



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



In the matter of:)
)
) ISCR Case No. 14-03088
)
Applicant for Security Clearance)

Appearances

For Government: Philip J. Katauskas, Esq., Department Counsel
For Applicant: *Pro se*

10/30/2015

Decision

RIVERA, Juan J., Administrative Judge:

Applicant illegally used marijuana with varying frequency from 1999 to June 2012. He used marijuana while possessing a top secret security clearance in 2012. Applicant's evidence is insufficient to mitigate the drug involvement and personal conduct security concerns. Clearance is denied.

Statement of the Case

Applicant submitted a security clearance application (SCA) on May 5, 2010. On November 21, 2014, the Department of Defense (DOD) issued Applicant a Statement of Reasons (SOR) alleging security concerns under Guideline H (drug involvement) and Guideline E (personal conduct).¹ Applicant answered the SOR on December 19, 2014, and elected to have his case decided on the written record in lieu of a hearing.

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 copy of the Government's file of relevant material (FORM), dated April 30, 2015, was mailed to him on May 14, 2015. Applicant acknowledged receipt of the FORM on June 1, 2015. He was allowed 30 days to submit any objections to the FORM and to provide material in extenuation and mitigation. Applicant did not submit any information within the period of 30 days after his receipt of the FORM. The case was assigned to me on August 4, 2015.

Findings of Fact

Applicant admitted all the SOR factual allegations, except for SOR ¶ 1.c, which he failed to admit or deny. However, because SOR ¶ 1.c cross-alleges the same facts alleged under SOR ¶ 2, I construe his admission to SOR ¶ 2 as an admission to SOR ¶ 1.c. Applicant's admissions are incorporated as findings of fact. After a thorough review of the record evidence, including his 2010 SCA (FORM, Item 2), his answers to the SOR (Item 1), and his May 2014 responses to interrogatories (Item 3), I make the following findings of fact:

Applicant is a 34-year-old concrete finisher. He graduated from high school in 1999, and has been working as a concrete finisher and laborer for different federal contractors. He has never been married and has no children.

Applicant was hired by his current employer in July 2009, and he was promoted to foreman in May 2010. Applicant has possessed a top secret security clearance during an undisclosed period incidental to his job.

Applicant admitted that he illegally used marijuana from about June 1999 until June 2012, about once a year while on vacation. In June 2012, Applicant illegally used marijuana while on vacation. When he returned to work he was asked to participate in a drug screening test, which was positive for marijuana.

Applicant's use of marijuana was against his employer's policy, which prohibits its employees from using illegal drugs. He was suspended from his job in July 2012, pending his completion of a substance abuse rehabilitation program. Applicant stated that his suspension cost him a lot of time and money because he was not allowed to work until he completed his rehabilitation program.

Applicant stated during his 2014 interviews that he only used marijuana recreationally, and about once a year. He admitted that he has a couple of friends that still use marijuana. He explained that he does not see his marijuana-using friends often, and that they do not try to get him to use marijuana. He claimed that he stopped using marijuana in June 2012, after he tested positive. (Item 3; See the summaries of Applicant's interviews conducted by OPM investigators.) Applicant possessed a top secret security clearance when he illegally used marijuana.

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

The record is silent as to whether Applicant purchased marijuana, the circumstances surrounding his use of marijuana, the friends and acquaintances with whom he used marijuana, and the extent of his contacts with his drug-using friends and associates. There is no documentary evidence to show that Applicant successfully completed his rehabilitation program, whether he continued to participate in aftercare, and whether he received a favorable diagnosis and prognosis.

Applicant's most recent SCA, dated May 5, 2010, asked him to disclose whether he had used any illegal drugs, including marijuana, during the preceding seven years. He failed to disclose in his 2010 SCA that he illegally used marijuana in 1999. Applicant's record evidence shows that he was convicted of driving under the influence both in 1999 and in 2003. On both occasions he was required to attend alcohol and drug awareness classes. Between 2003 and 2006, Applicant received six letters of reprimand for his failure to follow company policies. Additionally, in his 2010 SCA, Applicant reported having financial difficulties that included having a lien placed against him, a judgment, delinquent debts turned over to collection agencies, credit card suspended, wages garnished, and being over drawn on his checking account.

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 E, Personal Conduct

AG ¶ 15 articulates the security concern for 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.

Applicant illegally used marijuana with varying frequency from around 1999 to at least June 2012. He tested positive for marijuana use while possessing a top secret security clearance in 2012. His illegal use of marijuana violated his employer’s policy against the use of illegal drugs. Although Applicant denied any use of marijuana after 2012, he continues to associate with his drug-using friends and associates. Between 2003 and 2006, Applicant received six letters of reprimand for his failure to follow his company’s policies.

Applicant’s illegal marijuana use triggers the applicability of the following disqualifying conditions under AG ¶ 16:

(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; and

(g) association with persons involved in criminal activity.

AG ¶ 17 lists six conditions that could potentially 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 improper or inadequate advice of authorized personnel or legal counsel advising or instructing the individual specifically concerning the security clearance process. 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 caused untrustworthy, unreliable, or other inappropriate behavior, and such behavior is unlikely to recur;
- (e) the individual has taken positive steps to reduce or eliminate vulnerability to exploitation, manipulation, or duress; and
- (f) the information was unsubstantiated or from a source of questionable reliability.

None of the above mitigating conditions is sufficiently raised by the facts and evidence in this case and they are not applicable. Additionally, for the same reasons discussed under Guideline H, incorporated here, I further find that the above mitigating conditions do not fully apply, and do not mitigate the personal conduct security concerns.

Applicant's drug-related behavior extended from 1999 until 2012. The evidence failed to establish that his illegal drug use occurred under unique circumstances and is unlikely to recur. On the contrary, it appears that it occurred as part of Applicant's lifestyle. Applicant's illegal drug use while possessing a top secret security clearance casts doubt on his current reliability, trustworthiness, and judgment.

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 with varying frequency from around 1999 to at least June 2012. He tested positive for marijuana use while possessing a top secret security clearance in 2012. His illegal use of marijuana violated his employer's policy against the use of illegal drugs. Although Applicant denied any use of marijuana after 2012, he continues to associate with his drug-using friends and associates.

AG ¶ 25 describes three conditions related to drug involvement that could raise a security concern and are disqualifying in this case:

- (a) any drug abuse;
- (b) testing positive for illegal drug use; and
- (g) any illegal drug use after being granted a security clearance.

AG ¶ 26 provides three 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;
- (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 . . . ; and
- (d) satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

None of the Guideline H mitigating conditions fully apply. I considered that Applicant's most recent illegal drug-related behavior occurred in 2012. Thus, his drug-related behavior is not recent. Applicant claimed that his marijuana use was occasional, and limited to once a year during his vacations between 1999 and 2012. He also claimed that he has not used marijuana after 2012, because such conduct resulted in him being suspended from his position. Nevertheless, he illegally used marijuana from 1999 to June 2012, and while possessing a top secret clearance in 2012.

Applicant presented no documentary evidence to show that he successfully completed any substance abuse counseling, or that he has continued his rehabilitation by participating in aftercare. I note that he participated in two drug and alcohol awareness classes after DUI convictions in 1999 and 2003. However, that did not prevent his use of marijuana between 2003 and 2012. Applicant presented little evidence about his past marijuana use habits. He submitted insufficient evidence to show that he no longer associates with his drug-using friends and contacts, or that he changed his lifestyle and avoids the environments where illegal drugs are used. Considering Applicant's age and experience working for a federal contractor while holding a top secret security clearance, his favorable evidence is insufficient to mitigate the drug involvement 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 Guidelines H and E in my whole-person analysis.

Applicant is a 34-year-old employee of a defense contractor. He has worked for federal contractors since 1999, and he possessed access to classified information at the top secret level. He illegally used marijuana while possessing a top secret security clearance in 2012.

Applicant failed to submit evidence to establish his successful rehabilitation and a change of lifestyle to avoid future illegal drug use. He submitted no recent evidence to show he is currently exercising good judgement, and to establish his reliability and his willingness and ability to comply with the law, rules, and regulations. Moreover, he failed to disclose in his 2010 SCA that he illegally used marijuana at least in 1999. This is a concern in light of his past failure to comply with his company's policies, DUI convictions, delinquent debts, and illegal drug use.

In sum, Applicant's favorable evidence is insufficient to mitigate the security concerns. His past illegal drug use while possessing a clearance continues to raise questions about his reliability, trustworthiness, judgment, and ability to comply with the law, or to protect classified information. He failed to mitigate the Guidelines H and E 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:	AGAINST APPLICANT
Subparagraphs 1.a - 1.c:	Against Applicant

Paragraph 2, Guideline H:

AGAINST APPLICANT

Subparagraphs 2.a - 2.c:

Against Applicant

Conclusion

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant eligibility for a security clearance to Applicant. Clearance is denied.

JUAN J. RIVERA
Administrative Judge