



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



In the matter of:)	
)	
REDACTED COPY)	ISCR Case No. 17-03396
)	
Applicant for Security Clearance)	

Appearances

For Government: Aubrey M. De Angelis, Esq., Department Counsel
For Applicant: *Pro se*

03/30/2018

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used drugs between 2001 and 2015, while possessing a clearance during part of that period. There is no evidence of substance misuse after 2015. Nevertheless, the passage of time so far is insufficient to demonstrate his reliability, trustworthiness, ability to comply with the law, 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 August 9, 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 October 13, 2017. Applicant answered the SOR on October 31, 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

January 2, 2018. Applicant received the FORM on January 9, 2018. 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 March 23, 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 August 9, 2017. (FORM, Item 7) 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 admitted all of the SOR allegations under Guidelines H and E. 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 33-year-old employee of a federal contractor. He received his bachelor's degree in 2008. He is currently pursuing a master's degree. He married in 2012, and has two children, ages four and two.

Applicant has been working for different federal contractors since August 2011. His current employer and clearance sponsor, a federal contractor, hired him in February 2016, and he has worked there to present. Applicant was granted a secret clearance in July 2012, which he has possessed since then.

On August 12, 2011, Applicant submitted his first SCA. In his response to Question 23 (Illegal Use of Drugs or Drug Activity) Applicant disclosed that he illegally purchased and used marijuana between May 2001 and November 2010. He explained that he used marijuana towards the end of high school and throughout college. He used marijuana frequently in college. After college, he used it occasionally until he stopped. (Item 4)

Between October and November 2015, Applicant participated on a pre-employment drug screening test that resulted positive for marijuana. On December 17, 2015, Applicant notified his then facility security officer that he tested positive for marijuana, and told her that his last illegal use of marijuana took place in October 2015.

On January 26, 2016, Applicant submitted another SCA. In response to Section 23 (Illegal Use of Drugs or Drug Activity), Applicant disclosed that in the last seven years he had illegally purchased and used marijuana while possessing a security clearance. Applicant explained that towards the end of high school and throughout college he illegally used marijuana frequently because he was young and immature and was not thinking of the future. Applicant claimed he stopped using marijuana towards the end of 2010 because he needed to change his life. He illegally purchased and used marijuana, while holding a clearance, from September to November of 2015, because he made a bad, stupid decision while he was going through marital issues. He also found out his wife was pregnant in September 2015. (Item 5)

Between September and November 2015, Applicant purchased about 3.5 grams of marijuana on approximately four separate occasions. Applicant averred he was contemplating a divorce and the marijuana made him feel relaxed. (Item 7)

Applicant stated he does not intend on using any illegal drugs or controlled substances again. He noted that he lost a job offer because he failed a pre-employment drug screening test. He averred he was devastated and did not want to use illegal drugs again because he did not want to jeopardize his and his family's livelihood. He stated he realized there was not upside or positive reason for him to illegally use drugs. Applicant has never sought or received any medical or psychological treatment or counseling for his substance abuse.

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 2001 and 2015, Applicant illegally purchased and used marijuana. He illegally use marijuana between 2012 and 2015, while he possessed a security clearance granted to him in 2012. 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 purchase and use. Applicant disclosed in his 2011 SCA that he illegally used drugs between 2001 and 2010 and stopped. The 2011 SCA made him aware that the illegal use of drugs would create a security concern and adversely affect his eligibility for a clearance. He was granted a clearance in 2012. He married in 2012 and had a child. He continued with his education and is pursuing a master's degree. He applied for well-paying jobs that required his eligibility for a clearance. Notwithstanding, Applicant illegally used marijuana for the benefit of feeling relaxed to cope with a marital dispute.

Applicant's 2015 purchase and 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 was granted a clearance in 2012.

I considered that Applicant self-reported his past illegal drug use in his 2011 SCA, and again after he tested positive for marijuana during a pre-employment drug screening test in December 2015. I note, however, that he failed to disclose his marijuana purchase and use before he tested positive for marijuana.

Applicant stated his intent to never illegally purchase and use marijuana in the future. 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. 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.

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 purchase and use marijuana while possessing a clearance satisfies the above disqualifying condition.

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 disclosed his illegal marijuana use after he tested positive during a drug screening because he anticipated his prospective employer would notify the Government and his then employer of his positive test result. He did not disclose his 2015 illegal use of marijuana before his failed screening test.

Applicant's use of marijuana 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 33-year-old employee of a federal contractor. He has worked for federal contractors since 2011; has held a clearance since 2012; and has worked for his current employer since 2016. Applicant disclosed his substance misuse in his 2011 and 2016 SCA. He stated that he is committed to not using any illegal drugs in the future.

The factors against granting a clearance are more substantial. Applicant's lack of judgment and his unwillingness to comply with rules and regulations continue to raise questions about his current reliability, trustworthiness, and ability to protect classified or sensitive information. 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 - 1.e:	Against Applicant
Paragraph 2, Guideline E:	AGAINST APPLICANT
Subparagraph 2.a:	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