



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



In the matter of:)
)
) ISCR Case No. 15-04915
)
Applicant for Security Clearance)

Appearances

For Government: Candace L. Garcia, Esq., Department Counsel
For Applicant: *Pro se*

05/12/2017

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana about 10 times between November 2013 and March 2014, after he was granted a clearance. He has not used any illegal drugs in over three years. Considering the evidence as a whole, including Applicant's 27-year service while holding a clearance and his medical condition, I find that the passage of time is sufficient to mitigate the security concerns raised by his marijuana-related criminal behavior. Guideline H security concerns are mitigated. Clearance is granted.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on August 14, 2014. After reviewing it and the information gathered during a background investigation, the Department of Defense (DOD) was unable to make an affirmative decision to grant Applicant eligibility for a clearance. On February 10, 2016, the DOD issued him a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement).¹ Applicant answered the SOR on March 18, 2016, and requested

¹ The action was taken 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 hearing before an administrative judge from the Defense Office of Hearings and Appeals (DOHA).

The case was assigned to me on August 12, 2016. The DOHA issued a notice of hearing on December 12, 2016, scheduling a hearing for January 5, 2017. At the hearing, the Government offered three exhibits (GE 1 through 3). Applicant testified and submitted six exhibits (AE 1 through 6). AE 6 was received post-hearing. All exhibits were admitted without objection. DOHA received the hearing transcript (Tr.) on January 10, 2017.

Findings of Fact

Applicant admitted the factual allegations in SOR ¶¶ 1.a through 1.c, and provided evidence in mitigation and extenuation. He denied SOR ¶ 1.d - that he intends to use marijuana in the future. His admissions to the SOR and at his hearing are incorporated herein as findings of fact. After a thorough review of the record evidence, including his testimony and demeanor while testifying, I make the following additional findings of fact:

Applicant is a 51-year-old employee of a federal contractor. He has been married three times and divorced twice. He married his current spouse in 2003. They have a 13-year-old son and a 9-year-old daughter.

In 1983, while in high school, Applicant enlisted in the Army Reserve and served until 1985. He then enlisted in the Army (active duty) and honorably served until the end of his enlistment in 1989. He then rejoined the Reserve and attended college. Applicant received a bachelor's degree and an Army commission in 1993. He honorably served on active duty as an officer until 2012, when he retired with the rank of lieutenant colonel. In August 2012, a military service hired him as a federal employee. Applicant's current employer and clearance sponsor hired him in June 2013.

Applicant possessed a clearance from about the date he was commissioned in 2002 until he was honorably retired in 2012. Applicant believed his clearance was continued between August 2012 and June 2013, because during that period he had access to classified information and secured areas while working as a federal employee. (Tr. 30-34) His then employer was seeking renewal of his clearance.

Applicant believed his clearance expired when he left his federal employee position in June 2013. He was pending renewal of his clearance, but the process was not completed. To his knowledge, the clearance was never renewed. Applicant testified he had no access to classified information or classified areas between May 2013 and August 2014, when he submitted his most recent SCA. (Tr. 35)

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

In response to Section 22 (Police Record) and Section 23 (Illegal Use of Drugs or Drug Activity) of his 2014 SCA, Applicant disclosed that he illegally used marijuana between November 2013 and March 2014. He used marijuana "periodically and less than 10" times. (SCA, Section 23) He averred the marijuana helped him to deal with his anxiety and Post Traumatic Stress Disorder (PTSD). He also reported his illegal use of marijuana to his employer.

Applicant disclosed that in March 2014, a state police officer arrested and charged him with illegal possession of marijuana (less than 10 grams) after a traffic stop. Applicant pled guilty to the illegal possession of marijuana and the court sentenced him to complete 16 hours of community service. Upon completion of the community service, the charge was placed on a stet docket. Applicant also disclosed that in July 2012, while in the service, he received non-judicial punishment for drunk and disorderly and conduct unbecoming an officer. He received a reprimand and the command referred him to a substance abuse counseling program. He was evaluated, but not admitted to the counseling program.

At hearing, Applicant confirmed his illegal use of marijuana between November 2013 and March 2014. An acquaintance provided him with marijuana free of charge. He continues to associate with this acquaintance infrequently. (Tr. 39)

Applicant explained he tried marijuana for self-medicinal purposes, to determine whether marijuana would help with his anxiety and PTSD problems. Applicant was diagnosed with anxiety while he was on active duty in 2010. He believes his condition is the result of his enlisted service in a sniper unit and his tour in Afghanistan. He has been treated and prescribed medications for anxiety since he was in the service in 2010. He has a 30% disability rating from the Department of Veterans Affairs (VA) as of July 2013. (AE 6)

Applicant averred he has had difficulty getting prompt appointments in the backlogged VA medical system. Sometimes, it took him six months to get a consultation, and if he went to the emergency room for his anxiety problems, he has to wait sometimes 10 hours to be seen. He was concerned about not getting his anxiety and PTSD under control. Applicant claimed he consulted with doctors outside of the VA system at his own expense. To him, the process becomes a guessing game as to what medications would work. He averred the medications he was prescribed made him groggy, drowsy, and he could not think clearly. He cannot handle those medications and work. He is seeking a doctor who will help him to achieve the right balance with his medications. He believes there are legal medicines that will help him stabilize his anxiety without side effects.

Applicant knew the use of marijuana was illegal. Since March 2014, Applicant has been in situations where he believed his friends and associates were using marijuana. He ignored their behavior because he is not attracted to marijuana, and he no longer seeks it out. (Tr. 40) He averred he is not associated with marijuana users on a daily basis or a recurrent basis. He credibly stated he has not used any illegal drugs

after March 2014. Applicant testified that he does not intend to illegally use marijuana in the future. However, if federal law is changed and marijuana is approved for prescription, he would like to try marijuana again.

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 (less than 10 times) between November 2013 and March 2014. He used marijuana after being granted a clearance. He was arrested and charged with possession of marijuana in March 2014. The charge was placed on a stet docket following a pre-trial diversion program.

AG ¶ 25 describes three conditions related to drug involvement that 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 . . . ; 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; and
- (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;
 - (4) a signed statement of intent with automatic revocation of clearance for any violation.

Applicant's marijuana-related criminal behavior last occurred in March 2014. It has been over three years since Applicant's most recent use of marijuana. There is no

evidence of any further illegal drug abuse. Applicant promised to never use marijuana illegally again. His past statement regarding his intent to do so was contingent on marijuana being made legal by federal law. He promised that so long as security clearance rules prohibit his use of marijuana, he would follow security rules.

Applicant's illegal marijuana use was limited to a short period. His use of marijuana no longer casts doubt on his reliability, trustworthiness, and judgment. Considering the evidence as a whole, including Applicant's 27-year service while holding a clearance and his medical condition, I find that the passage of time is sufficient to mitigate the security concerns raised by his marijuana-related criminal behavior. AG ¶¶ 26(a) and (b) apply.

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. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant is a 51-year-old employee of a federal contractor. He served 27 years in the Army - 19 of those years as an officer while holding a clearance. His past illegal use of marijuana is not recent. There is no evidence of any further marijuana-related criminal conduct after March 2014, or of any other illegal drug use. He disclosed his marijuana-related criminal conduct and other questionable behavior and criminal conduct in his 2014 SCA. He also notified his employer of his misconduct. Applicant acknowledged his criminal behavior and credibly promised never to illegally use marijuana again. He understands that his use of any illegal drug will raise additional security concerns.

On balance, Applicant's 27 years of service is sufficient to mitigate the security concerns raised by his short period using marijuana, after he was granted a clearance, three years ago.

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:	FOR APPLICANT
Subparagraphs 1.a - 1.d:	For Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is granted.

JUAN J. RIVERA
Administrative Judge