



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



In the matter of:)	
)	
)	ISCR Case No. 17-02648
)	
Applicant for Security Clearance)	

Appearances

For Government: Dave F. Hayes, Esq., Department Counsel
For Applicant: *Pro se*

05/11/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana between 1972 and 2012, while possessing a clearance during part of that period. There is no evidence of substance misuse after 2012. Nevertheless, the passage of time so far is insufficient to demonstrate his reliability, trustworthiness, ability to comply with the law, rules and regulations, and his ability to protect classified information. Personal conduct and drug involvement and substance misuse security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted his most recent security clearance application (SCA) on January 26, 2016. He was interviewed by a government investigator on May 24, 2017. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement and substance misuse) and Guideline E (personal conduct) on August 14, 2017. Applicant answered the SOR on September 7, 2017, and requested a decision based on the record in lieu of a hearing.

A copy of the Government's file of relevant material (FORM), submitting the evidence supporting the security concerns, was provided to Applicant by letter dated

September 22, 2017. Applicant received the FORM on September 28, 2017. He was allowed 30 days to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant did not respond to the FORM. The case was assigned to me on April 13, 2018. Lacking any objections, I admitted and considered the Government's proposed evidence.

Procedural Issue

In the FORM, Department Counsel advised Applicant that the FORM included his unauthenticated summary of interview with a government background investigator from May 24, 2017. (FORM, Item 4) Applicant was informed he could object to the summary of his interview, and it would not be admitted or considered, or that he could make corrections, additions, deletions, and update the document to make it accurate. Applicant was informed that his failure to respond to the FORM or to raise any objections could be construed as a waiver and the proposed FORM evidence would be considered. Applicant did not respond to the FORM and waived any objections. I admitted the FORM's proffered evidence and considered it.

Findings of Fact

Applicant partially admitted the SOR allegations under Guidelines H stating that "at some point during my time with a clearance some amount of marijuana entered my system." He admitted the SOR allegations under Guideline E stating "I chose to not report that on my past clearance re-investigations." His admissions are incorporated as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 59-year-old employee of a federal contractor. He graduated from high school in 1976. He married in 1978 and divorced in 1998. He has two adult children of that marriage. He has been living with a cohabitant since 2010.

Applicant has been working for different federal contractors since 1977-1978. His current employer and clearance sponsor, a federal contractor, hired him in 1979, and he has worked there ever since. Applicant submitted an SCA and was granted a secret clearance around 1979, which he has possessed since then.

In his response to Section 23 (Illegal Use of Drugs or Drug Activity) of his January 2016 SCA, Applicant disclosed for the first time that he illegally used marijuana between June 1972 and June 2012, while possessing a security clearance. In response to the question concerning the nature of use, frequency, and number of times, he answered "It was vacation". Applicant indicated he did not intend to use marijuana in the future.

During his May 2017 interview with a government investigator, Applicant revealed that he illegally used marijuana weekly during high school (1972-1976), mostly due to peer pressure. Between 1976 and about 2000, Applicant used marijuana

socially, whenever someone offered it, including after being granted a clearance in 1979. Applicant illegally smoked marijuana once in 2012 during a motorcycle rally. He denied smoking marijuana between 2000 and 2012, and between 2012 and 2016 (when he submitted his most recent SCA).

Applicant told the investigator that he had been rehearsing with a band for one year. One of the three other band members smokes marijuana. Applicant averred he has not used marijuana with the band. He tells the other band member to take it outside when he wants to smoke marijuana.

Applicant knew the use of marijuana is illegal, and that the use of marijuana while holding a clearance is also against Government's policies, rules, and regulations. Applicant stated that he was afraid to disclose his illegal use of marijuana during his first clearance investigation. He did not recall disclosing his illegal use of marijuana during subsequent periodic investigations.

Applicant submitted an SCA on November 15, 2005. Section 24 (Your Use of Illegal Drugs and Drug Activity) asked Applicant to disclose whether during the preceding seven years he had illegally used any controlled substance, including marijuana, and whether he had used any controlled substances while holding a clearance. Applicant answered "No" to both questions and failed to disclose his prior illegal use of marijuana while holding a clearance.

Applicant has not received any substance abuse counseling or treatment. He stated that he had no future intent to use marijuana while holding a clearance because he values his job and his clearance.

In his SOR Answer, Applicant stated that his illegal use of marijuana happened infrequently and under circumstances unlikely to recur. He noted that he has held a clearance for close to 40 years without any issues or concerns. He highlighted that he receives glowing performance evaluations and has never been arrested.

Applicant believes the government has a double standard between alcohol (in Applicant's opinion, the more dangerous drug, though legal) and marijuana (in his opinion less destructive, though illegal). He believes that this double standard is what led him to lie in his SCAs. He was placed in a position where telling the truth was detrimental to his wellbeing and career. He felt he had to lie or lose his job. The only reason Applicant felt free to admit his past illegal drug use in his 2016 SCA was because his need for a clearance would soon be ending. Apparently, he intends to retire in 2017-2018. He also wanted to make his statements in support of many others that are now or will be in the future affected by what he believes is a double standard.

Policies

The SOR was issued under Executive Order (Exec. Or.) 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 *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (AGs), applicable to all adjudicative decisions issued on or after June 8, 2017.

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, § 2. 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 SEAD 4, App. A ¶¶ 2(d) and 2(f). 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; SEAD 4, ¶ E(4); SEAD 4, App. A, ¶¶ 1(d) and 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 and Substance Misuse

AG ¶ 24 articulates the security concern for the illegal use of drugs:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. 802.

Between 1972 and 2012, Applicant illegally used marijuana. He illegally used marijuana between 1979 and 2012, while holding a security clearance. AG ¶ 25 provides disqualifying conditions that could raise a security concern and may be disqualifying in this case:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia; and
- (f) any illegal drug use while granted access to classified information or holding a sensitive position.

The record established the disqualifying conditions under AG ¶¶ 25(a), (c), and (f) requiring additional inquiry about the possible applicability of mitigating conditions under AG ¶ 26:

- (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) the individual acknowledges his or her drug involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:
 - (1) disassociation from drug-using associates and contacts;
 - (2) changing or avoiding the environment where drugs were used; and
 - (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

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).

None of the mitigating conditions apply. Applicant has a long history of illegal marijuana use. Applicant started his illegal use of marijuana during high school (1972), and he continued using marijuana until 2012. He knew that the use of marijuana was illegal. Moreover, he was granted a clearance in 1979, and he held a clearance ever since. He was aware of the Government's policies against the illegal use of marijuana by its workforce. Notwithstanding, he continue his illegal marijuana use until 2012.

Applicant's long-term illegal use of marijuana while holding a clearance cast doubts on his current reliability, trustworthiness, good judgment, ability or willingness to comply with laws, rules, and regulations, and suitability to hold a clearance, especially because his recent substance misuse occurred after he was granted a clearance in 1978-1979.

I considered that Applicant self-reported his past illegal marijuana use in his 2016 SCA. I note, however, that he failed to disclose his illegal marijuana use in his first SCA submitted around 1978, and in every SCA he submitted for periodic re-investigations thereafter, including his 2005 SCA, until his most recent one.

Applicant stated his intent to never illegally use marijuana in the future. However, in light of the record as a whole, I consider Applicant's empty promises to be lacking weight and credibility. Applicant knew the adverse security clearance consequences of his substance misuse, and that did not dissuade him from using marijuana between 1979 and 2012. He illegally used marijuana while holding a clearance granted to him in 1979. He also continues to associate with illegal marijuana users in his band. More time without recurrence of substance misuse is needed for Applicant to establish his reliability, trustworthiness, his ability to comply with laws rules and regulations, and his suitability for a clearance.

Personal Conduct

The personal conduct security concerns are based on the same facts alleged under Guideline H. For the sake of brevity, they will not be repeated again.

AG ¶ 15 explains why personal conduct is a security concern stating:

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 or sensitive information. Of special interest is any failure to cooperate or provide truthful and candid answers during national security investigative or adjudicative processes.

Applicant omitted relevant and material information from his 2005 SCA when he failed to disclose his prior illegal use of marijuana while holding a clearance. Applicant's omissions, if deliberate, would trigger the applicability of the following disqualifying condition under AG ¶ 16:

(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.

Proof of an omission, standing alone, does not establish or prove an applicant's intent or state of mind when the omission occurred. (ISCR Case No. 03-10380 at 5 (App. Bd. Jan. 6, 2006)). Considering the evidence as a whole, including Applicant's age, education, work experience, and his statements in his 2016 SCA, during his 2017, interview, and in his SOR Answer, I find that Applicant's omissions were deliberate or made with the intent to mislead the Government. AG ¶ 16(a) is applicable.

Additionally, AG ¶ 16(e) describes a condition that could raise a security concern and may be disqualifying in this case:

personal conduct, or concealment of information about one's conduct, that creates a vulnerability to exploitation, manipulation, or duress by a foreign intelligence entity or other individual or group. Such conduct includes: (1) engaging in activities which, if known, could affect the person's personal, professional, or community standing. . . .

Applicant's illegal use of marijuana while possessing a clearance satisfies the above disqualifying condition. Additional inquiry about the possible applicability of mitigating conditions is required.

AG ¶ 16 describes conditions that could mitigate the personal conduct security concerns:

(a) the individual made prompt, good-faith efforts to correct the omission, concealment, or falsification before being confronted with the facts;

(b) the refusal or failure to cooperate, omission, or concealment was caused or significantly contributed to by advice of legal counsel or of a person with professional responsibilities for advising or instructing the individual specifically concerning security processes. Upon being made aware of the requirement to cooperate or provide the information, the individual cooperated fully and truthfully;

(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 contributed to 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.

For the same reasons discussed under Guideline H, none of the mitigating conditions is fully applicable to the facts in this case and they do not mitigate the personal conduct security concerns. Applicant hid his illegal use of marijuana from the government between 1979 and 2016. He falsified his SCAs from the date he was hired by a federal contractor until his 2016 SCA. He falsified his 2005 SCA because he knew his marijuana use was illegal and contrary to government policies. He was aware that his illegal use of marijuana could adversely affect his eligibility for a clearance.

Applicant's falsification of his 2005 SCA is a serious offense (felony), it did not occur under unusual circumstances, and it continues to cast doubt on his reliability, trustworthiness, and good judgment. Applicant presented no evidence of counseling.

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. SEAD 4, App. A, ¶¶ 2(a) and 2(d). I have incorporated my comments under Guidelines H and E in my whole-person analysis. Some of these factors were addressed under that guideline, but some warrant additional comment.

Applicant is a 59-year-old employee of a federal contractor. He has worked for federal contractors since 1979, and has held a clearance while working for his current employer since 1979. Applicant disclosed his substance misuse only in his 2016 SCA. He stated his intent to not using marijuana illegally in the future.

The factors against granting a clearance are more substantial. Applicant's lack of judgment and his unwillingness to comply with the law, rules, and regulations continue to raise questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. His gross lack of judgment is demonstrated by his statements blaming the government for his SCA falsifications because of his inability or unwillingness to follow with the law. The substance misuse and personal conduct security concerns are not mitigated.

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
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraphs 2.a and 2.b:	Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national security interests of the United States to continue Applicant's eligibility for a security clearance. Clearance is denied.

JUAN J. RIVERA
Administrative Judge