



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



In the matter of:

Applicant for Security Clearance

)
)
)
)
)

ISCR Case No. 15-04938

Appearances

For Government: Tovah A. Minster, Esq., Department Counsel
For Applicant: Jacob Ranish, Esq.

11/28/2016

Decision

RIVERA, Juan J., Administrative Judge:

In 2014, Applicant self-reported his prior marijuana use while in college (five times in 2008), and in November 2013, when he used marijuana once while holding a public trust position. As of the date of his hearing, Applicant had not used marijuana for 32 months. He provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. He mitigated personal conduct security concerns.¹ Eligibility for access to classified information is granted.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on December 1, 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 a clearance. On December 8, 2015, the DOD Consolidated Adjudications Facility (CAF) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline E (personal conduct).² Applicant answered the SOR

¹The statement of reasons did not allege a drug involvement security concern.

²DOD acted 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*

on January 12, 2016, and requested a hearing before an administrative judge. The case was assigned to me on April 12, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on May 2, 2016, scheduling a hearing for June 1, 2016.

At the hearing, the Government offered two exhibits (GE 1 and 2). Applicant testified, and submitted six exhibits (AE) 1 through 6. All exhibits were made part of the record without objections. DOHA received the hearing transcript (Tr.) on June 7, 2016.

Findings of Fact

Applicant denied the two SOR allegations; however, he admitted that in early 2008, while in college, he experimented with marijuana five times. He also admitted to using marijuana in November 2013, while holding a position of trust granted to him in 2010. 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 27-year-old cyber security project manager working for several federal contractors since 2010. He graduated from high school in 2006, and received a bachelor's degree in 2010. He has never married, and he does not have any children. In 2010, Applicant was granted a public trust position, which he has held to the present. He has worked for his current employer since October 2014.

Applicant first used marijuana in 2008 when he was a sophomore in college. He used marijuana five times from about January to March 2008 at fraternity functions. He did not sell or purchase marijuana. Applicant decided to stop using marijuana because he was considering going into federal law enforcement, and he did not want to continue to associate with the people involved with marijuana.

Section 21 of Applicant's August 12, 2010 public trust application (PTA) asked whether he had used illegal drugs in the previous 12 months, and Applicant answered, no. His answer was accurate and truthful because at the time he completed his PTA he had not used illegal drugs since about March 2008.

In November 2013, Applicant claimed he was under stress because of changes in his employment; he was moving to a new address; and his mother was having serious medical problems. Applicant sought medical assistance and was prescribed an anti-anxiety medication which he continues to take to the present. Applicant went to another city to visit a friend, and he accepted and used the marijuana she offered to him. (Tr. 27) Applicant regretted his decision, describing it as childish and irresponsible. (Tr. 27, 33)

Applicant is engaged to be married in June 2017. Applicant told his fiancé about his marijuana use in November 2013. She does not tolerate illegal drug use, and she said their relationship would end if he used marijuana again. He promised his fiancé that he would never use marijuana again. He emphasized that he did not want to risk the loss of his relationship with his fiancé.

Section 23 of Applicant's 2014 SCA asked about Applicant's illegal drug use in the previous seven years. He disclosed that he first used marijuana in January 2008, and most recently used marijuana in November 2013. He used marijuana five to seven times in the previous seven years. In regard to future illegal drug use, he indicated, "I do not intend to do anything that would interfere with obtaining further security clearances." He believed his answers on his December 1, 2014 SCA were truthful and accurate. He did not use marijuana after November 2013. (Tr. 32)

In March 2016, Applicant received a substance abuse evaluation from Ms. B, who is a Licensed Social Worker (LSW), Certified Substance Abuse Counselor (CSAC), Licensed Substance Abuse Professional (SAP). She described Applicant as having sincere remorse about his marijuana use, excellent insight, and above average intelligence. (AE 1) She concluded there was "a very low probability of a substance abuse disorder," no treatment was warranted, and there was no risk of relapse. (AE 1)

Applicant provided a signed statement of intent with automatic revocation of clearance for any future use of illegal drugs. He does not associate with anyone that currently uses marijuana. Applicant has disclosed his marijuana involvement to some of his closest friends.

On September 6, 2013, a manager wrote thanking Applicant for his "excellent service, support rendered, and passionate participation" as well as for his "active involvement and enthusiastic contributions to our overall goal." Applicant provided seven statements from Applicant's friends and coworkers who have known him for 5 to 14 years. They lauded Applicant's exemplary character, trustworthiness, reliability, honesty, loyalty, and thoughtfulness. Their statements support approval of his access to classified information. (AE 5)

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

Personal Conduct

AG ¶ 15 expresses the security concern pertaining to personal conduct:

Conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about an individual's reliability, trustworthiness and ability to protect classified information. Of special interest is any failure to provide truthful and candid answers during the security clearance process or any other failure to cooperate with the security clearance process.

AG ¶ 16 describes four conditions that could raise a security concern and may be disqualifying in this case:

(a) deliberate omission, concealment, or falsification of relevant facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(c) credible adverse information in several adjudicative issue areas that is not sufficient for an adverse determination under any other single guideline, but which, when considered as a whole, supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information; and

(d) credible adverse information that is not explicitly covered under any other guideline and may not be sufficient by itself for an adverse determination, but which, when combined with all available information supports a whole-person assessment of questionable judgment, untrustworthiness, unreliability, lack of candor, unwillingness to comply with rules and regulations, or other characteristics indicating that the person may not properly safeguard protected information. This includes but is not limited to consideration of:

(1) untrustworthy or unreliable behavior to include breach of client confidentiality, release of proprietary information, unauthorized release of sensitive corporate or other government protected information;

(2) disruptive, violent, or other inappropriate behavior in the workplace;

(3) a pattern of dishonesty or rule violations; and

(4) evidence of significant misuse of Government or other employer's time or resources; and

(e) personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress, such as (1) engaging in activities which, if known, may affect the person's personal, professional, or community standing. . . .

AG ¶ 16(a) is not established. Applicant refuted the allegation in SOR ¶ 1.b that he failed to disclose his marijuana use on his 2010 PTA. He denied that he used marijuana within 12 months of completing his PTA, and there is no evidence to the contrary. AG ¶ 16(d) is not established. Applicant's marijuana use is explicitly covered under the drug involvement guideline.

AG ¶¶ 16(c) and 16(e) apply. Applicant used and possessed marijuana on about five occasions in 2008 while he was in college. He also illegally used marijuana in November 2013, while holding a public trust position. In ISCR Case No. 12-00609 at 6 (App. Bd. Apr. 4, 2014), the Appeal Board emphasized the importance of the applicant's security clearance and employment status when the criminal conduct was committed stating:

A reasonable person could find [a]pplicant's behavior to have been reckless and incompatible with his claims of rehabilitation and good judgment. See, e.g., ISCR Case No. 11-00391 at 2-3 (App. Bd. Dec. 1, 2011) (A pre-employment drug test should have placed the applicant on notice that drug use was incompatible with his employment. The applicant's use of marijuana after this test suggests a lack of willingness to follow rules and regulations); see also ISCR Case No. 07-00852 at 3 (App. Bd. May 27, 2008) (Use of marijuana after having submitted an SCA undercuts the applicant's promise to avoid such conduct in the future). The Judge's failure to address this aspect of the case impairs his whole-person analysis.

Applicant's marijuana use while holding a public trust position showed poor judgment. His marijuana use adversely affected his personal, professional, and community standing and accordingly, this information creates a vulnerability to exploitation, manipulation or duress.

AG ¶ 17 provides three conditions that could mitigate security concerns in this case including:

(c) the offense is so minor, or so much time has passed, or the behavior is so infrequent, or it happened under such unique circumstances that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;

(d) the individual has acknowledged the behavior and obtained counseling to change the behavior or taken other positive steps to alleviate the stressors, circumstances, or factors that caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur; and

(e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress.

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 ¶ 17(c) can mitigate security concerns when drug offenses: (1) are not recent; (2) are infrequent; or (3) happened under such unique circumstances that the circumstances are unlikely to recur. If any of the three criteria apply, then the drug offenses may not cast doubt on the Applicant's reliability, trustworthiness, or good judgment. 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."³

Applicant used marijuana five times during a short period in early 2008 and then stopped using marijuana; his marijuana use recurred in November 2013; and he has not used marijuana again. Applicant credibly resolved not to use marijuana in the future. He abstained from marijuana use for about 31 months. He recognized the adverse impact

³ISCR 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 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.

See *also* ISCR Case No. 11-00193 at 2-5 (App. Bd. Jan. 24, 2013) (reversing grant of security clearance for applicant who refrained from marijuana use for two years because he had used marijuana with varying degrees of frequency for 21 years; he used marijuana while holding a security clearance; and he made inconsistent statements); ISCR Case No. 06-18905 at 3-4 (App. Bd. Nov. 16, 2007) (reversing grant of security clearance where applicant holding a security clearance used marijuana "two and a half years prior to the hearing" and he made inconsistent statements about his history of marijuana use and his intentions of using marijuana in the future).

of drug abuse in connection with access to classified information and on his relationship with his fiancé. He also understands that possession of marijuana violates federal law. AG ¶ 17(c) applies to his marijuana-related conduct.

Applicant has completed a sustained period of abstinence, and he provided “a signed statement of intent [not to use illegal drugs] with automatic revocation of clearance for any violation.” See *generally* AG ¶ 26(b) (this drug involvement mitigating condition is not directly applicable; however, it is an indication of the importance in the Directive of this mitigating factor in the assessment of drug-related conduct).

AG ¶ 17(d) partially applies. Applicant acknowledged his illegal marijuana possession and use, and he sought an assessment (not counseling) from Ms. B. He is taking medication to relieve stress, and he has the support of his fiancé to refrain from future marijuana use. Applicant’s has not been involved in drug abuse counseling. Ms. B indicated his marijuana abuse was so limited such counseling was unnecessary. Applicant’s future marijuana use is unlikely to recur.

AG ¶ 17(e) applies. Applicant has eliminated his vulnerability to exploitation, manipulation, or duress by disclosing his marijuana use on his 2014 SCA, to his fiancé, and to some of his close friends. He promised to refrain from future marijuana use.

In sum, the only evidence of Applicant’s marijuana use is his self-report during the security clearance process. His November 2013 marijuana use occurred while he was holding a public trust position. He provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. He did not make any inconsistent statements about his history of marijuana use or about his intention to not use marijuana in the future. He has abstained from marijuana use for 31 months (November 2013 to June 2016, the date of his hearing), demonstrating a sufficient track record of no drug abuse to mitigate personal conduct 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). I have incorporated my comments under Guideline E in my whole-person analysis.

Applicant is a 27-year-old cyber security project manager working for a federal contractor since October 2014. In 2010, after graduating from college, he was granted a public trust position, which he has held to the present. Applicant’s employer considers him to be an excellent employee who has made significant contributions to the employer’s goals. Applicant’s friends and coworkers lauded his exemplary character, trustworthiness, reliability, honesty, loyalty, and thoughtfulness. Their statements support approval of his access to classified information.

Applicant used marijuana five times in 2008, and once in November 2013. He self-reported his marijuana use in his 2014 SCA. His November 2013 marijuana use

occurred while he was holding a public trust position and showed very poor judgment. He ended his marijuana use in November 2013, and his marijuana use is not recent. His fiancé supports his abstention from illegal drug use. He sincerely and credibly assures he will not use marijuana in the future, and he provided a signed statement of intent not to use illegal drugs with automatic revocation of clearance for any violation. Applicant mitigated the personal conduct security concerns.

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 E:	FOR APPLICANT
Subparagraphs 1.a and 1.b:	For Applicant

Conclusion

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

JUAN J. RIVERA
Administrative Judge