



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



In the matter of:

Applicant for Security Clearance

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ISCR Case No. 17-02954

Appearances

For Government: Alison O'Connell, Esq., Department Counsel
For Applicant: *Pro se*

01/13/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant has a long history of illegal drug use. His recent substance misuse occurred after he submitted his 2016 security clearance application (SCA) and while the application was pending. The drug involvement and substance misuse security concerns are not mitigated. Clearance denied.

Statement of the Case

Applicant submitted an SCA on September 22, 2016. He was interviewed by a government investigator several times in May 2017. After reviewing the information gathered during the background investigation, the Department of Defense (DOD) issued a Statement of Reasons (SOR) on October 5, 2017, alleging security concerns under Guideline H (drug involvement and substance misuse). Applicant answered the SOR on October 17, 2017, and requested a decision based on the written record in lieu of a hearing.

A copy of the Government's file of relevant material (FORM), submitting the evidence prompting the security concerns, was provided to Applicant by letter dated November 13, 2017. Applicant was allowed 30 days to submit any objections to the FORM and to provide material to refute, extenuate, and mitigate the concerns. Applicant

submitted a one-paragraph statement in response to the FORM on November 20, 2017. The case was assigned to me on January 17, 2018. I admitted and considered all the FORM's proffered evidence.

Findings of Fact

Applicant admitted all of the SOR allegations (§§ 1.a - 1.c). His admissions to the SOR are incorporated herein as findings of fact. After a thorough review of the record evidence, I make the following additional findings of fact:

Applicant is a 38-year-old employee of a federal contractor. He graduated from high school in 1998 and has no additional formal education. He enlisted in the U.S. Army National Guard in March 1998, but did not attend the basic course. He received an uncharacterized discharge in July 1998. Applicant married in 2006 and divorced in 2016. However, he and his ex-wife are living together and they intend to set aside the divorce. They have three children, ages 11, 9, and 8.

Applicant was employed between September 2006 and March 2010; unemployed between March and May 2010; and employed between May 2010 and June 2011. He was employed part time between June 2011 and September 2011, and employed with a federal contractor between September 2011 and February 2012. His current employer and security sponsor, a federal contractor, hired Applicant in February 2012. He has been working there since.

Applicant disclosed in his 2016 SCA (Section 23 Illegal Use of Drugs or Drug Activity) that he illegally used marijuana and cocaine during the preceding seven years. He stated he used marijuana between June 1994 and April 2016. He described his use as "recreational use. Used once in the past year," and claimed "I'm not a big user of substance." Applicant disclosed he illegally used cocaine (snorted) between April 2003 and December 2006. He described his use as "recreational use. Weekend parties in that time period." He stated that he did not intend to use illegal drugs in the future because, "I have a family now and do not intend to use."

Applicant discussed his illegal drug use with a government investigator during his May 19, 2017 interview. He told the investigator that he used marijuana approximately one time per year from June 1994 to April 2017. He explained he used marijuana in April 2017 after his divorce, recreationally to relax and unwind. Applicant stated that he illegally used cocaine every 2-3 years from April 2003 to April 2017. Applicant also volunteered that he illegally used LSD/Acid twice between February and March 2017. (FORM, Item 6)

Applicant claimed that his friends brought the illegal drugs when they visited him and they illegally used the drugs at Applicant's home or at parties. Applicant indicated that his parents and siblings are aware of his illegal drug use. During the interview and in his response to the FORM, Applicant averred he does not intend to use illegal drugs in the future because he does not need the drugs any longer, and those days are now

behind him. He stated that the most recent illegal drug use happened when he was going through his divorce. He acknowledged that any future involvement with illegal drugs or misuse would be grounds for revocation of his national security eligibility. (Answer to the FORM)

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* (AG), effective 8 June 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.

Applicant illegally used marijuana between June 1994 and April 2017. He illegally used cocaine between April 2003 and April 2017. He illegally used LSD/Acid twice between February and March 2017. 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); and
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution; or possession of drug paraphernalia.

The record established the disqualifying conditions under AG ¶¶ 25(a) and (c), 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. In his 2016 SCA, Applicant disclosed that he illegally used marijuana approximately once a year between 1994 and 2016, and that he used cocaine several times between 2003 and 2016. He stated that he did not intend to use illegal drugs in the future because he had a family now.

In his May 2017 interview, Applicant corrected and updated the details of his illegal drug use and admitted to further illegal drug use after submitting his September 2016 SCA. He used marijuana, cocaine, and LSD/Acid on at least two occasions between September 2016 and April 2017.

Applicant's recent use of illegal drugs 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 submitted his 2016 SCA and while the application was pending. He promised in his 2016 SCA he would not illegally use drugs again, and he broke that promise.

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), 2(d) and 2(f). I have incorporated my comments under Guideline H in my whole-person analysis.

Applicant has a long history of illegal drug use. His recent substance misuse occurred after he submitted his 2016 SCA and while the application was pending. The drug involvement and substance misuse 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
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Subparagraphs 1.a - 1.c:	Against Applicant
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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 grant eligibility for a security clearance to Applicant. Clearance denied.

JUAN J. RIVERA
Administrative Judge