



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 15-03924

Appearances

For Government: Andre M. Gregorian, Esq., Department Counsel
For Applicant: *Pro se*

03/28/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant possessed and used marijuana on about 20 to 25 occasions from March 2013 to February 2014 while holding a security clearance. More time without illegal drug use is necessary to fully mitigate drug involvement security concerns. Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on September 4, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) on November 23, 2015, issued a statement of reasons (SOR) to Applicant, detailing security concerns under Guideline H (drug involvement).¹ Applicant answered the SOR on December 8, 2015, and requested a hearing.

¹ The DOD acted under Executive Order (EO) 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 for Determining Eligibility for Access to Classified Information* (AG), implemented by the DOD on September 1, 2006.

On January 29, 2016, Department Counsel indicated he was ready to proceed. The case was assigned to me on August 26, 2016. On August 29, 2016, DOD issued a hearing notice, setting the hearing for September 23, 2016. Applicant's hearing was held as scheduled. Department Counsel offered four exhibits (GE 1 through 4); Applicant offered one exhibit (AE 1); there were no objections; and all documents were admitted into evidence, except Government Exhibit (GE) 4, which was attached to the record. On October 3, 2016, I received the transcript.

Findings of Fact

Applicant admitted the conduct alleged in SOR ¶¶ 1.a and 1.b. His SOR and hearing admissions are incorporated into my findings of fact. After a complete and thorough review of the evidence of record, I make the following additional findings of fact:

Applicant is a 36-year-old systems engineer who has been employed by two defense contractors from 2003 to 2014 and from 2014 to present. He has held a security clearance from 2004 to present. (Tr. 8, 23; GE 2) There is no evidence of security violations. He received a bachelor's degree in electrical and computer engineering in 2003 and completed a master's degree in systems engineering in 2011-2012. Applicant has never been married; however, he has lived with his life partner for four years, and they have a three-month-old child.

In Section 23 of Applicant's September 2014 SCA, he disclosed that he used marijuana from March 2013 to February 2014 about twice a month for a total of 20 to 25 times. He claimed he did not use marijuana or any other illegal drugs prior to March 2013. He used marijuana recreationally, primarily at home. He used marijuana several times for other than a sleep aid because he was curious or to relax after work. He told a Government investigator that he used marijuana to help him sleep.

Applicant obtained marijuana using a medical marijuana prescription in a state where his marijuana possession and use was authorized under state law. He did not retain a copy of his marijuana prescription or of his visit to the doctor's office where he received the prescription. He did not provide any marijuana to anyone. He did not use marijuana with his partner. She does not use marijuana. He used a bong to inhale marijuana, and he did not bring it with him when he moved to a different state in 2014.

In February 2014, Applicant ended his marijuana use because he was moving on with his life; he did not need it anymore; and his marijuana possession and use was illegal under state law in the state where he moved in 2014. Also, his marijuana prescription was expiring, and he did not want to renew it. He does not intend to use marijuana in the future. He did not receive any counseling or treatment for drug abuse. Applicant is willing to take follow-up drug tests to show he is not using illegal drugs.

Applicant was aware that possession and use of marijuana was illegal under federal law before he began using it. (Tr. 24, 28) His DOD contractor employer from 2003 to 2014 had a drug-free workplace policy. Over his 11 years working for the DOD

contractor, he was drug tested three or four times. He did not test positive for use of illegal drugs. He knew marijuana use would adversely affect his security clearance. He started using marijuana out of curiosity and to help him sleep.

Applicant's two performance evaluations from February 2014 to January 2016 laud his contributions to mission accomplishment. His supervisor indicated Applicant frequently exceeds expectations, he learns quickly, shows initiative, and works well with others. (AE A)

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

Drug Involvement

AG ¶ 24 articulates the security concern concerning drug involvement:

[u]se 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.

The disqualifying conditions in AG ¶¶ 25(a) "any drug abuse;"² 25(c) "illegal drug possession;" and 25(g) "any illegal drug use after being granted a security clearance;" could raise a security concern and may be disqualifying in this case. Applicant possessed and used marijuana on about 20 to 25 occasions from March 2013 to February 2014 while holding a security clearance.³ AG ¶¶ 25(a), 25(c), and 25(g) apply.

AG ¶ 26 provides for 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

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."

³ 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.

Schedules I, II, III, IV, and V, as referred to in the Controlled Substances Act are contained in 21 U.S.C. § 812(c). Marijuana is a Schedule (Sch.) I controlled substances. See Drug Enforcement Administration listing at http://www.deadiversion.usdoj.gov/21cfr/cfr/1308/1308_11.htm. See also *Gonzales v. Raish*, 545 U.S. 1 (2005) (discussing placement of marijuana on Schedule I). On October 25, 2014, the Director of National Intelligence wrote that marijuana use continues to violate federal law, even in those jurisdictions where it has been decriminalized. (GE 3, Letter ES 2014-00674, Oct. 25, 2014)

(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.

The Appeal Board concisely explained Applicant's responsibility for proving the applicability of mitigating conditions as follows:

Once a concern arises regarding an Applicant's security clearance eligibility, there is a strong presumption against the grant or maintenance of a security clearance. See *Dorfmont v. Brown*, 913 F. 2d 1399, 1401 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991). After the Government presents evidence raising security concerns, the burden shifts to the applicant to rebut or mitigate those concerns. See Directive ¶ E3.1.15. The standard applicable in security clearance decisions is that articulated in *Egan, supra*. "Any doubt concerning personnel being considered for access to classified information will be resolved in favor of the national security." Directive, Enclosure 2 ¶ 2(b).

ISCR Case No. 10-04641 at 4 (App. Bd. Sept. 24, 2013).

AG ¶ 26(a) can mitigate security concerns when drug offenses are not recent. There are no "bright line" rules for determining when such conduct is "recent." The determination must be based "on a careful evaluation of the totality of the record within the parameters set by the directive." ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). If the evidence shows "a significant period of time has passed without any evidence of misconduct," then an administrative judge must determine whether that period of time demonstrates "changed circumstances or conduct sufficient to warrant a finding of reform or rehabilitation."⁴

⁴ ISCR Case No. 02-24452 at 6 (App. Bd. Aug. 4, 2004). In ISCR Case No. 04-09239 at 5 (App. Bd. Dec. 20, 2006), the Appeal Board reversed the judge's decision denying a clearance, focusing on the absence of drug use for five years prior to the hearing. The Appeal Board determined that the judge excessively emphasized the drug use while holding a security clearance, and the 20 plus years of drug use, and gave too little weight to lifestyle changes and therapy. For the recency analysis the Appeal Board stated:

Compare ISCR Case No. 98-0394 at 4 (App. Bd. June 10, 1999) (although the passage of three years since the applicant's last act of misconduct did not, standing alone, compel the administrative judge to apply Criminal Conduct Mitigating Condition 1 as a matter of law, the Judge erred by failing to give an explanation why the Judge decided not to apply that mitigating condition in light of the particular record evidence in the case) with ISCR

Applicant stopped using marijuana in February 2014. He resolved not to use marijuana in the future. He recognized the adverse impact of drug abuse in connection with access to classified information, and he expressed remorse about using marijuana while employed by a defense contractor. He also understands that possession of marijuana violates federal law. AG ¶ 26(a) partially applies to his possession and use of illegal drugs;⁵ however, more time without illegal drug use is necessary to fully apply AG ¶ 26(a).

AG ¶ 26(b) provided some mitigating evidence. He stated his intention not to abuse any illegal drugs in the future, and he does not associate with marijuana users. His period of abstinence is March 2014 to September 2016 (the date of his hearing), which in this instance is insufficient.

AG ¶¶ 26(c) and 26(d) are not applicable. Applicant did not abuse drugs after being issued a prescription that is lawful under federal law. He did not complete a drug counseling or treatment program.

In sum, Applicant possessed and used marijuana on about 20 to 25 occasions from March 2013 to February 2014 while holding a security clearance. Each time he possessed marijuana he violated federal criminal law. He violated security rules and his employer's policy against illegal drug use. He understands the adverse consequences from marijuana use;⁶ however, he has not shown or demonstrated a sufficient track record of abstention from illegal drug use to eliminate drug involvement as a bar to his access to classified information. His marijuana use while holding a security clearance with full knowledge that marijuana use was prohibited weighs against approval of access to classified information because they show an unwillingness to comply with the law and regulations, and a lack of reform and rehabilitation. Drug involvement security concerns are not mitigated at this time.

Case No. 01-02860 at 3 (App. Bd. May 7, 2002) ("The administrative judge articulated a rational basis for why she had doubts about the sufficiency of Applicant's efforts at alcohol rehabilitation.") (citation format corrections added).

In ISCR Case No. 05-11392 at 1-3 (App. Bd. Dec. 11, 2006) the Appeal Board, affirmed the administrative judge's decision to revoke an applicant's security clearance after considering the recency analysis of an administrative judge stating:

The administrative judge made sustainable findings as to a lengthy and serious history of improper or illegal drug use by a 57-year-old Applicant who was familiar with the security clearance process. That history included illegal marijuana use two to three times a year from 1974 to 2002 [drug use ended four years before hearing]. It also included the illegal purchase of marijuana and the use of marijuana while holding a security clearance.

⁵ In ISCR Case No. 02-08032 at 8 (App. Bd. May 14, 2004), the Appeal Board reversed an unfavorable security clearance decision because the administrative judge failed to explain why drug use was not mitigated after the passage of more than six years from the previous drug abuse.

⁶ Approval of a security clearance, potential criminal liability for possession of drugs and adverse health, employment, and personal effects resulting from drug use are among the strong motivations for remaining drug free.

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 Guideline H in my whole-person analysis, but some warrant additional comment.

Applicant is a 36-year-old systems engineer. He holds a bachelor's degree and a master's degree in systems engineering. He has worked for two defense contractors from 2003 to present, and has held a security clearance since 2004 to present. There is no evidence of security violations. Applicant's performance evaluations laud his contributions to mission accomplishment, and his supervisor indicated he frequently exceeds expectations.

The evidence against continuation of Applicant's clearance is more substantial. Applicant possessed and used marijuana on about 20 to 25 occasions from March 2013 to February 2014 while holding a security clearance. He violated federal criminal law; he violated security rules; and he violated his employer's policy against illegal drug use. His marijuana possession and use while holding a security clearance weighs against approval of access to classified information. His illegal drug possession and use raises issues about his reliability and trustworthiness, both because it may impair judgment and because it raises questions about his ability or willingness to comply with laws, rules, and regulations. He has not demonstrated a sufficient track record of abstention from illegal drug use to eliminate drug involvement as a bar to his access to classified information. I conclude Applicant did not fully mitigate drug involvement security concerns.

Unmitigated drug involvement concerns lead me to conclude that continuation of a security clearance for Applicant is not warranted at this time. This decision should not be construed as a determination that Applicant cannot or will not attain the state of reform necessary for award of a security clearance in the future. With more time without abuse of illegal drugs, he may well be able to demonstrate persuasive evidence of his security clearance worthiness.

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

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with national security to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is denied.

JUAN J. RIVERA
Administrative Judge