behavior casts doubt on his reliability, judgment, and ability to comply with the law. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on August 5, 2010. On September 29, 2011, the Defense Office of Hearings and Appeals (DOHA) issued Applicant a Statement of Reasons (SOR) listing security concerns under Guideline H (Drug Involvement).¹ Applicant answered the SOR on October 12, 2011, and requested

¹ DOHA acted under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense (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.

a decision on the record. On December 8, 2011, Applicant requested a hearing before an administrative judge. The case was assigned to me on December 21, 2011.

DOHA issued a notice of hearing on January 3, 2012, convening a hearing for January 23, 2012. At the hearing, the Government offered exhibits (GE) 1 through 6, which were admitted without objection. Applicant testified, presented one witness, and submitted exhibits (AE) 1 and 2, which were admitted without objection. DOHA received the hearing transcript (Tr.) on January 27, 2012.

Findings of Fact

Applicant admitted the SOR factual allegations. His admissions are incorporated to the findings 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 28-year-old analyst working for a government contractor. He received his high school diploma in May 2002. He is currently pursuing his bachelor's degree and has completed some college courses. He has never been married and he has no children.

At his hearing, Applicant initially testified that he first illegally used marijuana in January 2009. Under cross-examination, he admitted that he illegally used marijuana once while in high school. He explained that in high school he was young and impressionable. He succumbed to the peer pressure and experimented with marijuana. He used marijuana only once because he knew better than to use an illegal drug. (Tr. 26)

After high school, Applicant enlisted in the U.S. Marine Corps Reserve, where he served from February 2002 until his discharge in 2009. He served two eight-month combat tours in Iraq as a light vehicle mechanic. His first combat tour was during the 2003 Iraq invasion, and in 2008 he served his second tour in Iraq. He received a Combat Action Award for his 2003 tour, and two Navy Achievement Medals, one for each deployment. He achieved the rank of sergeant (E-5), and his service was characterized as honorable. Because of his military duties, he received access to classified information at the secret level in 2004. From late 2007 until his discharge, he was assigned to the Inactive Reserve, and he had no drilling responsibilities. He testified that he did not illegally use marijuana while serving in the Marine Corps.

Applicant was hired by his current employer, a government contractor, in December 2008. When Applicant started working for his employer, he was informed that the company has a zero tolerance policy regarding the illegal use of drugs. Because of his job, he continuously held a secret security clearance from December 2008 until his hearing day. There is no evidence to show that Applicant has ever compromised or caused others to compromise classified information.

From January 2009 until August 2009, while holding a security clearance, Applicant illegally used marijuana. He testified that he had difficulty adapting to being a civilian after serving in the Marine Corps and being deployed to Iraq. He claimed that he used marijuana because he felt that he did not fit, and that something was not right. He was looking for an escape, and trying to adapt and fit into his civilian lifestyle. (Tr. 36-37) Applicant obtained the marijuana from a high school friend. He testified: “[I] was with some friends who I knew were using, and I wanted to try it out and it felt pretty good.” (Tr. 38) On average, he used marijuana between one and three times a week.

Applicant was introduced to a marijuana dealer by his high school friend. He and his high school friend travelled to another state to purchase marijuana. Additionally, Applicant purchased marijuana three times directly from his high school friend. Applicant’s high school friend has been living with Applicant (renting his basement) since May 2009, until at least the day of the hearing. Applicant smoked marijuana with his high school friend on a frequent basis until he stopped smoking marijuana in August 2009. His fiancé was aware that Applicant and his high school friend smoked marijuana. Applicant claimed that the last time he observed his high school friend smoke marijuana was shortly after Applicant stopped using marijuana.

In August 2009, Applicant decided to stop using marijuana because he knew it was not a good idea. He testified that enough people (his girlfriend and family members) knew that he was illegally using marijuana and they advised him to stop. Because of his military service and his company’s policy against the illegal use of drugs, Applicant was aware of the possible adverse consequences that would result from the use of illegal drugs while holding a security clearance.

In his August 2010 SCA, Applicant disclosed that he illegally purchased, possessed, and used marijuana between January 2009 and August 2009. At his hearing, he expressed regret for his lapse of judgment. He promised to never use illegal drugs again. He believes his misconduct is mitigated by the passage of time, his change of circumstances, and his job performance. He averred that he changed his lifestyle and no longer socializes with illegal drug users. (Although, he was living with his high school friend.) He is now engaged to be married, purchased a home, has a good job that he likes and would like to keep. Applicant is considered to be dependable, credible, and trustworthy by his friends. He has not participated in substance abuse counseling.

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 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 between January 2009 and August 2009. He used marijuana at age 25, after serving in the Marine Corps, and while possessing a security clearance and working for a government contractor with a zero tolerance policy against the use of illegal drugs. 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”;² 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 apply. Applicant’s illegal marijuana use is recent and frequent. Because of his age, military training and service, and his years possessing a secret security clearance, he was aware of the illegality of his actions and the adverse consequences he would face because of his misconduct.

² 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's behavior not only was illegal, but it also violated the trust bestowed on him by the Government.

Applicant has not used marijuana since August 2009. He claimed he has implemented some lifestyle changes to help him remain abstinent. He also 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. Applicant's claims of lifestyle changes are belied by his own testimony. As of the hearing day, he was living with his marijuana dealer and high school friend, with whom Applicant frequently used marijuana in 2009.

Applicant's actions demonstrate that he does not understand what is required of him to establish eligibility for a security clearance. Applicant's questionable behavior casts doubt on his reliability, judgment, and willingness and ability to comply with the law. His favorable evidence is not sufficient to 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 secret security clearance.

In light of Applicant's age, his military training, years holding a security clearance, and his continued association with a known drug dealer and user, his promise to not use illegal drugs in the future is not sufficient to establish his questionable behavior is unlikely to recur. 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.c:	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